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Illustration: The case of *Gideon v. Howard*, is in Pac. Rep., vol. 164, p. 11. This table shows that the same case is reported in "33 Cal. App. 5."

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RICHARD H. SCOTT.

⁴ Appointed March 31, 1917.

⁵ Appointed April 23, 1917.

⁶ Appointed Justice of Supreme Court April 16, 1917.

⁷ Appointed April 19, 1917.

⁸ Appointed May 8, 1917.

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THE
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In re JEPSON'S ESTATE (L. A. 5055, 5056.)

(Supreme Court of California. March 22, 1917.)

DESCENT AND DISTRIBUTION §34—**PERSONS ENTITLED—NEPHEWS AND NIECES.**

Under Civ. Code, § 1386; subd. 2, providing that the issue of deceased brothers and sisters take by descent in certain cases, and subdivision 4, giving the entire estate to the surviving spouse if decedent does not leave certain enumerated relatives including, as now amended, the issue of deceased brothers and sisters, such issue now take by descent, although it was otherwise before the amendment of subdivision 4.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 97-101.]

Lorigan, J., dissenting.

In Bank. Appeals from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Frederick E. Jepson, deceased. From orders setting apart a homestead to the widow and dismissing contests, deceased's nephews and nieces appeal. Motions to dismiss denied.

Fred N. Arnoldy and Stewart & Stewart, all of Los Angeles, for appellants. Frank Stewart and J. W. Howell, both of Los Angeles, for respondents.

HENSHAW, J. Frederick E. Jepson, upon his death, intestate, left surviving him a widow, but neither issue, nor father, nor mother, nor brother, nor sister. He did, however, leave nephews and nieces, children of deceased brothers and sisters. The widow made application to the court in probate to have set apart to her a homestead. These nephews and nieces filed a contest. Their contest was dismissed by the court in probate, upon the ground that they were not parties in interest. The court made its order setting aside a homestead to the widow. The nephews and nieces have appealed from both of these orders, and their appeals are met with this motion to dismiss upon the ground indicated, namely, that they are not parties in interest.

The question then is this: If these nephews and nieces under our law of succession have no inheritable interest in the estate of the deceased, they are not interested in the widow's application for a homestead, and these appeals should be dismissed. The ar-

gument that they have no inheritable interest and are, therefore, not parties in interest, is founded upon the construction which this court gave to subdivisions 5 and 2 of section 1386 of the Civil Code as those subdivisions read before their amendment in 1905, the further contention being advanced that the amendments of 1905 have not changed the law so as to give such nephews and nieces an inheritable interest which before the amendments was not theirs. The cases referred to are *Estate of Ingram*, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, *Estate of Carmody*, 88 Cal. 616, 26 Pac. 373, and *Estate of Nigro*, 149 Cal. 702, 87 Pac. 384. In each of those cases this court was construing, as it was compelled to do, subdivision 2 of section 1386, under the limitations upon that subdivision imposed by the language of subdivision 5 of the same section. By the amendments of 1905 subdivision 5 has become subdivision 4, and for convenience in exposition we will here deal with subdivision 4, it always to be borne in mind that in the cases above cited it was, and was called, subdivision 5.

What, then, were these cases? The first of them, the *Estate of Ingram*, is the only one calling for analysis, since the other two simply follow the construction placed on the law in the *Estate of Ingram*. The *Estate of Ingram* presented precisely the situation that exists in the present case. There was no surviving father or mother; there was no surviving brother or sister, but there were surviving children of a deceased sister. At that time subdivision 4 (then subdivision 5) declared in effect that the whole estate of a spouse dying intestate went to the surviving spouse, unless the deceased spouse left either issue, or a father or a mother, or a brother or a sister. It stopped there. Therefore by this unequivocal language, if no one of these persons was in being, the right of the surviving spouse to take all of the estate was absolutely fixed. To determine the disposition which the law made of an estate under these circumstances when there were not such survivors, the judge in probate primarily, and this court in review, turned to the language of subdivision 2. Subdivision 1 made provision for the case where a deceased spouse left issue as well as a surviving

spouse. Subdivision 2 treated of the disposition of the estate in the other contingencies contemplated by subdivision 4, and it declared that if the deceased spouse left father and mother or father or mother, one-half of the estate should go to them or the survivor of them. If there was neither father, nor mother, then the one-half of the estate, which otherwise would have gone to them, went to the living brothers and sisters "and to the children of any deceased brother or sister by right of representation." What, then, was the inevitable and necessary construction of these laws forced upon this court? It was simply this: Subdivision 4 had placed no limitation upon the right of the surviving spouse to take all of the estate merely because there might have been living children of a deceased brother or sister, but, to the contrary, had said that unless there were living brothers or sisters, the whole estate should go to the widow. Turning, then, to subdivision 2, which contemplates that in the event that there is a living brother or sister and children of a deceased brother or sister, the children of such deceased brother or sister shall take the parent's share, the construction was inevitable that such children of a deceased brother or sister could take only upon contingency, and that contingency was the existence of a living brother or sister. This construction, we have said, was forced upon this court. We mean forced in the sense that it was an inevitable and unescapable conclusion. The unreasonableness of it—even the injustice of it—was apparent and was recognized. No sound reason could be or ever was attempted to be adduced to support a law which said, as then did ours, that children of a deceased brother or sister could share in the estate if there was another living brother or sister, but could not share if there were none. All that this court could say was: *Ita scripta lex*. In time the anomaly of the situation came to be recognized by the Legislature and it amended subdivision 4 in a most important particular. It also amended subdivision 2, that it might read harmoniously with the amended subdivision 4. That amendment for the first time added to the classes, the existence of which would forbid the surviving spouse from taking all of the estate "the children or grandchildren of a deceased brother or sister." Or, to make our meaning plain, paraphrasing the language of subdivision 4, while still maintaining its meaning, originally it declared that all of the estate shall go to the surviving spouse unless the deceased spouse left issue, husband, wife, father, mother, brother, or sister, in which event the estate should go as provided in the previous subdivisions 1 and 2; or, again paraphrasing its meaning, the subdivision declared that the surviving spouse should not take all of the estate if any of these enumerated relations of the deceased spouse survive. By the amendment to subdivision 4 it declared that

the surviving spouse should not take all of the estate if, as well as those first enumerated, children or grandchildren of a deceased brother or sister survived. As a limitation upon the right of the wife to take all of the estate, these children and grandchildren of a deceased brother or sister were placed in the same list and category as a surviving parent or a surviving brother or sister. We now have the law reading as it never read before. We have the law declaring that the surviving spouse shall not take all if the deceased spouse left a surviving father, or mother, or, failing these, left a surviving brother or sister, or, failing these, left children or grandchildren of a deceased brother or sister. It still becomes necessary to turn to subdivision 2 to learn what disposition the law makes of the estate when any of the contingencies or limitations contemplated by section 4 upon the surviving spouse's right to take all of the estate have arisen, and we do this now with the fixed declaration of the law that the surviving spouse shall not take all of the estate if there be surviving children or grandchildren of a deceased brother or sister of the deceased spouse. When we turn to the consideration of subdivision 2, with this new light and law before us, we now find a law rationally and justly framed to enable children of a deceased brother or sister to inherit, whether or not there be a surviving brother or sister. If there be a surviving brother or sister, then the children of each deceased brother or sister take collectively their parent's share "by right of representation." If there be no surviving brother or sister, and there be children of more than one deceased brother or sister, each group of such children takes the parent's share by right of representation. Such is the manifest meaning of the amended law; such is the meaning that would have been given to this law from the first—a meaning which this court was unable to give it because of the original limitation in subdivision 4, so often referred to.

And, finally, let it be said, if the amendment to subdivision 4, aptly phrased to accomplish this thing, does not mean this it means nothing, and the Legislature was but beating the air.

The precise question here under consideration has never been directly presented to this court under these amendments to section 1386 of the Civil Code. But upon the other hand there is no decision of the court given since those amendments which follows the views of the Estate of Ingram—the law of which case happily fell to the ground with the existence of the amendments. To the contrary, while the question was not directly presented in them, the opinions in such cases as *Estate of Claiborne*, 158 Cal. 646, 112 Pac. 278, could only have been written under the recognized concession of the litigants that the law had been changed as indicated—a

concession which the court accepted. Estate of Nigro, 172 Cal. 474, 156 Pac. 1019, contains nothing in opposition to what has been here said. In the Estate of Nigro this court simply laid down the unimpeachable proposition that children and grandchildren of a deceased brother or sister were not grouped in the law as forming together one class but as forming two distinct classes, so that grandchildren were entitled to the inheritance only in the event that there were no living children.

The motions to dismiss are therefore denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

LORIGAN, J. I dissent. As subdivisions 2 and 4 of section 1386 of the Civil Code now stand they provide—subdivision 2—that:

"If the decedent leaves no issue, the estate goes one half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent *and to the children or grandchildren of any deceased brother or sister by right of representation.*"

I have italicized that portion of the section more particularly involved in the consideration of this matter. Subdivision 4 provides that:

"If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife."

These are the only subdivisions of the section requiring attention. Appellants base their claim as heirs to a portion of the estate of decedent under subdivision 2 of the section.

When the Ingram Case, referred to in the prevailing opinion, was decided in 1889, subdivision 2 of section 1386 read just as it does now except that in 1905—many years after it was decided—it was amended so as to add the words "or grandchildren" after the word "children." The other subdivision quoted above—subdivision 4—is the same now as it was when the Ingram Case was decided, except that it was then marked subdivision 5, and except, further, that it also was amended in 1905 to add "nor the children or grandchildren of a deceased brother or sister" after the word "sister." These amendments do not affect the situation here as far as grandchildren are concerned because there are none.

Now, as to the Ingram Case, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80. It appears therefrom that Mrs. Ingram, deceased, left a surviving husband, but no issue and no surviving father, mother, brother, or sister. There were, however, left by her certain children and grandchildren of a deceased sister, who, on distribution of the estate, claimed

that they were entitled to one-half of it. The trial court having ignored their claim entirely and having distributed all the estate to the assignee of the surviving husband, the said children and grandchildren of the said deceased sister appealed. They asserted, as do the appellants here, that they were entitled to one-half of the estate under said subdivision 2 of section 1386. This court, however, held to the contrary, and in construing both subdivisions 2 and 5 (now 4 as amended) said:

"It is entirely beyond doubt that the whole of the estate should have been distributed to the surviving husband. Paragraph 5 of section 1386 of the Civil Code is too clear to present any difficulty of construction whatever. It is as follows: 'If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife.' Paragraph 2 of said section refers to the case where *there is* a surviving brother or sister, and provides that in such case, if there be *also* children of the deceased brother or sister, they shall take their parents' share by right of representation. It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister *ought* to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts."

While this was a department decision, the construction put on these subdivisions was subsequently affirmed in bank in *Re Carmody*, 88 Cal. 616, 26 Pac. 373, and *Estate of Fabricio Nigro*, 149 Cal. 702, 87 Pac. 384, in which latter case it was declared, while not questioning the construction of the subdivisions as made in the *Ingram Case*, that such interpretation of the law had theretofore become a rule of property which should be and is adhered to. These two decisions were made under the subdivisions as they stood prior to the said amendments of 1905, and they are confirmatory of the construction in the *Ingram Case* of the subdivisions as they then stood, and such construction should be adhered to not only as a proper one, but as having become a long-established rule of property, unless the amendment of 1905 to subdivision 4 compels a different construction. The prevailing opinion decides that it does. I am unable to agree with it. Certainly, the amendment of 1905 of subdivision 2 itself worked no change in the construction as given in the *Ingram Case*. That amendment amounted only to the insertion of the word "grandchildren" therein which obviously operated solely as an enlargement of the class who might take if the class of "children or grandchildren" could take at all. No one claims that this subdivision alone, as amended, called for any different construction than it received in the *Ingram Case*. And appellants do not. So it must be taken that as far as subdivision 2 is concerned it means, taken by itself, just what it has always meant and as the *Ingram Case*

declared it meant, namely, that the issue of a brother or sister of a deceased spouse could not inherit unless there were also a brother or sister left surviving the decedent. It is claimed, however, that a change in subdivision 2 was wrought through the amendment of subdivision 4 in 1905. If this is not so, then it has not been wrought at all. If the amendment did have this effect, where is the language in it which declares it? The insertion in subdivision 4 of the words "nor the children or grandchildren" is not language potent or positive of itself to give them the right to inherit at all. These words were simply inserted in subdivision 4 to have it conform to subdivision 2 and make it consistent and harmonious with it. What the amendment to both these subdivisions amounted to is as to subdivision 2—that grandchildren and children of a deceased sister or brother may with a surviving brother or sister of a decedent inherit one-half the estate of a decedent with the surviving spouse, but only where there is a surviving brother or sister of the decedent who is entitled to do so. As to subdivision 4—that the surviving spouse shall inherit the whole estate when the decedent leaves "neither * * * brother, sister, nor the children or grandchildren of a deceased brother or sister." In other words, when the decedent spouse leaves none of those who, as enumerated therein, would be entitled to inherit one-half of it under subdivision 2, then the whole estate goes to the surviving spouse. It will be observed also that the only subdivision which gives brothers or sisters, children or grandchildren of a deceased brother or sister, in plain and direct language any right to inherit with a surviving spouse at all is this subdivision 2. Subdivision 4 does not pretend to confer any right of inheritance on any one save the surviving spouse, and then gives the whole estate to such survivor when none of the parties exist who under subdivision 2, re-enumerated in subdivision 4, would be entitled to take. It is necessarily understood when subdivision 4 declares that on the nonexistence of any of the different classes enumerated therein, the surviving spouse takes the whole estate, that what is meant is that none of the classes exist who, if left, would be capable of inheriting under subdivision 2. *Anderson v. Potter*, 5 Cal. 63. If the Legislature did not agree with the interpretation in the *Ingram* Case it took it many years—some 17—to enact something different with the result that instead of a clear and positive enactment as to inheritable rights, if that was the intended subject, we are still left to indulge in more construction and interpretation as to what was meant. Certainly, if it was intended to change the *Ingram* rule and establish a different rule of succession, it was not difficult for the Legislature to do so and

do it in plain certain language in the proper place. If children and grandchildren were to inherit one-half with the surviving spouse, though no brothers or sisters survived the decedent, it could have easily and clearly said so in subdivision 2, where the inheritable rights of said persons are declared, and not left it to be construed through the use of negative, indirect, and obscure language inserted in subdivision 4, and which does not refer to succession or inheritance at all, and particularly where the only inheriting language used in said section is that conferring a positive inheritable right on the surviving spouse. I am satisfied that the enumeration in subdivision 4 of any of those who might not be entitled to take with the surviving spouse the one-half of the estate under subdivision 2 was made simply as a reason for granting or vesting the whole estate in such surviving spouse and as not affecting the change in the rules of succession declared in subdivision 2 and as construed in the *Ingram* Case.

The *Estate of Claiborne*, 158 Cal. 646, 112 Pac. 278, is not to be taken as authority questioning the rule of the *Ingram* Case. That case is not mentioned or discussed there, nor was the construction of subdivisions 2 and 4, or either of them, involved in that appeal. It could not be, as the question there was not one of succession on intestacy, but the construction of peculiar terms in a will. As far as the *Estate of Ellen Nigro*, 172 Cal. 474, 156 Pac. 1019, is concerned, while it did not involve the same question as here—the construction of subdivisions 2 and 4—it did involve the construction of subdivisions 2 and 3. In that construction the reasoning in the *Ingram* Case was applied and approved, and I do not perceive that the two cases present any radical difference between them in the language used as to inheritable rights.

I think the trial court was correct in holding that the appellants had no interest in the estate which entitled them to appear therein or to be heard on appeal to this court, and that the motions to dismiss their appeals should be granted.

**REALTY DOCK & IMPROVEMENT CORP.
v. ANDERSON et al. (S. F. 6833.)**

(Supreme Court of California. March 20, 1917.)

1. FIXTURES §27(2) — TRADE FIXTURES — RIGHTS OF LESSOR — REMOVAL OF IMPROVEMENTS—STATUTE.

Where a lease provided that all alterations, additions, and improvements to the premises by the lessee should become the property of the lessor, it is not material in determining the rights of the parties to a safety deposit vault constructed in the basement whether such vault was a trade fixture within Civ. Code, § 1019, giving the tenant the right to remove a trade fixture at any time before the termination of his lease if the removal could be effected with-

out injury to the premises, unless the thing had by the manner in which it was affixed become an integral part of the premises, or whether the removal could be effected in the manner prescribed in that section, but the rights of the parties are to be governed solely by the provisions of the lease.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 5, 22, 44, 45, 54.]

2. LANDLORD AND TENANT *§*157(2, 3). — **LEASE—CONSTRUCTION—“IMPROVEMENT.”**

Within the provisions of a lease that no alterations, repairs, or changes should be made by the tenant except with consent of the lessor, and that all alterations, additions, and improvements made by the tenant should be the property of the lessor, a safety deposit vault built in accordance with the terms of the lease by the lessee, a bank, which consisted of a large room erected on the basement floor having substantial brick walls and a steel and concrete roof, all lined on both sides with steel plates, and having a steel door, became the property of the lessor, whether or not it was a trade fixture, since the term “improvement” is much more comprehensive than “fixture,” and the bank commissioner was therefore liable to the lessor for removing the steel lining and the door from the vault.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 574, 575.

For other definitions, see *Words and Phrases*, First and Second Series, *Improvement*.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Realty Dock & Improvement Corporation against Alden Anderson and another. Judgment for defendants, and plaintiff appeals. Reversed.

Edgar C. Chapman, of San Francisco, for appellant. F. R. Sweasey, F. A. Cutler, and Gillett & Cutler, all of San Francisco, for respondents.

LORIGAN, J. In June, 1908, the Union State Bank, a banking corporation, leased and went into the occupancy of a portion of the Monadnock Building in San Francisco, under a ten-year lease from Herbert C. Law, its owner. In October, 1908, Law sold the property and assigned his interest in the lease given to him by the Union State Bank to the plaintiff. In July, 1909, the defendant Alden Anderson, as superintendent of banks of this state, declared the Union State Bank to be insolvent, took charge of its property, business, and banking premises, and with the assistance of his codefendant, S. P. Young, his deputy, removed all the personal property of the bank from the building as expeditiously as possible, at that time, among other things, removing, over the protest of the plaintiff, a steel door and the exterior and interior steel plate linings of a large safe deposit vault which, under the terms of its lease, the bank had constructed in the basement of the leased banking premises.

Plaintiff brought this action to recover

damages from the defendants for the removal of said steel door and said exterior and interior steel lining of said vault, which it alleged were wrongfully removed. The court made findings and entered a judgment in favor of defendants, from which, and a denial of its motion for a new trial, plaintiff appeals.

The court found that by the terms of the lease made between the plaintiff and the Union State Bank the bank was leased a certain amount of space on the ground floor of the Monadnock Building for ordinary banking business, and also a large room in the basement immediately below the ground floor space; said basement room to be used for safe deposit vaults to be constructed in said basement for the customers of the bank; that the premises leased should not be used “for any other purposes than that of banking and safe deposit business without the written consent of the lessor.” The lease further provided:

“That said premises should not be altered, repaired, or changed without the written consent of the lessor, and that unless otherwise provided by written agreement all alterations, improvements, and changes should be done either by or under the direction of the lessor, but at the cost of the said lessee; that all alterations, additions, and improvements made in and to said premises should, unless otherwise provided by a written agreement, be the property of the lessor and should remain upon and be surrendered with the premises.”

As to the construction of the brick vault: The court found that the bank upon entering into possession of the premises constructed a safe deposit vault in said basement; that said vault rested on the floor of said basement and was not connected with the walls of the basement or with the ceiling, and was approximately 20 feet wide by 30 feet long and between 8 and 9 feet high; the walls of said vault were 2 feet thick, made of brick, and lined inside and out with sheets of steel; the vault was provided with a steel door and steel paneling surrounding the door; within this vault the said Union State Bank placed safe deposit boxes for the use of its customers; that neither said vault, door, or paneling in it was imbedded or affixed to said building owned by plaintiff, nor attached or affixed to its walls or connected therewith, and formed no integral part of said building, and was not placed in the basement of said building or in said building as an “alteration, addition, or improvement” thereto, but was placed there for the purpose of trade as aforesaid, and not otherwise, and the same could be removed from said building and from said basement without causing any injury or damage thereto.

These matters are taken from the findings. But in addition to said findings, and showing more in detail all about the construction of said vault and the removal thereof, the following undisputed facts taken from the

record are referred to: The safe deposit vault was constructed by the bank under the provisions of the lease and as an essential aid to the proper conduct of its banking business, and was of such substantial character and strength and permanency of construction as to render safe and secure protection for the valuables of the depositors and of sufficient size to be convenient and commodious for them. This vault was built in a corner of the basement room, and one side and one end were set against said basement walls. These were not connected by cement or mortar with such basement walls, but were built up against and parallel therewith. The vault room was built up from the floor of said basement to the width, breadth and height as found by the court. The walls were 2 feet thick, built of brick; they were constructed from the cement floor of the basement, the brick being laid on the basement floor and affixed thereto by means of mortar mixed with cement. The roof of the vault did not reach the ceiling of the basement, but was constructed of 9-inch steel I beams, 18 feet long, laid close together across the vault walls and filled in with brick and cement. The reasonable cost of the construction of the vault brickwork was \$800. The vault was lined inside and out with burnished steel casing; the outer steel casing being placed there solely for ornamental purposes. The steel of the ceiling of the vault was secured to the steel beams entering into its construction, and the inner and outside steel linings were screwed to the brick walls of the vault. The steel door and vestibule (one piece) was set in mortar and secured by flanges to the vault walls to hold it in place. This door and the inner and outer linings of the vault were of the reasonable value of \$2,550. The defendants in dismantling the vault unscrewed the steel linings, inner and outer, from the walls of the ceiling, and broke away the plaster from around the steel door and vestibule and took them out. The taking out of the door left the brick walls about the door somewhat jagged and ragged on one side, but otherwise the brickwork of the walls was not injured. No attempt was made to remove any of the walls or ceilings of the vault save as we have indicated. In fact, the only portions taken were the door and vestibule and the inner and exterior steel linings. Otherwise the vault room was left intact. As to the vault room itself, as originally constructed and equipped and used by the bank, it was provided with safe deposit boxes on three sides, and with chairs, tables, and other accommodations for the patrons of the safe deposit department. When these defendants dismantled the vault in the manner described and took away the property in question they did so by breaking the sidewalk in front of the building and taking it out through the opening so made. This was the

only way in which the articles could be removed.

It is insisted by the appellant that the finding of the trial court that neither the vault, nor door, nor panelings, when constructed, were affixed to the building owned by plaintiff and formed no integral part of the building leased, and were not placed in the basement of said building, or in said building, as an "alteration, addition, or improvement" thereto, is not sustained by the evidence. While this finding, as a whole, embraces several particular findings, we do not think it necessary to consider the attack of appellant upon all of them, because we are satisfied that its contention is correct as to the particular finding that this vault was not placed in said building as an "alteration, addition, or improvement" thereto, and it is upon the fact as to whether the construction of the vault did or did not constitute an "alteration, addition, or improvement" to the building that the rights of the parties in this action are to be determined.

[1] The theory of the respondents appears to be, and was doubtless that adopted by the trial court, that the construction of this vault in the manner and style described in the evidence constituted it simply a trade fixture which, under section 1019 of the Civil Code, the tenant had a right to remove at any time before the termination of his lease if the removal could be effected without injury to the premises unless the thing had by the manner in which it was affixed become an integral part of the premises. We do not think, however, as we have just said, that the finding of the court in as far as it determines that the vault is a trade fixture, and that it could be removed from the building without causing any injury thereto, is of any consequence. Nor do we think it of any moment in the consideration of this appeal whether the vault was imbedded in or affixed to the main building and had become an integral part thereof, except in so far as these matters may bear on what we consider the determinative question in the case, namely, whether its construction constituted an "alteration, addition, or improvement" in the premises which under the terms of the lease inured to the lessor. It is not a matter of controlling importance whether the vault as constructed was a permanent or a movable fixture. We are not here considering the rights arising by operation of law only between landlord and tenant as to the articles placed upon the leased premises by the latter. On the contrary, these rights are to be determined from the terms of the lease under which the parties undertook to fix them. The lease provided that no "alterations, repairs, or changes" should be made by the tenant except with the consent of the lessor, and that, as to them, provided that all "alterations, additions, and improvements"

should be the property of the lessor. This vault was built under the terms of the lease and with the consent of the lessor. Hence, the only question is, Did this construction of the vault result in an "alteration, addition, or improvement" to the premises leased? If it did not, the defendants, as representing the lessee, had a right to remove it as they did. If it did, then it belonged to the plaintiff and the defendants had no right to interfere with it.

[2] It appears to us as assuming rather an idle task if we were to discuss at length the question whether the character of this vault built by the bank did or did not constitute "an alteration, addition, and improvement" in the premises. It is, of course, quite apparent that the term "improvement" is comprehensive enough to embrace all additions or alterations which may be made by a tenant for the convenience of his business upon the premises. It is much more comprehensive than the word "fixture," and, while including these, includes also many things that may not be classed as fixtures. In fact, if force is to be given to a provision in a lease which provides that all "improvements" made in premises shall inure to the lessor, it is difficult to conceive of any subsequent addition, alteration, or repair to the premises during the tenancy which would not be embraced within the term "improvement." That the construction of this vault was intended to and did amount to all of these—an addition, alteration, and improvement—and was embraced within the terms of the lease, we think is evident. Certainly, a room covering a floor space of 20 feet wide by 30 feet long, with walls 8 feet high, made of solid brick 2 feet thick set in cement and mortar, and having a steel beam roof, sheathing inside and out with steel sheeting screwed in place, having a steel door and vestibule and the whole erected and adapted as a safety vault at an expense of over \$3,000, is in the nature of things an alteration in the premises on which it is built, and in its solidity, permanency, and utility is certainly an addition and improvement to the premises. It certainly altered the basement of the premises to build it there, and was an addition and improvement in aid of the use of the premises for banking purposes for which they were rented and in aid of which use the building of the vault was contemplated and accomplished. This safety vault was not like an ordinary movable safe or a machine which might be temporarily housed in or which is constructed or fixed together in parts readily separable so as to permit of removal and reassembling at some other place. This vault as constructed had no removable identity. It lost its character as a safety vault as soon as it was taken apart. With the removal of the steel casings and the door the structure remained but brick and mortar, which, as one of the defendants testified, was of no use or value to the lessee, and in its then condition

it could not be of particular value to the lessor. That as constructed in the manner and form described in the evidence it did constitute an "alteration, addition, and improvement" which passed to the owner of the leased premises when it was made is sustained by the authorities. *French v. Mayor*, etc., of the City of New York, 29 Barb. (N. Y.) 363; *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623; *Merritt v. Judd*, 14 Cal. 59; *Harris v. Kelly* (Pa.) 13 Atl. 523; *Wright v. La May*, 155 Mich. 119, 118 N. W. 964; *In re Rahls Ice Cream & Baking Co.* (D. C.) 195 Fed. 986; *Levin v. Improved Property Holding Co.*, 141 App. Div. 106, 125 N. Y. Supp. 963. In the *French Case*, supra, the court said:

"The question in this case is not, what are fixtures which a tenant is at liberty to remove on the expiration of his lease, but, what did the lessees covenant with the lessors they would surrender and suffer to remain on the demised premises on the termination of the lease? The covenants of the lease are that on the last day of the term the lessees will surrender the demised premises, 'and all the improvements that may have been placed thereon by the said parties of the second part [the lessees], and which improvements are to belong to said parties of the first part [the lessors], and all of which are to be surrendered up in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.' * * *

"The covenant is to surrender all the improvements that may have been placed thereon. Improvements clearly," in the lease here used, "embrace every addition, alteration, erection, or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful and convenient to them. It is a more comprehensive word than 'fixtures,' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say all which may be placed upon the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded."

While the other authorities cited are to the same effect, attention is specially directed to *Parker v. Wulstein*, supra, for a more particular discussion of the subject.

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.

SHAW, J. (dissenting). I dissent. Under the terms of the lease and upon the facts as stated by Justice LORIGAN I am of the opinion that the safe deposit vaults, having been put in the basement solely to facilitate the banking business carried on by the tenant in the leased premises, and not forming any part of the premises leased, should not be deemed to be a part of the premises, or an "improvement" thereto within the meaning of the clause that all "improvements made in and to said premises" should go to the lessor. That clause should be held to refer to improvements to the premises as leased, not to a trade structure in no way

affixed, except that it was set upon the floor of the basement. Neither the fact that it was not all removed nor the fact that it was a massive structure alters its character in law.

In re MATHEWS.

ROUSE v. MATHEWS.

(S. F. 7673.)

(Supreme Court of California. March 22, 1917.)

GUARDIAN AND WARD §10—RIGHT OF PARENT—"COMPETENT"—STATUTES.

Code Civ. Proc. § 1751, declaring that the parent of a child under age of 14, if found competent to discharge the duties of guardianship, is entitled in preference to any other person to be appointed guardian, controls Civ. Code, § 246, subd. 1, providing that in appointing a guardian the court is to be guided by what appears to be for the child's best interest in respect to its temporal, mental, and moral welfare, and if it is of age to form an intelligent preference, the court may consider that preference; so that the parent being "competent," that is, having the mental and moral qualifications, though lacking means, so that she may be compelled to seek state aid in the child's maintenance, must be appointed, irrespective of the child's intelligent preference, unless the parent has by abandonment, or act or omission enumerated in subdivision 4 forfeited right of guardianship.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33.

For other definitions, see Words and Phrases, First and Second Series, Competent.]

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Application for appointment of a guardian of Gerald Mathews, a minor. From decree denying petition of Warren A. Rouse, and appointing the minor's mother, petitioner appeals. Affirmed.

W. B. Rinehart, of Oakland (Charles M. Shortridge, of Oakland, of counsel), for appellant. James L. Nagle and Louis H. Ward, both of San Francisco (P. B. Nagle, of San Francisco, of counsel), for respondent.

HENSHAW, J. This is a second appeal in the matter of the guardianship of Gerald Mathews, a minor. The decision on the former appeal will be found reported in 169 Cal. at page 26, 145 Pac. 503. Upon that appeal this court, with the evidence before it, was called upon to review a finding of the trial court that the mother "is an unfit, incompetent, and improper person to have the care, custody, or control of her minor child." The holding was that the evidence so presented did not support this finding. Upon this present appeal there are tendered for our consideration findings in many respects different from the single finding which was under review in the previous appeal. The appellant rests his case upon these new find-

ings, and insists that under them his petition for guardianship should have been granted and that of the mother denied. It becomes necessary then to set forth these findings, and it will be done as succinctly as possible.

Warren A. Rouse, the petitioner, is married, and is and for many years has been living with his wife, Carrie E. Rouse. To them and into their custody was given the minor when he was but 8 months of age. This was in October, 1906. The child is therefore now about 11 years of age. The father is and for many years has been dead. Ever since its reception into the home of the Rouses it has been treated by them in all respects as their child. There was no agreement entered into between the Rouses and the mother of the child at the time the former received it nor thereafter going to either its care or support, to the mother's contribution thereto, or to the duty of the Rouses to restore the child to the mother upon demand. But to the contrary, the mother has neither supported nor maintained the child during all of these years, nor has she provided for its support and maintenance, and she never has been "and is not now able to support and maintain her child." The Rouses have great affection for the child, and are in all respects fit, proper, and competent persons to have its care, custody, and control, and "it is for the best interest of said minor child, with respect to its temporal, mental, and moral welfare that he remain" in their custody. Upon examination the court finds: That the child is of sufficient age to form an intelligent preference in the matter of his custody, and that his preference is to remain in the care, custody, and control of the Rouses. During the time that they have had the child the mother has made small voluntary contributions toward its support, not exceeding in the aggregate the sum of \$150. The mother "is not the proper person, in the judgment of this court, to have the care, custody, or control of said minor Gerald Mathews, but she is not incompetent, but is competent, to discharge the duties of guardianship." "That while said Annie Mathews, respondent, is not incompetent to discharge the duties of guardianship, yet considering her condition, her surroundings, and ability to care for said minor child, the court finds that the best interests of said minor child in respect to its temporal, mental, and moral welfare is that said child remain in the custody of the petitioner; and the affections of said minor child and its relationship to the petitioner have become fixed to the extent that said minor child has come to regard the petitioner and said Carrie E. Rouse as his parents, and that said Annie Mathews, the respondent, to that extent is practically a stranger to him."

No controlling law of the case was declared upon the former appeal. All that the

court was there called upon to do and did was to review the evidence addressed to the finding of the incompetency of the mother to discharge the duties of guardianship, and the holding of this court, after a review of the evidence, was that the finding was not sustained. Upon the second trial the court made its findings with elaboration, which findings covered numerous probative matters, and together present, as they are designed to present, a survey of the whole situation. Also it is quite apparent that notwithstanding the influence and effect which the findings thus made may have upon the determination of the ultimate question of the competency of the mother, the court felt constrained by virtue of our former decision to find in terms that she was competent, while also finding that she was not the proper person to be appointed guardian.

We are now called upon, in the light of all of these other findings, to determine whether the denial of guardianship letters to the Rouses was made compulsory upon the court (as the court unquestionably deemed that it was made compulsory) by the finding of competency of the parent, coupled with the force of section 1751 of the Code of Civil Procedure, which declares that the father or the mother of a minor child under the age of 14 years, if found by the court "competent to discharge the duties of guardianship," is entitled to be appointed a guardian in preference to any other person. Elsewhere (Civ. Code, § 246) the law declares that the primary consideration by which the court is to be guided in the appointment of a general guardian is "what appears to be for the best interests of the child in respect to its temporal and its mental and its moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question" (Civ. Code, § 246, subd. 1). If the language just quoted from section 1751 of the Code of Civil Procedure were not upon our books, it would leave as the controlling consideration the language from section 246 of the Civil Code just quoted, and as the findings distinctly and repeatedly declare not only that the best interests of the child demand its continued control under the Rouses, but as the child itself has expressed that preference, as furthermore the court has found that the mother, while competent, is not the proper person, while the Rouses are in all respects not only competent but fit and proper persons, no difficulty would be presented over the determination.

The difficulty arises from the declaration of section 1751 of the Code of Civil Procedure touching the parent's right, which declaration of necessity must be read and construed with the language of section 246 of the Civil Code.

In its last analysis, then, our question is, what is the meaning of the phrase "compe-

tent to discharge the duties of guardianship" as that language is employed in section 1751? "Competency" is a word of broad and varied application. Within the legitimate scope of its meaning as employed in the law, it embraces many attributes. Wealth alone does not establish competency any more than poverty alone establishes incompetency. Wealth and mental capacity together do not always establish competency, though, upon the other hand, lack of means and lack of mental capacity would clearly render a petitioner for guardianship letters incompetent. Wealth and ability may be found in a dissolute and even in a criminal life, and no court would award guardianship over a minor to such a dissolute or criminal person, even if he were found to be abundantly possessed of mental ability and financial means. Poverty alone of itself no more establishes incompetency than wealth alone establishes competency. No one would say that the state would or should deprive the natural parent of the custody of its child because dire poverty, which may strike any of us, had stricken that parent. To the contrary, the state, in recognition that poverty shall not be a ground for the severance of the relation of parent and child, has made provision itself to aid in the support of the children of the poor, the parents being expected to contribute only in accordance with their limited means. It is only when a parent has abandoned the child, or has been found disqualified for other reasons than poverty alone, that under our law the parental rights of guardianship are terminated and destroyed. Civ. Code, § 246, subd. 4.

The finding of competency in this case is a full finding of competency in all mental and moral respects. No question is presented of the unfitness of the mother for dissoluteness, immorality, unwillingness to labor, or for any other reason, saving as that competency so found is affected by her poverty. But touching this, as we have said, poverty itself, unless accompanied by an abandonment, or some other disqualification as above suggested, no one of which is here found, is not sufficient to justify the denial by a court of the preferential parental right declared in section 1751. Being competent, the mother is still entitled to the legal custody of this child which she has not abandoned, and to whose support she has contributed as her limited means would permit. Upon taking such custody she may still be compelled to seek state aid in its maintenance. But this is only a part of the cruel lot which too frequently falls on the very poor.

It is argued with great force that the trend of modern decisions is to regard as of primary importance the welfare of the minor himself. This is most true. The decisions to this effect are made either under the permission of the law, which contains no such restriction as that found in our section 1751,

or else are given under the command of the law which, in effect, declares that over and above all else the controlling consideration shall be the welfare of the child. If we were thus at liberty to act, it might well be that the custody of this child, under the findings of the court, would be given to the Rouses. This is the injunction declared in our own law by subdivision 1 of section 246 of the Civil Code. But, as we have pointed out, unless the parent has for some reason (and no such reason is here found) forfeited his preferential right to the guardianship of his offspring, all considerations of the welfare of the child must, under our law, be regarded as subordinate to that right.

The decree appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

COLQUHOUN v. FURSMAN et al.
(Civ. 1951.)

(District Court of Appeal, First District, California. Feb. 10, 1917.)

1. SALES §52(6)—ACTION FOR PRICE—PERSONS LIABLE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that goods sold to one individual were sold upon the credit and authority of defendants, so as to charge them with the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138.]

2. APPEAL AND ERROR §1011(1)—SCOPE OF REVIEW—FACT FINDINGS.

The discretion of the trial court in resolving conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

3. JUDGMENT §951(2)—EVIDENCE—ADMISSIBILITY.

In action for purchase price of goods against several individuals, where defendants pleaded that plaintiff had a prior judgment against other persons for the same goods, but did not set up such judgment as a bar, it was proper to admit evidence of such judgment, and on sufficient evidence to find the existence of such judgment, where the court did not find that it was a bar to the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808, 1810.]

4. PRINCIPAL AND AGENT §121—AUTHORITY—EVIDENCE—ADMISSIBILITY.

In action for purchase price of goods sold to one person who assumed to act for others, it was proper to exclude testimony of such person as to the extent of his authority for the others.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 413-415.]

5. JUDGMENT §282—TRIAL §395(8)—SUBSEQUENT PROCEEDINGS—SIGNING—DEATH OF PARTY.

Action of court in signing findings and judgment after the death of one defendant in whose favor judgment ran was not an irregularity prejudicial to plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 554-556; Trial, Cent. Dig. § 934.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by W. W. Colquhoun against H. C. Fursman and others. Judgment for defendants, and order denying motion for new trial, and plaintiff appeals. Affirmed.

Walter Slack and Joseph K. Hutchinson, both of San Francisco, for appellant. Clayberg & Whitmore, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action, brought by the plaintiff as assignee of a certain firm, to recover the sum of \$750 as the reasonable value of certain goods, wares, and merchandise alleged to have been sold and delivered by said firm to said defendants as a copartnership and individually, and for which they had refused to pay.

The four defendants who were served with process and appeared herein denied that they were copartners, or that as such or individually they or either of them had purchased any wares or merchandise from plaintiff's assignor; and they also averred affirmatively that plaintiff had already recovered judgment against certain other persons on account of the sale to them of such goods. Upon the issues thus framed the cause went to trial, at the conclusion of which the trial court gave judgment in favor of the defendants. The court also denied the plaintiff's motion for a new trial on the ground of newly discovered evidence, and from such judgment and order the plaintiff appeals.

[1, 2] We find no merit in the first contention of the appellant that the evidence was insufficient to support the findings and judgment in defendant's favor. The evidence introduced at the trial showed the following state of facts: In the month of October, 1910, one Henry E. Lee caused to be located 175 placer mining claims at Searles Lake in San Bernardino county. In so doing he used the names of the defendants in this action without their knowledge or authority. Subsequently, according to the testimony of said Lee, he procured from these defendants a ratification of his acts in using their names in making said locations, but upon the condition and understanding that none of said defendants should assume or be charged with any personal liability because of such locations, but that said Lee should care for the property, perfect the title, sell or work the said locations, and provide all funds necessary for such purposes without any personal liability on the part of the defendants. Subsequently, when certain assessment work was required to be done upon these locations, said Lee, in co-operation with Thomas W. Pack and T. O. Toland, proceeded to employ men and incur expense in doing such work, and in so doing purchased the goods,

wares, and merchandise from the assignor of the plaintiff, for the value of which this suit was brought.

Upon the trial of the action Lee was called as a witness for the plaintiff, and testified circumstantially to the foregoing state of facts. The evidence further disclosed that the assignor of plaintiff had no direct connection or communication with any of these defendants in respect of such transaction; but, on the contrary, showed that the goods were purchased by said Thomas W. Pack and were charged to him on the sellers' books. This evidence, if believed by the trial court, was sufficient to overthrow whatever inference the plaintiff sought to have drawn from the acts and conduct of the defendants in ratifying the action of said Lee and the use of their names in the making of the locations, and also in continuing to recognize said Lee as their agent in the doing of later acts and things in respect to such lands. The utmost that may be said with regard to the testimony in the case and to the inferences to be drawn therefrom is that a substantial conflict exists, which the trial court was justified in resolving in defendants' favor. Its discretion in that regard will not be reviewed upon this appeal.

The appellant criticizes the conclusions of the trial court as based upon an alleged implied finding that Lee was not the agent of the defendants in procuring the assessment work to be done upon these locations in the course of which these goods were bought, and which implied finding the appellant claims to be contrary to the undisputed evidence in the case. But we see no room or need for any implied finding in the premises, since the court expressly finds that the goods in question were never sold and delivered to the defendants herein. For the same reason a finding as to the reasonable value of the goods was unnecessary.

[3] The appellant further contends that the trial court erred in directing the judgment in favor of the defendants upon their affirmative plea that the plaintiff had recovered a prior judgment against said Pack and Lee. But the record does not show that the judgment of the court was based upon this plea as a plea in bar, but only discloses that the court found the fact of such prior judgment in response to the issue as to its existence raised by the pleadings. It was not, however, pleaded as a plea in bar, and was not found or declared to be such by the trial court. It thus appears that the court properly admitted evidence in support of such issue, and that its finding was correct, and that its judgment in the defendants' favor was not predicated upon such finding as a bar to the present action.

[4, 5] As to the other alleged errors of the court upon the admission or rejection of evidence during the trial, we have examined the

voluminous record in the case, and are of the opinion that there is no prejudicial error in any of these rulings; that the court did not err in excluding the evidence of Lee, a witness for plaintiff, as to the scope and details of his agency for the defendants some considerable time after the alleged purchases were made; nor in refusing to admit in evidence as a whole the record and papers in certain actions commenced by said Lee on behalf of the defendants long after the transaction in question, and which record and papers the defendants personally never saw, and of which much was irrelevant and immaterial matter; nor in its other rulings not deserving of special mention; nor do we think that the court erred in refusing to grant the continuance sought by the plaintiff in order to allow certain depositions to be taken, no abuse of its discretion in that regard having been shown; nor was the action of the court in signing its findings and judgment after the death of one of the defendants, said judgment being in his favor, an irregularity by which the plaintiff would be injured or of which he would have the right upon this appeal to complain. We are also of the opinion that there is no manifest abuse of the large discretion with which the trial court was invested in the granting or refusing a new trial on the ground of newly discovered evidence which is cumulative in its character and effect.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

GIDEON v. HOWARD et al. (Civ. 2197.)

(District Court of Appeal, Second District, California. Feb. 13, 1917. Rehearing Denied by Supreme Court April 12, 1917.)

1. MASTER AND SERVANT ⇨ 286(4)—INJURY—DEFECTIVE APPARATUS—NEGLIGENCE—QUESTION.

Evidence in an action for injury held sufficient to go to the jury on the question of negligence of the employer in furnishing a defective apparatus, a worn rope, for pulling away a board mold from around hardened concrete.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1011.]

2. PLEADING ⇨ 126—ANSWER—NEGATIVE PREGNANT.

That the employers furnished the rope by which the employé was injured is admitted by their answer, denying only that they negligently furnished it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263.]

3. MASTER AND SERVANT ⇨ 129(1)—INJURY—PROXIMATE CAUSE.

The breaking of a rope furnished by the employer, precipitating against a stump an employé using it, and not the stump, was the proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 257.]

Appeal from the Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by O. P. Gideon against P. A. Howard and another, partners as the Howard Bros. Construction Company. From an order denying motion for new trial, plaintiff appeals. Reversed.

Miller & Miller and E. B. Drake, all of Los Angeles, for appellant. Flint, Gray & Barker, Gray, Barker & Bowen, and Wheaton A. Gray, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought to recover damages for personal injuries alleged to have resulted from the negligence of defendants as copartners. At the close of the evidence, defendants offering none, the court, at their request, instructed the jury to render a verdict for defendants, which being done, judgment followed in accordance therewith. The appeal is from an order of court denying plaintiff's motion for a new trial. The question presented is one of law as to whether or not there was any substantial evidence as to facts determinative of the case upon which the jury could have properly found for plaintiff.

The evidence tends to establish the following facts: Plaintiff was an employé of defendants, who were contractors engaged in the erection of a bridge, in the construction of which wooden molds or forms were made, into which concrete was deposited, and after it set and hardened these molds or forms were detached therefrom. As such employé, plaintiff, with others, not only worked as a carpenter in making and installing these forms, but in detaching them from the hardened concrete walls by various means, among which was that of attaching thereto ropes provided by defendants and pulling them loose by hand. At the time in question, when plaintiff sustained the injuries of which he complains, two men had thus, for the purpose of removing one of the molds, attached a rope thereto, and, being unsuccessful in breaking it away, called upon plaintiff and another, who were at work on the bridge, to aid them in pulling it away. They responded, and their united strength applied in pulling upon the rope caused it to break, as a result of which plaintiff, with the others, all of whom were at the time on the ground, was precipitated backwards into a depression some 18 inches deep to a point 10 or 12 feet distant, where he fell upon a stump, the others falling upon him, and, in some way undisclosed by the record, was injured. The rope was five-eighths or three-fourths inch in size and about 45 feet in length. Some three or four days prior to the accident, plaintiff, while using this rope on a scaffold some 40 feet from the ground, discovered that it was badly worn, weakened and cut, for which reason he removed it from the swing he was working on, came down and informed Mr. Crump, the superintendent in charge of construction, of its condition, telling him that the rope was "not fit to work on," and threw it upon

the ground under an abutment of the bridge, from which place his coemployé, when requiring a rope for use in detaching the mold, secured and used it for the purposes aforesaid, which fact, however, was unknown to plaintiff until after the accident.

[1-3] At the time in question a statute then in force (Stats. 1911, p. 796) provided that in actions by employés to recover for personal injuries based upon want of reasonable care of the employer, contributory negligence of the employé should not bar a recovery where such negligence was slight, and that of the employer, by comparison, gross; nor, as provided by the same statute, did the fact that the employé assumed the risk, or that the injury was due to the negligence of a coemployé, constitute a bar to his recovery. Since, therefore, negligence on the part of the plaintiff or that of a fellow servant is not involved, the sole question presented by the record is whether or not there was any substantial evidence introduced from which the jury might have found that defendants were guilty of negligence in furnishing a defective rope for plaintiff's use in pulling away the concrete mold. Not only did the evidence tend to show that the rope was supplied by defendants, but such fact is admitted by the answer, which denied only that they negligently furnished the same. The proximate cause of the injury was the breaking of the rope used by plaintiff, which use was within the scope of his employment. It was the duty of defendants to exercise reasonable care to provide their employés with safe appliances in the performance of the work required of them, and under the facts here presented the rope was an appliance which the evidence tends to show was, with defendants' knowledge, worn and weakened to an extent that rendered it unsafe for the purpose.

There is no merit in respondents' contention that the stump upon which plaintiff fell, and not the breaking of the rope, was the proximate cause of the injury. It is reasonably certain that but for the breaking of the rope plaintiff would not have fallen backward upon the stump, and his coemployés would not have fallen upon him. But it may be that falling upon the stump contributed nothing toward his injuries; the record is silent upon that point. It might with equal logic be claimed that where a defective cable, used in hoisting one to the top of a building, breaks, precipitating him upon a pile of stone underneath, the pile of stone, and not the breaking of the cable, was the proximate cause of his injury.

It is further claimed that the circumstances were such that the defendants could not reasonably have anticipated an injury resulting from the breaking of the rope. This and the question as to whether or not the injury sustained by plaintiff was due to causes which men in defendants' position could in the ex-

ercise of ordinary prudence reasonably have foreseen and guarded against, are matters which, in our opinion, should, upon the record presented, have been submitted to the jury.

The order denying plaintiff's motion for a new trial is reversed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. PRIETZ. (Cr. 656.)

(District Court of Appeal, First District, California. Feb. 7, 1917.)

1. CRIMINAL LAW § 1168(2)—APPEAL AND ERROR—ADMISSION OF EVIDENCE—HARMLESS ERROR.

In prosecution for rape, where the prosecuting witness' story lay near the border line of incredibility, any error in admitting or rejecting material evidence will amount to prejudicial error, particularly where such evidence had a direct bearing upon the main issue and upon the degree of credit to be accorded to the prosecuting witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129-3136.]

2. RAPE § 48(1)—ADMISSION OF EVIDENCE—COMPLAINANT'S STATEMENT TO THIRD PERSONS.

Permitting prosecuting witness, in a prosecution for rape, to testify to statements made by her to a third party as to treatment she had suffered was reversible error, where her story was close to the border line of incredibility, and where the prosecuting attorney had called the jury's attention to such statements in his opening.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 67.]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Robert Prietz was convicted of rape, and appeals. Reversed.

A. F. St. Sure, of Alameda, and J. Leonard Rose, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. This is an appeal from a judgment of conviction of the defendant upon a charge of rape alleged to have been committed upon his daughter at the time of the age of 15 years.

The record is voluminous, and presents a state of facts which it would subserve no worthy or useful purpose to reproduce in their disgusting and sordid details here. The appellant's first contention is that the story of the prosecuting witness as recited upon the trial of the cause is so inherently improbable as to require a reversal of the verdict and judgment of conviction based upon it. While there is much force in this suggestion, and while there was also much in the prosecution of the case as disclosed by the record which does not commend itself to us, we are unable to say from a careful consid-

eration of the entire record that the testimony elicited on behalf of the people is on the whole insufficient to support the verdict by reason of its inherent improbability.

[1] While, however, this is our conclusion as to the facts of the case, we are of the opinion that this is one of those cases wherein an error of the trial court in the admission or rejection of material evidence would amount to prejudicial error, particularly where the evidence thus erroneously admitted or excluded had a direct bearing upon the main issue in the case and upon the degree of credit to be accorded to the prosecuting witness therein.

[2] This brings us to the appellant's second contention, which is that the trial court erred in its rulings upon the admission of certain statements made by the prosecuting witness to another of the principal witnesses for the prosecution respecting complaints which the prosecuting witness claimed to have made with regard to her father's treatment of her. While upon the witness stand the prosecuting witness was asked the following question:

"Q. You stated to Miss Delmar that your father had committed many acts of sexual intercourse upon you, did you not?"

Aside from the leading and improper form of this question, to which the defendant did not urge this specific objection, his other proper objections to it were overruled by the court, and the witness was permitted to answer the question affirmatively. The question and answer thus permitted responded to the proffer of proof made by the prosecuting attorney in his opening statement to the jury, wherein he said, "She finally confessed to Mrs. Margaret Delmar what had been done to her all this time," and would thus be given an added impression and influence upon the jurors' minds. We are unable to distinguish the foregoing question and ruling from the question and ruling which led to the reversal of the case of *People v. Wilmut*, 139 Cal. 103-107, 72 Pac. 838, wherein the obnoxious question was in the following form:

"Q. Did she say whether or not this defendant had had sexual intercourse with her?"

The trial court permitted this question to be answered, and the Supreme Court reversed the case upon that sole ground, holding that the testimony elicited was clearly incompetent, and that it must have substantially affected the defendant's case.

In a case lying as close to the border line of incredibility as does the present one we think the error of the trial court in permitting the foregoing question to be answered was prejudicial to a degree which requires a reversal of the case.

Judgment and order reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

ELLSWORTH v. NATIONAL HOME & TOWN BUILDERS. (Civ. 2204.)

(District Court of Appeal, Second District, California. Feb. 13, 1917.)

1. CORPORATIONS §99(2)—SALES OF STOCK—CONSIDERATION.

Corporation stock issued in return for valuable services rendered and labor performed on behalf of the corporation is not issued without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445.]

2. CORPORATIONS §193—MEETING OF STOCKHOLDERS—PLACE—VALIDITY OF ACTS.

Though the by-laws provided that the stockholders' meetings should be held in Phoenix, Ariz., the acts of stockholders and of the directors elected by them at a meeting in Los Angeles, Cal., to which all the stockholders consented, and notice of which they waived, were valid; the officers serving under such election being de facto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 733.]

3. CORPORATIONS §130—TRANSFER OF STOCK ON BOOKS—RIGHT TO TRANSFER.

The mere fact that certain stock was named in a pooling agreement which was never consummated would not prevent its transfer on the books to the holder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489.]

4. CORPORATIONS §133—TRANSFER OF STOCK—REFUSAL OF CORPORATION TO MAKE—EVIDENCE—ADMISSIBILITY.

In action by a purchaser of corporation stock for refusal to transfer it on the books, evidence of the consideration paid by her was inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 518-520.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Lucie E. Ellsworth against the National Home and Town Builders. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Gray, Barker & Bowen and Flint, Gray & Barker, all of Los Angeles, for appellant. S. L. Carpenter, of Los Angeles, for respondent.

SHAW, J. This action to recover damages for conversion is based upon defendant's refusal to transfer to plaintiff certain shares of its capital stock, evidenced by a duly indorsed certificate, No. 167, which the latter had acquired from one J. F. Clark, to whom the defendant corporation had theretofore issued the stock. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

[1] As grounds for reversal, appellant claims: (1) That the stock was issued without consideration; (2) that the issuance thereof was unauthorized by the corporation; (3) that at the time when plaintiff demanded the making of the transfer, another party, with defendant's knowledge, held an option from plaintiff's assignor for the purchase of

the stock, which fact was also known to plaintiff; (4) that a transfer of the stock would be in violation of a pooling agreement to which appellant was a party, the existence of which was known to plaintiff; and (5) that plaintiff paid no consideration for the stock.

First. There is no merit in the first contention, since the uncontradicted record shows that the stock was issued by the corporation to Clark in consideration of valuable services rendered and labor performed by him for and on behalf of the corporation.

[2] Second. The contention that the issuance of the stock to Clark was illegal is based chiefly upon the fact that defendant was a corporation created under the laws of the state of Arizona; that the by-laws of the company provided that all meetings of stockholders, whether regular or special, should, upon notice as therein prescribed, be held in Phoenix, Ariz., whereas the board of directors which authorized the issuance of the stock to Clark was elected at a special meeting of the stockholders held, without notice given as provided in the by-laws, in the city of Los Angeles, Cal.—all of which facts appear to be true. But it is likewise true that the holders of all of the outstanding stock, in writing consented to the holding of such meeting in the city of Los Angeles, and waived notice thereof, and that at the meeting so convened pursuant to such written consent, all of the stock of said corporation then issued was represented at said meeting and participated in the election of members of the board, each and all of whom received the unanimous vote of all the stock so represented. The board of directors so elected organized by electing officers, and in transacting the business of the corporation, assumed to and did act as the duly constituted board of directors of the company. Appellant insists that, by reason of the stockholders' meeting being held outside of Arizona, contrary to the by-laws of the company, such meeting and all proceedings there had were without right or authority, and hence wholly void. We cannot assent to this contention. It may be conceded that in a proper proceeding the members of the board so elected might have been ousted from office (*State v. Cronan*, 23 Nev. 437, 49 Pac. 41) but they were nevertheless, so long as they continued to act as the duly constituted board, de facto officers (*San Joaquin L. & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594), the validity of whose acts is not subject to attack in an action of the character of that here involved (*San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; 2 Cook on Corporations [6th Ed.] § 623). Meetings held in violation of charter provisions have been held void. Mr. Cook in his work on Corporations (6th Ed.) § 589, in discussing such authorities, says:

"It is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing. So, also, are the stockholders who participated in the meeting."

To the same effect see *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Heath v. Silverthorn Lead, etc., Co.*, 39 Wis. 146; *Thompson on Corporations*, § 814. The stockholders' meeting in question, so far as disclosed by the record, was not in violation of any provision of the charter, but contrary to the by-laws which had been adopted by the stockholders. Neither the corporation nor the stockholders all of whom, as stated, were present and united in the election of this board of directors by unanimous vote of all the outstanding stock, as against plaintiff, who acquired the certificate in usual course, are in any position to assert as void the act of the board in issuing the stock to her vendor.

Third. Appellant offered in evidence a document signed by J. F. Clark, E. E. Ragsdale and one Joseph P. Smith, whereby Clark and Ragsdale agreed that Smith should have an option for a period of 12 months from August 5, 1911, to purchase from said Clark and Ragsdale 200,000 shares of the capital stock of appellant corporation for the sum of \$2,000, to the introduction of which plaintiff's objection was sustained. No error is predicated upon this ruling. Waiving such omission, we perceive no error in the ruling for the reasons: First, that the agreement appears to have been made without any consideration therefor; and, second, there is nothing in the agreement showing that it had reference to the stock evidenced by certificate No. 167, issued to Clark long after the making of said agreement. We cannot assume that the 50,000 shares of stock so purchased by plaintiff was in violation of this agreement made by Ragsdale and Clark, or if Smith exercised the option they would not deliver to him the stock as agreed. There was no error in the ruling of the court in excluding from evidence this document.

[3] Fourth. It is next claimed that the stock in question so owned by Clark was subject to a pooling agreement signed by Clark. It is true a document was offered in evidence to which the signature of Clark was attached, providing that the stock and the certificates evidencing the same, owned by the signers thereof, should be deposited with —, as trustee. Such pooling agreement, however, was never consummated, and the evidence clearly shows that certificate No. 167 was at all times, up to the time when he delivered same to the plaintiff herein, in the control and custody of Clark. There is no evidence of any circumstance that justified or excused the corporation for refusing to transfer the stock on demand of the plaintiff, and hence the cases of *Jennings v. Bank of*

California, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145, and *Young v. New Standard, etc., Co.*, 148 Cal. 306, 83 Pac. 28, have no application to the facts here presented.

[4] Fifth. It must follow from what has been here said that whether or not plaintiff paid any consideration for the stock was no concern of appellant, and hence it was not error for the court to exclude any evidence as to the consideration paid therefor.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

REDMOND v. McLEAN et al. (Civ. 2207.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. QUIETING TITLE §44(3) — EVIDENCE — PRIMA FACIE CASE.

In an action to quiet title, evidence, consisting of plaintiff's testimony that at the commencement of the action he was and for a long time prior thereto had been in possession of the lot described in the complaint as delineated upon a map under and by virtue of a deed referred to conveying the lot described in the complaint to him, was sufficient as a prima facie showing to establish plaintiff's right as against defendant to a decree quieting his title to the lot so described.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 91.]

2. QUIETING TITLE §44(5) — EVIDENCE — SUFFICIENCY.

Evidence held to justify a finding that plaintiff was at the time of the commencement of the trial in possession of the lot described in the complaint, and was the owner thereof and entitled to a decree quieting his title thereto.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 92.]

3. QUIETING TITLE §47(2) — FINDINGS — CONFORMITY TO ISSUES.

As no issue as to the location of the boundary lines and dimensions of the lot was tendered by the complaint, and there was nothing in the answer enlarging the scope of the complaint, a finding of the court which purports to locate the lot upon the ground and fix the dimensions thereof should be disregarded as a finding of fact not in issue or presented by the pleadings, and, being so disregarded, that part of the decree based upon such finding should be stricken.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 97.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action to quiet title by John E. Redmond against Mrs. Della McLean and others. From a judgment for plaintiff, and an order denying a motion for a new trial, the named defendant appeals. Judgment modified, as modified affirmed, and order denying motion for new trial affirmed.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for appellant. Edward Dietrich, Dietrich & Kidder, and Smith, Miller & Phelps, all of Los Angeles, for respondents.

SHAW, J. Action to quiet title, the complaint being in the usual form and alleging that plaintiff was the owner and in possession of lot 31, block 2, of the Golden Bay tract, as per map recorded in book 2, page 15, of maps, Los Angeles county, Cal.; that defendant, without right, claimed an estate or interest therein adverse to plaintiff. Defendant Della McLean, the appellant, answered, denying that the plaintiff was the owner or in possession of the lot described in the complaint; and, as a further defense, asserted that she was the owner in fee simple of the easterly 4 feet of said lot 31, but asked no affirmative relief. At the trial, judgment went for plaintiff, from which, and an order denying her motion for a new trial, defendant McLean appeals.

[1, 2] The sole question at issue upon the pleadings was whether plaintiff was at the time of commencing the action the owner and in possession of all or any part of the lot described in his complaint as lot 31, block 2, as delineated upon the map referred to. At the trial plaintiff, in support of his claim, testified that at the commencement of the action he was, and for a long time prior thereto had been, in possession of said lot 31, as delineated upon said map, under and by virtue of a deed whereby the grantors therein, describing the lot as in the complaint, conveyed the same to him. This evidence, uncontradicted, was sufficient as a prima facie showing to establish plaintiff's right as against defendant to a decree quieting his title to the lot so described. *Davis v. Crump*, 162 Cal. 513, 123 Pac. 294; *De Noon v. Morrison*, 83 Cal. 163, 23 Pac. 374. In opposition to the case so made by plaintiff, defendant conceded that plaintiff, under the deed, was in possession of all of said lot, except a strip of 4 feet on the easterly side thereof, which defendant claimed to be in possession of by virtue of an agreement fixing the boundary line between the lots. Aside from any conflict in the testimony touching the question of possession, the evidence offered by defendant was wholly insufficient to establish any agreement fixing the boundary line. While both parties had caused surveys to be made and the surveyors had agreed upon a line, there is no evidence that plaintiff ever acquiesced in the line so established by these surveyors. There is some meager evidence as to a fence, erected by somebody undisclosed by the record; but it is not made to appear that the fence was erected in accordance with any agreement between plaintiff and defendant, nor is it shown at what time the fence was erected; indeed, from aught that appears to the contrary, it may have been erected the day before the trial. Upon the state of the record here presented, the court was fully justified in finding that plaintiff was at the time of the commencement of the trial in possession of the lot described in

the complaint, and was the owner thereof and entitled to a decree quieting his title thereto.

[3] Had the court contented itself with such finding and decreed in accordance therewith, no just cause for complaint would have existed. As stated, the action was one to quiet title. Notwithstanding this fact, the court, over objections of defendant that such question was not in issue, permitted evidence to be introduced under which it not only quieted plaintiff's title, but fixed the location of the boundary lines, and dimension of the lot. No issue was tendered by the complaint under which, had defendant suffered default or filed a disclaimer, the court would be justified in making a decree establishing the size and boundary lines of the lot; nor is there anything in the answer that enlarged the scope of the complaint. Nevertheless, by its judgment, the court found and decreed that said lot so described in the complaint as lot 31, block 2, of the Golden Bay tract, as delineated upon the map therein referred to, was located at a point—

"beginning at a point 460 feet east from the center line of an alley known as the Speedway on the southerly line of Ozone street, continuing thence along said southerly line of Ozone street a distance of 30 feet east, continuing thence in a southerly direction to a point distant 490 feet from the center of said Speedway along the northerly line of an alley between Ozone and Rose streets, and continuing along said northerly line in a westerly direction a distance of 30 feet to a point distant 460 feet from the center line of aforesaid Speedway along the northerly line of said alley, thence in a northerly direction to a point in the southerly line of Ozone street 460 feet from the center line of Speedway, being the point and beginning."

Not only was the question of the dimensions and location of the lot not involved, but we are unable to find any evidence in the confused and jumbled record presented which sustains the finding of the court as to the location of the boundary lines of the lot.

That part of the finding which purports to locate the lot upon the ground and fix the dimensions thereof should be disregarded as a finding of fact not in issue or presented by the pleadings. Thus disregarded, that part of the decree herein quoted and following the language of said finding is without support, and hence should be stricken from the decree.

The judgment is therefore modified by striking therefrom that portion commencing with the words, "beginning at a point 460 feet," and ending with the words, "being the point of beginning." As thus modified, the judgment is affirmed, and hence no reason exists for granting appellant's motion for a new trial, and the order denying said motion is likewise affirmed; appellant to recover her costs on this appeal.

We concur: CONREY, P. J.; JAMES, J.

EGAN v. DODD. (Civ. 1872.)

(District Court of Appeal, First District, California. Feb. 6, 1917.)

1. LANDLORD AND TENANT § 152(4) — REPAIRS—LESSEE'S DUTY.

A lease providing that the lessee will not call upon the lessor for repairs and will surrender premises in good order less reasonable use casts upon the lessee the burden of making repairs necessary to make the building safe.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 541-543.]

2. LANDLORD AND TENANT § 101—REPAIRS—STATUTE.

Civ. Code, § 1932, providing that the hirer of a thing may terminate the hiring when the greater part of the thing hired perishes, etc., is inapplicable to a lease which requires the lessee to make the repairs.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. H. Egan against Fred Dodd. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. Cosgrave, of Fresno, for appellant. Short & Sutherland, of Fresno, for respondent.

KERRIGAN, J. The plaintiff commenced this suit to recover from the defendant a balance alleged to be due for laundry work. The defendant answered, and also set up a counterclaim, in which he alleged that the plaintiff was indebted to him for the rent of premises situate in the city of Fresno, and held by plaintiff under two leases from the defendant. The judgment of the court was in favor of the plaintiff and that the defendant take nothing by his counterclaim. Defendant appeals.

The question presented for determination is as to whether or not the plaintiff was entitled under the circumstances of the case to abandon the premises held under said leases, and thereby terminate them, and calls for a construction of the provisions of the leases relating to the obligation to keep the premises in repair.

Concerning the lessee's obligation to repair, the lease of what is called the main building provides:

"The lessee also agrees that the lessor shall not be called upon to make any repairs or improvements whatever in said leased premises during the term of this lease, or any renewal thereof, and that he will at all times and at his own cost and expense keep said premises in good order, repair and condition, provided, however, that the lessor agrees to install" (here follows an enumeration of certain improvements agreed to be made by the lessor, and a provision imposing on the lessor the repair of the roof of the building, but which are not involved in the present controversy).

The other lease, covering a portion of the second floor of the building, contains the following covenant on the part of the lessee:

"That he will not call upon the lessor for any repairs, alterations, or maintenance during said term."

Both leases contain the additional covenant on the part of the lessee to the effect that:

"He will surrender and yield up possession to the lessor all in good order and repair as the same is received by him, reasonable use and wear thereof and damages by the elements alone excepted."

It appears that in December, 1913, two years before the plaintiff vacated the premises, the city engineer of the city of Fresno served a notice upon the defendant as owner of the leased premises, declaring the building to be dangerous in certain specified particulars, and requiring its demolition within 60 days thereafter. Following the receipt of this notice defendant, under the provisions of the city building ordinance, demanded an arbitration to determine whether or not the building could be repaired and rendered safe under the ordinance. The matter was submitted to arbitration in the manner provided in the ordinance; and in their report made to the city engineer the arbitrators agreed "that there is no necessity whatever for taking down any portion of the building," but reported that certain repairs were necessary and should be made. Upon receipt of a copy of the arbitrators' report defendant at once wrote plaintiff advising him of the requirements of the arbitrators as to repairing the building, and, referring to the covenants of the lease regarding the lessee's obligation to repair, notified him to make at once the repairs required. Those repairs were not made. Subsequently, and during the life of the lease, a portion of one of the walls of the building collapsed owing to an excavation made into the adjoining land in the course of building operations thereon; whereupon and almost immediately the defendant, although insisting that he was under no obligation to do so, commenced to repair the wall, saying that he felt under all of the circumstances of the case that perhaps it would be asking too much of the tenant to make this particular repair. Nevertheless the plaintiff, without notice to the defendant, abandoned the premises, and moved into a building which he had recently caused to be erected.

[1] The covenants to repair above set out bound the tenant, we think, under the general rule adopted in this state, to make the repairs, and he was not entitled because of the condition of the building to vacate the premises. The effect of such covenants is thus stated by Tiffany, in his work on *Landlord and Tenant*, at section 116 (d):

"An express covenant by the tenant to repair or keep in repair binds him to repair, although the injury were accidental and in no way caused by his negligence. The express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if

caused by storm, flood, fire, inevitable accident, or act of a stranger. * * * There are dicta and perhaps one decision to the effect that the tenant is not bound to rebuild in case of such destruction by the act of God or of destruction by the public enemy. Such a view can be supported only on the theory that the covenant to repair, in view of the circumstances under which it was made, is not in the particular case to be construed as extending to injuries so caused, and the authorities show that such a limited construction is not ordinarily placed upon the covenant. The tenant is liable, under the covenant to repair, in case the premises are injured by third persons, or even if the premises fall on account of defects existing therein at the time of the lease."

To the same effect is *Taylor on Landlord and Tenant* (9th Ed.) § 364.

Our own Supreme Court, stating the effect of a general covenant to repair in the case of *Polack v. Ploche*, 35 Cal. 416, 422, 95 Am. Dec. 115, used the following language:

"If the tenant desires to relieve himself from [damages] resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant."

In a Texas case in many respects like the one at bar the lease contained the following covenant:

"It is expressly agreed and understood that the said Martinez [the tenant] shall himself bear all the expenses of repairing or improving the premises hereby leased him during his occupancy of same."

There also the only exception to the lessee's obligation was a covenant on the part of the lessor to make needed repairs to the roof. The building had been condemned by the municipal authorities of Dallas and ordered demolished. Subsequently a resolution was passed by the city council ordering the building to be repaired under the direction of the city engineer. The tenant refused to make the repairs, and they were made at the expense of the landlord, who brought suit to recover the amount expended by him. The court, holding that the landlord was entitled to recover the cost of the repairs, used the following language:

"The contract shows that defendant obligated himself to bear all expenses of repairing or improving the property during his occupancy. * * * This would obligate him to bear the expenses of everything falling within the meaning of repairs or improvements necessary during the term, except as by the other provisions of the contract he may have been released from such liability. * * * The work which Thompson caused to be done was for the purpose of restoring the house to a sound state or a safe condition, and this was the repairing, the expense of which the defendant promised to pay." *Martinez v. Thompson*, 80 Tex. 568, 16 S. W. 334.

To the same effect is *Markham v. David Stevenson, etc., Co.*, 104 App. Div. 420, 93 N. Y. Supp. 684.

In the case in New York the obligation of the tenant was held to extend even to the repair of dilapidations caused by defects in the construction of the building. In that case the lessee covenanted "to make such

improvements as he might require, also make all necessary repairs and to keep the same in tenantable order at his own cost." There, as here, the lessee abandoned the premises, claiming that the same had become untenable because of the settling of the rear wall owing to the original defective construction of the foundation. The court, sustaining the right of the landlord to recover the money expended by him in making certain repairs, held that:

"As the covenant was absolute to make all necessary repairs and keep the premises in tenantable order, and no fraud on the part of the landlord having been shown, defendant was bound to make the repairs irrespective of the cause of the defect, and defendant having abandoned the premises without making the repairs the landlord had a right to make them and recover the expenses." *Lockrow v. Horgan*, 58 N. Y. 635.

[2] Section 1932 of the Civil Code has no application to the facts of this case. That section provides:

"The hirer of a thing may terminate the hiring before the end of the term agreed upon * * * when the greater part of the thing hired, or that part which was and which the latter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care of the hirer."

That section is not applicable to a case where the lease itself expressly provides who shall make the repairs; and even if it could he held that this section does apply, the evidence wholly fails to show that the greater part of the thing hired, or that part which was the material inducement to the hirer, was destroyed. We think, therefore, that from no aspect of the case was the tenant relieved from the obligation to pay the agreed rent.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE v. GILBRETH. (Cr. 527.)

(District Court of Appeal, Second District, California. Feb. 14, 1917.)

CRIMINAL LAW §913(1)—TIME FOR ENTRY OF JUDGMENT—RIGHT TO NEW TRIAL—STATUTE.

As the provisions of Pen. Code, § 1191, providing that after a verdict of guilty the court must appoint a time for judgment not more than 2 nor less than 5 days after verdict, and that the court may extend the time not more than 20 days, where the question of probation is concerned, are mandatory, in view of section 1202, requiring judgment to be pronounced on day appointed or to which it is continued under section 1191, and if not rendered within the time fixed the defendant shall be entitled to a new trial, in a prosecution for embezzlement where, after verdict of guilty, plaintiff made oral application for release on probation, and the time for hearing this application and for pronouncing judgment was extended several times, until the court finally denied the application for probation, and en-

tered judgment 33 days after the date of conviction, defendant was entitled to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137–2139, 2141, 2142, 2145.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

George W. Glibreth was convicted of embezzlement, and his motion for a new trial denied, and he appeals. Judgment and order reversed.

A. A. Sturges and Waldo, Root & Dysert, all of Los Angeles (G. E. Waldo, of Los Angeles, of counsel), for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. The defendant, by verdict of the jury returned on the 14th day of September, 1916, was found guilty of the crime of embezzlement, a felony. He made oral application for release on probation, and the court, without request or consent of the defendant, fixed the time for hearing of this application and for pronouncing judgment at September 28, 1916. On September 28th, at the request of defendant, time was extended to October 5th. Another extension was made from October 5th to October 10th, at the request of defendant. On October 10th, however, without the request of defendant, time was extended to October 17th, which was 33 days after the date of conviction. The court at the latter time denied the application for probation, and the defendant then made his motion for a new trial, the principal ground being that, under the provisions of sections 1191 and 1202 of the Penal Code, the court had no jurisdiction to pronounce judgment. Sentence being pronounced, this appeal was taken from the judgment and from the order denying the application for a new trial.

The requirement of the provisions of section 1191 of the Penal Code, which limit the time for the pronouncing of judgment after conviction, has been before this court and the District Court of Appeal for the First District heretofore. These provisions have been construed to be mandatory in effect and designed to produce speedy determination of criminal proceedings in the trial court. We refer to the cases of *People v. Winner*, 160 Pac. 689, and *People v. Boling*, 161 Pac. 1169. The views of this court as declared in the decision first mentioned are in harmony with those which find place in the opinion in the *Boling* Case, which was decided in the First District. In the *Boling* Case there was a petition for rehearing in the Supreme Court, which petition was denied, thereby giving the adjudication final approval. On the authority of the cases cited, defendant, the appellant here, is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

ABALAS v. CONSOLIDATED CONST. CO. (Civ. 2222.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. DAMAGES — 153 — SERVANT'S INJURY — COMPLAINT — ALLEGATION OF DAMAGE.

Complaint, alleging in general terms injuries suffered by employé while digging a trench for the laying of sewer pipe, concluding with the prayer for a specific amount of damages, was not insufficient for failing to allege in the body of the complaint the specific damage suffered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 422–425.]

2. APPEAL AND ERROR — 930(2) — PRESUMPTION THAT JURY FOLLOWED INSTRUCTIONS.

Where court instructed jury in action for servant's injury that expenses of care and nursing "are subjects of direct proof and are to be determined * * * on the evidence," it will be assumed that the jury followed such instructions, and included no sum for any matter not proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757.]

3. DAMAGES — 160 — SERVANT'S INJURY — PLEADING AND PROOF — RECOVERY FOR CARE.

Complaint alleging that plaintiff "expended much for medicines and treatment and employment of physicians," in the absence of demurrer, was sufficient to justify proof of exact amount expended for care and nursing.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 439, 445, 448.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by M. P. Abalas against the Consolidated Construction Company. Defendant appeals from judgment for plaintiff, and from order denying new trial. Affirmed.

Jones & Weller, El T. Sherer, and Emmet H. Wilson, all of Los Angeles, for appellant. Sam B. Dannis and Walter J. Horgan, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment in favor of the plaintiff and from an order denying to defendant a new trial.

[1] The plaintiff suffered personal injuries while at work for the defendant in digging a trench for the laying of sewer pipe. He alleged in his complaint that he was employed by the defendant and earning \$2.25 per day as a common laborer at the time he suffered his injuries, and that he was at work in the performance of his duty at the bottom of the trench, which was about 55 feet deep, when defendant's foreman negligently caused brick to be placed near the opening and immediately above where the plaintiff was at work; that one of the brick being dislodged fell and struck the plaintiff on the head. This allegation followed:

"That by reason of the negligence and carelessness of defendant as hereinbefore set out plaintiff was hurt in his health, strength and activity, and received a profound shock to his nervous system, and received a fracture of the skull, and plaintiff is informed and believes and upon such information and belief states that the

injury to his head is permanent, and that he will never regain his former health, strength, and activity, and that plaintiff has lost much time and expended much for medicines and treatment and employment of physicians."

The prayer attached to the complaint asked for judgment in the sum of \$20,000. The judgment as entered upon the verdict of the jury was for the sum of \$2,000. No demurrer was made to the complaint. But two points are presented as ground for the contention that the judgment and order should be reversed, to wit: (1) That the complaint did not state facts sufficient to constitute a cause of action. (2) That the court erred in instructing the jury on the matter of the amount of damages which might be assessed. It is contended that as the specific amount of damages suffered is not alleged in the body of the complaint, no cause of action was stated which would entitle plaintiff to any recovery. As already noted, the complaint did contain an allegation describing in general terms the injuries suffered (and there was no special demurrer interposed), and the complaint concluded with a prayer for a specific amount of damages. It has been held that a plaintiff in such a case need not allege particularly the amount of damage he has suffered, and that a complaint which contains a statement of such amount in the prayer only sufficiently states a cause of action. *Kiser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Tucker v. Cooper*, 158 Pac. 181.

[2, 3] The court instructed the jury as to the measure of damages, and stated that the elements entering into damage were, first, "such sum as will compensate him for the expenses he has paid or incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint." After enumerating other elements, such as the value of time and impaired power to earn money in the future and for pain suffered, the court advised the jury as follows:

"The first two of these elements are the subjects of direct proof, and are to be determined by the jury on the evidence they have before them."

It is the contention of appellant that it was neither pleaded nor proved that there had been any expense paid or incurred for care and nursing. We must assume that the jury included in their computation no sum for any matter which had not been proved before them; the court expressly told them that the first two elements defined were the subjects of proof and to be determined upon the evidence before the jury. Had the defendant demurred specially to the complaint, plaintiff would have been required to particularize the amount expended for nursing; but in the absence of such a demurrer and under the authorities which are cited above, the complaint undoubtedly was sufficient to entitle plaintiff to introduce evidence to prove the

amount expended or incurred on the several accounts. However, assuming that there was no evidence sufficient to authorize any allowance on account of nursing or medical charges, still, as has been stated, it must be assumed that the jury gave heed to the instruction of the court and included no allowance on any account not fully established by the evidence.

No other errors are pointed to as supporting the case for appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

LYNCH v. PACIFIC ELECTRIC RY. CO. (Civ. 2211.)

(District Court of Appeal, Second District, California. Feb. 5, 1917.)

1. MASTER AND SERVANT §137(4)—INJURY TO RAILROAD EMPLOYÉ—NEGLIGENCE.

Defendant electric railway company's failure to furnish sufficient power to move a train, causing a car to back onto an employé, does not establish negligence, especially where employé knew the condition of the power supply.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278.]

2. APPEAL AND ERROR §973—DISCRETION OF LOWER COURT—WITHDRAWING CASE FROM JURY.

An order, directing a verdict for defendant after the entire case has been presented, will not be reversed, unless the court abused its discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8846.]

3. NEGLIGENCE §136(31)—INJURY TO RAILROAD EMPLOYÉ—DIRECTED VERDICT.

The trial court did not abuse its discretion in directing a verdict for defendant electric railway company, where an employé stepped between two cars of a train for some unknown reason and shortage of electricity caused one portion to back against him, although St. 1911, p. 796, allowed recovery where employé's negligence was slight and employer's gross.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Elizabeth Lynch, administratrix of William Edward Lynch, against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for respondent.

CONREY, P. J. The plaintiff, as administratrix of the estate of her deceased husband, William Edward Lynch, prosecutes this action against the defendant to recover damages on account of the death of her husband, which she alleged was caused by negligence of the defendant employer of said Lynch. The charge is that, on the 29th day of April, 1913, "while the defendant was attempting to draw a gravel train of cars over its tracks on a steep upgrade, near Redondo Beach, Cal., the

defendant negligently failed to furnish sufficient electricity, the motive power thereof, to pull said train, * * * so that while the said William Edward Lynch was in the act of passing between two cars of said train, the front part of said train slipped back against him and caught him between said two cars, crushing him so that he immediately died therefrom." The complaint also alleged negligent failure of the motorman to put on brakes as a proximate cause of the accident. After the evidence had been received as offered by the respective parties, the court, on motion of the defendant, instructed the jury to find for the defendant. This the jury did, and judgment was rendered accordingly. From that judgment the plaintiff has appealed.

At the commencement of the trial, counsel for plaintiff abandoned his claim of negligence on the part of the motorman, and admitted that at the time in question the motorman did throw on the power as quickly as he could, but that before he could put on the power the car slipped back and caught Mr. Lynch between the two cars, whereby he was killed. The case was tried upon the charge that the defendant negligently failed to furnish power to make it sufficiently safe for him to work. The circumstances were as follows: The defendant was operating a line of electric cars from Los Angeles to and through Redondo and to a place called Clifton, a short distance south of Redondo. Its passenger cars did not run beyond Clifton. At a point a half mile or more beyond Clifton defendant had a gravel pit to which it had extended a track on which a motor and cars were operated for the transportation of gravel. This track ran on an upgrade from the gravel pit toward Clifton. Power was obtained through a trolley wire running over the track down to the gravel pit, which trolley wire was continuous with the wire used by the passenger cars running to Clifton, and carried the same supply of power. The result was that sometimes, when cars were actually running on what was called the Clifton section, their consumption of power reduced the supply of power available for the gravel cars, and there was not always sufficient power to bring the gravel cars upgrade. A cluster of electric lights on the motor car of the gravel train was utilized by the operatives of the gravel train to show them whether at any given time there was or was not power available for their purposes. On the day of the accident Lynch was the foreman in charge of the gravel train, and had under his direction the motorman and two other employees. The cars were started upgrade toward Clifton in the form of a train the parts of which were in the following order: The motorcar was at the north end (toward Clifton); car No. 1 was attached to the motorcar, and car No. 2 was attached to car No. 1, and the train was being pulled up-

grade toward Clifton. After they started from the gravel pit the train was stopped two or three times on account of lack of power. When it arrived at a point 100 feet, more or less, from the top of the grade, the train stopped again and Lynch decided that it would be better to detach car No. 2, deliver car No. 1 on a siding at the top of the grade, and go back later for car No. 2. Lynch, while standing on top of car No. 2, set the hand brake and then climbed down and disconnected the air brake between cars Nos. 1 and 2. Next he gave a signal, in response to which the motorman slackened the pull on car No. 2 so that a coupling pin could be drawn. This was accomplished by Lynch by pulling a lever at the side of car No. 2. This he was able to do, and did do, without going between the cars. The signal was received by a man who stood by the side of the motorman and who transmitted the signal to the motorman, the latter not being in position where he could see Lynch's signals. Lynch then signaled for the motorcar and car No. 1 to move ahead, and this was done, car No. 2 remaining stationary on the track. When the two cars had moved about three feet the power went off, and the motorcar with its attached car No. 1 started back toward car No. 2. In the meantime, for some reason or impulse not explained, Lynch had moved into the space between the rails, immediately in front of car No. 2 and between the coupling apparatus of that car and car No. 1, and as the cars came together he was crushed between them. Hearing Lynch's cry of distress, the man opposite the motorman called to the motorman, who as quickly as possible sent his cars forward, the electric power having at that moment returned to the line. Lynch was thereby released, but he had received fatal injuries. There is no direct evidence showing why the power under which the train was moving was lost during the brief interval in which this accident occurred. It does appear, however, that the supply of power available for the use of the gravel train varied on account of the movements of the passenger cars; that the men of the gravel train were in the habit of timing their work according to their knowledge of the arriving and leaving time of the passenger cars on the Clifton section; and that as to whether they had electricity off or on, they judged by the lights on the motor car.

[1] The defendant by its answer denied that it had negligently failed to furnish sufficient electricity to pull the train. This was an admission that the amount of power was not entirely sufficient; the admission being coupled with the denial that such failure was negligent. The evidence showed that this insufficiency was known to Lynch who, for that reason, had caused car No. 2 to be detached. Under all of these circumstances it cannot be that defendant was guilty of neg-

ligence causing the injury and death of Lynch, unless it can be maintained that it was the defendant's duty to furnish a supply of power at all times sufficient to move the train, and that it owed this duty to its employes, notwithstanding that they had full information concerning the actual condition of the power supply. This would be a more extreme rule than is necessary to meet the requirement that the employer shall use reasonable care to provide its employes with safe appliances with which to do their work. We have not been referred to any decisions enforcing such extreme rule.

[2, 3] At the time of the accident to William Edward Lynch there was in force an act, approved April 8, 1911, commonly known as the Roseberry Act. Under section 1 thereof it was provided that in any action to recover damages for death resulting from personal injury sustained within this state by an employe while engaged in the line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, "the fact that such employe may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employe." Stats. 1911, p. 796. In addition to its denial of any negligence on its part, the defendant pleaded contributory negligence of the deceased. Appellant contends that by reason of the above-mentioned statute this defense was not available to the respondent, and that it was solely for the jury to determine the amount or degree of negligence of the employer and employe, or of both, so that the terms of the statute might be applied to the facts thus found. Upon the facts of this case, which we have stated very fully, it probably was very difficult for the trial judge to avoid the conclusion that the gross negligence, comparatively speaking, shown by the evidence, was that of the deceased, rather than of the defendant. For reasons which we are about to state, the judge was authorized to take these facts into consideration in determining how he would instruct the jury, or what he would direct the jury to do.

It is true that, as claimed by appellant, usually in actions of this kind the question of negligence of the defendant should be determined by the jury, and that the court may not grant a nonsuit on the evidence introduced by the plaintiff if that evidence tends to establish the fact of negligence. But the court here directed a verdict for the defendant after the entire case had been presented. This being so, the situation is very much the same as where the jury has returned a verdict and the judge has set aside that verdict

as not sustained by the evidence. If the trial court has not abused its discretion in making such order, the order will not be reversed. So here, under like circumstances, the court's order directing a verdict for the defendant should be sustained. The condition of the evidence was such that the judge determined that he would not be justified in allowing the verdict to stand if it deprived the defendant of the defense of contributory negligence to which it seemed well entitled in this case, or he determined that there was not sufficient proof of negligence on the part of defendant. In acting upon this determination his discretion was properly exercised, upon either or both of the grounds above stated. "To withhold a case from the jury is no greater interference than to set aside their verdict." *Bohn v. Pacific Electric Ry. Co.*, 5 Cal. App. 622, 91 Pac. 115, and cases there cited.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. FODERA. (Cr. 663.)

(District Court of Appeal, First District, California. Feb. 14, 1917. Rehearing Denied March 16, 1917; Denied by Supreme Court April 13, 1917.)

1. HIGHWAYS \S 186—COLLISION—FAILURE TO STOP AND ASSIST—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence on prosecution under Pen. Code, \S 367c, of driver of automobile for not stopping and rendering assistance to occupants of vehicle collided with by him, held sufficient to justify conviction as against contention of defendant that he did not, at the time, know of the collision.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 476, 477.]

2. WITNESSES \S 274(2)—CROSS-EXAMINATION—SCOPE.

Asking witnesses who had testified to the reputation for kindness and gentleness of defendant, as bearing on the likelihood that his failure to stop and assist occupants of a motorcycle, struck by his auto, was with knowledge of the accident, whether they had heard that he had been arrested for picking chickens alive, and at another place had run down a boy or man, and had been arrested for unlawfully killing an elk, had a direct bearing on the issue, and in the absence of a showing of bad faith, was within the proper bounds of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 966.]

3. CRIMINAL LAW \S 1036(2), 1170½(5)—APPEAL—HARMLESS ERROR.

Prejudicial error cannot be predicated on the making and permitting inquiry of character witnesses for defendant, charged with not stopping to assist occupants of a vehicle with which his auto had collided, as to whether they knew of his arrests and pleas of guilty and fines for unlawful speeding on other occasions; in most cases no objection or assignment of misconduct being made to the questions; most of the witnesses stating that they had never heard thereof; no request for admonition or instruction to disregard the evidence being made; and the good

faith of the district attorney in making the inquiries at the time not being questioned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2640, 3133.]

4. CRIMINAL LAW §1144(16)—APPEAL—PRESUMPTION—HEEDING ADMONITION.

It will be presumed that the jury heeded the admonition that offers of testimony which the court refused to admit, and answers stricken out and insinuations against a party in questions, are not evidence, and should be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2768, 2901, 3034.]

5. CRIMINAL LAW §1037(2) — APPEAL — WAIVER OF ERROR.

Prejudicial misconduct cannot be predicated on the asking by the district attorney whether witness ever heard that on the day of the matter in issue, a violation of the law of the highway, defendant was visiting a person who had been arrested as a member of the Black Hand Society; the defendant allowing the question, and the answer in the negative made before he could object, to stand, and making no request for admonition or instruction to disregard the same, though the court, on objection by him, stated that if he wished it would be stricken out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645.]

6. HIGHWAYS §186 — COLLISION — FAILURE TO STOP AND ASSIST—KNOWLEDGE AS ELEMENT.

Aside from Pen. Code, § 20, providing that in every crime there must be a union of act and intent, it is necessarily to be implied from section 367c, declaring the duty of the driver of a vehicle colliding with another to stop and assist the occupants of the vehicle collided with, and making violation thereof an offense, that knowledge by the driver of the collision is essential to the offense.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477.]

7. WITNESSES §293—PRIVILEGE—TESTIMONY AGAINST HIMSELF—STATUTES.

Pen. Code, § 367c, requiring the driver of an auto colliding with any vehicle to stop and give aid, and to give information as to the number of his machine and his name and address, and making violation of any provision thereof an offense, does not compel him to give evidence against himself, in violation of Const. art. 1, § 13.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009-1014.]

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Antone Fodera was convicted of violating Pen. Code, § 367, and appeals. Affirmed.

W. E. Foley, and Devoto, Richardson & Devoto, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Rlordan, Deputy Atty. Gen., and Arthur M. Free, Dist. Atty., and Archer Bowden, Deputy Dist. Atty., both of San Jose, for the People.

LENNON, P. J. This is an appeal from a judgment of conviction of the defendant upon the charge of a violation of section 367c of the Penal Code, requiring drivers of automobiles colliding with other vehicles to stop and render assistance to the occupants of the vehicle collided with and who may have been injured by such collision, under penalties which render the act or

neglect of such drivers in failing or refusing to comply with such requirements a felony.

[1] The facts of this case immediately preceding, attending, and succeeding the collision are substantially these: On the evening of October 31, 1915, a little after sunset the defendant was proceeding northward along the state highway near the town of Mayfield, in the county of Santa Clara, on his way home to San Francisco from Coyote, in that county, to which place he had made the trip earlier in the day. There were four companions with the defendant in the car which he was driving at a rate estimated as exceeding 40 miles an hour. A closed limousine, in which two ladies—Mrs. Carolan and Miss Shute—were being driven by a chauffeur, was also proceeding northward along the highway at that point at about 25 miles an hour. The defendant undertook to pass the limousine, swerving to the left in order to do so. At the moment of passing, a tandem motorcycle, driven by one Hector Zapata with one Joseph Ottens as his companion, two young students of the University of Santa Clara, was going southward at the rate of 18 to 20 miles an hour, and was also about to pass said limousine, when a collision occurred between the defendant's machine and said motorcycle, in which Zapata was instantly killed and Ottens severely injured. The defendant did not stop or check his speed, but rather increased it until he was overtaken at Mayfield by the Carolan car, when the chauffeur called to the defendant to stop. There is also some evidence that the chauffeur, who spoke English imperfectly, made some remark to the defendant to the effect that he had killed somebody. The defendant stopped momentarily, but did not return to the scene of the collision, but continued rapidly on his way to San Francisco until he was finally halted by the officers at Burlingame. He insisted at all times that he did not know of the collision at the time of its occurrence, and in this he was supported by the testimony of the four other persons who were occupants of the car. The evidence educed at the trial disclosed, however, that the impact of the collision was distinctly heard by the two ladies who were within the closed limousine, and also by a Mr. Van Gordon, who was sitting upon the porch of his residence 100 yards away from the scene of the collision. It also appeared that the body of Zapata had been carried along by the defendant's car for a distance of from 45 to 60 feet before falling from it to the roadside; while from the exhibits produced at the trial and exhibited to this court upon the oral argument of this appeal, consisting of photographs of the defendant's car, and also of articles of clothing worn by one of the occupants thereof sitting on the side nearest to the point of contact, it appeared that the fenders and tool box of the

defendant's car had been bent and indented by the impact, while the sides of the machine and the coat of its said occupant were bespattered with the blood and brains of Zapata.

It would thus appear that the evidence before the jury was abundantly ample to justify the defendant's conviction. Notwithstanding this fact the appellant insistently contends that the judgment of conviction herein should be reversed on account of certain alleged acts of prejudicial misconduct on the part of the district attorney occurring during the trial and the argument of the case and claimed to have resulted in a miscarriage of justice. The specific acts of alleged misconduct relied upon for a reversal, substantially stated, are these:

[2] During the trial of the cause and prior to the time when the defendant himself had taken the stand as a witness in his own behalf his counsel proffered proof that his general reputation for truth, honesty, and integrity was good. The trial court, upon objection made, limited the evidence offered in this regard to proof of the general reputation of the defendant for kindness and gentleness, as being the particular qualities involved in the particular inquiry. The defendant apparently accepted this limitation; and proceeding upon the theory that it would be unlikely that a person of gentle and kindly nature would disregard the promptings of humanity as well as the commands of the law requiring him to stop and render aid to those who might be injured by a collision if he was aware of the fact or likelihood of such injury, the defendant called several witnesses, who testified that the general reputation of the defendant for kindness and gentleness was good. Of the witness George Filmer the district attorney asked upon cross-examination whether he had ever heard it discussed that the defendant, with several other poultry men of San Francisco, had been arrested for picking chickens alive. The same question was asked of each of the other witnesses to the defendant's general reputation for kindness and gentleness. A number of these replied to the question that they had never heard the matter discussed, while others stated that they had heard of it, but had investigated it and found that the rumor had no foundation in fact. The district attorney also asked of most, if not all, of said witnesses if they had not heard that the defendant had run down a boy or a man upon the streets of San Francisco and been arrested, for it, to which most of them replied that they had never heard of it. Of some of said witnesses the district attorney also inquired if they had not heard of the defendant's arrest for unlawfully killing an elk. To this line of questions in most instances no objection or assignment of misconduct was made at the time, nor was the good faith of the district attorney in asking these questions assailed at the trial; and it seems very clear that the questions them-

selves had a direct bearing upon the issue as to the particular qualities of the defendant to which these several witnesses were called to testify, and that, in the absence of a showing of bad faith on the part of the prosecuting officer, they were within the proper bounds of his cross-examination.

[3] The district attorney also asked of a number of said witnesses whether they had heard that the defendant had on several occasions been arrested for speeding his automobile beyond the legal limit, and in some instances had pleaded guilty and paid fines therefor. In most cases this question was asked and answered negatively without objection or assignment of misconduct. It may be seriously questioned whether a person habituated to reckless driving of an automobile to the extent of being in a number of cases and in several counties arrested therefor is of that kindly and humane disposition which the character witnesses of the defendant herein would have had the jury believe him to be; but however this may be it appears, as above stated, that in most instances no objection or assignment of misconduct was made to these questions, and that also in most cases the witnesses stated that they had never heard of the matter, and in some instances the witnesses admitted that they had heard of these episodes. It further appears from the record that no request was made to the court for an admonition to the jury to disregard this evidence; nor was any instruction to that effect requested; nor was the good faith of the district attorney in making these inquiries at the time brought into question. Under these circumstances no prejudicial error can be predicated upon the action of the district attorney in making, or of the court in permitting, the inquiry as to whether the character witnesses for the defendant knew of his arrests and pleas of guilty and fines for unlawful speeding.

[4] The district attorney is also charged with misconduct in asking several of said witnesses whether they had heard it discussed that the defendant was under investigation by the police department of San Francisco for the selling of several stolen automobiles. The question was improper, and the action of the district attorney in asking it an act of misconduct on his part; but the record shows that the court in each instance sustained the defendant's objections to the question; and further shows that while the defendant's counsel assigned the act of the district attorney as misconduct, no request was made of the court to admonish or instruct the jury to disregard the same. Notwithstanding this, the court of its own motion gave the jury the following instruction:

"Offers of testimony by either counsel which the court refused to admit in evidence, and answers given by witnesses which may have been stricken out by the court, are not evidence, and should be disregarded by you. It sometimes happens that counsel asks a question of a witness

which contains an insinuation against one or other party to the action. The insinuations contained in such questions are not evidence and you must disregard them."

It is to be assumed that the jury heeded this admonition with respect not only to this precise inquiry, but also as to other questions of doubtful propriety respecting which objections were made and sustained by the court. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

[5] The district attorney is also charged with misconduct in having asked of the witness Charles Swanberg the following question: "Q. Did you ever hear it discussed, Mr. Swanberg, that on the day of this affair he [the defendant] was visiting at the home of a person who had been arrested as a member of the Black Hand Society?" Before objection could be made the witness responded, "I never heard it discussed." The defendant then made his objection and assignment of misconduct; whereupon the court stated to the counsel for the defendant, "If you wish, it will be stricken out." No such request was made, however, nor was the court asked to either admonish or instruct the jury, nor was the district attorney charged with bad faith in making the inquiry. It is sufficient to say, therefore, that since the defendant chose to allow the question and answer to stand, and made no request for an admonition or instruction to the jury to disregard it, no prejudicial misconduct sufficient to justify a reversal of the case can be predicated upon the asking of the question.

The appellant further contends that the district attorney was guilty of misconduct in producing a justice of the peace of San Mateo with his docket, for the purpose of showing affirmatively that the defendant had in fact been arrested, and pleaded guilty and paid a fine upon the charge of unlawful speeding. It is sufficient to say that the evidence was incompetent, and its proffered introduction improper, but that the court promptly sustained an objection to it, and that the defendant neither assigned the proffer of it as misconduct, nor asked for an instruction to the jury to disregard it. The error and impropriety of its offer in evidence must therefore be held to have been cured by the foregoing voluntary instruction of the court in its final charge to the jury.

With regard to the alleged acts of misconduct on the part of the district attorney during the argument of the case, we do not deem it necessary to deal with these in detail, for the reason that in most instances the court admonished the district attorney to confine himself to the evidence in the case; and for the further reason that upon the

whole these imprudent remarks of the district attorney were not in our opinion sufficiently prejudicial to have seriously affected the verdict or to warrant a reversal of the case, particularly in view of the fact that, as above stated, the proof presented to the jury in the form of testimony and exhibits was amply sufficient to justify the verdict of conviction, and to warrant the conclusion that none of the several alleged acts of misconduct on the part of the prosecuting officer were sufficiently prejudicial in character or influential in effect as to cause the verdict of conviction in this case to have been a miscarriage of justice.

[6] The final contention of the appellant is that the section of the Penal Code under which the defendant was prosecuted and convicted is unconstitutional, for two alleged reasons: First, that the section does not expressly embody in its phraseology words limiting its application to those persons who knowingly cause their vehicles to collide with those occupied by others. But our reading of the section in question convinces us that the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act, to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision. Moreover, section 20 of the Penal Code, which is to be read together with and into the section under review, provides that "in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." We are of the opinion that the act is not unconstitutional for the first reason assigned.

[7] The appellant urges as the second reason for its alleged invalidity its provision requiring the driver or occupant of a vehicle striking another to give certain information as to the number of the vehicle, the name and address of the driver and of the owner and of its passengers. It is claimed that this requirement, by compelling the persons of whom such information is demanded to be witnesses against themselves, amounts to a violation of section 13 of article 1 of the state Constitution. But the appellant concedes that this point has been decided adversely to his contention in a number of cases from other states which, as respondent shows, have been approved by this court in the case of *People v. Diller*, 24 Cal. App. 799, 802, 142 Pac. 797. There is, therefore, no merit in this contention.

Judgment and order affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

RAMISH v. WORKMAN et al. (Civ. 2201.)

(District Court of Appeal, Second District, California. Feb. 14, 1917. Rehearing Denied by Supreme Court April 12, 1917.)

1. JUDGMENT \Leftrightarrow 608—ACTIONS BARRED—ACTION FOR RENT.

Under Code Civ. Proc. § 1176, providing that an appeal taken by defendant shall not stay proceedings upon the judgment unless the court so directs, where lessees under a lease which gave a right of re-entry for default in payment of rent continued to occupy the premises, pending the final determination of an appeal in an action for unlawful detainer in which the landlord recovered judgment, and no stay was directed, the lease constituted the measure of the lessees' liability for such time as they remained in possession, and the judgment did not constitute a bar to the maintenance of an action for the rent for such period.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1118.]

2. LANDLORD AND TENANT \Leftrightarrow 184(2)—LEASE—CONSTRUCTION.

Where a lease for ten years provided that the lessees "will pay to the lessor as a further consideration for his lease for this lease in addition to the rent hereinabove reserved the sum of \$7,200, the receipt of which is hereby acknowledged by the lessor," and that, if the lessees should pay the rent reserved when due, and perform the agreements of the lease for first nine years, seven months, and twelve days of the lease, and the lease shall not be terminated by the re-entry of the lessor within said period, etc., he will credit the sum of \$7,200 the remainder of the rent due, the \$7,200 was in the nature of a bonus or additional consideration for the lease of the premises under the conditions specified, and the lessees did not part with the money, as a penalty or as security, and title to it passed absolutely to the lessor, unaffected by the fact that he agreed upon the performance of certain conditions by defendants to give them credit therefor, and in the absence of such performance by the defendants they have no claim to the fund.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 745-748.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Adolph Ramish against Elmer N. Workman and another, in which the named defendant filed a cross-complaint. From a judgment for plaintiff and an order denying a motion for a new trial, the defendants, and named defendant, as cross-complainant, appeal. Affirmed.

I. Henry Harris and Williams, Goudge & Chandler, all of Los Angeles (Hunsaker & Harris, of Los Angeles, of counsel), for appellants. Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondent.

SHAW, J. This controversy grew out of a lease of property made by plaintiff to defendants Workman and Sturm and their assignors, for a term of ten years, for the sum of \$180,000, payable in advance in monthly installments of \$1,500.

Default was made in the payment of the rent due December 1, 1912, whereupon plaintiff instituted a proceeding in unlawful de-

tainer for restitution of the property and recovery of the rent then due for said month, for which judgment was rendered on January 31, 1913, pursuant to which, notwithstanding an appeal perfected therefrom by defendants, they were evicted from the property on February 10th following.

The present action, filed April 26, 1913, was to recover the rent for the period extending from January 1st to February 10th, during which the premises were held and occupied by defendants, and for which judgment in the sum of \$2,000 was rendered in favor of plaintiff, from which, and an order denying their motion for a new trial, both Workman and Sturm, as defendants, and the former also as cross-complainant, appeal.

[1] The lease provided, among other things, that upon default in payment of the rent reserved, the lessor, at his option, might enter upon the demised premises and remove all persons therefrom. By another provision it was agreed that the lessees "will pay to the lessor as a further consideration for this lease in addition to the rent hereinabove reserved the sum of \$7,200, receipt of which is hereby acknowledged by the lessor," and "that, if the lessees shall pay the rent herein reserved when the same becomes due hereunder, and shall well and truly perform and observe all the covenants and agreements herein contained on their part to be performed and observed, during the first nine years, seven months, and twelve days of this lease, and this lease shall not be terminated by the re-entry of the lessor as hereinafter provided within said period of nine years, seven months and twelve days, he will credit the sum of \$7,200 hereinafter provided to be paid to him by the lessees upon the last four months and eighteen days' rent under this lease."

While appellants admit that they occupied the premises during the month of January and up to February 10th, the rent for which period under the terms of the lease was \$2,000, they insist their obligation to pay the same was fully adjudicated in the action for unlawful detainer, wherein judgment was rendered for \$1,500, which judgment they claim constituted a bar to the maintenance of this action. At the trial it was in substance stipulated that in the unlawful detainer action no claim was made for any damages, nor for rent, other than \$1,500 due for the month of December, for which and the restitution of the premises judgment was rendered, but not executed as to restitution until February 10th. The action did not involve the rent for the period extending from January 1st to February 10th, nor was there any judgment therefor rendered. Moreover, this judgment was not final for the reason that an appeal was perfected therefrom, and hence, there being no final determination of the question as to plaintiff's right to forfeit the lease, the question was left as though it

had never been tried, even though no stay was directed by the court as provided in section 1176, Code of Civil Procedure. Hence, so long as defendants continued to occupy the premises, pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession.

Appellants' chief ground for a reversal, and upon which they devote much of their argument, is based upon the provision of the lease pursuant to which they paid plaintiff \$7,200, claim to which is asserted in both the answer and cross-complaint. Notwithstanding the plain language in which the provision is couched, the meaning of which, to our minds, admits of no controversy, they insist that it should be construed as security for the payment of the rent reserved during the time ending with their eviction and any damages sustained by plaintiff; that when the landlord elected to evict defendants from the premises for nonpayment of rent he waived all claim to the \$7,200, except in so far as it was necessary to apply it in payment of rent then due or accrued. As stated in *Dutton v. Christie*, 63 Wash. 373, 115 Pac. 857, where a similar question was involved: "We cannot agree with this contention without in effect writing a new contract for the parties."

[2] Clearly the \$7,200 was paid for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as "a guaranty," "as indemnity," as "a penalty," "for security," etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of *Dutton v. Christie*, *supra*.

The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and, thus construed, it is clear that the parties intended the \$7,200 to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions

therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof he promised in effect to release them from the payment of rent at the rate of \$1,500 per month for the last four months and eighteen days of the term so demised furnishes no reason for appellants' contention.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

HILLYER v. EGGERS, Sheriff. (Civ. 1870.)
(District Court of Appeal, First District, California. Feb. 9, 1917.)

1. REPLEVIN \S 4, 59—ACTION OF CLAIM AND DELIVERY—DESCRIPTION OF PROPERTY.

In an action in claim and delivery, it is essential that the specific personal property claimed should be described with a reasonable degree of certainty, and, as a rule, money is not the subject of such an action unless it is marked or designated so as to make it specific as regards its capability of identification.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. \S 4-19, 21-26, 215-218.]

2. ACTION \S 32—CLAIM AND DELIVERY.

Under Code Civ. Proc. \S 509-520, providing an auxiliary remedy whereby when a party sues to recover personal property he may claim that the property be immediately delivered to him without awaiting the trial, where the complaint showed plaintiff to be entitled to recover from a sheriff an amount of money taken from him wrongfully under execution, upon the theory that he had, as required by the Code, stated the facts constituting his cause of action, or facts showing a cause of action for money had and received, judgment for plaintiff was proper, though the complaint did not describe the money sufficiently to entitle plaintiff to its return in specie in an action in claim and delivery; there being no forms of civil actions in California.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. \S 257-261, 316.]

Appeal from Superior Court, City and County of San Francisco; Hon. Geo. E. Crothers, Judge.

Action by Curtis Hillyer against Frederick Eggers, Sheriff of the City and County of San Francisco, State of California. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Tomskey, of San Francisco (J. L. Nagle, of San Francisco, of counsel), for appellant. Curtis Hillyer and Thomas W. Forsyth, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the defendant from an adverse judgment in an action for the recovery of \$730, claimed to have been unlawfully taken under execution.

In the early part of the year 1914 the Sequoia Motorcar Company gave in payment

for legal services rendered to it its promissory note for \$300 to its attorney, O. C. Pratt. Prior to its maturity the payee, for a valuable consideration, transferred it to the plaintiff. At its maturity it was unpaid. Subsequently H. J. Small became a judgment creditor of the company in the sum of \$3,000. It also appears from the record that Mrs. H. A. Gillis was indebted to the company in the sum of \$1,000 upon a stock subscription, the indebtedness being evidenced by her promissory note, given, however, with the understanding that the note was not to be negotiated. Contrary to this agreement it was negotiated; and Mr. Henley C. Booth, attorney for both H. J. Small and Mrs. H. A. Gillis, wishing to find out who had possession of the note, communicated with plaintiff by telephone, telling him that he represented Mrs. Gillis, and asking him if he knew where the note was. Plaintiff replied that he did not, but would try to find out and let Mr. Booth know. Later, having ascertained that the note was held by a Mr. W. W. Allen, plaintiff communicated with Booth, and negotiation ensued, resulting in Booth agreeing to pay plaintiff the sum of \$730 for it. The latter then purchased the note from Allen, paying him therefor the sum of \$550, hoping apparently through the completion of the transaction with Booth to recoup in part the loss he had sustained by his purchase of the note given by the company to Pratt, the company being now insolvent.

About this time, according to the argument of the respondent, Booth appears to have conceived the idea of acquiring for Mrs. Gillis her note, and that the price to be paid for it should go to his other client, Small. Accordingly, he agreed with the plaintiff that the payment of the \$750 for the note should be made in his (Booth's) office, at a certain time, harboring the intention, however, that at the moment of receiving the note from the plaintiff and tendering payment thereof the money should be seized in execution of Small's judgment. This plan was carried out, so that when the plaintiff's agent handed the note to Booth the latter placed \$730 in currency on the desk in front of him, and before the messenger of the plaintiff could pick it up, a deputy of the defendant, who was waiting in the room for that purpose, seized the currency and levied upon it pursuant to an execution issued in favor of Small upon a judgment obtained by him against the Sequoia Motorcar Company. Plaintiff immediately demanded of the defendant the return of the money, and filed with him a claim for the same. Defendant refused to comply with his demand, whereupon plaintiff brought this action for its recovery.

The record further shows that the plaintiff, prior to its maturity and without notice of the collateral agreement of the company not to transfer it, paid a valuable consideration for the note; that no fraud was either

charged or proven against the plaintiff, and that no fiduciary relation existed between him and any of the parties to the transaction, and that title to the note was vested in him.

[1] Passing now to the only objection seriously urged by the appellant for a reversal of the judgment, it is that the plaintiff has apparently proceeded upon the theory that his remedy was an action in claim and delivery. In such an action it is essential that the specific personal property claimed should be described with a reasonable degree of certainty; and as a rule money is not the subject of such an action unless it be marked or designated in some manner so as to make it specific as regards its capability of identification. *Eddings v. Boner*, 1 Ind. T. 173, 38 S. W. 1110; *Griffith v. Bogardus*, 14 Cal. 410, 413; *Sharon v. Nunan*, 63 Cal. 235; *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696. The description of the money in this case is not sufficient to entitle the plaintiff to its return in specie.

[2] The complaint, however, irrespective of what the plaintiff has styled it, is sufficient to show him to be entitled to recover from the defendant the amount of money taken from him wrongfully under execution, upon the theory that he has, as required by the Code, stated the facts constituting his cause of action, or facts showing a cause of action, for money had and received. Under the circumstances of this case the judgment of the trial court must be sustained notwithstanding the contention of the appellant, as it is apparent from a decision of our own Supreme Court in *Faulkner v. First National Bank*, 130 Cal. 258, 62 Pac. 463, where it is said:

"Courts and law writers have sometimes inadvertently spoken of the Code 'action of claim and delivery' as if there were really here a form of action called by that name—just as there were forms of action at common law, such as 'debt,' 'covenant,' 'replevin,' 'trover,' etc. But we have here no forms of civil actions. We have only one form of action, which has no name; so that an action cannot be here defeated, as it could have been at common law, because not properly named. Sections 509 to 520 of the Code of Civil Procedure are preceded by the heading 'claim and delivery of personal property,' but the sections themselves show the meaning of this heading. They merely provide an auxiliary remedy by which, when a party brings an action to recover personal property, he may 'claim' that the property be immediately delivered to him at the commencement of the action and without waiting the trial. * * * These sections merely give to a plaintiff suing to recover personal property an auxiliary remedy very similar to the auxiliary remedy of 'attachment' given to a plaintiff suing upon a contract for the direct payment of money, and to the auxiliary remedy under the head of 'arrest and bail' and 'injunction during litigation.' But it is no more proper to speak of an action 'of claim and delivery' than to speak of an action 'of attachment.'"

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

ROBINSON v. SMITH-BOOTH-USHER CO.
(Civ. 2198.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. TRIAL \S 296(4, 5)—**INSTRUCTIONS—CURE OF ERROR.**

Where the judge erroneously instructed that servant could not recover for injuries if he was contributorily negligent in any degree, the error was cured by subsequent specific instruction repeated a second time that the servant's recovery if he was contributorily negligent should merely be diminished in the proportion that his negligence bore to that of his master.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 709.]

2. APPEAL AND ERROR \S 928(1)—**PRESUMPTIONS—RECORD—SUFFICIENCY OF PRESENTATION OF QUESTIONS.**

In view of Code Civ. Proc. \S 475, providing that there shall be no presumption that error is prejudicial, where complaint is made of instructions, but all the instructions are not included in the record, no error is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3749, 3753.]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by E. J. Robinson against the Smith-Booth-Usher Company. From judgment for defendant and order denying motion for new trial, plaintiff appeals. Affirmed.

Randall & Gaines and Shepard & Alm, all of Los Angeles, for appellant. Oscar Mueller, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein the plaintiff seeks to recover damages for personal injuries sustained by him while employed by the defendant in its machine shop; it being alleged that these injuries were caused by the negligence of the defendant. The answer denied all negligence on the part of the defendant, and also pleaded contributory negligence on the part of the plaintiff. The jury returned a verdict for the defendant, and judgment was entered accordingly. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

Appellant first insists that the evidence proved negligence on the part of the defendant and failed to prove contributory negligence of the plaintiff. There was a substantial conflict in the evidence upon these questions, and the evidence favorable to the defendant, if believed by the jury (as it was), is sufficient to support the verdict.

Appellant directs attention to certain instructions given by the court to the jury at the request of the defendant. It is claimed that by these instructions the jury was told that, if the plaintiff was guilty of a want of ordinary care in the slightest degree contributing directly to his injury, plaintiff could not recover, regardless of the negligence of the defendant or its servant. Reli-

ance is placed upon the fact that at the date of this accident, November 25, 1911, there was in force a statute relating to the liability of employers to their employes (Stats. 1911, p. 796), wherein it was provided that in actions of this class:

"The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé." Section 1.

In addition to the instructions complained of by appellant, the court gave to the jury an instruction requested by plaintiff, stating the doctrine of contributory negligence in accordance with said statute.

[1] At the close of his reading of instructions to the jury, the judge suggested that there was an inconsistency in the instructions relating to that issue. He then specially directed the attention of the jury to the instruction which he had given at plaintiff's request and read it to them a second time, with the further direct statement that this was a correct statement of the law. In view of this action by the court, we deem it unnecessary to examine the instructions complained of. Assuming that they were erroneous, the instruction as finally given had the effect of withdrawing those erroneous instructions from the consideration of the jury. That a court may thus correct its own error seems too plain to leave room for argument.

[2] Appellant also complains of defendant's instructions numbered 14 and 24 as given by the court. These instructions related to the question of negligence of the defendant, if from the evidence the jury believed certain stated facts. The criticism upon these instructions is that each of them purported to state a complete defense, but omitted certain facts concerning which evidence had been introduced pertaining to defendant's alleged negligence. Assuming that the omitted evidence should have been stated, the record is not in the condition necessary to enable us to determine that the error was prejudicial to the plaintiff.

"There shall be no presumption that error is prejudicial, or that injury was done if error is shown." Code of Civ. Proc. \S 475.

The statement of the case, as set forth in the transcript, says that:

The court, "on its own motion and at the request of the plaintiff, instructed the jury in part as follows."

After setting forth certain instructions thus given, it is further said:

"That thereupon the court instructed the jury in part as follows, at the request of the defendant."

After setting forth those instructions, it is said that:

"Other instructions were given by the court of its own motion and by request of plaintiff and defendant not here set forth."

There is not even a statement that the instructions placed in the record include all of the instructions given with respect to the propositions covered by the instructions put into the record.

"It is said in the transcript that the instruction complained of, 'among others,' was given. The others referred to are not contained in the transcript, and we have no means, therefore, of judging what bearing they may have had upon the one in question. If it should be conceded, therefore, that the instruction complained of should have been qualified or modified in some degree, it may be that the instructions omitted would have qualified or modified the one in question, and the rule is well settled that instructions are to be read and considered as a whole, and the fact that, when taken severally, some of them have failed to enunciate in precise terms and with legal accuracy propositions of law, does not render them erroneous." *Hanson v. Stinehoff*, 139 Cal. 171, 173, 72 Pac. 913, 915.

"Where numerous instructions are given [as in this case] it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions." *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 699, 89 Pac. 976, 980.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

PEDREIRA v. PEDREIRA. (Civ. 1632.)

(District Court of Appeal, Third District, California, Feb. 6, 1917. Rehearing Denied by Supreme Court, April 4, 1917.)

1. HUSBAND AND WIFE \S 296—ACTION FOR SEPARATE MAINTENANCE—EVIDENCE.

In a wife's action for separate maintenance for cruel and inhuman treatment, where the pleadings contained no appropriate allegation with reference to defendant's acts before the marriage, plaintiff's evidence that defendant had had intercourse with her frequently for seven or eight years before their marriage, and at nearly every such occurrence had promised to marry her, was improperly admitted as without the issues, and calculated to prejudice defendant with the jury and court.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1089.]

2. HUSBAND AND WIFE \S 296—ACTION FOR SEPARATE MAINTENANCE—EVIDENCE—PLEADING.

In an action for separate maintenance on the ground of cruel and inhuman treatment, allegations of specific cruel treatment did not warrant admission of evidence of specific acts of cruelty other than those presented by the pleadings.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1089.]

3. HUSBAND AND WIFE \S 298(1, 2)—ACTION FOR SEPARATE MAINTENANCE—INQUIRY INTO WIFE'S NECESSITIES.

The Court should have permitted an inquiry into plaintiff's necessities and her manner of living in order that a suitable award might be

made for her maintenance; the discretion of the trial court not being arbitrary, but to be exercised in view of the necessities of the parties, and defendant's financial condition and his earning capacity, together with plaintiff's possessions and her accustomed style of living, being proper elements to be regarded.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1093.]

4. WITNESSES \S 275(3) — CROSS-EXAMINATION—ACTION FOR SEPARATE MAINTENANCE.

Where plaintiff set up defendant's having had her committed to a hospital for the insane as an act of cruelty, and, on her direct examination, she testified to facts concerning the occurrence that would necessarily create the impression that she was sane at the time, defendant's inquiry on cross-examination, directed to the point that plaintiff did not know she was examined or committed, in other words, that her mind was a blank as to what happened, should have been permitted.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 969.]

5. HUSBAND AND WIFE \S 297—ACTION FOR SEPARATE MAINTENANCE—PREPONDERANCE OF EVIDENCE.

In a wife's action for separate maintenance on the ground of cruel and inhuman treatment, the law requires that the jury be convinced of cruelty by a preponderance of evidence to justify finding for plaintiff.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1090.]

6. HUSBAND AND WIFE \S 298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

The court instructed that if the jury found plaintiff was sane at the time of the marriage, and there was evidence of cruelty, verdict would be for plaintiff in the amount the jury might determine to be adequate, etc., and that, if the jury believed from the testimony that plaintiff was treated in a cruel and inhuman manner, as alleged, and that the general treatment of plaintiff by defendant from the time of marriage to the date of commencement of trial was cruel and inhuman, verdict would be for plaintiff. *Held*, that the instruction was erroneous as ignoring the consideration of the weight and credibility of the evidence as to the cruelty and the jury's proper function in relation thereto, also in failing to state the elements that should enter into the determination of the amount to be awarded plaintiff.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1091, 1092.]

7. HUSBAND AND WIFE \S 298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

An instruction as to the general treatment of plaintiff was not justified by the pleadings, there being no allegation of general cruel treatment of plaintiff by defendant.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1091, 1092.]

8. HUSBAND AND WIFE \S 298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

In a wife's action for separate maintenance for cruel and inhuman treatment, wherein she alleged, as an act of cruelty, that her husband procured her commitment to a hospital for the insane, the husband had a right to expect that the jury would be instructed along the line suggested by him in requests concerning his theory as to the wife's insanity at the time of the marriage.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1091, 1092.]

9. HUSBAND AND WIFE \Leftrightarrow 298½ — **ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.**

In a wife's action for separate maintenance for cruel treatment, though the jury's verdict was simply advisory, it was nevertheless important that the jury should be clearly instructed, particularly in view of the usual inclination on the part of the judge to adopt its findings, and the fact that they were adopted.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1091, 1092.]

10. HUSBAND AND WIFE \Leftrightarrow 298(1,2) — **ACTION FOR SEPARATE MAINTENANCE—ALLOWANCE FOR ATTORNEY'S FEES — BURDEN OF PROOF—STATUTE.**

A wife is entitled to an allowance for attorney's fee in her suit for separate maintenance only when it is necessary to enable her properly to maintain her action, and the burden is on her to show that the allowance is necessary; Civ. Code, § 137, governing the matter, contemplating that it shall be made only when necessary to enable the wife to present her case.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1093.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action for separate maintenance without divorce by Mary Pedreira against A. F. Pedreira. From judgment for plaintiff, defendant appeals. Reversed.

F. W. Henderson and Hugh K. Landram, both of Merced, for appellant. Jack Mahon, of Merced, for respondent.

BURNETT, J. The action, brought under section 137 of the Civil Code and grounded upon cruel and inhuman treatment, was for separate maintenance without divorce. The specific instances of cruelty alleged were: (1) Defendant absented himself during the birth of a child to plaintiff; (2) defendant did not provide a doctor or nurse for plaintiff during childbirth; (3) said neglect caused plaintiff great physical pain and mental anguish by reason of which the child was born dead; (4) that on April 14, 1914, defendant caused plaintiff to be moved to the Merced sanitarium, and thence to the Merced county jail, whence the plaintiff was committed to the state hospital at Stockton; (5) that, upon her release from said hospital in July 1914, defendant refused to take plaintiff to his home or to live with her as his wife.

In the answer there was a specific denial of the allegations of cruelty, an admission that plaintiff was committed to said hospital, but an explanatory averment that defendant was advised by the medical attendants of plaintiff that it was necessary, for the protection of the plaintiff and those who might come in contact with her, that she be committed to said hospital because she was violently insane, and that she was regularly committed to the state hospital after a hearing in the superior court of the county of Merced. Defendant further alleged that plaintiff had agreed to accept from defendant the sum of \$40 per month as and for her

separate maintenance. By way of cross-complaint it was further averred that at the time of the marriage of plaintiff and defendant she was of unsound mind and not capable of contracting marital relations; that because of this insanity defendant prayed for an annulment of the marriage.

The action was tried with the assistance of a jury. The jury found that the plaintiff was not insane at the time of the marriage; that defendant had treated plaintiff in a cruel and inhuman manner subsequent to said marriage; that plaintiff had not agreed to accept the sum of \$40 per month for her separate maintenance; and that \$75 per month was a reasonable amount for such purpose. The court adopted said findings and rendered judgment accordingly, and in addition allowed plaintiff \$400 for her attorney's fees.

It is claimed by appellant that many prejudicial errors are disclosed by the record, and we proceed to notice some of the assignments.

Over objection, plaintiff was permitted to testify that the defendant had had intercourse with her frequently for seven or eight years prior to their marriage, and that at nearly every such occurrence he promised to marry her. The court declared "it would not be evidence that you could rely upon," but overruled the objection.

[1] The evidence seems to have been entirely outside of the issues made by the pleadings and could hardly assist "in getting at the truth of the facts disputed." The natural effect of such testimony would be to excite sympathy for the plaintiff and hostility toward the defendant. It can be easily imagined how the jury, or the judge of the court, for that matter, would regard with indignation and contempt a man who, under repeated promises of marriage had seduced plaintiff and had actually been guilty of such illicit conduct while his first wife lay upon her deathbed. The prejudice thus aroused would hardly permit of a dispassionate and impartial consideration of the evidence relevant to the issues made by the pleadings.

Respondent contends that:

"The object of this testimony was, not to prejudice the defendant in the eyes of the jury, but to arrive at facts which would and did throw light on the issues involved. These acts of intercourse bore directly on the attitude of the defendant at the time he married plaintiff, and were the very acts upon which his subsequent treatment of plaintiff was based; they were facts necessary to be before the jury in order to obtain a fair understanding as to the relations of the parties."

As to this we think plaintiff is in error. If it had been supposed that it was important to inquire into the acts of appellant before the marriage, there should have been some appropriate allegation in reference thereto. The fact is, said evidence refers to

a time remote from anything referred to in the complaint and to conduct before marriage, whereas the cause of action is entirely based upon treatment of plaintiff by defendant after the marriage took place. Of course, the general rule is as stated in Jones on Evidence, vol. 1, par. 140a, that:

"Evidence of other acts of the parties, outside of the acts in record and unconnected with it, are not generally admitted in evidence."

"The rule excludes," as stated in *People v. Lane*, 100 Cal. 379, 34 Pac. 856, "all evidence of collateral facts, or those which are incapable of affording a reasonable presumption or logical inference as to the principal fact or matter in dispute; and evidence of another offense cannot be given unless there is some clear connection between the two offenses by which it may be logically inferred that if guilty of the one the defendant is also guilty of the other."

The statement was made in a criminal case, but the same principal would manifestly apply here. We can see no logical connection between said conduct before marriage and the acts after marriage which are set out in the complaint.

[2] Objection was also made to evidence of other specific acts of cruelty than those presented by the pleadings. If important enough to be shown, they were certainly important enough to be alleged. It may be permissible to show a general course of conduct as supplementing specific acts of cruelty where only the specific acts are set out, but the rulings complained of could hardly be justified except upon the erroneous theory that it is not necessary to allege any specific act but that a general allegation of cruel treatment is sufficient.

[3] We think, also, that the court should have permitted an inquiry into the necessities of the plaintiff and her manner of living in order that a suitable award might be made for her maintenance. Manifestly, much discretion in this matter must be confided to the trial court, but the discretion is not an arbitrary one and must be exercised in view of the circumstances of the parties. The financial condition of the defendant and his earning capacity, together with the possessions of the plaintiff and her accustomed style of living, were proper elements to be regarded in the consideration. In *Kusel v. Kusel*, 147 Cal. 60, 81 Pac. 295, there is an interesting discussion of the difference between an allowance to the wife on divorce and the separate maintenance that is contemplated by the Code. Referring to the latter, it is said:

"The action does not contemplate a divorce, but, on the contrary, that the parties shall continue to remain as they were before, husband and wife. The rights of the wife in the remaining property of the husband are not destroyed or affected in the least by the decree or judgment. The necessity for the separate maintenance may terminate at any time by reconciliation of the parties, or by the death of one of them. The law favors the reconciliation of the parties, and it should not be construed so as to afford a temptation for the wife to press an action for maintenance rather than to seek restoration to her marital rights."

This view of the spirit of the law emphasizes the importance of confining the allowance to the necessary maintenance of the wife in comfort and decency according to her accustomed standard of living.

[4] We think the cross-examination of plaintiff in reference to her commitment to the hospital for the insane was improperly curtailed. On her direct examination she had testified to facts concerning said occurrence that would necessarily create the impression that she was sane at the time. It would be argued from this that the husband had knowledge of her condition and was therefore chargeable with cruelty in having her committed. To rebut this unfavorable inference several questions were asked of the witness directed to the point that she did not know even that she was examined or committed; in other words, that her mind was a blank as to what happened. The inquiry was addressed to the same matter involved in the direct examination and should have been permitted. It may be added that counsel for appellant, at the time of the direct examination, sought to have respondent declare whether she claimed to have been sane at the time she was committed, and her counsel answered: "Yes, you bet she was." It is true that a moment after he said:

"I don't claim she was railroaded. The jury can draw their own conclusion. I don't claim that she was sane or insane."

However, the effect of her testimony was as we have indicated, and appellant had the legal right to subject it to the test of cross-examination. The gravity of the inquiry is quite apparent, as it involved the most serious charge of cruelty in the case.

After stating to the jury that they must first find whether plaintiff was sane or insane at the time of her marriage, the court, on request of plaintiff, gave this instruction:

"If you find that the plaintiff was sane at the time of the marriage and there is evidence of cruelty, then your verdict will be for the plaintiff, in the amount that you may determine to be adequate, and for her attorney's fees and for her costs of suit."

"I instruct you that if you believe from the testimony introduced in this case that the plaintiff was treated in a cruel and inhuman manner as alleged in the complaint, and you believe that the general treatment of the plaintiff by the defendant from the time of the marriage to the date of the commencement of this trial was cruel and inhuman, your verdict will be for the plaintiff."

[5, 6] Probably the most serious objection to the instruction is that it authorized the jury to find for plaintiff if there was any evidence of cruelty. The law, of course required that they be convinced by a preponderance of the evidence in order to justify such finding. The instruction as given also ignored the consideration of the weight and credibility of such evidence and the proper function of the jury in relation thereto. It is subject, also, to criticism in failing to state the elements that should enter into the de-

termination of the amount to be awarded plaintiff.

[7] The instruction as to the general treatment of plaintiff by defendant was not justified by the pleadings. There was no such allegation, and therefore it was not within the issues. Following the instruction, the jury might have believed that none of the specific allegations of cruelty was supported, and yet have found in favor of plaintiff upon this sweeping direction as to general treatment. This would be contrary to the established rules of practice.

[8] Appellant complains also of the action of the court in refusing certain instructions proposed by him concerning his theory as to the insanity of plaintiff at the time of the marriage. They seem to embody a correct principle of law, and it is not shown that they were inapplicable to the evidence. Appellant had a right to expect that the jury would be instructed along the line suggested.

[9] In considering the instructions, we are mindful of the fact that the verdict of the jury was simply advisory, and that the erroneous action of the court thereon must be regarded in a somewhat different light from the case where a jury may be demanded as of right. However, in view of the natural and usual inclination on the part of the judge to adopt the findings of the jury and the fact that they were adopted in this case, it seems quite important that the jury should have been correctly instructed.

[10] There is apparent justification for appellant's complaint as to the allowance of \$400 for an attorney's fee. As we understand it, the law is settled that a wife is entitled to an allowance of this kind only when it is necessary to enable her properly to maintain her action and the burden is upon her to show that such allowance is necessary. Respondent is challenged by appellant to point out any evidence showing such necessity. It is declared that plaintiff made no attempt of any kind to prove that it was necessary, that the record is absolutely silent upon the point, and that there are no findings of fact upon which such an order could be based. The only reply is that the contention is absurd, but it can hardly be so easily answered. The statute itself, section 137 of the Civil Code, contemplates that the order shall be made only when it is necessary to enable the wife to present her case, and, in commenting upon this provision of the law, the Supreme Court, in *Loveren v. Loveren*, 100 Cal. 494, 35 Pac. 87, said:

"The plain object of this statute was to empower the court, * * * upon a proper showing made by the wife for that purpose, to compel the husband to provide her with the means necessary to enable her to prosecute or defend the action."

Other errors are claimed by appellant, but it is deemed unnecessary to notice them specifically. It is earnestly contended that the

evidence is utterly insufficient to support the findings of cruelty. There is force in the contention, but we are not prepared to say that there is an entire failure in that respect. The evidence, however, bearing upon and lending support to the allegations of the complaint, seems quite meager, and we think in fairness to appellant that there should be a new trial. If the evidence were strong and convincing, it might be held that the errors committed were without prejudice; but, as the case appears so doubtful upon the merits, in view of the record we think the judgment should not be permitted to stand.

It is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

PORTER v. STOCKDALE et al. (Civ. 1628.)
(District Court of Appeal, Third District,
California. Feb. 12, 1917.)

1. SPECIFIC PERFORMANCE ~~§ 119~~—ADEQUACY OF CONSIDERATION—EVIDENCE.

In an action for specific performance of a contract to convey placer mining land, the contract itself does not afford any evidence of the adequacy of the consideration, though, the contract being in writing, the presumption is that it was for a valuable consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383.]

2. SPECIFIC PERFORMANCE ~~§ 123~~—PROOF OF ADEQUACY OF CONSIDERATION—STATUTE.

Under Civ. Code, § 3391, providing that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration, where plaintiff, in an action for specific performance of an agreement to convey placer mining land, failed to prove that the consideration was adequate, though the point was put in issue by the pleadings and his attention was called to it on the motion for nonsuit, when, if requested, the court would have permitted him to supply the evidence, judgment of nonsuit was proper.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 397, 399.]

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Frank R. Porter against Lieu Ellen Stockdale and others. From a judgment of nonsuit, and an order denying motion for new trial, plaintiff appeals. Judgment and order affirmed.

H. H. Eaton, of San Francisco, for appellant. Hennessy & Peterson, of Grass Valley, for respondents.

BURNETT, J. The action is for specific performance of an agreement to convey certain placer mining land in Nevada county. After plaintiff had introduced his evidence at the trial a motion for nonsuit was made upon the grounds that the complaint failed to state a cause of action; that the plaintiff was barred by his laches in making tender of payment more than 3 years and 5 months after the third payment in his contract became due, and more than 2 years and 5 months after the

fourth payment became due; that time was of the essence of the contract, and therefore plaintiff could not recover; that the delay in making his tender constituted laches from the very nature of the land, it being mining property; that plaintiff had failed to prove the value of the land, and that he had not shown that the sum of \$700, as set forth and mentioned in the contract sued upon, was and is a fair and adequate consideration and price for the land therein described. The court held that time is an essential feature in contracts relating to the sale and purchase of mining property, and that, since the tender of payments was made long after they became due, the plaintiff was barred by his laches, and, furthermore, that plaintiff had failed to prove an adequate consideration or whether it was fair and equitable. A motion for a new trial was made and denied, and the appeal is from that order and the judgment of nonsuit.

It is to be observed that appellant seems to have been rather indifferent to the view of the trial court as to the adequacy of the consideration, it appearing that in his assignment of his reasons for excepting to the ruling there is no allusion whatever to this ground, although the court had made it very emphatic, stating:

"Further than that, it seems to me, even if the court should hold against the defendant upon the ground of inexcusable delay and laches, there is no showing before the court which would enable the court to say what is the value of the land, or whether the compensation agreed upon is fair and equitable. * * * It is an action in equity, and that is one of the essential factors that the compensation is fair and reasonable."

We notice, also, that in the assignments of error there is the same omission and the opening brief of appellant is entirely silent on the subject. Nevertheless, the question is of vital importance in this state. The statute itself is clear and the decisions applying and enforcing it numerous and conclusive. We may notice a few of these.

In *Morrill v. Everson*, 77 Cal. 115, 19 Pac. 190, it is said:

"Before the Code, the preponderance of authority was, that mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance. *Pomeroy on Specific Performance*, § 194. But the Civil Code contains the following provision: 'Sec. 3391. Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not as to him just and reasonable.' Here the inadequacy of consideration seems to be mentioned as a distinct ground from the injustice and unreasonableness; and the provision seems to be explicit and absolute. We do not doubt that the point of time to which the question of adequacy must relate is the time of the formation of the contract."

In *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386, the appeal was from an order denying the motion for nonsuit, and, in reversing it, the court said:

"Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an ac-

tion of this character to show both in the averments of his pleading and in the evidence at the trial that he is entitled to the equitable relief which he seeks. In the absence of any averment or evidence as to the value of the land involved in the controversy, either as to the whole of it or as to any portion of it, with nothing stated upon which to base any estimate of the value or worth of the option and privilege to purchase, how is the court to determine whether defendants have received an adequate consideration or whether the contract is as to them just and reasonable? * * * It may be that this land is worth \$500 an acre; if so, \$100 per acre is not an adequate consideration for it. * * * The allegations and evidence as to improvements being placed upon the land by plaintiff do not tend to obviate or cure the defects in plaintiff's case already pointed out."

In *White v. Sage*, 149 Cal. 616, 87 Pac. 193, after citing various prior decisions of the Supreme Court, it is said:

"The effect of these decisions is that the mere statement of the price agreed to be paid, as in this case, will not suffice. There must be a showing of the value, at least, so that the court can determine whether or not it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements."

So in *Kaiser v. Barron*, 153 Cal. 788, 96 Pac. 806, it was declared that:

"Specific performance of a contract for the conveyance of land cannot be had by a vendee where it is neither alleged nor proved that the vendor had received an adequate consideration for the contract, and that as to him it was just and reasonable, nor that facts exist which would justify the inference that such conditions existed."

Finally, in *Haddock v. Knapp*, 171 Cal. 59, 151 Pac. 1140, it is said:

"Whatever may be the rule in the absence of statute—and on this point the authorities in other jurisdictions are not in harmony—section 3391 of the Civil Code and the decisions of this court establish beyond the possibility of question the proposition that inadequacy of consideration is, under the law of California, an independent and distinct ground for denying specific performance. * * * The burden of alleging and proving the adequacy of the consideration is upon the party seeking the relief."

Coming to the facts here, we find that plaintiff alleged in his complaint:

"That the sum of \$700 as set forth and mentioned in said instrument was and is a just, fair and adequate consideration and price for the land therein described."

Defendants' answer to this was full and specific in denying that the sum of \$700 was or is adequate or fair or just, and no evidence whatever was even offered as to the value of the property at the time the contract was executed, nor do any circumstances appear tending to show that said consideration was adequate or fair or just.

[1] The contract was not denied, but in this class of cases the contract itself does not afford any evidence of the adequacy of the consideration. Being in writing, the presumption is that it was for a valuable consideration, but, as we have seen, the adequacy is a distinct and independent ground in an action for specific performance, and it

must be proved, or else equity will afford the plaintiff no relief.

[2] If the proof was available plaintiff can blame only himself for the condition of the record. The issue was made by the pleadings, and he should have been placed on his guard. His attention was also called to it on the motion for nonsuit, and, no doubt, if requested the court, would have permitted him even then to supply the evidence. He chose, however, to ignore that feature, probably for a good reason. At any rate, it seems decisive of the controversy, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

ALTPETER et al. v. POSTAL TELEGRAPH-CABLE CO. (Civ. 1588.)

(District Court of Appeal, Third District, California. Feb. 7, 1917.)

1. MUNICIPAL CORPORATIONS \S 663(3), 691—STREETS—NUISANCES—TREES ALONG SIDEWALKS.

Trees may be lawfully grown and maintained along the sidewalks in the streets of cities and towns and in front of premises of abutting property owners, and trees so grown are not nuisances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1440, 1492-1508.]

2. MUNICIPAL CORPORATIONS \S 663(3) — STREETS—INJURING TREES—RIGHT OF ACTION.

While the owner of property in front of which trees are grown and standing has only a qualified or limited interest in them, an interest subject and subordinate to the rights of the city to trim and remove the trees whenever the public interests require such action, if a person injures such trees without lawful right or authority, the owner can recover such damages as he may be able to show he has suffered by reason of any depreciation in the value of his property occasioned by the injury to the trees.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

3. MUNICIPAL CORPORATIONS \S 680, 681(1)—POWER TO GRANT FRANCHISE TO PUBLIC UTILITIES.

Cities and towns are empowered, as agents of the state, to grant to public utility corporations, such as those engaged in the distribution of water, gas, electricity, or the transmission of telegrams, etc., the right to use the streets in a reasonable manner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1459.]

4. MUNICIPAL CORPORATIONS \S 663(3) — STREETS—INJURIES TO TREES—RIGHT OF TELEGRAPH COMPANY TO CLEAR WIRES OF BRANCHES OF TREES.

A telegraph company did not subject itself to an action for damages when it cut the branches of trees growing in front of city property along a sidewalk to clear its wires to prevent interference with their proper operation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

5. MUNICIPAL CORPORATIONS \S 663(3) — STREETS—INJURIES TO TREES—RIGHT OF TELEGRAPH COMPANY TO CLEAR WIRES FROM BRANCHES.

A telegraph or telephone corporation, in trimming or severing the branches of trees to prevent contact of wires therewith, can do no more than is necessary for the proper and efficient working of wires, without subjecting itself to civil liability for damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

6. MUNICIPAL CORPORATIONS \S 671(4) — STREETS—INJURIES TO TREES—REMOVING BRANCHES FROM WIRES.

In an action by property owners against a telegraph company for damages caused by the company's cutting off the branches of trees in front of plaintiffs' property to clear its wires, the burden was on plaintiffs to show either that it was entirely unnecessary to remove any branches from the trees, or that the company removed more branches than the situation with respect to its wires called for.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447, 1450.]

7. MUNICIPAL CORPORATIONS \S 671(4) — STREETS—INJURIES TO TREES—REMOVING BRANCHES FROM WIRES—EVIDENCE.

In such action evidence held insufficient to sustain plaintiffs' burden.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447, 1450.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Catherine Altpeter and another against the Postal Telegraph-Cable Company, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed.

See, also, 25 Cal. App. 255, 143 Pac. 96; 26 Cal. App. 705, 148 Pac. 241.

Willard P. Smith and B. B. Blake, both of San Francisco, for appellant. E. E. Gaddis, of Woodland, for respondents.

HART, J. This is an action for damages for the alleged injury of certain walnut trees standing and growing in and on Court street, in the city of Woodland, in front of the plaintiffs' houses, situated on lots 8, 9, and 10 of block 4 of said city, said lots being the property of the plaintiffs.

The complaint alleges a wrongful and unauthorized cutting of the limbs of the trees, the charge so alleged being that the defendant without lawful or any authority knowingly and willfully cut down, chopped, mangled, mutilated, disfigured, and destroyed four of said trees, and prays for a judgment for \$500 and treble any sum at which damages may be assessed. Code Civ. Proc. § 733.

The answer denies the allegations of the complaint, and as an affirmative defense describes the character of the defendant's business, alleges the necessity of clearing its wires from the branches of the said trees, through the branches of which said wires pass, alleges that the lines of the defendant have been maintained on the street in question and through said trees for a long period of time prior to the acquisition by the plain-

tiffs of the premises in front of which said trees stand.

The cause was tried by the court without a jury, and judgment rendered and entered in favor of the plaintiffs for the sum of \$450, and costs. This appeal, supported by a bill of exceptions, is prosecuted by the defendant from said judgment.

The action is founded on section 783 of the Code of Civil Procedure, *supra*, which reads:

"Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction."

Section 3346 of the Civil Code prescribes the measure of damages for the wrongful injuries to timber, trees, or underwood "upon the land of another, or removal thereof." The general contention of the defendant is that the findings derive no support from the evidence.

The particular proposition urged by the defendant, however, is whether or not a telegraph company which maintains its lines in the public streets of a town or city may, as against an abutting property owner, lawfully trim trees growing and standing in a street, and through which its wires pass, for the purpose of preventing branches of such trees from interfering with the proper operation of the wires as transmitters of telegraph messages.

[1-3] These propositions will not be controverted: (1) That trees may lawfully be grown and maintained along the sidewalks in the streets of cities and towns and in front of the premises of abutting property owners, that is to say, that trees so grown are not nuisances as would be a purpresture of any character which would ordinarily have the effect of obstructing or materially interfering with traffic in and over the street; (2) that, while the owner of property in front of which trees are grown and standing has only a qualified or limited interest in the trees—an interest which, in other words, is subject and subordinate to the rights of the city to trim or remove them whenever the public interests require such action—if a person injures such trees without lawful right or authority, such owner may maintain an action for damages for the injury so inflicted and recover such damages as he may be able to show that he has suffered by reason of any depreciation in the value of his property which has been occasioned by such injury; (3) that, where trees so grown are cut, trimmed, or removed by the city or town for the purpose of facilitating the use of the street in a legal manner by the public, then the damage resulting from such cutting or removal to the owner of the

property in front of which such trees are standing is *damnum absque injuria*; (4) that cities and towns are generally empowered, as agents of the state, to grant to public utility corporations such as are engaged in the distribution of water, gas, electricity, or the transmission by electric currents of telegrams or messages the right to use, in a reasonable manner, or so as not to interfere with common traffic, their streets for the purpose of installing and maintaining in such streets the equipments essential to the carrying on of the business of such corporations, and that, when such right or privilege or franchise is so granted, such corporations are authorized, upon such conditions or under such restrictions as may have reasonably been imposed, to remove from the streets so used any object or thing which will, if permitted to exist, prevent proper and efficient service by them as such corporations to the public.

[4] The last stated of the foregoing propositions is peculiarly applicable to telegraph and telephone corporations maintaining their wires over and along the streets of cities and other urban communities.

"The telegraph company," well say counsel for the defendant in their opening brief filed herein, "exercises its franchise in the street as a public agency, and not as a private individual. It is charged with a public duty which it can neither shirk nor avoid. It must maintain its lines at all times in a safe and workable condition, so that the messages of the public may be transmitted over them without delay and without error. In this respect it exercises the same functions over its wires that the public authorities exercise over the streets and highways themselves. The latter are endowed with the right and charged with the duty of removing trees whenever they become an obstruction to travel by foot or vehicle over the surface of the highway. The same reasoning which supports this right requires that the owners of the telegraph lines dedicated to public use should be endowed with a similar right and charged with a similar duty whenever the free transmission of telegrams over their wires is obstructed by the growth of the branches of trees among the wires or from any other cause. And just as the street and highway authorities are given a wide latitude of discretion in performing their duties, so the telegraph company should be given a broad latitude in removing limbs of trees so long as the removal is not done carelessly or in bad faith. Furthermore, the telegraph company having been granted the right by the state to construct its lines on the public highways, such incidental powers as are necessary to make the principal grant effective naturally follow it. If it were otherwise the principal grant would exist only in name and would be absolutely of no value or effect for practical purposes. Recognizing the soundness of this reasoning, the courts have uniformly held that the power and right to trim trees interfering with telegraph wires exists in the telegraph company owning the wires."

See *Southern Bell Tel. Co. v. Constantine*, 61 Fed. 61, 9 C. C. A. 359; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 229, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; *Meyer v. Standard Tel. Co.*, 122 Iowa, 514, 98 N. W. 300; *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 47 L. R. A. 497, 81 Am. St.

Rep. 155; Miller v. Detroit, etc., Ry., 125 Mich. 171, 84 N. W. 49, 51 L. R. A. 955, 84 Am. St. Rep. 569; Dodd v. Consolidated T. Co., 57 N. J. Law, 482, 31 Atl. 980.

[5] Of course, a telegraph or telephone corporation, in trimming or severing the branches of trees to prevent contact of their wires therewith, will not be permitted to do more in that respect than is necessary for the proper and efficient working of their wires. If it goes beyond this or wantonly and unnecessarily cuts or mutilates the trees—that is, if such corporation removes branches or limbs which do not, and from their situation with respect to the wires cannot, interfere with or impair the proper and efficient use of such wires—then it is liable for any damages thereby caused to the owner of the premises in front of which the trees stand.

The principles stated above are elementary, and, applying them to the facts of the instant case as the evidence presented before us discloses them, we cannot perceive how the findings may be upheld.

The facts are: That the predecessor in interest of the defendant installed a telegraph line in the city of Woodland and erected the wires over and along Court street in said city and through the trees in question in the year 1886, and have ever since so maintained said wires. From time to time during the period from 1886-87 down to the date of the trimming of said trees in August, 1911, the defendant and its predecessor in interest have, when the exigency of the case required it, trimmed and severed from the trees certain of the branches and limbs thereof. That such cutting and trimming are absolutely necessary whenever the branches and limbs have so grown and spread out as to bring them in contact with the defendant's wires is so obvious a proposition that it will not be disputed. But a clearer understanding of this proposition may be obtained from the testimony of Mr. Blake, president and general superintendent of the defendant. For over 40 years, as an operator, a chief operator, an inspector of lines, and as manager, Blake has been identified with the telegraph business. His testimony stands in the record uncontradicted, as indeed it could not in its general aspect be contradicted, since it involves a lucid explanation of the philosophy of telegraphy, the method of its operation, and the effect of the contact of telegraph wires with foreign substances under certain conditions upon messages transmitted over the wires, all of which propositions are nowadays quite obvious to the average understanding. He explained:

"Telegrams are transmitted over wires by the electromagnetic system of telegraph invented by Prof. Morse. The electricity flows on the wire and the messages are made by dots and dashes. Certain combinations of dots and dashes produce letters, and the dots and dashes are made by closing and breaking the circuit, then completing the circuit, allowing the electricity to flow

through the wire and back through the ground by interrupting it, and a dot is really a short dash. In the different capacities in which I have been employed it has been my duty to ascertain matters interfering with the working of lines of telegraph. The limbs of a green tree growing from the ground up into and among the wires affect the transmission of messages by diverting a certain amount of current from the wire to the ground. A dry tree will do the same thing when wet by rain, and when a green tree is wet by rain it causes a greater escape, as we call it. That is very similar to putting a hole in a water pipe that you are putting water through. A small hole has very little effect. The larger the hole the more water escapes and the less the force at the end of the pipe. The same thing applies to electricity; if it leaks off the line, you lose the strength, and that strength is required to operate the telegraph instrument. Where the telegraph is employed for business purposes, you can't work the wires safely where trees are among them. Sometimes you can't work them at all, but never safely if there are any limbs touching the wires. If a limb were lying against the wire solidly, it would interrupt the signal on the wire so that the current would not pass through to the far end of the wire and produce a signal. If the wind was blowing the limb against the wire, making an intermittent escape, it would mutilate the signals. We have had cases where telegrams were sent from San Francisco to New York where a very plain word appears on the tape in San Francisco and a totally different word appears in New York. Something hit the wire and mutilated the signals and made a complete change. We have three claims for damages we have traced to that very thing."

As to the cutting of the trees, the plaintiff called as a witness E. P. Heller, the line repairer and "trouble man" of the defendant in Woodland in August, 1911. Heller did the cutting and trimming complained of by the plaintiffs. After testifying on direct examination that he trimmed the trees and severed therefrom a certain number of branches, he was turned over for cross-examination, and testified:

"I trimmed out the new growth that had been formed on the trees since they had been trimmed the last time; that is, the suckers and the new growth that had formed on these limbs since the previous trimming. This new growth was merely limbs that had grown out from the stubs where they had been cut off previously; in other words, it is what is commonly known as suckers that sprang out from around the top of the old stubs. I don't think these stubs would exceed two or three inches in diameter. The suckers had formed around where the limbs had been cut off previously, forming a little bush at the top and just immediately under that edge and probably two or three or four inches down. We cut it off like that (indicating) and let it down to make a clean job of it. With reference to the wires of the telegraph company, *we trimmed the trees just enough to clear them well under the wires and to get them away from the wires enough not to cause trouble.* [Italics ours.] I did not use an axe. I never trim a tree with an axe."

The witness Hutchinson, testifying for the plaintiff, declared that he saw Heller and his assistants cutting the branches, and that the work was, he thought, done with a hatchet, although he subsequently stated that he looked at the severed branches or limbs the morning following the day they were removed from the trees, and that the larger limbs

had the appearance of having been "sawed off." This same witness further testified that:

"The size of the big limbs sawed off were from as big as my thumb up to three inches. * * * There was a place cut out through the trees that looked four or five feet wide. That left the big limbs coming up on either side."

The witness Keehn stated:

That he was "called in by Mr. Altpeter after the cutting of these trees. I measured up the size of the limbs that were cut. They averaged all the way from 1 to 1½ inches. The stubs are still on the trees and can be measured up if desired. I couldn't tell exactly how many limbs were cut. I should judge all the way from five to six branches on each tree, mostly out of the center of the tree. The brush on the ground after it was cut would make a good sized wagon-load, I should judge. The trees were black walnut, about 18 or 20 years old. Some of these cuttings were on an average of about 10 or 12 feet below the cross-arm."

The witness Murray, for the plaintiffs, testified that:

"The tops were cut out of the trees, leaving the wires six or eight feet from the points where the limbs were taken from the trees."

Mrs. Altpeter, one of the plaintiffs, testified:

That the trees were in the month of August, 1911, "terribly disfigured by cutting them off right straight at the top. They have no shade at the top. * * * We had no trees trimmed at that time and gave no permission to any one to trim them. * * * I did not see any of the branches that were cut off. The main limbs of the trees were cut. I don't know how big the limbs were that were cut off, but they were the main limbs, the center limbs, I would call it."

[6] The foregoing comprehends substantially a statement of all the testimony presented by the plaintiffs upon the question as to the cutting or trimming of the trees. The burden was upon the plaintiffs to show that either it was entirely unnecessary to remove any branches or limbs from the trees for the purpose claimed by the defendant or that the latter removed more limbs and branches than the situation with respect to its wires called for.

[7] This burden they wholly failed to sustain. Heller was the only witness who gave any testimony upon this question, and he declared, as will be observed, that only so much and such parts of the trees were trimmed and cut as were necessary to prevent collision between the wires and the branches—a collision or contact which would have caused such interference with the transmission of messages over the wires as would necessarily have destroyed that efficient service which the defendant, as a telegraph corporation, owes to the public, and the failure to furnish which may subject it to the severest penalties in one form or another. This was one of the vital questions of fact in the case. Indeed, it constituted the very foundation of plaintiffs' right to a recovery; for obviously, since the defendant, as a public service corporation, is, as above explained, charged with the duty of so maintaining its wires

as to facilitate the proper and efficient performance of its obligations to the public, it is necessarily its duty to remove from any point along the route over which it has been granted the right, either by the public authorities or by judgments in condemnation or by agreements with private individuals, to run and maintain its lines, any obstruction interfering with the safe and proper transmission of messages. As has been shown, it had the lawful authority (Code Civ. Proc. § 733) to cut or trim limbs and branches from the trees in question, if necessary for a safe and proper transmission of messages over its wires passing through and in said trees. Therefore the number of the branches or limbs removed, whether large or small, or the size of the limbs or branches so removed, whether large or small, or what influence and to what extent, if any, the severance of the limbs and branches from the trees exerted in depreciating the value of the property in front of which the trees stand and grow, constitute facts which become wholly immaterial and unimportant unless it be shown that the defendant unnecessarily stripped the trees of certain of their branches and limbs or destroyed more branches and limbs than the necessities of the situation actually required. In this case, whatever may be the extent and effect of the damage the cutting and trimming of the limbs and branches of the trees might have had on the property of the plaintiffs, it having been shown by the evidence without conflict that such cutting and trimming were necessary to the safe and proper operation of the defendant's wires as transmitters of messages, the damage so inflicted is *damnum absque injuria*, and therefore can form no basis for a recovery by the plaintiffs.

The defendant has presented and argued other points in impeachment of the judgment, but, in view of the conclusion above announced, they need not be considered.

For the reasons above explained, the judgment must be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

TURTON et al. v. SHINN et al. (Civ. 1605.)
(District Court of Appeal, Third District, California. Feb. 8, 1917.)

1. GUARANTY §25(3)—ACCEPTANCE OF GUARANTOR—EVIDENCE.

In an action on a guaranty signed by three guarantors, evidence held insufficient to show that the creditor refused to accept the first signer alone so as to release him.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104.]

2. GUARANTY §85(2)—LIABILITY OF GUARANTOR—DEMAND AND NOTICE.

Though the guarantor may make his obligation depend on notice or demand, the law, in view of Civ. Code § 3532, requires no idle act,

and as a failure to observe a precedent condition is not always fatal to recovery, where defendant guarantor denied that he had been accepted as a guarantor, it was not necessary for the guarantors to allege demand.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Nellie Turton and another against C. G. Shinn and others. Judgment for plaintiffs, and defendant Shinn appeals. Affirmed.

Shinn & Shinn, of Sacramento, for appellant. White, Miller, Needham & Harber, of Sacramento, for respondents.

CHIPMAN, P. J. The action is against defendants as guarantors of a certain lease executed by plaintiffs as lessors and the Morgan Shoe Company, a corporation, as lessees, the premises being situated at No. 801 K street, in the city of Sacramento. The guaranty reads as follows:

"In consideration of the foregoing lease or agreement, and one dollar to me paid, the receipt whereof is hereby acknowledged, we do hereby covenant, promise and agree, to and with the said Nellie Turton and Kate Turton that the said Morgan Shoe Company, a corporation, shall well and truly pay all rents and perform and execute all the covenants therein contained on its part, and that on its failure to do so in any particular will on demand pay unto said Nellie Turton and Kate Turton all rents or damages that may happen or occur by reason of such failure, not exceeding the sum of fifteen hundred dollars, and immediate notice of default is hereby expressly waived.

"Dated and signed on this 20th day of September, 1913.

C. G. Shinn.

"H. S. Baxter-Hooper.

"Dave Ahern.

"Signed, sealed and delivered in the presence of A. L. Shinn, A. B. Erway, H. F. De Back."

The complaint is verified.

Answering the complaint, defendant Shinn denied that he, together with the other alleged guarantors, "subscribed or delivered to the plaintiffs an agreement guaranteeing the payment of all or any rents or damages that might happen or occur by reason of the failure of the Morgan Shoe Company to pay the said rent," etc.; averred that defendant affixed his signature to said instrument, and it "was thereupon presented by the Morgan Shoe Company to plaintiff for acceptance"; that plaintiff refused to accept defendant as guarantor, and defendant was forthwith notified by said company of said refusal; that said company "thereafter obtained the signatures of said Hooper and Ahern to said instrument as the guarantors of the rents and damages as aforesaid; that plaintiffs accepted the said Hooper and Ahern as the only guarantors of said rents and damages, and plaintiffs ever since said acceptance have treated with the said Hooper and Ahern as the only guarantors of the said rents and damages"; denied that plaintiffs ever notified him of the company's default in the payment of said rents, or ever demanded

from defendant the payment thereof. The cause was tried by the court without a jury, and plaintiffs had judgment for \$1,500 and costs of suit, taxes at \$20. Defendant Shinn appeals.

It is not necessary to state the terms of the lease, as no question arises concerning its purport. The lessee, Morgan Shoe Company, became insolvent and defaulted in payment of rentals in an amount in excess of \$1,500. Hence the action against the guarantors.

Appellant specifies the following particulars wherein he claims the evidence to be insufficient to justify the decision of the court:

"(1) The evidence is insufficient to justify the portion of finding No. V, viz.: 'That proof of such demand upon defendant, C. G. Shinn, was neither required nor necessary.' The contract of guaranty expressly provides that demand must be made. (2) There is no evidence to justify that portion of finding VII, viz.: 'That the averments in the answer of defendant C. G. Shinn, and each of them, is not true.' He avers that his offer to guarantee was not accepted by plaintiffs. The evidence of plaintiffs' agent, Frank Hickman, shows that the offer was conditionally accepted, and that defendant never assented to the condition thus imposed."

The lease was prepared by Frank Hickman, a real estate and insurance agent, acting in the matter as plaintiffs' agent. He testified:

That he secured the Morgan Shoe Company as tenant of the premises; that the Morgan Shoe Company obtained the signatures of the guarantors and as executed by that company with the guaranty signed by the three parties the lease was presented to him and signed by plaintiffs. "Q. State the circumstances concerning the signatures of the guarantors. A. The best of my recollection, they brought the lease in with the name of Shinn. I told them that was not sufficient; then followed with Mr. Hooper—I did not know Hooper—and made the same objections. They finally brought in Mr. Ahern's name, then I told him I thought the three of them would be satisfactory. We accepted the lease."

He testified to the occupancy by the Morgan Shoe Company; its bankruptcy later; the amount of rentals paid and still unpaid, etc., as to which no question arises. On cross-examination he testified:

"By Mr. Carl Shinn: Q. Do you recall who presented the lease with the signature of C. G. Shinn attached? A. One of the men of the Morgan Shoe Company. Q. That was Mr. Tom Finlayson, was it not? A. I think so. Q. What did you tell him? A. I told him that I did not know Shinn. I would like to have additional bondsmen—additional security on the lease. Q. Did you ever communicate with Mr. Shinn in reference to obtaining other signatures? A. No, sir. Q. You never communicated with him in any respects regarding the guaranty? A. No, sir. Q. All your dealings occurred with the Morgan Shoe Company? A. Yes, sir. Q. He never expressed his assent to that arrangement stated by you for other signatures? A. I do not think I had any conversation with Mr. Shinn whatever. Q. All you know is you objected to his signature for the reason that it was not sufficient? A. I simply asked for additional security on the lease. I did not object to the signatures; no, sir. Q. You refused to accept that signature, however? A. No, sir; I did not refuse to accept any signature on the

lease—merely asked for additional security, in addition to Mr. Shinn and Mr. Hooper. Q. You made a conditional acceptance at that time? A. Yes, sir. Q. Plaintiffs had nothing to do with the execution of the lease or the guarantors on it; you attended to all that entirely? A. Yes, sir. Q. What did Mr. Finlayson say to you when he returned with the lease signed by the three parties? A. I could not tell you. Q. There has never been any understanding between you and Mr. C. G. Shinn in reference to that guaranty? A. No, sir. Q. Of any kind? A. No, sir. Mr. Shinn: That is all."

Defendant Shinn testified as follows:

"Q. State briefly what connection you had with the lease. A. I had acknowledged the signatures of the Morgan Shoe Company. Mr. Finlayson asked me if I would go on the bond. I told him yes, if it would help him; so he took it away."

"The Court: Was Mr. Finlayson one of the firm? A. One of the members of the Morgan Shoe Company."

"Mr. Carl Shinn: Q. You say Mr. Tom Finlayson was negotiating the lease and guaranty in behalf of the Morgan Shoe Company? A. Yes. Q. Is Mr. Tom Finlayson now living? A. No, sir; he died about three months ago."

The remaining questions put to this witness called for conversations later between Finlayson and the witness and were objected to and not answered.

The foregoing is substantially all of the evidence bearing upon the findings objected to.

[1] Appellant's defense is that plaintiffs refused to accept him as a guarantor and accepted Hooper and Ahern as the only guarantors. *Niles v. Hancock*, 14 Cal. 161, and other like cases are cited, in which it was held that:

"Where an offer has once been rejected, the party rejecting cannot afterwards, at his option, accept the rejected offer, and thus convert the same into an agreement by acceptance."

The evidence does not warrant the application of this principle. The case here is quite different from the cases cited. Appellant signed the guaranty, as he testified, at the request of the Morgan Shoe Company—not at plaintiffs' request. He testified:

"Mr. Finlayson asked me if I would go on the bond. I told him yes, if it would help him; so he took it away."

He did not testify, and there was no evidence, that appellant attached any condition to his guaranty, nor was any conditional offer communicated to plaintiffs. Neither was there any evidence that plaintiffs refused to accept him as a guarantor, nor that plaintiffs offered to accept him as a surety on terms different from those found in the written instrument executed by appellant. The instrument seems to have been drawn in contemplation of being signed by more than one person, for its language is, "We do hereby covenant," etc. There is an entire failure of proof in support of appellant's an-

swer, and hence the finding that its "averments are not true" was justified.

The court made the following findings:

"That no proof of service of demands of said rentals upon defendants C. G. Shinn and H. S. Baxter-Hooper was offered; that it appears from the verified answers of said defendants last named that such demand would have been idle, needless, and useless; that defendant C. G. Shinn in his answer denied the execution and delivery to plaintiffs of said hereinbefore mentioned agreement, and alleged that plaintiffs refused to accept him as guarantor of the rents or damages, and that plaintiffs accepted the said Hooper and Ahern as the only guarantors of said rents and damages; * * * that said last-named defendants denied the relationship existing between them and plaintiffs by reason of the execution and delivery by them of said contract and the liabilities and consequences arising therefrom; that proof of such demand upon defendants Shinn and Hooper was neither required nor necessary."

[2] It is contended that:

"It is within the power of a guarantor to make his obligation dependent upon notice, demand, or any other condition he deems proper for his own protection and safety"; that his liability cannot be extended beyond the terms of his contract.

This view of the law may not be questioned. But "the law neither does nor requires idle acts" (section 3532, Civ. Code); and the courts frequently resort to this maxim in dealing with the contractual relations of men. A failure to observe a precedent condition is not always and under all circumstances fatal to recovery. This is very well shown in *Parrott v. Byers*, 40 Cal. 614, 622:

"It is a familiar rule that where the relations between the parties are such that a demand and refusal is a condition precedent to the right of the plaintiff to maintain the action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in the complaint of a previous demand and refusal. In an action by a landlord against his tenant, or by a vendor against his vendee for the possession, or by a cestui que trust against the trustees to enforce the trust, if a demand and refusal were otherwise necessary, a denial in the answer that the alleged relation exists between the parties will dispense with the necessity of averring or proving a prior demand and refusal. The law does not require a useless act to be performed; and, when it is plain from the answer that if a demand had been made it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made."

This case has been many times cited and with approval. In his verified answer appellant not only denied any liability, but denied the relationship in which he placed himself towards plaintiffs by the instrument sued upon. It seems to us quite apparent that a demand of payment before commencing the action would have been fruitless and unavailing, and hence was unnecessary.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

McCLATCHY et al. v. LAGUNA LANDS, Limited, et al. (Civ. 1627.)

(District Court of Appeal, Third District, California. Feb. 6, 1917.)

1. NAVIGABLE WATERS — 34 — PUBLIC NUISANCE — ABATEMENT — REMEDY.

In an action by the State Reclamation Board to abate as a nuisance diversion of waters into San Joaquin river, under St. 1913, p. 252, § 12, declaring that diversion of waters that will increase the flow of the Sacramento and San Joaquin rivers is a public nuisance which may be prevented or abated by the reclamation board, where the allegations in the complaint are comprehensive enough and injunctive relief is asked for, it may be awarded where it accomplishes purposes of abatement.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 59-63, 67-70, 72.]

2. NAVIGABLE WATERS — 34 — PUBLIC NUISANCE — ACTION.

The merits of an action to abate as a nuisance diversion of water of a river contrary to St. 1913, p. 252, § 12, cannot be tried on affidavits.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 59-63, 67-70, 72.]

3. VENUE — 5(5) — ACTION TO ABATE PUBLIC NUISANCE.

An action to abate as a public nuisance diversion of water contrary to St. 1913, p. 252, § 12, declaring diversion of water that will increase flow of Sacramento and San Joaquin rivers a public nuisance, where it involves injuries to real property, must be tried in the county in which the subject of the action or some part thereof is situated.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 9.]

4. NAVIGABLE WATERS — 34 — PUBLIC NUISANCE — ACTION — COMPLAINT — SUFFICIENCY.

A complaint in an action brought in San Joaquin county to abate as a public nuisance diversion of water into San Joaquin river contrary to St. 1913, p. 252, § 12, need not allege that some specific tract of land in said county has been injured, or that injury is immediately present, it being sufficient if it can be gathered from complaint that lands therein are directly threatened with the injury complained of.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 59-63, 67-70, 72.]

5. VENUE — 16 — ABATEMENT OF PUBLIC NUISANCE.

Where real property injured by a public nuisance is situated partly in one county and partly in another, an action to abate such nuisance may be brought in either county under Code Civ. Proc. § 392.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 23, 25-27.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by V. S. McClatchy and others, as members of the State Reclamation Board, against the Laguna Lands, Limited, L. A. Nares, Summit Lake Investment Company, and others. From an order denying a motion of the defendants named for a change of place of trial, they appeal. Affirmed.

Short & Sutherland and H. P. Brown, all of Fresno, for appellants. C. H. Oatman and Geo. O. Perry, both of San Francisco, for respondents.

CHIPMAN, P. J. This is an appeal from an order denying appellants' motion for a change of the place of trial from San Joaquin county to Fresno county.

The action is for the abatement of an alleged public nuisance and for an order restraining the defendants from doing any of the acts mentioned in the complaint, and is brought under the provisions of an act of the Legislature in effect August 10, 1913. Stats. 1913, p. 252. The act provides for the creation of a drainage district to be known as Sacramento and San Joaquin Drainage District, describing its boundaries, the appointing of a reclamation board for the management and control of said district, defining the powers and duties of the reclamation board, and for the prevention of the diversion of the waters of any stream into the Sacramento and San Joaquin rivers. Section 12 of the act declares that the board shall have power "to maintain actions to restrain the diversion of the waters of any stream that will increase the flow of water in said Sacramento or San Joaquin rivers or their tributaries, and such diversion of the waters of any stream into the said rivers or any of their tributaries is hereby declared to be a public nuisance which may be prevented or abated by the reclamation board." Section 7 of the act of 1913 declares that:

"The state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams, and confining the waters of said rivers * * * within their respective channels"

—and it is made the duty of the reclamation board to enforce the erection, maintenance and protection of such levees, etc.

It appears from the verified complaint that Kings river and the San Joaquin river have their source on the easterly slope of the Sierra Nevada Mountains, the San Joaquin river rising near the northeasterly portion of Fresno county, taking a westerly course and generally parallel with Kings river, which latter river is about 35 miles distant and south from San Joaquin river; that these rivers reach a designated point somewhere near the boundary line dividing Kings county from Fresno county, where, when unobstructed, the natural flow of Kings river diverges to the south, and has not naturally flowed into or become a part of the San Joaquin, and empties into Tulare Lake, while the San Joaquin river turns northerly, passing through the San Joaquin Valley in the counties of Fresno, Madera, Merced, Stanislaus, San Joaquin and Contra Costa, where it empties into Suisun Bay, an arm of San Francisco Bay. The complaint sets forth

with much particularity that the defendants are engaged in efforts to turn the waters of Kings river in a northerly direction in the vicinity where the two rivers take opposite directions naturally, and have been engaged in the construction of artificial works for the purpose of forcing the water out of the natural channel of Kings river in a northerly direction and towards the San Joaquin river; that by these works defendants turned out said Kings river water to a point whence it could readily be turned into the San Joaquin river, and that defendants then constructed what is designated "the new channel," which furnished the means for the water to force its way to the San Joaquin river. The character of the soil through which this new channel is constructed is described as easily eroded, widened, and deepened by the action of the water, and has been since its construction so widened and deepened as to increase its carrying capacity until it is now capable of carrying from the watershed and slope of Kings river and into the watershed and slope of said San Joaquin river nearly all the high waters of said Kings river, and by such processes of erosion and enlarging, if it shall be permitted to continue to carry such waters of Kings river, within one or two years, it will be so enlarged as to divert all of the high and flood waters of Kings river and pass the entire flow thereof into said San Joaquin river; that the natural course of the San Joaquin river, as it continues to flow from the point where the waters of said Kings river are so mingled with it, is through the central portion of San Joaquin Valley in a northwest direction until it mingles with the water of Suisun Bay, and is through a low-lying country; that the natural floods of the San Joaquin river and its tributaries have, from time to time, flowed out over the banks of the river and over said low-lying lands, and inundated, within the natural flood planes of the river, upwards of 623,356 acres of such lands; that of these lands 300,000 acres have been sufficiently reclaimed by artificial works to be cultivated to crops and occupied for farms and homes, and approximately 300,000 acres additional are capable of being reclaimed by the erection of works within the jurisdiction of the plaintiff in this action; that the waters of Kings river which have been diverted therefrom by reason of said dams and other obstructions heretofore described as having been erected and maintained by defendants, "added to the natural high-water plane of said San Joaquin river, have so increased, and will, unless said works are abated, continue to increase, the water plane of said San Joaquin river at high water, that it has impaired, and, unless said works and diversions are abated, will continue to impair and destroy, a great portion of the reclamation work along said San Joaquin river, and has made, and will continue to make, it more difficult and expensive to re-

claim the unreclaimed portions of land along said San Joaquin river, as hereinbefore described"; that if said dams, embankments, and channels mentioned in the complaint are not abated, all of the flood or high waters of said Kings river will be diverted and turned into the San Joaquin river to the extent of 25,000 cubic second feet to 35,000 cubic second feet of water; that with the average velocity of said San Joaquin river between the point where said waters have been and will be commingled and the outlet of said San Joaquin river at four feet per second, and the average width of the San Joaquin river of from 500 to 750 feet, if the added waters of Kings river are permitted to flow through the San Joaquin river and confined to the width of the natural channel of the river, it will result in raising the water surface of San Joaquin river from 8 to 15 feet in elevation.

The prayer of the complaint is for judgment that "said dams, obstructions, embankments, and channels so erected, constructed, and maintained by said defendants be decreed to be and constitute a public nuisance, or public nuisances," and that defendants be required to abate the same, "and that said defendants, and each of them, be enjoined and restrained from the doing of any act or thing that may be injurious to any of the works necessary to control the flood waters of said San Joaquin river, or interfere with the successful execution of any plan of said state reclamation board which may be adopted for the control of such flood waters, and that they, and each of them, be forever enjoined and restrained from the diversion of any of the waters of said Kings river that will increase the flow of said San Joaquin river, * * * and for such other and further relief as may be conformable to equity."

At the hearing defendants submitted two affidavits in support of the motion. L. A. Nares deposed that he is familiar with the obstructions mentioned in the complaint, and also with the water measurements of the San Joaquin river and the various reports of the general government covering a period of years commencing prior to the construction of said obstructions; that the said reports "show that the flood waters of Kings river * * * have not, even during periods of highest known water on said Kings river, increased the water plane of the San Joaquin river at high water on said San Joaquin river"; that said reports show that the natural period of high water on the San Joaquin river at or near the southerly boundary of San Joaquin county, caused by water in said river from streams other than Kings river, "occurs much earlier in point of time than the natural period of high water at said point caused by water from said Kings river, and that in each season for many years last past, when the crest of the flood waters from the Kings river has reach-

ed the southerly boundary of said San Joaquin county, the flood waters reaching said point from streams other than the Kings river have already passed down said San Joaquin river, and the water plane of said San Joaquin river at said point has invariably fallen so far below high-water mark at said point that the flood waters from said Kings river, diverted as set forth in said complaint, have never raised the water plane of the said San Joaquin river to the high-water mark of said river at said point"; that all the said obstructions are situated in Kings county. Affiant appends to his affidavit an excerpt from a report made by the engineer of the reclamation board concerning the unusually high flood of 1914, which, it is contended, corroborates affiant's statement as to the San Joaquin river clearing itself before the flood waters of the Kings river reach the southern boundary of San Joaquin county.

I. Tellman deposed that he is familiar with said obstructions, and that they are situated in Kings county near the southerly boundary of Fresno county; "that the waters of the Kings river, which flow north and empty into the San Joaquin river flow in natural channels, known as Fish slough, sometimes called Fresno slough; that said natural channels flow in a general westerly and northwesterly direction in said Fresno county, and empty into said San Joaquin river in said county; that such water of the Kings river as is diverted, if any, by the dams, obstructions, embankments, excavations, and channels described in the complaint on file herein passes immediately into Fresno county and into the slough above described, and that if any damage is caused by the flood waters of Kings river passing into said slough, it is caused solely and only to real property situated in the said county of Fresno."

[1-3] While the gravamen of the action may be for the abatement of the obstructions referred to in the complaint, the averments therein are comprehensive enough to involve the question of plaintiffs' right to an injunction to prevent the threatened injury, and the prayer of the complaint seeks injunctive relief as well as the abatement of the alleged nuisance. The court said, in *People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 90, 124 Pac. 692, 695 [Ann. Cas. 1913E, 1267]:

"While it is undoubtedly true that, strictly considered, the words 'abate' and 'enjoin' have technically different meanings (*Ruff v. Phillips*, 50 Ga. 133) in California, the rule is well established that in proper cases injunctive relief, which accomplishes the purposes of abatement without its harsh features, is permissible."

We do not think the merits of the action can be tried on affidavits. For the purposes of the motion defendants concede "that the allegations of the complaint are true." However, in whatever aspect the action be

viewed, it involves injuries to real property, and must be tried in the county in which the subject of the action, or some part thereof, is situated. Code Civ. Proc. § 392; *People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267. Where the erection of a dam in one county which when complete would cause damage to real property in another county, because of the diversion of waters, the action should be tried in the latter county (*Drinkhouse v. Spring Valley Waterworks*, 80 Cal. 309, 22 Pac. 252; *Last Chance Water Ditch Co. v. Emigrant Ditch Co.*, 129 Cal. 277, 61 Pac. 960); and the rule applies to threatened injuries. It was held, in *City of Marysville v. North Bloomfield Gravel M. Co.*, 66 Cal. 343, 5 Pac. 507, that actions to enjoin hydraulic mining in this state could be maintained in any county along the river carrying the mines' tailings, where the damage accrued. The question is discussed in *Las Animas, etc., Land Co. v. Fatjo*, 9 Cal. App. 318, 99 Pac. 393, and the cases cited.

The purport of Mr. Nares' affidavit is that past observation has shown that the flood crest on Kings river has not reached the San Joaquin river when the flood crest was on the latter river. Whether the alleged dams, channels, and obstructions erected by defendants to turn the flood waters into the San Joaquin river will have the effect alleged in the complaint is one of the vital issues in the case, and neither Mr. Nares nor Mr. Tellman deposed to that question. Neither of these affiants showed that there was any injury to real property in Fresno county. Mr. Tellman's statement was that the waters that are caused to flow north "and empty into San Joaquin river" flow through Fish or Fresno slough, and that if any damage is caused by the water "passing into said slough," it is caused solely and only to real property in Fresno county. Mr. Tellman is silent as to the effect of the water after it has passed through Fresno slough into the San Joaquin river.

Appellants claim that:

"There is no allegation in the complaint as to the location of any particular lands which might be injured because of the increased flow of water in the San Joaquin river caused by such diversion. Although the action was brought in the county of San Joaquin, the complaint is silent as to whether or not any of the lands affected or to be affected by such diversion are situated in San Joaquin county."

It is urged also that there is nothing in the complaint to show that there is at the present time, by reason of the maintenance of said obstruction, any present interference with the rights or enjoyment of property situated in San Joaquin county.

"Within reasonable limits," there is no question, says Mr. Wood, "but that the Legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance per se." 2 Wood on Nuisance, § 763.

The Legislature has, within its undoubted power, declared the acts complained of to be a public nuisance, and such acts constitute a nuisance per se. Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved. 2 Wood on Nuisance, § 569. And all parties to a nuisance per se, he who creates it and he who maintains it, are responsible for its effect, without limitations of condition or time. *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 908, 32 L. R. A. (N. S.) 968.

Equity will interfere by injunction to prevent threatened injury, where acts which create a public nuisance are about to be committed, causing also an inevitable private and special injury to the complainant (*Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423); and the rule applies equally where the threatened injury is to the public and the people are the complainants.

[4] We do not think it was necessary to allege that some specific subdivision or tract of land situated in San Joaquin county was injured, nor that the alleged injury was immediately present, for relief will be awarded when the danger is apparent or the mischief already done.

We think the averments of the complaint are sufficient to warrant the inference that the "low-lying lands" referred to as situated along the shores of the San Joaquin river throughout its length where it passes through the counties mentioned, including San Joaquin county, are directly threatened with the injury complained of, and that these lands are within the jurisdiction of the board of reclamation, and are made the subject of its care and protection. The scheme of reclamation contemplated by the act is of state-wide concern as well as of great importance to the territory immediately interested. The effect of the dams, channels, and other means of diversion of the water of Kings river is distinctly pointed out, and it is shown that such diversion will raise the water plane of the San Joaquin river throughout its course in the San Joaquin Valley; that from 25,000 to 30,000 cubic second feet of water will be added to the channel of the San Joaquin river, raising its water surface from 8 to 15 feet in elevation; that said obstructions have impaired, and will continue to impair and destroy, a great portion of the reclamation works along said river and have made, and will continue to make, it more difficult and expensive to reclaim portions of land along said river as in the complaint fully described.

[5] Inasmuch as the affidavits submitted with the motion fail to show injury to any lands in Fresno county, and inasmuch as we think it fairly appears that lands situated in San Joaquin county have been injured and

are threatened with further injury, we think the motion was rightly denied. If, however, the complaint, or the affidavits, show injury also in Fresno county the trial may be had in either county where injury has resulted or will result. "Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action." Code Civ. Proc., sec. 392.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

DIESTELHORST v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 1604.)

(District Court of Appeal, Third District, California. Feb. 10, 1917.)

1. MASTER AND SERVANT §380—WORKMEN'S COMPENSATION ACT—"SERIOUS AND WILLFUL MISCONDUCT."

"Serious and willful" misconduct means the same as willful misconduct, since any willful misconduct that leads to death or great bodily injury must necessarily be serious.

2. MASTER AND SERVANT §380—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION—"WILLFUL MISCONDUCT"—MINOR EMPLOYÉS.

Where a minor employed about machinery had been instructed not to oil it while in motion, but thoughtlessly, after the power had been shut off and while the machine was moving of its own momentum, oiled it, and was injured, he was not chargeable with "willful misconduct."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

3. MASTER AND SERVANT §405(1) — WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION — WILLFUL MISCONDUCT—MINOR EMPLOYÉS.

Evidence held to show that minor's disobedience to order was thoughtless, and not the result of willful misconduct.

Proceedings by Bert Bollinger, employé, for compensation, opposed by William Diestelhorst, employer. On application by the employer for writ of review for annulment of the award by the Industrial Accident Commission and others. Writ discharged, and award affirmed.

Dean & Carter, of Redding, and Thos. B. Dozier and Eric G. Scudder, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

BURNETT, J. Petitioner seeks the annulment of an award made by said Commission to said applicant for an injury received by the latter while employed by the petitioner to act as a general helper around a gold dredger. It is claimed that the accident was due to the "willful misconduct of said Bert Bollinger, and therefore the Commission was without jurisdiction to make the award." It is admitted that if no other rational conclu-

sion as to the attributable cause of the accident can be drawn from the evidence, then, in the exercise of its statutory authority, the court should vacate and annul said award. It is, however, the claim of respondents that there is sufficient justification for the finding that the injury was not due to the willful misconduct of the applicant, and that the Commission therefore cannot be properly chargeable with an adjudication in excess of its legal authority.

Indeed, the attack and the defense relate, not only to the evidence, but to the sufficiency of the finding itself to support the conclusion of the Commission. It is the contention of petitioner that the facts found are compatible only with the position that the applicant was guilty of willful misconduct, and that petitioner is therefore not liable under the Workmen's Compensation Act.

We are asked to set aside the award by reason of the following finding:

"That previous to said injury said employé had been instructed by his employer on two occasions not to oil the said machinery while the same was in motion, and had been warned of the danger of so doing; that at the time of the injury the motive power of the machinery had been shut off, and after so shutting off the power, the machinery continues to move for 15 minutes by its own momentum, and while well knowing the said instructions and the danger of their violation, but for the purpose of saving the time necessary to wait for the machinery to stop, said employé, without waiting until the machinery had stopped, thoughtlessly and without at the time being mindful of said instructions, attempted to oil the same, and in so doing, sustained the injury as above set forth; that by reason of the extreme youth of said employé and his consequent lack of mature judgment and discretion, and for the further reason that the said act of the employé was with the sole motive and for the sole purpose of saving time, and to that extent in the interest of the employer, the act of the employé in violating his instructions as aforesaid was negligent, but was not an act of willful misconduct, and the said injury was not caused by the willful misconduct of the employé."

It is the contention of petitioner that a violation of such reasonable directions constitutes in itself willful misconduct, and that it is not condoned or mitigated by the excuse or apology contained in said finding. He claims:

"That the cases from all jurisdictions uniformly hold that the breach of an express rule or order, particularly if made expressly for the safety of an employé, constitutes serious or willful misconduct within the meaning of Workmen's Compensation Acts."

He cites a large number of cases, beginning with Scotland. Of these, it is asserted that two are practically on all fours with the case at bar. Both involved minors, and the injuries were occasioned by disobedience of rules. The first is *Powell v. Lanarkshire Steel Co., Ltd.*, 6 Sc. Sess. Cas. (5th Series) 1039 (1904). Therein the father of Patrick Joseph Powell, a minor, claimed compensation for the death of said minor under the Compensation Act of 1897. At the time of his death he was 15 years of age (the same as

applicant herein). He was employed in a rolling mill, and was allowed certain intervals for resting. During such an interval the deceased and some other boys of about the same age, who were also employed in the mill, started to play on some wagons on an inclined track. One of the wagons started down the incline, and the deceased, in an attempt to stop it, was thrown beneath the wheels and met his death. The boys, including the deceased, had been instructed not to play about the wagons. Lord Trayner, in his decision, said:

"The defenders had given this boy and others like him positive instructions that they were not to go across the line of rails or near the wagons. They had been repeatedly warned against doing so for fear of accident, and they knew that in doing so they were doing wrong. I cannot figure anything more serious or willful than positive and intentional disobedience to a strict and positive order. That is the character of the case, and I must hold accordingly."

The other is *Fanny Callahan v. Maxwell*, 2 Sc. Sess. Cas. (5th Series) 420. Therein Fanny Callahan, a young girl, was employed on a steam thresher to unbind and hand sheaves to the millman which he put through an opening into the mill. She had been instructed to remain at her place, and had been warned of the danger of moving about. The millman had occasion to go beneath the thresher to remove an obstruction, whereupon Fanny attempted to step across the opening for the purpose of speaking to another girl on the other side of the opening. In crossing the opening, her foot slipped and was caught by the revolving drum, and her right leg was taken off below the knee. One question presented to the appellate court was whether her conduct in leaving her place and attempting to step across the opening in the machine amounted to serious and willful misconduct on her part in the sense of the Workmen's Compensation Act. It was held that she was so chargeable, it being stated in the opinion:

"I do not think that there can be a more distinct case of willful misconduct than one in which a person is injured in consequence of having disobeyed a specific order, such as that given here, and which was given in order to insure her safety."

Many cases, also, from other British jurisdictions are cited, of which we may refer to *Best v. London & Southwestern Railroad Company* (1907), A. C. 209, 8 Ann. Cas. 1, which went to the House of Lords. In that case, an engine driver, because his train was late, left the foot plate of his engine while in motion and mounted the coal on the tender, in violation of a rule of the company that "enginemen and firemen must not leave the foot plate of their engine while the latter is in motion." He was killed by being struck by a bridge. It was claimed at the trial of the claim for compensation that the driver's object was to try and find better coal in order to make up the lost time. In the decision, the Lord Chancellor (Loreburn) said:

"This unfortunate man broke this rule, which certainly is a very serious rule. There was evidence that he knew of its existence, and that he knowingly and willfully acted in defiance of it. It was a rule to save life and to prevent danger, both to the public and to the servants of the company."

In the same decision Lord Atkinson said:

"I do not attempt to define what 'willful misconduct' is, nor to express any opinion which I might be unable to retract on further consideration, but it would appear to me, I confess, that if a man breaks a rule, knowing at the time that he is breaking it, and is not compelled to break it by some superior power which he cannot resist, he is guilty of a willful breach of it."

Coming nearer home, it is the opinion of petitioner that we have in this state two decisions that virtually govern this, that is, *Pacific Coast Casualty Co. v. Pillsbury et al.*, 162 Pac. 1040, and *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. In the first of these, an errand boy in the employ of a millinery company in San Francisco had been expressly warned not to ride in or attempt to operate the freight elevators in the building occupied by his employer. Notices to the same effect were also conspicuously posted near the entrances of the freight elevators. Said errand boy, upon returning from an errand, attempted to ascend by way of one of the freight elevators to the floor where his employer had his place of business, and, in so doing, to operate the elevator himself. The boy was killed, and compensation was sought for his death. The Industrial Accident Commission made findings "that the deceased and other employes of the defendant frequently operated said Fifth street elevator by themselves without reproof or discipline by said defendant," and "that the signs placed by the owners of said building upon the doors of the elevators were habitually disregarded without protest," and furthermore, "that the protection of its employes from serious bodily injury or death in connection with the operation of such elevators was not made plain to them nor to Cassell [the deceased] in a manner suited to the intelligence of a person of his age," and therefore compensation was allowed. It was decided by the District Court of Appeal for the First District that there was no evidence to support these findings, and the award was accordingly annulled. In denying the petition for rehearing the court said:

"We are of the opinion that the undisputed evidence in the case showed that the deceased had been expressly warned not to ride in, or attempt to operate, the freight elevators in the building in which he met his death, under penalty of discharge, and that notices were posted at, or near, the entrance of such elevators of similar import, and that the disregard of such warning by the employé must, in the absence of evidence mitigating such disobedience, be held to constitute such willful misconduct as would prevent a recovery before the Commission, where, as in the instant case, there is no evidence tending to show that the disregard of its warnings, orders, and notices was condoned by the employer."

In the *Great Western Power Case*, supra, the award by the Commission was annulled

by the Supreme Court by reason of the willful misconduct of deceased, Mayfield, who had been employed as a lineman by said company. The company had issued orders that employes should not work on poles carrying live wires without using rubber gloves provided by the company. It was not shown that Mayfield did not know or understand this rule. On the day of the accident, Mayfield ascended a pole to cut a wire without taking his gloves, and he received a shock which caused his death. In discussing the meaning of the term "willful misconduct" the Supreme Court declared:

"But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

It was held that the evidence showed a deliberate violation of the rule, and hence the annulment.

It must be conceded that petitioner makes a strong and persuasive argument, buttressed as it is by an imposing array of authorities. On the other hand, the contention of respondents is entitled to serious consideration. It is claimed that the defense of willful misconduct is an affirmative defense in the nature of a penal provision forfeiting compensation for willful wrongdoing, that the burden of proof is upon the employer to establish this defense, and that it was not established in the present case by reason of the failure of the employer to prove the necessary element of willfulness. In amplifying their position, respondents indulge in an interesting historical review of the common law and of the statutes culminating in the workmen's compensation acts as they relate to the redress for injuries afforded to the employé. The dissimilarity between the common-law remedy and that under the modern legislation is pointed out, and it is declared that under the system of workmen's compensation acts now adopted in California and in approximately 35 states of the Union, the industry is made to carry the cost of injuries sustained by its employes in the course of its operation, without regard to the fault of either the employer or employé. Or, as stated by the Supreme Court of Montana in *Lewis & Clark County v. Industrial Acc. Board of Montana*, 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628:

"Liability and compensation statutes cannot be grouped together, since they are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas; the liability statutes being intended to limit the defenses of the master, and the compensation statutes to provide compensation for the workman regardless of negligence of master, fellow servant, or himself."

Attention is then called to a peculiar provision of the California act and of some of the other states, penalizing, so it is claimed, the employer or employé, as the case may be,

for wanton and intentionally evil conduct, as provided in section 12b and section 12a (3) of our statute (Stats. 1913, p. 283), and it is claimed that this provision as to the employé was not intended as a substitute for contributory negligence, and it should not be so construed, but should be regarded in the spirit of section 21 of article 20 of the Constitution, authorizing the Legislature by appropriate enactment to "create and enforce a liability on the part of all employers to compensate their employes for any injury [sustained] by the said employes * * * irrespective of the fault of either party." To give effect to this provision and the obvious purpose of the said Compensation Act, it is claimed that the misconduct which would defeat the right of the employé to compensation must be more than even gross contributory negligence, in fact, must be the violation of reasonable rules or the doing of an extremely hazardous act which, under the common law, would amount to a breach of the duty owed to the employer, and, in addition, must be accompanied by a willfulness of intent or wrong motive amounting to a mens rea. It is insisted that this is demanded by the language and spirit of the Compensation Act, and is supported by the decisions of this state and of other jurisdictions.

Among the decisions cited from foreign jurisdictions is *Jensen v. Bowen Bros. & Co.*, Ct. of Abr. of New Zealand, Canterbury Ind. Dist. (1909), vol. 8, Decisions under the Workmen's Compensation for Accident Act, 49, 50, wherein it is said:

"The question of serious and willful misconduct is one of fact to be determined on the circumstances of each case. In dealing with the question the court is not bound to treat every violation by a worker of a rule in force in the factory or works as amounting necessarily to serious and willful misconduct. Whether it is so or not depends on the nature of the rule and the circumstances in which the violation has taken place."

The Supreme Court of Massachusetts, in the Matter of Nickerson, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, declared that "serious and willful misconduct," for the consequences of which the employé is not entitled to compensation, under the Workmen's Compensation Act of that state, "means more than even gross negligence, and resembles closely the wanton or reckless misconduct which renders one liable to a trespasser or to a bare licensee," and it was held that:

"Where an employé, engaged in cleaning and painting, began work around a moving shaft shortly before noon, although he had been ordered to do that work during the noon hour, while the machinery was stopped, his disobedience was a thoughtless act on the spur of the moment, rather than deliberate disobedience, and does not deprive his dependent of compensation under [said] act."

In that case, it seems that the deceased, less than half an hour before he was killed, was told by the superintendent to do the

work at the noon hour, and yet the court said:

"The fact that the injury was occasioned by the employé's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful, or, as was said by Lord Loreburn, in *Johnson v. Marshall Sons & Co., Ltd.* (1906), A. C. 409, 411, 'deliberate, not merely a thoughtless act on the spur of the moment.'"

It is asserted that the same rule is recognized by our Supreme Court in the quotation hereinbefore made from 170 Cal. 180, 149 Pac. 35, where willful misconduct is described as the deliberate violation of a reasonable rule made for the workman's benefit, where he has knowledge of its existence and of the dangers accompanying its violation.

As to the two cases from this state cited by petitioner, respondents find substantial disparity with this. It is pointed out that in the Pacific Coast Casualty Company Case the young employé was killed in the accident, and it was impossible to discover his exact mental state in violating the rule, that is, whether it was willful disobedience or the result of an inadvertence, and in the absence of testimony on that point, the court naturally, from the bare fact of disobedience, drew the inference that it was deliberate and willful. This, probably, was what the court had in mind in its opinion denying the petition for rehearing when it referred to the "absence of mitigating circumstances." Herein there is express testimony, negating the willfulness which overcomes any inference drawn from the bare fact of disobedience.

In the Mayfield Case, supra, 170 Cal. 180, 149 Pac. 35, there was not only an absence of testimony tending affirmatively to establish inadvertence, but there was, in addition, testimony that the deceased had been warned, within a few hours before his death, of the danger of not wearing gloves, which was sufficient to establish willfulness. Mayfield was, moreover, a man of mature years.

As to the cases from foreign jurisdictions cited by petitioner no specific attention is paid to them by respondents. However, the most important ones appear for the first time in the reply brief of petitioner, it being stated therein that:

"Since receiving respondents' reply brief we have been to some trouble to look up the cases under workmen's compensation acts interpreting or defining 'willful misconduct,' and have found that most of said cases originated in the courts of Great Britain."

It would have been more satisfactory if petitioner had taken the trouble to do that before filing his opening brief. We cannot undertake to examine these cases in detail. Most of them, we may say, involved adults and accidents under circumstances leading necessarily to the conclusion that there was willful violation of reasonable rules for the safety of the workmen.

[1] Again, while some of the cases called for a consideration of "serious and willful misconduct," it is apparent that the word

"serious" added nothing to the gravity of the conduct. Any willful misconduct that leads to death or great bodily injury must necessarily be serious.

In reference to the Powell Case, from Scotland, it is apparent that the decision is based upon two grounds: First, that the accident did not arise "out of the employment" of the deceased; and, second, that he was guilty of deliberate and intentional wrongdoing when he went to a place where he had no right to be and placed himself in a dangerous position against which he had been warned.

The Fanny Callahan Case was decided upon the same grounds.

[2] In all these cases holding that the victim of the accident was chargeable with willful misconduct, it seems to have been assumed that the violation of the rule was intentional and deliberate, and, as far as we are advised, there was no attempt to excuse it on the ground of inadvertence or thoughtlessness. The violation of a rule known to the party would, of course, raise the presumption that it was done deliberately and intentionally, but is it not a disputable presumption? May not a person, although guilty of an infraction of an order given for his protection, show that at the time he was unmindful of the order, and that his act was the result of inattention and thoughtlessness and without any real purpose to be contumacious? Petitioner contends that to permit this course would open the door to fraud and perjury. In some cases, no doubt, such would be the effect, but these evils will never be entirely avoided in the attempt to administer justice through human instrumentalities. But the objection goes rather to the weight and effect of the evidence than to its admissibility. When the person violates a known rule, it should be held ordinarily that he does it deliberately, but we do not think that the door should be closed entirely against the inquiry whether it may not have been the result of thoughtlessness and inadvertence, at least in the case of a mere child. Where a minor is involved why should not the same consideration be shown as in the ordinary action for damages wherein contributory negligence is urged as a defense? Why should not the distinction be recognized that is so learnedly pointed out in the case of *Maud Guyer v. Sterling Laundry Co.*, 171 Cal. 761, 154 Pac. 1057? Therein, as to minors, it is said:

"Mentally, a tremendous growth must take place, * * * before knowledge has ripened into wisdom and wisdom coupled with experience, has developed a sound and sane judgment. * * * Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking

power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else."

With this well-known characteristic of youth in view why should it be thought a strange thing that a boy of 15 should forget an order given him, and, in a moment of forgetfulness, do that which was forbidden? And acting thus, how could his conduct be justly denominated "willful misconduct"? In that event it would be, properly speaking, willful misconduct to no greater degree than if he did the act in the absence of any order. In either case it might be, and, in this case it would be, contributory negligence but nothing more.

It is probably true, as contended, that the portion of the finding as to oiling the machinery while in motion in order to save time does not indicate a sufficient palliation or excuse for his conduct, yet it is at least opposed to the idea that he had an intentionally disobedient frame of mind, and is in aid of the conclusion that there was an absence of willfulness.

[3] Looking at the evidence, we find sufficient support for the inference that he was not intentionally and deliberately disobedient. The boy himself, when asked: "Were you aware at the time that you were violating your employer's instructions? Did you know and think at the time that you were disobeying orders?" replied: "No, sir; I didn't think." He further said that at the time he did not remember that Diestelhorst had told him not to oil the machinery while in motion. Indeed, one cannot read the record without obtaining a strong impression of the candor and honesty of the witness. He was anxious to save time, and he wanted to get out as much dirt as possible. He was in the habit of oiling right after lunch before the machinery was put in motion, but on this occasion he started it in obedience to the direction of petitioner, or, as the boy explained it:

"We were then eating dinner, and right after dinner Diestelhorst wanted to go and fix a bridge across the creek, and there was a 'jack' out where we were dredging, and he said to move that, and I started up, and he passed the chain around it and moved it, and I shut off the power and went to oiling."

We think from these considerations that the Commission might conclude with legal propriety that the boy was not chargeable with such willful misconduct as to deprive him of the benefits of the Compensation Act and the writ is therefore discharged, and the award affirmed.

We concur: CHIPMAN, P. J.; HART, J.

DILGER v. WHITTIER. (Civ. 1616.)

(District Court of Appeal, Second District, California. Feb. 14, 1917.)

1. HIGHWAYS \Leftrightarrow 184(2) — INJURY TO PEDESTRIAN — EVIDENCE — SUFFICIENCY.

In an action for personal injuries sustained by a child when struck by an automobile, which was diverted from the roadway by reason of a collision with an automobile operated by defendant, evidence held to justify a finding that the injury was due solely to defendant's negligence in operating his car, and that the operator of the other car was not guilty of any negligence which contributed to plaintiff's injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 472, 473½.]

2. APPEAL AND ERROR \Leftrightarrow 1082(1) — BURDEN TO SHOW PREJUDICIAL ERROR.

It devolves upon an appellant to show prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051.]

3. APPEAL AND ERROR \Leftrightarrow 928(2) — REVIEW — PRESUMPTIONS.

Where the instructions are omitted from the record on appeal, the appellate court must presume that the jury was properly instructed as to the law applicable to the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3750, 3753.]

4. EVIDENCE \Leftrightarrow 474(8) — SPEED — KNOWLEDGE OF WITNESS.

As the objection that a witness who testified as to the speed of defendant's car had not seen the car in sufficient time prior to the collision to enable him to testify on the subject goes to the weight, rather than to the competency, of the evidence, and as such testimony differed but little from that offered by the defendant on the same subject, its admission was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2202.]

5. APPEAL AND ERROR \Leftrightarrow 1050(1) — HARMLESS ERROR.

Any error in the admission in evidence of the torn clothes of the child, and testimony as to tears and rents therein, was harmless as the evidence did not tend to show either negligence of defendant or injuries to the child.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. NEW TRIAL \Leftrightarrow 88 — GROUNDS — DISCRETION OF COURT.

As no facts were stated from which the trial court could determine what effort the sheriff had made to serve a subpoena upon two alleged material witnesses for defendant, and it was not shown that the defendant placed the subpoena in the hands of the sheriff before the trial was commenced, there was no abuse of discretion in denying a new trial upon the ground of surprise, which ordinary prudence could not have guarded against.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 176.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Florencia Dilger, a minor, by W. J. Dilger, her guardian ad litem, against C. F. Whittier. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, for appellant. Rowen Irwin, of Bakersfield, and Fred L. Seybolt, of San Francisco, for respondent.

SHAW, J. This is an action brought by plaintiff, a minor four years of age, to recover damages for personal injuries sustained while playing in a vacant lot adjoining her father's place of business, as a result of being struck by an automobile driven by one Earl Oldham, which, it is claimed, was diverted from the roadway and precipitated against plaintiff by reason of colliding with another automobile negligently operated by defendant. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of \$1,000, for which judgment was entered in her favor, and from which, and an order denying his motion for a new trial, defendant appeals.

Appellant's chief contention is that the verdict is not justified by the evidence, in that it fails to show that defendant was guilty of any negligence in operating his car, but, on the contrary, shows that the injury sustained was due to Oldham's negligence. Not only is the evidence touching the action of both Oldham and defendant in operating their respective cars conflicting, but the plat of the location and position of the cars used by the witnesses in testifying is not before us; hence much of the testimony is meaningless. No purpose could be served by an extended reference to the conflicting evidence. Suffice it to say, there appears to be testimony which tended to show and which, when illustrated by the plat in connection with which it was given, might, and therefore since it is not brought up we must assume that it did, clearly justify the jury in finding that the injury was due solely and alone to defendant's negligence in operating his car.

[1-3] The accident occurred in the unincorporated town of Fellows, in Kern county, through which a highway, known as the Midway road, extended north and south. The father of the plaintiff, W. J. Dilger, had a place of business on the east side of this highway, which, between the sidewalks, was some 47 feet in width. Adjoining Dilger's place of business on the north were two vacant lots, on one of which, and next to the northwest corner of her father's house, plaintiff was playing. Defendant was driving a Cadillac car on the right-hand side of this highway, going in a southerly direction at a speed of some 20 or 25 miles per hour, and Oldham, driving a Ford car, was closely following a Santa Fé car going northerly and traveling near the center of the roadway. At a point about opposite Dilger's place, defendant met the Santa Fé car, when, instead of passing it to the right, he turned to the left thereof, and when clear of the Santa Fé car met the one driven by Oldham, who, while in the rear of and close to the Santa Fé car, was nearer to the sidewalk on his right. At the time it appears that Oldham was traveling at a speed of 5 miles per hour, and, seeing defendant approaching at a high speed

immediately in front of him on the wrong side of the highway, turned sharply to the right, toward the vacant lot, in an effort to escape, when defendant's car collided with the side of the Ford machine, projecting it some 15 feet, against the child on the vacant lot. Presumably the jury concluded the accident would not have occurred had defendant observed the law of the road, which required him to pass to the right of the Santa Fe car. On the other hand, Oldham, since he was operating his car slowly on the side of the street to which he was entitled, was not, as shown by the record, guilty of any negligence which contributed to plaintiff's injury. It devolves upon an appellant to affirmatively show prejudicial error. Upon the record presented it cannot be said there is an absence of sufficient evidence to justify the verdict of the jury, which we must presume, in the absence of the instructions, copy of which is omitted from the record, was properly instructed as to the law applicable to the case.

[4] Basing his claim upon the fact that W. J. Dilger's view of defendant's car prior to its colliding with that of Oldham was not of sufficient length as to time as to enable him to testify upon the subject, appellant insists the court erred in permitting him to testify that it was running at a speed of 20 to 25 miles per hour. In our opinion, the objection goes to the weight rather than to the competency of the evidence, which differed little, if any, from evidence upon the same subject offered by defendant. In no event could it have affected the verdict.

[5] The court, over defendant's objection, permitted plaintiff to introduce in evidence the torn clothes of the child, and to testify as to tears and rents therein. While the evidence was immaterial, inasmuch as it did not tend to show either negligence on the part of defendant or injuries to the child, nevertheless it is impossible to conceive how defendant could have been prejudiced by the ruling. Surely the dress shown to have rents in it was not calculated to appeal to the passions of the jury to such an extent as to cause it to render a verdict for excessive damages; nor is the verdict in this case, when the child's injuries are considered, subject to such objection.

[6] One of the appellant's grounds of motion for a new trial was surprise which ordinary prudence could not have guarded against, in support of which defendant filed the affidavit of his attorney, from which it appears that at some time—whether before or pending the trial is not shown—he placed in the hands of the sheriff of Kern county for service a subpoena for Earl Oldham and one Malt Smith, both of whom, it was claimed, would give material testimony in favor of the defendant; that diligent search was made by said sheriff for said witnesses, with-

out success. No facts are stated from which the court could determine what effort the sheriff made to serve the subpoena, and from aught that is shown to the contrary, defendant did not place the subpoena in the hands of the sheriff with instructions to serve it until the trial was commenced. It cannot be said there was any abuse of discretion on the part of the court in denying the motion upon such ground.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

HAMMOND v. PACIFIC ELECTRIC RY. CO. (Civ. 2205.)

(District Court of Appeal, Second District, California. Feb. 8, 1917.)

1. STREET RAILROADS §98(6)—ACCIDENTS ON TRACKS—DUTY TO PEDESTRIANS.

The duty of a pedestrian in crossing a city street is to use ordinary care with regard to street cars, which is the degree of care which people of ordinary prudent habits would reasonably be expected to exercise under the circumstances of a given case, and the rule governing the duty of a pedestrian about to cross a steam railroad or an interurban electric railroad in the country does not apply to city streets "in all its strictness."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 207.]

2. STREET RAILROADS §114(18)—ACCIDENTS ON TRACKS—ACTIONS—EVIDENCE—SUFFICIENCY.

In action for damages for personal injuries received by plaintiff when hit by defendant's street car, in which negligence of defendant was established, evidence held to support a jury finding that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 248.]

3. TRIAL §260(8)—PERSONAL INJURY—INSTRUCTIONS.

The rule stated in a requested instruction, that a person alighting from a car and intending to cross the street behind the same is charged with the duty of exercising ordinary care to look and listen for approaching cars before attempting to cross, and is charged with the duty of keeping up the exercise of ordinary care in looking and listening for approaching danger until the last moment, before passing from a place of safety to one of danger, and that the omission of such ordinary care constitutes negligence, and if thereby plaintiff contributes directly or proximately to the injury she cannot recover, was sufficiently and correctly stated in an instruction that the motorman in charge of a car has the right to assume that a pedestrian in the street is in possession of all his faculties, unless there is notice to the contrary, and will use reasonable diligence and ordinary care to avoid danger to himself, and that the failure to use such diligence and care is negligence, and that if the plaintiff negligently placed herself in a position of danger from which she was unable to escape, and the motorman of defendant's car, which struck her, used every effort in his power to avoid striking her after discovering her danger, verdict must be for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657.]

4. TRIAL \Leftrightarrow 296(4, 5)—PERSONAL INJURY—INSTRUCTIONS.

An instruction that if plaintiff found herself suddenly in peril, without sufficient time to consider all the circumstances, she might be excusable for omitting some precautions in making an immediate choice under this disturbing influence, although, if her mind had been clear, she ought to have done otherwise, and that if she found herself in imminent danger just prior to and at the time of the collision, and at that time tried to escape the peril, and in thus doing acted as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances, the jury could not find on this account that she was guilty of contributory negligence, did not purport to say that a person in sudden peril by his own negligence is relieved from the imputation of contributory negligence, but only stated the principle that an unwise choice under such peril is not of itself contributory negligence, when considered with instructions that if the plaintiff had failed to use such care that a person of ordinary prudence would have used under the same or similar circumstances, and such failure contributed proximately caused the injury, plaintiff could not recover, and an instruction that all of the instructions ought to be considered as a whole in arriving at the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

5. TRIAL \Leftrightarrow 295(1)—INSTRUCTIONS.

It is the duty of the jury to consider all of the instructions given as a whole in arriving at the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

6. STREET RAILROADS \Leftrightarrow 102(2) — INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

The mere fact that plaintiff was careless and negligent is not of itself sufficient to excuse the defendant, if such carelessness is remote in the chain of causation and did not contribute proximately to the cause of the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 203.]

7. APPEAL AND ERROR \Leftrightarrow 1063 — REVIEW — PREJUDICIAL ERROR.

Although an instruction that the mere fact that plaintiff was negligent did not excuse defendant's negligence, if plaintiff's negligence was remote and did not contribute proximately to the injury was irrelevant, it was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Trial, Cent. Dig. § 558.]

8. STREET RAILROADS \Leftrightarrow 118(11)—ACTION FOR INJURY—INSTRUCTIONS.

An instruction that if plaintiff, at the time of the accident, may or may not have been guilty of such contributory negligence as under the instructions of the court relieved the defendant of liability, which otherwise would have attached, before the jury could find for defendant it must appear by the preponderance of the evidence that plaintiff was guilty of such contributory negligence as to excuse the defendant, which must appear from satisfactory evidence or such inferences as the jury may legally draw from the evidence, that the jury must not speculate or guess, but their minds must be convinced, does not state the doctrine of comparative negligence, but only requires that it be established that plaintiff was guilty of such contributory negligence as to excuse defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268.]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Leah Hammond against the Pacific Electric Railway Company. From a judgment for plaintiff, and from an order denying motion for a new trial, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles, for appellant. W. O. Morton, Harry A. Hollzer, T. A. Williams, and C. B. Morton, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover damages for personal injuries received by the plaintiff, who was hit by a car of the defendant while she was crossing a street in the city of Pasadena. Fair Oaks avenue runs north and south, and is intersected by California street. The defendant has a double-track railroad on each of those streets. Its interurban cars run on Fair Oaks avenue, and some of its north-bound cars turn east on California street at that intersection. Some of its local cars run westerly on California street from Fair Oaks avenue. The plaintiff was a passenger coming from Los Angeles, and as such passenger she received a transfer entitling her to go west on a California Street car. The northbound two-car train from Los Angeles, on which she was a passenger, stopped at California street, and then turned east on that street. The plaintiff alighted from the rear car of the train at a point about 100 feet south of California street. A West California Street car was waiting on the west side of Fair Oaks avenue to receive passengers. This was at 6 o'clock in the evening on January 29, 1912. When she alighted from the steps of her car on the east side thereof, she looked north and saw some of the passengers at the front of the train, who were moving around the front of the train to go to the California Street car. The plaintiff looked south, and then crossed the track at the rear of her train, and started to cross the westerly or south-bound track to go to the California Street car. In so doing she did not look to the north, and did not either see or hear an approaching south-bound car which was coming toward her at the rate of about 12 miles per hour. The car was so close to her that, after coming into the place of danger, she was unable to escape, and the motorman was unable to stop the train in time to avoid striking the plaintiff.

The plaintiff alleged that the defendant was negligent, in that it was moving its train at an excessive and dangerous rate of speed, and in that no warning or signal was given by which she could be notified of the approach of the car. Although there is some conflict in the evidence, there is sufficient evidence to support the jury's finding of negligence on the part of the defendant, and we shall assume that such negligence was duly established. The defendant, in addition to

denying its own negligence, pleaded that the plaintiff did not exercise ordinary care to avoid being injured, and that her injuries were directly and proximately contributed to and caused by her own negligence. The verdict and judgment were in favor of the plaintiff, and the defendant appeals from the judgment, as well as from an order denying its motion for a new trial.

[1, 2] On behalf of appellant it is insisted that the evidence proves, without conflict, that the plaintiff was guilty of contributory negligence directly causing her injury, since it is admitted by her own testimony and shown by all of the evidence in the case that she passed over from the north-bound track to the south-bound track without looking northward to see whether any car was approaching. In order to sustain this contention it would be necessary to hold, as matter of law, that under the circumstances stated the plaintiff was negligent in failing to look to the north before she moved into the place of danger. Whatever might be said as to the rule governing the duty of a pedestrian about to cross a steam railroad or an inter-urban electric railroad in the country, it does not apply "in all its strictness" as against pedestrians in crossing a city street. Under the circumstances of this case, the plaintiff was required to use ordinary care, and that is the degree of care which people of ordinary prudent habits could reasonably be expected to exercise under the circumstances of a given case. We may say here, as was said in *Driscoll v. Cable Railway Co.*, 97 Cal. 553, 587, 32 Pac. 591, 33 Am. St. Rep. 203, that considering all the evidence and circumstances in the case at bar, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. To same effect see *Arbunlich v. United Railroads*, 28 Cal. App. 291, 294, 152 Pac. 51.

[3] It is claimed that the court erred in refusing to give an instruction requested by the defendant as follows:

"A person alighting from a car as the plaintiff did in this case, and intending to proceed across the street behind the same, is charged with the duty of exercising ordinary care in looking and listening for approaching cars, before proceeding to attempt the crossing, and is charged likewise with the duty of keeping up the exercise of ordinary care in looking and listening for approaching danger, until the last moment before passing from a place of safety to one of danger. The omission of such ordinary care constitutes negligence and if thereby a plaintiff contributes directly or proximately to the injury ensuing, she cannot recover."

This instruction might well have been given, as it is a correct statement of the law. We find, however, that in other instructions the same rule was correctly stated in sufficiently definite terms. The jury was told that the motorman in charge of a car has the right to assume that a pedestrian on the street is in possession of all his faculties, unless there is notice to the contrary, and will

use reasonable diligence and ordinary care to avoid danger to himself, and that the failure to use such diligence and care is negligence. They were also instructed:

"If you find from the evidence that the plaintiff negligently placed herself in a position of danger from which she was unable to escape, and that the motorman of defendant's car which came in contact with her, used every effort in his power to avoid striking her after discovering her danger, then your verdict must be in favor of defendant."

In *Arbunlich v. United Railroads*, *supra*, the appellant complained that the court erred in modifying the following instruction requested by the defendant:

"In cases of this character the correct rule of law is that one riding or walking along or across the tracks of a street railroad company must use reasonable care in the exercise of his faculties of sight or hearing to watch or listen for cars going in either direction."

The court gave that instruction in the following modified form:

"In cases of this character the correct rule of law is that one riding or walking along or across the tracks of a street railroad company must use reasonable care and precautions for his own safety."

Discussing this matter, the District Court of Appeal of the First District said:

"It must be conceded that the cases cited by the appellant in support of the correctness as a matter of law of the foregoing instruction in the form requested by it sustain its contention in that regard, and that, had the court refused to give said instruction or one similar to it in effect, its action in so refusing would have been reversible error; but, in our opinion, the court gave in substance and effect, although not in its requested detail, the defendant's instruction, and that the language of the court, requiring persons walking across the tracks of a street railway to use reasonable care and precautions for their own safety, would suggest to the minds of the jurors as reasonable men that such care and precaution would naturally consist in the exercise of their faculties of sight and hearing."

The Supreme Court denied a rehearing in that case.

[4, 5] Error is predicated upon instructions 19, 25, and a part of 24, as given by the court to the jury. No. 19 is as follows:

"In judging the conduct of the plaintiff, you must view the situation as it appeared to her just prior to or at the time of the accident. If she found herself suddenly put into peril, without having sufficient time to consider all the circumstances, then she might be excusable for omitting some precautions or taking an immediate choice under this disturbing influence, although, if her mind had been clear, she ought to have done otherwise. If she found herself in imminent danger just prior to and at the time of the collision, and at that time, tried to escape the peril, and in thus doing acted as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances and conditions, then you cannot find on this account that she was guilty of contributory negligence. As the court has instructed you, negligence is commensurate with the circumstances under investigation."

No. 25 is as follows:

"If the plaintiff, at the time of the accident, may or may not have been guilty of such contributory negligence, as under the instructions of the court would relieve the defendant from any liability which otherwise would have attach-

ed, then before you can find for the defendant it must appear further by a preponderance of the evidence plaintiff was guilty of such contributory negligence as to excuse the defendant. This must appear to you from satisfactory evidence, or such inferences as you may legally draw from the evidence, and you must not speculate or guess, for your minds must be convinced."

The objection urged against instruction 19 is that it presented to the jury an irrelevant suggestion, and omitted to point out that, if the plaintiff's own negligence had placed her in a position of imminent danger, then the jury might find that she was guilty of contributory negligence, even though the exercise of ordinary prudence in her efforts to escape could not then avail to save her from injury.

Appellant directs attention to the fact that the case of *Schneider v. Market St. Ry. Co.*, 134 Cal. 483, 490, 66 Pac. 734, where the rule stated in instruction No. 25 was declared, was a case in which it appeared that the plaintiff's presence on the tracks was caused by reason of perturbation and panic induced by the negligence of the defendant, and not by his own negligence. There is force in the distinction thus pointed out by appellant. It is true, however, as suggested by counsel for respondent, that the instruction did not purport to say that a person in sudden peril by his own negligence is relieved from the imputation of contributory negligence, but only stated the principle that an unwise choice under such peril is not of itself contributory negligence, as the court said that the jury could not "on this account" find that the plaintiff was guilty of contributory negligence. While the phraseology, standing alone, may be obscure, we think that respondent's explanation of it is supported by other instructions given to the jury, and which must be considered in connection with the instruction in question. The court very properly stated to the jury:

"You are not to take any one part of these instructions as expressing all the law, but are to consider the whole thereof in arriving at your verdict."

And they were instructed that if they believed from the evidence that the plaintiff had failed to use such care as a person of ordinary prudence would have used under the same or similar circumstances as those then under investigation, and that such failure contributed proximately to or proximately caused the injury complained of, then plaintiff could not recover.

[8, 7] There was no error in adding to this statement the last sentence of instruction No. 24, of which the defendant complains, and which is as follows:

"The mere fact that the plaintiff may have been careless and negligent is not of itself sufficient to excuse the defendant, if you find that her carelessness or negligence is remote in the chain of causation, and did not contribute proximately to cause the injury."

It may be, as suggested by appellant, that the quoted sentence was irrelevant under the evidence presented; but as a proposition of law the statement was correct, and we cannot see that it was likely to affect the verdict.

[8] The additional objection urged against instruction 25 is that it suggests the idea of degrees of negligence on the part of the plaintiff, and the thought that plaintiff might be guilty of some contributory negligence, and yet not of such contributory negligence as to excuse the defendant; that it presents the idea of comparative negligence, whereas the law is that even slight contributory negligence on the part of plaintiff would bar her recovery. The answer is that the instruction does not state the doctrine of comparative negligence, but only requires that it be established that the plaintiff was guilty of "such contributory negligence as to excuse the defendant," and that other instructions correctly and sufficiently inform the jury as to what constitutes contributory negligence, and that if the plaintiff was guilty of such negligence which contributed proximately to cause the injury, the verdict must be in favor of the defendant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

PACIFIC GAS & ELECTRIC CO. v. ROLLINS et al. (Civ. 1498.)

(District Court of Appeal, Third District, California. Feb. 10, 1917.)

1. NEW TRIAL \S 128(5)—MOTION—SPECIFICATION OF GROUNDS—STATUTE.

Under Code Civ. Proc. \S 657, designating insufficiency of the evidence to justify the verdict as a ground of motion for new trial, and section 659, providing that the moving party must designate in his notice of intention to move for a new trial the grounds upon which the motion will be made, where defendants' notice set forth as one of the grounds of the motion "insufficiency of the evidence to justify the verdict," the motion for a new trial on the grounds set forth in the notice of intention, following which was a statement of the grounds set forth in the notice of intention, was sufficient.

[Ed. Note.—For other cases, see New Trial. Cent. Dig. \S 281.]

2. NEW TRIAL \S 128(5)—GROUNDS—INSUFFICIENCY OF EVIDENCE—SPECIFICATION OF PARTICULARS.

In eminent domain proceedings, where defendants moved for new trial on the ground of insufficiency of the evidence, and their specification of the particulars in which the evidence was claimed to be insufficient to justify the verdict directed attention to the particular elements of value constituting the basis upon which compensation should be fixed, each element being mentioned, and stated that the testimony bearing on such elements did not justify the jury's conclusion that the property was of no greater value than that fixed by the jury, such specification of particulars was sufficient, since plaintiff could have experienced no difficulty in determining therefrom the particular facts as to

which it stated the evidence was not sufficient to justify the verdict on the question of value, which was all that was necessary.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 261.]

3. APPEAL AND ERROR §933(4) — REVIEW — ORDER GRANTING NEW TRIAL—GROUNDS.

Where the trial court, in granting a motion for new trial, does not expressly limit the order granting such motion to any particular ground of those stated, it is the duty of the appellate court to sustain it if it can be upheld on any ground embodied in the notice of intention.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3775.]

4. APPEAL AND ERROR §933(4) — REVIEW — PRESUMPTION.

On appeal from an order granting defendants new trial in an action in eminent domain, where there was a wide variance between the witnesses for the respective parties on the question of value, the appellate court is authorized to presume, in support of the order appealed from, that one of the reasons impelling the trial court to allow motion was that the evidence was insufficient to justify verdict; that being a ground brought forward by defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3775.]

5. APPEAL AND ERROR §979(1) — EMINENT DOMAIN §224—REVIEW—ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

The granting or denying of a new trial on the ground that the evidence is insufficient to sustain the verdict, where there is a substantial conflict, rests so fully in the discretion of the trial court that its action is conclusive on appeal, unless there has been an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871, 3872; *Eminent Domain*, Cent. Dig. §§ 574-579.]

6. EMINENT DOMAIN §224—MOTION FOR — INSUFFICIENCY OF EVIDENCE—DISCRETION OF TRIAL COURT.

In an action in eminent domain, it was within the trial court's discretion, in considering the motion for new trial on the ground of insufficiency of the evidence to sustain the verdict, to determine whether the verdict, in so far as it concerned the value of the property, was justified, or reasonably in accord with the evidence on the question.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 574-579.]

7. EMINENT DOMAIN §224—ORDER GRANTING—ABUSE OF DISCRETION.

In an action in eminent domain against a mining company to condemn a right of way for water, where defendants' witnesses testified that the value of all defendants' properties was from \$100,000 to \$125,000, and plaintiff's witnesses testified that the properties were valueless for any purpose; the order of the trial court granting defendants a new trial for insufficiency of the evidence to sustain the verdict that the value of the property \$4,000 was not an abuse of discretion.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 574-579.]

8. APPEAL AND ERROR §979(2)—REVIEW—ORDER GRANTING NEW TRIAL.

The appellate court cannot weigh the testimony of witnesses in determining whether the trial court abused its discretion in granting new trial for insufficiency of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3871.]

9. EVIDENCE §474(16)—COMPETENCY OF EXPERTS—PARTIES—DETERMINATION.

Defendants, in an action in eminent domain, being otherwise qualified, were competent to testify as witnesses in their own behalf to the value of their property.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2215.]

Appeal from Superior Court, Placer County; J. E. Prewitt, Judge.

Action by the Pacific Gas & Electric Company, a corporation, against J. L. Rollins and others, as trustees of the Erie Mining Company, a defunct California corporation, and of its stockholders. From an order granting new trial, plaintiff appeals. Order affirmed.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, and John M. Fulweller, of Auburn, for appellant. C. W. Kitts and C. W. Cross, both of San Francisco, and A. C. Lowell, of Auburn, for respondents.

HART, J. This is an appeal from an order granting a new trial. The action is in eminent domain to condemn a right of way for the conveyance of water. The plaintiff is engaged in the business of storing, selling, and distributing water, for power, mining, irrigating, domestic, and other purposes, and particularly for supplying counties, cities, and towns, etc., in the state of California, and the inhabitants thereof, with water for all of said purposes. To carry out these objects, it has constructed and now maintains and operates canals, reservoirs, dams, ditches, flumes, aqueducts, and all such other works, structures, machinery, and appliances necessary for the collection, storage, and distribution of water for the purposes mentioned. The plaintiff, it appears, was, at the time of the commencement of this proceeding, constructing a large storage reservoir in the county of Nevada, called "Lake Spaulding Reservoir," through which the South Yuba river flows, and owns the right to divert and appropriate from said river at said reservoir 11,000 or more miner's inches of water, and has near the outlet of said reservoir constructed an aqueduct through which it proposes to conduct and convey approximately 14,000 miner's inches, and, as soon as the right to do so has been acquired, will discharge the same into the channel of Bear river at the lower end of said aqueduct, thence through and along said channel of said Bear river to the plaintiff's diverting dam. The right of way adopted by the plaintiff for conveying said water to said diverting dam includes the channel of that portion of said Bear river which is included between the lower end of said aqueduct and said diverting dam, and particularly that portion of the channel of said river which crosses the defendants' tract of land, of which a specific description is given in the complaint. The property which the plaintiff herein seeks to condemn

and appropriate to its purposes, above mentioned, is the right of way for conveying said water in and along that portion of the channel of the said Bear river which is included between the most northerly boundary line of defendants' said tract of land and the most southerly boundary thereof. It appears from the complaint that the defendant Erie Mining Company had, prior to the commencement of this action, failed to pay the state license tax imposed upon it for the year 1905, as provided by law (Stats. 1905, p. 493), and as a consequence had forfeited its charter to the state on the 14th day of December, 1905. Hence the action was brought against the directors of the defendant Erie Mining Company, as trustees of the corporation and its stockholders and members (Stats. 1907, p. 746), amendatory of the act of 1905 (Stats. 1905, pp. 493, 494). Upon the complaint, setting forth sufficient facts, and the denials of the answer, the cause was brought to issue and trial. The jury found that the market value of the right of way sought to be condemned was the sum of \$4,000, and that the damages which will be sustained by the defendants on account of injury to the remainder of the tract of land owned by the defendants, and of which the land sought to be condemned is a part, by reason of the taking and the severing therefrom of the said right of way, would be \$1,000. The court thereafter caused to be entered what is called in the record a "judgment." Within due time, the defendants served and filed a notice of intention to move for a new trial upon the following grounds: (1) Insufficiency of the evidence to justify the verdict of the jury; (2) that the verdict was and is contrary to and against the evidence; (3) that the verdict is contrary to law; (4) errors of law occurring at the trial and excepted to by defendants. The said notice stated that "said motion will be made upon a statement of the case," etc. The statement on the said motion was within due time prepared and served, and, on the 14th day of September, 1915, the court duly allowed and settled the same. On the 11th day of October, 1915, the matter of the motion for a new trial on the statement as allowed and settled was called for hearing. At said time, the defendants presented a motion for the amendment of said statement and specification of errors so as to make it appear in the appropriate place therein that "no findings were made or filed by the court, and that findings were not waived by defendants," and to add to the assignments of errors the following:

"That the judgment herein entered is contrary to law in this: That the court did not file its findings of fact upon the issues presented in the case other than the issue of compensation, as required by law; that the final order or decree of condemnation herein entered is contrary to law in this: That the court did not file its findings of fact upon the issues presented in the case other than the issue of compensation, as required by law."

To said motion the plaintiff interposed an objection upon the ground, among others, that no notice of said motion to amend had been given as provided by section 473 of the Code of Civil Procedure. The motion was denied by the court without prejudice to the right of the defendants to renew the same, and, against the objection of the plaintiff to any further delay, the court continued the further hearing of the motion for a new trial until the 18th day of October, 1915. On the 13th day of October, 1915, the defendants served upon the plaintiff their notice to amend the said statement in the manner and particulars above mentioned. Said notice was accompanied and supported by an affidavit. Upon hearing said motion as so presented, the court allowed the same over a number of specifically enumerated objections by the plaintiff.

It is preliminarily objected by the appellant: (1) That the motion for a new trial as made did not set forth any grounds upon which the court could properly have granted the motion. The argument in support of this proposition is that "the grounds as stated in the motion were too general and indefinite to enable the court to know wherein the evidence was insufficient to justify the verdict; * * * that it was incumbent upon respondents in making such motion to state specifically the grounds of the motion or refer to some paper on file wherein such grounds were specifically stated (citing *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762; *Hayne*, New Trial and Appeal, sec. 164); that respondents did not state specifically the grounds upon which they relied, nor did they refer to any paper on file in the case wherein such grounds were stated." (2) That the specification of the insufficiency of the evidence to justify the verdict is insufficient, in that it is too general and fails to point out the particulars in which the evidence does not justify the verdict.

[1] As to the point first suggested, section 657 of the Code of Civil Procedure designates the grounds upon which a motion for a new trial may be made. Among the grounds so specified is that of the insufficiency of the evidence to justify the verdict or other decision. Section 659 provides that the moving party must designate in his notice of intention to move for a new trial the grounds upon which the motion will be made. This latter provision obviously refers to the grounds upon which a new trial may be allowed as specified in section 657, and contemplates that the grounds designated shall go no further than to specify them in the notice of intention in the general language of the last-mentioned section. This is precisely what was done by the respondents in this case. The statement as settled and allowed contains the notice of intention, in which is set forth, as one of the grounds of the motion, "insufficiency of the evidence to justify

the verdict," which is the exact language of subdivision 6 of said section 657. The statement further contains the following statement:

"Thereupon the matter of motion for a new trial being before the court, defendants made the following motion: The defendants move the court for a new trial of this action upon the grounds set forth in the notice of intention, to wit"

—following which is a statement of the grounds set forth in the notice of intention.

The above motion was sufficient in all respects to meet the requirements of the law where, as here, the motion is, as the notice of intention here stated would be done, supported by a statement of the case. There is nothing said in *Williams v. Hawley*, supra, from which it may be implied that the court intended to hold or suggest that the motion as made here is not sufficient to warrant the trial court in considering and acting upon it. In that case the moving party, in making his motion, referred to the notice of intention theretofore served and filed, but, in making up the bill of exceptions prepared and settled for the support of his motion, failed to include therein said notice of intention. It was therefore very properly held that, not being a part of the record, although inserted in the transcript, the notice of intention could not be examined by the court for a statement of the grounds of the motion. The court in that case did say, however, that:

"It is not necessary, * * * for the appellant in making the motion to state the grounds at length. He must, in some way, inform the court what are the grounds of the motion, but this may be done as well by reference to some paper on file in the action, in which the grounds are stated, as by word of mouth."

See, also, *Taylor v. Northern Elec. Railway Co.*, 26 Cal. App. 765, 770, 148 Pac. 543.

[2] The specification of the particulars in which the evidence is claimed to be insufficient to justify the verdict, so far as compensation or value is concerned, while perhaps not as specific as it might have been, is, nevertheless, sufficient. By said specification (after the statement that the verdict, so far as it involved a decision of the question of the value of the property sought to be condemned, is not justified by the evidence) attention is directed to the particular elements of value which constitute the basis upon which compensation of the defendants for the taking of their property should be fixed, each such element being mentioned, and it states in effect that the testimony bearing upon such elements does not justify the conclusion of the jury that the property involved was of no greater value than that fixed by the jury. This was sufficient to point the particular evidence thus referred to, and the particulars in which it was claimed that it was not sufficient to justify the verdict. The plaintiff could have experienced no difficulty in determining from the specification the particular facts as to

which it was thus stated that the evidence was not sufficient to justify the verdict upon the question of value, and this is all that is needful in specifications. Indeed, the plaintiff seems to have perceived and understood the particulars to which the specification referred, as the statement contains a fairly complete statement of the testimony addressed to the several elements of value.

The rule respecting and requiring specifications of particulars, etc., is now much more liberally viewed and applied than in our earlier juridical history. Formerly the rule was very strict, and even a mere informal statement in such specifications might, and often did, operate to bring about a refusal by the courts to consider the points thus attempted to be pointed out. Many decisions have been from time to time made upon the subject, and finally the Supreme Court, in *American, etc., Co. v. Packer*, 130 Cal. 450, 62 Pac. 744, held that:

"Whenever there is a reasonably successful effort to state 'the particulars,' and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, * * * this court ought not to refuse to consider the case on appeal."

See also, *Drathman v. Cohen*, 139 Cal. 310, 73 Pac. 181; 1 Hayne on New Trial and Appeal (Rev. Ed.) p. 755.

Taking up now a consideration of the merits of this appeal, we first remark that there seems to be much force in the point made by the appellant that the document purporting to be and characterized in the record as the "judgment" (the preliminary or interlocutory judgment) not only constituted such a judgment, without which, manifestly, the court would have no authority or jurisdiction to make the final order of condemnation, but also embraces findings of all the essential facts and conclusions of law. But, assuming this to be true, we need not, in view of the conclusion arrived at herein upon another consideration presented here, stop to inquire whether the document referred to might legally stand for the findings, conclusions of law, and judgment, or whether on an appeal involving the merits of the controversy, the cause would be reversed for the sole and single reason that the findings of fact and conclusions of law are not separately stated, as required by section 633 of the Code of Civil Procedure, which is expressly made applicable to proceedings in condemnation by section 1256 of said Code. It might be that the provisions of section 4½ of article 6 of the Constitution would apply in such case. But, as stated, it is not necessary to consider this proposition. We think the cause may be disposed of on another ground.

It has been shown that one of the grounds upon which the motion for a new trial was based and pressed was that the evidence was insufficient to justify the verdict. The order granting the motion is in the following language:

"The motion of the defendants in the above-entitled case for a new trial coming on regularly to be heard upon the bill of exceptions, the notice of intention to move for a new trial and the judgment roll, and the motion having been made upon all the grounds specified in said notice of intention and duly argued and submitted, and the court having considered the same, the premises considered, it is ordered that the said motion for a new trial be, and the same is hereby granted."

[3] It will at once be observed that the order granting the new trial does not indicate the particular ground, or grounds, of the several set forth in the notice of intention upon which it was made, and it is the settled rule in California that where the trial court, in granting a motion for a new trial, does not expressly limit the order granting such motion to any particular ground of those stated, it is the duty of the appellate court to sustain it, if it can be upheld upon any ground embodied in the notice of intention. *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Newman v. Lossing*, 141 Cal. 175, 74 Pac. 761; *Bouchard v. Abrahamson*, 4 Cal. App. 430, 88 Pac. 383; *Briggs v. Hall*, 20 Cal. App. 372, 129 Pac. 288; *Shea-Bocqueraz Co. v. Hartman*, 20 Cal. App. 534, 129 Pac. 807.

[4] There is in this case a pronounced conflict in the evidence upon the question of the value of the property sought to be condemned. Indeed, there is such a wide variance between the witnesses for the respective parties upon the question of value that it may properly be assumed, and, in fact, we are authorized to presume, in support of the order appealed from, that one of the reasons impelling the trial court to allow the motion for a new trial was that the evidence was insufficient to justify the verdict. We may dispose of the case upon this presumption, and, therefore, consideration of other grounds and points involving an attack upon certain rulings of the court may be waived.

It is a well-established rule that:

"The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion." *Domico v. Casassa*, 101 Cal. 413, 35 Pac. 1024; *Warner v. Thomas, etc.*, *Works*, 105 Cal. 411, 38 Pac. 960; *Eidinger v. Sigwart*, 13 Cal. App. 667, 676, 110 Pac. 521.

See, also, *Bjorman v. Ft. Bragg R. R. Co.*, 92 Cal. 500, 28 Pac. 591; *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114; *Bledsoe v. Decrow*, 132 Cal. 312, 64 Pac. 397.

[5] We shall not undertake herein a detailed statement of the testimony upon the question of value. It is conceived to be sufficient to say: (1) That the witnesses for the defendants, having previously declared that they were familiar with the properties of the Erie Mining Company and were familiar with mining operations and the use and the methods of the impounding of water for power

purposes, and the availability of the properties of the company for the development and use of water for such purposes, and that the mine itself contained large deposits of rich and paying gravel, expressed the opinion that the value of all said properties was from \$100,000 to \$125,000 for all the purposes to which they may properly and profitably be adapted; that the right of way sought by the plaintiff herein, if allowed, would completely destroy and render valueless all the properties of said Erie Company and the defendants, and render them worthless for any practical mining or water power purpose, to which they are alone adapted. (2) That the witnesses for the plaintiff, having first shown themselves to be experts upon mining and kindred subjects, including the development and conservation of water for power purposes, and that they were familiar with the properties of the Erie Company, and knew their value for any purpose to which they might with profit be put, testified that said properties were absolutely valueless for any purpose.

Thus it will be observed that, as stated, there is a wide diversity of opinion between the witnesses as to the value of the property sought to be taken. In fact, it has no value whatever, according to the plaintiff's witnesses. But, that it has some value is evidenced by the verdict, and, although it is not so made to appear in the record, it is stated in the brief of counsel for the plaintiff that the jury viewed and inspected the property sought to be condemned.

[6] But, at all events, it was, as above pointed out, entirely within the discretion of the trial court, in considering the motion for a new trial to determine whether the verdict, in so far as it concerned the value of the property sought to be appropriated, was justified, or reasonably in accord with the evidence upon that question.

[7] The order granting the motion is evidence of the opinion of the court that the verdict as rendered was not, in respect of value, justified, and, as it cannot upon the record as we must view it justly be said that the court, in granting the motion on that ground, abused its discretion, it cannot be disturbed.

[8] We have not, in considering this record, overlooked the analytical examination of the testimony presented by the defendants by counsel for the plaintiff in their briefs and their argument following therefrom against the reliability of said testimony. But this court cannot weigh the testimony of witnesses. This was, obviously a matter entirely for the jury in the first instance and then for the court when considering the motion for a new trial. The defendants appeared to have sufficiently qualified themselves to express opinions on the value of the property. This is all that this court need know, and whether the testimony given by

them after so qualifying themselves was entitled to great or little or no weight is a matter with which, as suggested, a reviewing court, in the very nature of the case cannot concern itself. These observations apply as well to the argument that, since the only testimony in favor of the defendants upon the question of value was given by the defendants themselves, who were directly interested in the result of the trial, such testimony is not dependable.

[9] The defendants were competent to testify as witnesses in their own behalf, and whether they were influenced in their opinions on value by the fact that they were interested parties was a matter entirely for the determination of the jury and the trial court.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

ENNIS v. BANKS et al. (No. 13921.)

(Supreme Court of Washington. April 6, 1917.)

1. PHYSICIANS AND SURGEONS \S 18(9)—MALPRACTICE—QUESTION FOR JURY—CAUSE OF DEATH.

In action for malpractice for death resulting from administering soft toast and poached egg to a typhoid patient, where death might have resulted either from that cause or from the disease itself, or from removing the patient, the question of cause of death was for the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 44.]

2. PHYSICIANS AND SURGEONS \S 18(9)—MALPRACTICE—QUESTION FOR JURY—CHANGE OF DIET.

The question of whether a physician was guilty of malpractice in changing diet of a very sick typhoid patient from beef broth to soft toast and poached egg, where patient seemed to be improving on the former diet, and where there was medical testimony showing that the toast and egg diet was improper, under the circumstances, was for the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 44.]

3. APPEAL AND ERROR \S 1195(1)—LAW OF THE CASE—DECISION ON FORMER APPEAL.

Decisions on a former appeal become the law of the case, and will govern when the same questions arise on a retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4661.]

4. TRIAL \S 251(8)—MALPRACTICE—INSTRUCTIONS—GENERAL NEGLIGENCE.

Instructions given in a malpractice case, regarding general negligence not within the issues and in effect stating that for want of ordinary care, the physician was liable, where the only act complained of was a change of diet, and the jury were led to believe they could consider any other negligent acts, *held* erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 593.]

5. TRIAL \S 252(8)—MALPRACTICE—INSTRUCTIONS—ADVANCED STATE OF PROFESSION.

Instruction given in a malpractice case that in determining ordinary skill and diligence, the "advanced state of the profession at the time" might be considered *held* misleading; there being no evidence relating thereto, and the

jury could not consider that fact in determining the physician's want of care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 603.]

6. PHYSICIANS AND SURGEONS \S 14(2)—MALPRACTICE—FOLLOWING PARTICULAR SCHOOL OF MEDICINE.

Each school of medicine is entitled to practice in its own way, and because one does not use the other's methods will not constitute malpractice, and it is enough if the treatment employed has the approval of at least a respectable minority of the profession, since only the exercise of reasonable skill, learning and diligence is required.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 22.]

7. TRIAL \S 252(8)—MALPRACTICE—INSTRUCTIONS—INAPPLICABLE TO ISSUE.

Instruction given in a malpractice case that "when a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one shown was the operative agency in bringing about the result" *held* erroneous, since there was no accident and patient died either from disease, removal, or malpractice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 603.]

8. APPEAL AND ERROR \S 263(1)—EXCEPTION TO INSTRUCTIONS—NECESSITY.

Although an instruction was not as complete as it should have been, it will not be considered, where no exception was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1516.]

9. PHYSICIANS AND SURGEONS \S 18(10)—MALPRACTICE—INSTRUCTION.

In an action against a physician for malpractice in changing diet of a typhoid patient, substance of proper instructions covering the issues stated.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 45.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Lewis, Judge.

Action by Cora S. Ennis against Rush Banks and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Geo. C. Congdon, of Seattle, and Herman Allen, of Chehalis, for appellants. C. D. Cunningham and Wedmark & Grimm, all of Centralia, for respondent.

MOUNT, J. This is the second appeal in this case. When it was here before, on appeal from a judgment for \$1,500 in favor of the plaintiff, it was reversed because of the admission of certain evidence, and the giving of certain instructions to the jury. It was remanded for a new trial. 88 Wash. 237, 152 Pac. 1037. The issue in the case was whether the appellant was guilty of malpractice in giving a diet of poached egg and toasted bread to a typhoid fever patient. Upon this issue, the case was retried to the court and a jury, and resulted in a verdict and judgment against the defendants for \$9,000. The defendants have appealed from that judgment.

[1, 2] The facts are substantially as fol-

lows: The defendant Rush Banks is a physician, practicing his profession in the city of Centralia. On December 22, 1914, he was called to the home of Donald Ennis, whom he found suffering with typhoid fever. On the next day, Mr. Ennis was removed to a hospital, which was being conducted by Dr. Banks. From that time on until January 14, 1915, Mr. Ennis was treated by Dr. Banks. Mr. Ennis was attended by a nurse, who cared for him constantly during that time. From the time Mr. Ennis was taken to the hospital until the 14th day of January, 1915, he was a very sick man. Gas would accumulate, almost constantly, in his stomach and bowels, and, on the 11th day of January, Dr. Banks called in consultation two other doctors. It was then concluded that an operation was necessary, in order to remove the gas, but Mrs. Ennis, the plaintiff in this case, and the patient's mother would not consent to the operation. The patient, before this time, had been fed upon a milk diet, which apparently did not agree with him, and subsequently had been fed upon beef broth. This latter diet seemed to agree with him better than the milk diet. On the 12th and 13th of January, the patient seemed to be somewhat improved. On the 14th, the doctor caused to be prepared a slice of bread, about three inches square, from which the crust was removed, and which was toasted, soaked in boiling milk until the toast was soft; and an egg was broken in some hot water and allowed to coagulate. This egg was then placed upon the soft toast, and this toast and egg was given to the patient. The patient ate about two-thirds of the egg and toast. About three hours thereafter, an eggnog was prepared, and given to the patient. When the eggnog was administered, the patient vomited the eggnog and the egg and toast which had been administered three hours before. The patient, at that time, seemed to be worse. Mrs. Ennis then became dissatisfied with the treatment of Dr. Banks, and ordered the patient removed to her home, about a block away. The patient was taken from his bed at the hospital, carried out of the room, down a flight of stairs to the street, placed on a stretcher, and taken home. Another doctor, practicing the homeopathic method of medicine, was called, and treated the patient two days, when he died, on January 16, 1915. Afterwards, this action was brought. The basis of the action is malpractice, alleged to be the cause of the death of Donald Ennis, by reason of the feeding of the poached egg and toast.

The appellants very forcibly argue that the trial court should have granted a judgment notwithstanding the verdict, for the reason that the verdict of the jury is based upon speculation and conjecture, and that if the appellant, Dr. Banks, made any mistake, it was an error of judgment, and not a negligent act. But for the fact that these same questions were presented upon the other ap-

peal, and the case was remanded for a new trial, we are satisfied that there is merit in these points.

The evidence very conclusively shows that the patient, during the time he was under the charge of Dr. Banks, was a very sick man. Whether the feeding of this toast and egg was the primary cause of his death is open at least to very serious doubt. The evidence shows that Mr. Ennis' death may have been due to one of three causes: First, the disease itself; second, the carrying of the patient from the hospital to another place; and, third, the change of diet. But, under the rule established when the case was here before, we are constrained to hold it was for the jury to determine which of these causes resulted in his death, and whether the doctor, in administering the toast and egg, as hereinbefore stated, was guilty of malpractice. The evidence upon this trial was substantially the same as upon the other trial, and upon the other appeal we used this language:

"The appellant urges that the trial court should have granted his motion for a nonsuit at the close of the respondent's case. There was, however, evidence that the toast and egg diet was, under the circumstances, an improper treatment. Dr. Blair so testified. This was evidence that the specific act alleged was negligent, and this evidence should have been submitted to the jury under proper instructions."

[3] So it is plain that the facts shown upon this trial were sufficient to take the case to the jury. In other words, that statement of the rule became the law of the case. *Pattison v. Seattle, Renton & Southern Railway Co.*, 64 Wash. 370, 116 Pac. 1089, 35 L. R. A. (N. S.) 660; *Provine v. City of Seattle*, 70 Wash. 326, 126 Pac. 927; *Hendrickson v. Simpson Logging Co.*, 77 Wash. 276, 137 Pac. 444; *City of Chehalis v. Cory*, 64 Wash. 367, 116 Pac. 875.

[4, 5] The appellants also argue that the instructions were erroneous. The court, after defining the issues, instructed the jury as follows:

"(Instruction No. IV. With the issues thus made up I instruct you that before the plaintiff can recover in this case she must establish by a preponderance of the evidence that the defendant Rush Banks was either guilty of negligence in the treatment of the case, or that he did not exercise ordinary skill and competence in the treatment thereof, and that such negligent acts or omissions or said want of proper and ordinary skill, or both, were the proximate cause of the death of said Donald Ennis.)

"Instruction No. V. The court instructs you that the implied contract of the defendant when he assumed charge of the treatment of plaintiff's injuries was that he possessed and would employ in the treatment of the case such reasonable skill and diligence as were ordinarily exercised in his profession at and in localities similar to that in which he practiced, by the members as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession at the time and in places similar to Centralia. *Regard is to be had in determining this ordinary skill and diligence to the improvement and advanced state of the profession at the time the case was treated.*

"Instruction No. VI. I charge you, members of the jury, that when the defendant Rush Banks undertook as a physician and surgeon to treat

and care for Donald Ennis, the deceased husband of the plaintiff, the law required of him no more than that he should exercise that degree of knowledge, skill, and care which physicians and surgeons practicing in this vicinity and similar localities ordinarily possess (and if you should find from the evidence that in his treatment of the said Donald Ennis, the defendant Rush Banks did not use and exercise as high a degree of knowledge, skill, and care as is ordinarily used and possessed by physicians and surgeons practicing in this and similar localities, and as a result thereof the said Donald Ennis was injured and from those injuries he died, your verdict must be for the plaintiff).

"Instruction No. VII. While it is true that a physician is not liable for what is commonly called a mistake in judgment or a mistake in diagnosis (yet if you should find from a fair preponderance of the evidence in this case that the defendant Rush Banks failed to exercise his best judgment, that is, the judgment which a physician of ordinary care, skill, and intelligence in the same or similar localities would have used under like circumstances, then I charge you that the defendant cannot escape his negligent acts because of his failure to use his best judgment, and if you should find that the act, or acts, of the said defendant Rush Banks when he failed to use his best judgment, as I have hereinabove instructed you, approximately contributed to the death of Donald Ennis, then your verdict must be for the plaintiff)."

The parts of these instructions which we have indicated by parentheses should not have been given, because they are instructions upon general negligence, not within the issues of the case, and, in effect, tell the jury that, for want of ordinary care generally, the doctor is liable. When the case was tried before, the court admitted evidence of other acts, which were claimed to be negligent, and which acts were not within the issues, and, for that reason, the case was reversed. The act constituting malpractice, complained of here, and the only act complained of, was the administering of milk toast and soft-poached egg. No other negligence is alleged. Under these instructions, which we have quoted above, the jury were led to believe that they might consider any acts of negligence, or general acts, and make up their verdict outside the issues of the case. Instruction No. V, above quoted, is subject to another objection, namely, that the part underscored, to the effect that in determining ordinary skill and diligence, the advanced state of the profession at that time might be considered. There was no evidence in the case that there was any advanced state of the profession at that time, and, of course, the jury were not authorized to take that fact into consideration in determining want of care on the part of the physician. That part of the instruction was misleading.

[6, 7] The court, at instructions Nos. X and XI, used the following language:

"Instruction No. X. You are instructed if you should find from a fair preponderance of the evidence that the defendant Rush Banks did not follow such established practice in the case and treatment of the deceased, Donald Ennis, as is recognized, adopted, and followed by other physicians and surgeons in good standing, practicing in this and similar localities, and as a result thereof the said Rush Banks contributed or has-

tened the death of Donald Ennis, then I charge you that he is liable to the plaintiff in damages. "Instruction No. XI. In connection with the last-mentioned instruction I desire to charge you that the rule of law is in such cases as this, as follows: 'When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption in the absence of showing of other cause that the one known was the operative agency in bringing about the result.'"

These instructions were clearly erroneous. The evidence in this case shows that Dr. Banks was known as an allopathic doctor. One of the doctors who testified that the treatment given by Dr. Banks was improper was a physician of the homeopathic school of medicine, and admitted that his system of treatment was different from that of Dr. Banks, or the allopathic school.

The first of these last-quoted instructions told the jury, in substance, that, if Dr. Banks did not follow the practice recognized by other physicians in good standing in that locality, and, as a result thereof, hastened the death of Donald Ennis, the respondent was entitled to recover, which, of course, is not the law. Each school of medicine is entitled to practice in its own way, and because one does not use the methods of the other is no reason for holding the one for malpractice. In the case of *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079, we said:

"It has been the uniform holding of this court that where doctors of equal skill and learning, being in no way impeached or discredited, disagree in opinion upon a given state of facts, that the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. This is the logic of *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131. It is enough if the treatment employed 'have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment.' *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31. The reason is obvious. A man who is called upon to exercise professional judgment is bound only to the exercise of reasonable skill and learning and diligence. 'He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession' (citing authorities)."

So, it is apparent that this instruction was erroneous and misleading.

Instruction No. XI, to the effect that, when a cause is shown that might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one shown was the operative agency in bringing about the result, had no place in this case. There was no accident here. Mr. Ennis either died from natural causes, or from being removed from the hospital, or he died from malpractice. There was no occasion, therefore, for giving this instruction.

[8] The appellants contend that instruction No. XX, with reference to the effect to be given to the testimony upon hypothetical questions, was erroneous. We are satisfied that the instruction was not as complete as it should be, but, since no excep-

tion was taken to the instruction, we shall not consider it further.

[8] The instructions, taken as a whole, were voluminous. There were 24 instructions, covering 11 pages of typewritten matter. They were long and cumbersome, and had a tendency more to mislead, than to enlighten, the jury. The issue in the case was a simple one. It ought to have been covered in, at most, a half dozen instructions, to the points that unless the jury could say that the patient died solely from the effect of the soft toast and egg which was administered to him, and not from the disease, or from being carried from the hospital, at the stage of the disease he was then in, there could be no recovery; that there could be recovery only in case the giving of the toast and egg was the prime cause of the patient's death, and the doctor knew, or should have known, such result would follow. Before the respondent would be entitled to recover for malpractice, the jury ought to have been told that they must find that Dr. Banks did not use his judgment in administering the egg and toast, under the circumstances, but was guilty of malpractice in administering such toast and egg at that time. A few simple instructions upon these questions, in addition to those ordinarily given, were sufficient for the jury.

The appellants further argue that the court erred in not granting a new trial because of misconduct of the jury, in arriving at their verdict, for the reason that the result of the verdict was a quotient verdict, and not based upon the judgment of the jurors, and for the further reason that the verdict and judgment are excessive. There is merit in both these contentions, but, in view of the fact that a new trial must be granted for errors in the instructions, we shall not discuss them.

The judgment is reversed, and the cause remanded for a new trial.

HOLCOMB and PARKER, JJ., concur.
ELLIS, C. J., concurs in the result.

CALHOUN, DENNY & EWING v. WHITCOMB. (No. 12844.)

(Supreme Court of Washington. April 3, 1917.)

En Banc. Appeal from Superior Court, King County.

On rehearing. Judgment affirmed.

For former opinion, see 90 Wash. 128, 155 Pac. 759.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 128, 155 Pac. 759; and, for the reasons there stated, the judgment is affirmed.

NEWMAN et al. v. VAN NORTWICK et al. (No. 13856.)

(Supreme Court of Washington. April 3, 1917.)

1. MORTGAGES. §468(2)—FORECLOSURE—RECEIVERSHIP PROCEEDINGS.

Where the mortgage did not provide for deficiency judgment, but the property was worth less than the face of the mortgage, and the receiver appointed had received in rents almost the amount of delinquent taxes which then drew a 15 per cent. penalty, order discharging receiver was properly refused; the mortgagees being entitled to his services for preservation of the estate.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1375.]

2. MORTGAGES. §473—FORECLOSURE—RECEIVERSHIP PROCEEDINGS.

It was proper for the receiver to apply for permission to pay the taxes from the rents.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1384.]

3. MORTGAGES. §478—MAINTENANCE OF PROPERTY—"NECESSARY CHARGES"—"CURRENT EXPENSES."

Taxes upon mortgaged property are "necessary charges" and "current expenses" properly chargeable against the income of the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1384.]

For other definitions, see Words and Phrases, First and Second Series, Current Expenses; Necessary Charges.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Suit by Hannah Hill Newman and others against Bernice Van Nortwick and others. From an order refusing to discharge a receiver, the defendants appeal. Affirmed.

Weter & Roberts, of Seattle, for appellants.
Walter S. Fulton, of Seattle, for respondents.

MORRIS, J. [1] Appeal from an order refusing to discharge a receiver in an action to foreclose a mortgage on real property. The conceded facts are: That the property is worth less than the amount due on the mortgage; that there is no provision for any deficiency judgment; that the receiver has collected \$1,465.01 from rentals; that the property is well rented and well cared for; that the owners of the property had permitted delinquent taxes to accumulate to the sum of \$1,712.09 now drawing interest at 15 per cent. per annum. With these facts before it the lower court denied a motion to discharge the receiver. As stated by appellant, the question to be determined is:

"Are delinquent taxes alone a proper ground for the appointment of a receiver in the foreclosure of a mortgage, it being admitted that the security is inadequate to discharge the debt and that no deficiency judgment can be taken?"

Our answer is in the affirmative. Appellant relies upon *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715. Nothing in that case sustains the negative of appellants' query. It was there held that insufficiency of property to pay a mortgage indebtedness was not of itself sufficient ground for the appointment of a receiver in order to secure the applica-

tion of rentals to the discharge of a mortgage debt.

[2] The same rule was recently announced in *Gerber v. Heath*, 92 Wash. 519, 159 Pac. 691, where it was said that the property, and not its income, is the security for the mortgage debt, and that the mortgagor is under no obligation to apply the income of mortgaged property to either the principal or interest of the mortgage debt. That would mean, as applied to this case, that notwithstanding the inadequacy of the property to pay the mortgage debt, the receiver could not apply the rentals in payment of the amount due on the mortgage. We have no doubt such is the law in this state, but that is not the case here. So far as the record goes there is no intention on the part of the receiver to apply the rentals to the debt. He did, however, ask leave to apply the rentals in payment of the delinquent taxes. This, we think, was a proper request. In *Euphart v. Morrison*, 89 Wash. 311, 81 Pac. 695, and *Collins v. Gross*, 51 Wash. 516, 99 Pac. 573, it was held that it is the proper procedure in this state under section 741, Rem. Code, to appoint a receiver where it appeared that the property was in danger of being lost or materially injured or where in the discretion of the court it was necessary to secure ample justice to the parties. Such was the situation here. When taxes on real property are permitted to become delinquent and accumulate an added burden of 15 per cent. per annum, there is danger of material injury to the property. The payment of taxes is necessary to the preservation of the property. "Equity devolves it upon him who has the use; not to pay them is waste." The failure of the owners of this property to pay the taxes and allow them to become delinquent "was casting a burden upon the mortgaged estate which equity demanded the mortgagor should discharge." *Winkler v. Magdeburg*, 100 Wis. 421, 76 N. W. 332. In an earlier case, *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124, the same court said it was a want of good faith on the part of a mortgagor not to pay the taxes upon mortgaged property and yet remain in possession and appropriate all the profits of the property to his own purpose. Similar observations are made in *Philadelphia Mortgage & Trust Co. v. Oyler*, 61 Neb. 702, 85 N. W. 899, and in *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Neb. 804, 66 N. W. 843. In *Gerber v. Heath*, supra, after saying that the mortgagor was under no obligation to apply the income of the property to the payment of the mortgage debt, the court added that "a receiver is sometimes appointed to collect the income of property and apply the same to necessary charges pending the foreclosure proceedings in order to protect the property," continuing to the effect that current expense is a proper charge against the income of property.

[3] It will hardly be questioned but that taxes are "necessary charges" and "current expense" upon real estate. Under his contract the mortgagee could only look to the property for the satisfaction of the debt, but he had the right to look to all of the property and the right to have it preserved in the hands of a receiver and not have it subject to a paramount lien against which he could not protect himself without the payment of additional money upon a property already overburdened with debt. The law gave this right and equity will preserve it. The mortgagor could not add to the burden assumed by the mortgagee in payment of the mortgage debt. Neither could the mortgagee add to the burden of the mortgagor in obtaining a satisfaction of that debt.

Judgment is affirmed.

ELLIS, C. J., and CHADWICK, MAIN, and WEBSTER, JJ., concur.

STATE ex rel. SWAN v. SUPERIOR COURT
FOR CLARKE COUNTY et al. (No.
14027.)

(Supreme Court of Washington. April 4, 1917.)

MANDAMUS ~~6~~44—CHANGE OF VENUE—DIS-
CRETION OF COURT.

Rem. Code 1915, § 209—1, provides that no judge of a superior court shall try any proceeding when it is shown that such judge is prejudiced against any party or attorney in such cause, and that he shall forthwith transfer the action to another department of the same court, or call in a judge from some other court or apply to the Governor to send a judge to try the case, or if the convenience of the witnesses or the ends of justice will not be interfered with by such course, and the action is of such character that a change of venue may be ordered, he may send the case for trial to the most convenient court. Relator, who was attorney in three cases, filed affidavits that the presiding judge of the superior court of the county was prejudiced against him, whereupon the presiding judge entered orders changing the venue to another county, the orders reciting that the convenience of witnesses and the ends of justice would not be interfered with. Held that, as there are several alternatives given the presiding judge in case of prejudice, his discretionary ruling that a change of venue to another county would not interfere with the convenience of witnesses or defeat the ends of justice cannot, there being only one department of the superior court in the county, be interfered with by a writ of mandate to vacate the order.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 90, 91.]

Department 2. Original application by the State of Washington, on the relation of Edgar Swan, for a writ of mandate against the Superior Court for the State of Washington, and County of Clarke, and R. H. Back, Judge thereof. Application denied.

Henry Crass and Edgar Swan, both of Vancouver, for relator. James O. Blair and L. M. Burnett, both of Vancouver, for respondents.

MOUNT, J. This is an application for a writ of mandate to require the judge of the superior court of Clarke county to vacate certain orders, changing the venue in three cases from Clarke county to Cowlitz county, for trial.

It appears that the relator is an attorney of record in three cases, which were pending in Clarke county. He filed affidavits therein to the effect that the trial judge of Clarke county was prejudiced against him, and that he could not obtain a fair trial therein. There was no showing that the convenience of witnesses required the trial of the cases in Clarke county. After the affidavits were called to the attention of the judge of the superior court for Clarke county, he made orders changing the venue of the cases, and recited in the orders that the convenience of witnesses and the ends of justice would not be interfered with thereby. The relator now seeks, by this writ of mandate, to vacate the orders changing the venue.

Some preliminary questions are presented by the respondent which are not necessary to be noticed, because we are satisfied that the application for the writ should be denied upon its merits. In the case of *State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 928, a like order was made by the superior court of Jefferson county. When that case came on for hearing in the superior court of King county, the relator there denied the right of the court to proceed, and insisted that the case should be remanded to Jefferson county until the prejudice of the judge, the character of the action, and the convenience of the witnesses, could be heard and determined in that court. We there held that:

"With the change of venue, the superior court of King county acquired full and complete jurisdiction, and if for any cause the case should not be tried in King county, the statutory remedies for changing the venue are still open to the relator."

The difference between this application and that is the relator here is seeking to have the orders for change of venue vacated, while in that case the relator sought to have the case remanded from King county to Jefferson county. The statute (Rem. Code, § 209—1) provides that:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the Governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court."

In *State ex rel. O'Phelan v. Superior Court*, 88 Wash. 669, 153 Pac. 1078, in construing this statute, we said:

"Under the statute, when the affidavit is called to the attention of the judge, he may do one of four things: (a) Transfer the action to another department of the same court; (b) call in a judge from some other court; (c) apply to the Governor of the state to send a judge to try the case; and (d) if the convenience of witnesses, or the ends of justice will not be interfered with, and the action is of such a character that a change of venue may be ordered, he may send the case for trial to the most convenient county."

It appears that there is but one department of the superior court for Clarke county. Hence the trial court, when the affidavits were filed, might exercise its discretion upon one or the other of the three alternatives. There was no showing that the convenience of witnesses would be interfered with, and for that reason the court exercised its discretion, and changed the venue to the most convenient county. It is clear that the extraordinary writ of mandamus, or prohibition, will not lie to control the discretion of the trial court. *State ex rel. Mill Co. v. Superior Court*, 9 Wash. 673, 38 Pac. 155; *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

In *State ex rel. Howard v. Superior Court*, 88 Wash. 344, 153 Pac. 7, we held that this statute did not authorize a change of venue in a criminal case, because the person accused of crime has a right to a trial by a jury of the county in which the crime is alleged to have been committed, but in civil actions it is plain that the statute applies, and where there is no showing to the effect that the convenience of witnesses requires the case to be tried in the county in which it is brought, then the trial court may exercise its discretion and change the venue, in lieu of calling in another judge, or calling upon the Governor for another judge.

The relator, therefore, is not entitled to the writ. The application is denied.

ELLIS, C. J., and HOLCOMB, PARKER, and FULLERTON, JJ., concur.

STATE ex rel. ROBERTSON et al. v. SUPERIOR COURT FOR SPOKANE COUNTY et al. (No. 13983.)

(Supreme Court of Washington. March 31, 1917.)

1. LANDLORD AND TENANT ↔ 291(1)—ACTIONS—UNLAWFUL DETAINER—JURISDICTION.

Notice to pay rent, or quit, in an action of unlawful detainer, is a matter to be proved at trial, but unnecessary to give court jurisdiction, which depends on service of summons.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217—1222, 1226, 1227.]

2. PROHIBITION ↔ 8(3)—ADEQUATE REMEDY BY APPEAL—UNLAWFUL DETAINER.

Where trial court has jurisdiction in unlawful detainer, this court will not issue a writ to

prohibit entry of judgment; there being a complete remedy by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 7-19.]

Department 2. Application for prohibition by the State, on the relation of Frederick C. Robertson and another, against the Superior Court for Spokane County, C. C. Upton, Judge pro tempore. Writ denied.

Robertson & Miller and Cordiner & Cordiner, all of Spokane, for relators. C. L. Shuff and Roy A. Redfield, both of Spokane, for respondents.

MOUNT, J. The relators seek a writ to prohibit the superior court of Spokane county from entering a judgment in an unlawful detainer action.

The facts, upon which the writ is sought, may be briefly stated as follows: The relators are tenants of certain real estate in Spokane county belonging to Ida A. Waterman. They have erected a building upon the leased premises. The stipulated rent thereon had not been paid for the months of February, March, April, May, and June of the year 1916. On the 15th day of July of that year the relators had closed their residence in the city of Spokane, and moved to their summer residence in Idaho. Mr. Robertson, one of the relators, was at that time on an extended trip East. On the last-named date Ida A. Waterman, the owner of the premises, addressed a notice to the relators, notifying them that they were in default for the months named; that the total amount of rent, delinquent and overdue, was the sum of \$1,750; and the relators were notified to either pay the rent or to surrender possession of the premises within three days after the service of the notice. A copy of this notice was served on the subtenant and a copy was deposited in the United States post office at Spokane, addressed to the relators at their Spokane address. It was received by a keeper of the residence, and forwarded to Spirit Lake, Idaho, the place of the summer residence of the relators. This notice was not received by the relators until the 22d day of July. On the 20th day of July Ida A. Waterman brought an unlawful detainer action, and the summons in that action was served on the relators on the 21st day of July. Thereupon a writ of restitution was issued, and the leased property was taken possession of by Ida A. Waterman. The relators thereafter appeared in the action, issues were joined, and the case was tried to the court, findings were made in favor of the plaintiff, and the court was about to enter a judgment against the defendants there, whereupon they applied for this writ.

[1] It is contended by the relators that no sufficient service of the notice to quit was made upon them, and that therefore the trial court had no jurisdiction to enter a judgment against them in the unlawful de-

tainer action. It is not claimed that a proper service of summons was not made. It is apparent that the trial court had jurisdiction of the persons of the relators and of the property. The relators strenuously contend that the notice to pay rent, or quit, is necessary to give the court jurisdiction. It may be correct to say that, before an unlawful detainer action can be maintained, the notice to pay rent, or quit, must be served as required by statute, but the jurisdiction of the court to determine questions raised upon the trial of the unlawful detainer action does not depend upon the service of the notice to pay rent, or quit. Jurisdiction depends upon the service of the summons in the action. When the summons is properly served, the court undoubtedly has jurisdiction of the persons. The notice to quit, or pay rent, served in the manner required by law, is a fact to be established upon the trial before the the court may pronounce a judgment of unlawful detainer. The service of such notice is not in itself jurisdictional, but, like any other fact, must be proved. If the court should enter a judgment without the necessary facts being proved, the judgment would be erroneous, but the fact that an erroneous judgment may be entered or is threatened to be entered is not ground for a writ of prohibition.

This court has held in a long line of cases that before an extraordinary writ of mandamus or prohibition will be entertained it must appear that the court is not only acting without jurisdiction, but that there is no adequate remedy by appeal. *State ex rel. Townsend Gas & Electric Light Co. v. Superior Court of Jefferson County*, 20 Wash. 502, 55 Pac. 933; *State ex rel. Carrau v. Superior Court of King County*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Miller v. Superior Court for Spokane County*, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925; *State ex rel. Calhoun v. Superior Court for King County*, 86 Wash. 492, 150 Pac. 1168; and a large number of cases intervening between those decisions.

[2] It is apparent from the admitted facts in this case that the trial court not only had jurisdiction of the persons and of the subject-matter, but it is also apparent that there is an adequate remedy by appeal from the judgment which the court may render in the unlawful detainer action.

This court has issued extraordinary writs in cases where there was a want of jurisdiction, and in cases where there was no adequate remedy by appeal, but the rule of the court has been that the writ will not issue where the court is acting within its jurisdiction, and there is a complete and adequate remedy by appeal, as there is in this case.

It is therefore unnecessary to review the cases cited by the relators; for we are satisfied that the writ should not issue under any rule of this court.

The questions of fact presented upon the

application for this writ may all be reviewed upon appeal from the judgment which may be entered in the unlawful detainer action.

The writ is therefore denied.

ELLIS, C. J., and HOLCOMB and PARKER, JJ., concur.

PICARDO et ux. v. PECK. (No. 13800.)
(Supreme Court of Washington. April 3, 1917.)

1. JUDGMENT \S 12 — JURISDICTION — ACTION BY ATTORNEY IN FACT — DEATH OF PLAINTIFF.

A judgment in an action commenced by an attorney in fact of another person who had been judicially determined to have died prior to the commencement of the action was void; jurisdiction of the parties being essential, and jurisdiction of plaintiff being as necessary as jurisdiction of defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 15-21, 58, 159.]

2. JUDGMENT \S 485 — CONCLUSIVENESS — COLLATERAL ATTACK.

A void judgment may be attacked collaterally as well as directly.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 919.]

Department 1. Appeal from Superior Cour, King County; Boyd J. Tallman, Judge.

Action by Pasquale Picardo and wife against H. E. Peck. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. A. Schneider, of Seattle, for appellant. Horace A. Wilson, of Seattle, for respondents.

MORRIS, J. [1, 2] Appeal from a judgment in favor of respondents in an action to quiet title. Respondents' title is based upon two deeds from the sheriff of King county in mortgage foreclosure proceedings. Appellant claims under an assignment of a deficiency judgment against one of the defendants in the foreclosure proceedings on which execution had been levied on the property and a certificate of sale issued to appellant. The suit in which the deficiency judgment was entered under which appellant claims was for unlawful detainer and rent commenced by one Slepman under a power of attorney from one Elsholtz. This action was commenced March 10, 1909. Subsequently in probate proceedings upon the estate of Elsholtz it was judicially determined that Elsholtz died November 15, 1907. The evidentiary effect of this probate decree was determined by this court in *Wagner v. Alderson*, 91 Wash. 157, 157 Pac. 476, where it was held the decree adjudging the fact and time of Elsholtz's death was prima facie proof of the facts determined in a subsequent action brought against the administrator in his representative capacity. This case is determinative of this appeal in so far as the death of Elsholtz was a decisive feature, as there was no showing below which would to any extent overcome this prima facie proof. If

Elsholtz was dead, the judgment under which appellant claims was void for want of jurisdiction of the parties. In order to give that jurisdiction which in all cases is essential to the validity of a judgment there must be jurisdiction of the plaintiff as well as of the defendant. Lack of jurisdiction in the one case is as fatal to the jurisdiction of the court as lack of jurisdiction in the other. It matters not that such judgment is attacked collaterally. "A void judgment may be attacked collaterally as well as directly. It is entitled to no consideration whatever in any court as evidence of right." *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064.

It follows that the judgment must be and is affirmed.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

PERLUS v. MARKET INV. CO. (No. 13846.)
(Supreme Court of Washington. April 3, 1917.)

1. PLEADING \S 180(2) — COMPLAINT — AMENDMENT — "DEPARTURE."

Where the complaint was based on breach of alleged written contract of lease, a reply stating that the written contract had been abrogated and an oral one entered into, was a departure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Departure.]

2. PLEADING \S 180(2) — COMPLAINT — AMENDMENT — "DEPARTURE."

Where the complaint set up breach of alleged written lease and the fact of payment of money under the lease seeking return of such money paid, a reply, showing abrogation of the written lease and complete settlement of the claims of the parties, was a departure.

3. PLEADING \S 236(1) — AMENDMENT — DISCRETION OF COURT.

Whether an amendment to the complaint is to be allowed is within the discretion of the court, and where the plaintiff sought to amend his reply, after his third amended complaint and after having set up inconsistent causes of action in his reply, it was not an abuse of discretion to refuse the amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601.]

4. SET-OFF AND COUNTERCLAIM \S 11 — FAILURE OF PLAINTIFF'S CAUSE OF ACTION.

Where a lessee sued for breach of the alleged written lease, and the lessor counterclaimed for rent, whereupon the plaintiff replied, setting up an abrogation of the lease which constituted a departure, the lessor could not press his claim based on the lease.

[Ed. Note.—For other cases, see Set-off and Counterclaim, Cent. Dig. \S 14.]

5. COSTS \S 182 — ALLOWANCES — COPIES OF DOCUMENTS.

The cost of preparing certified copies of city ordinances is not a taxable item, unless the ordinances were in issue under the pleadings so as to make them admissible in evidence.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 714.]

6. COSTS \S 173 — COSTS TAXABLE — PLATS.

The cost of preparing plats is not a taxable item of costs in the first instance.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 708-711.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by A. Perlus, doing business as the Vashon Poultry Company, against the Market Investment Company, wherein defendant filed a cross-complaint. Judgment for defendant on the complaint and against it on the cross-complaint, and both parties appeal. Affirmed.

Geo. B. Cole and John Wesley Dolby, both of Seattle, for appellant. Shepard, Burkheimer & Burkheimer, of Seattle, for respondent.

HOLCOMB, J. The third amended complaint in this case alleges, in substance, that appellant was engaged in selling poultry, game, feed, etc., in stalls No. 1520-1522, pursuant to the terms of a written lease entered into on February 13, 1913, between respondent as lessor and appellant as lessee; that while such lease was in full force and effect respondent, in order to induce appellant to cancel the same and enter into a lease for stalls E, F, and G, which were distant some 150 feet northwesterly of where appellant was then located, and as a part of the consideration therefor, orally promised and agreed that, if appellant would surrender stalls 1520-1522, and enter into a new lease for stalls E, F, and G, respondent would fill out the floor space between these two sets of stalls by farmers with their produce for sale, and that there would be a passageway from Pine street in such farmers' sections and stalls in close proximity to stalls E, F, and G; that appellant, relying on these promises, did cancel his former lease and enter into a new lease for stalls E, F, and G, beginning on September 1, 1913, and moved his business thereto; that respondent failed to keep his promise and fill the intervening stalls, to appellant's damage in the sum of \$5,000. The second cause of action sets forth a claim for \$259 on account of expenditures made by appellant in improving and equipping the stalls covered by the written lease, and the third cause of action alleges the payment of \$255 by appellant in accordance with the terms of the lease, for which amount a recovery is claimed.

Respondent answered by admitting the execution of the lease and denying the other material allegations of the complaint; and by way of counterclaim, alleged that appellant had been in possession of the leased premises for a period of 33 months; that by the terms of the lease the rent for this period was the sum of \$2,805; that appellant had paid thereon only \$205, leaving a balance due respondent of \$2,600, for which amount with interest respondent asked judgment against appellant. In reply to this counterclaim it was alleged that the lease was abrogated by the contracting parties, and respondent agreed to charge appellant \$20 per

month as rent until respondent should comply with its agreement to fill the intervening stalls; and that, after appellant had paid rent for such stalls as above referred to and respondent had still failed to fulfill its agreement, it was then agreed that no rent at all should be charged appellant until such fulfillment had taken place.

After one witness had been sworn at the hearing of this cause, respondent moved for judgment on the pleadings for several reasons, among others, that the reply was inconsistent with and constituted a departure from the complaint. Appellant was refused leave to amend the reply, and a judgment on the pleadings was entered in respondent's favor, although it was not allowed to prove its counterclaim, as the trial court was of the opinion that it had been waived. Both parties have appealed.

It is asserted by appellant that the lower court erred in striking out several portions of the complaint, but from an examination of such stricken parts we are of the opinion that they were immaterial, and in any event there is no showing that appellant was in any manner materially prejudiced thereby.

[1] Appellant strenuously urges that the reply is not a departure from or inconsistent with the complaint, and that it was error to grant a judgment on the pleadings for this reason. An examination of the pleadings discloses that the complaint is based on the breach of an alleged oral agreement entered into between the parties prior to or contemporaneous with, and became a part of the consideration of, the lease of September, 1913. As alleged in the complaint, the validity and existence of the lease is the basis of the action, for assuredly it must fall if no lease in fact exists. The reply alleges the abrogation of this lease, a subsequent agreement which reduced the rent from \$85 a month to \$20 a month, and a still later agreement by the terms of which appellant was to pay no rent at all until respondent's oral agreement was fulfilled. It is appellant's position that the cross-complaint of respondent was a separate and distinct action by respondent against appellant, and that the reply dealt solely with a defense to the counterclaim; that the designation of their last pleading as a reply was in reality a misnomer, and that it should have been designated as an answer to the cross-complaint. There is no contention that the affirmative relief asked for in respondent's answer was not a proper counterclaim as provided by statute, and so was not a separate cause of action, for it simply asked for the rent as provided for in the terms of the lease pleaded in the complaint. In any event in one breath appellant swears that there was a lease in full force and effect and an oral agreement, which was part of the consideration of the lease, for the breach of which he attempts to collect damages, and in the next breath swears that the lease did

not exist, but a settlement was made by which he was to occupy the premises for nothing till respondent's promises were fulfilled. It is so obvious that these statements are inconsistent that it needs no further discussion. The lease either did or did not exist; and if the sworn statements made in the reply are taken as true, the lease was abrogated, and there could be no cause of action as alleged in the complaint. The reply, being absolutely inconsistent with the allegations of the complaint, constitutes a departure.

[2] We also deem this reply a departure from the third cause of action which demands the return of the \$255 paid on the lease, for, as shown by the reply, a complete settlement was made at the time the subsequent agreements were made, and as nothing was said therein about the sum, it is to be presumed that it was to be retained by respondent as part of the settlement.

[3] Nor are we inclined to hold erroneous the refusal of the trial court to allow appellant to amend its reply, as this was the third amended complaint. The allegations of the reply and complaint are so inconsistent that one or the other cannot be true, and, judging from the colloquy between the court and counsel for appellant, there is considerable ground for belief that the allegations of the reply are the truth. Whether an amendment should be allowed is in the discretion of the trial court, and, when these facts are taken into consideration, we are not prepared to say that this discretion has been abused, as there must be some time when the issues are to be settled.

[4] This conclusion also disposes of respondent's cross-appeal, for if appellant is unable to prevail because respondent insists that the averment in the reply—that the written lease was abrogated—constituted a departure, it is apparent that respondent could not press a claim which is based on such written lease and is an attempt to collect the monthly rentals provided for therein. If in considering appellant's claim the lease is held to be abrogated, it must also be held canceled when considering respondent's claim, and respondent undoubtedly so understood when it moved for judgment upon the pleadings.

[5, 6] Finally it is urged that the trial court erred in refusing to strike from respondent's cost bill the last two items of \$7 and \$1.20, respectively, for preparing "plats to be used in trial" and certified copy of city ordinances, since there was no evidence taken at the trial, the person who made the plats is unknown, the plats and ordinances were never filed, and the question of plats and ordinances is not raised by the pleadings. Obviously the cost of preparing the certified copy of the city ordinances would not be a taxable item, unless the same were

at issue under the pleadings so that they might be introduced in evidence. As no ordinances were pleaded, either verbatim or by their title and date of passage, they could not have been introduced; so this item should be stricken. In regard to the other item, it is not necessary to discuss what effect the introduction of no evidence in the case including the plats has on the question of whether it is a proper item of costs, as the weight of authority seems to be that the cost of preparing plats is not a taxable item of costs in the first instance, and for this reason it also should have been stricken from the cost bill. *Weiss v. Meyer*, 24 Or. 108, 32 Pac. 1025; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Ela v. Knox*, 46 N. H. 18, 88 Am. Dec. 179.

The judgment is affirmed, with the above costs stricken. Since appellant has recovered a more favorable judgment, neither party shall recover costs on appeal.

ELLIS, O. J., and MOUNT and PARKER, JJ., concur. FULLERTON, J., concurs in the result.

LA BRECK et al. v. CITY OF HOQUIAM. (No. 13710.)

(Supreme Court of Washington. April 3, 1917.)

1. MUNICIPAL CORPORATIONS ⇨757(1) — STREETS—DUTY TO IMPROVE.

A city need not improve all streets platted within its boundaries, but only those which are necessary, and the city is itself the judge of such necessity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1591.]

2. MUNICIPAL CORPORATIONS ⇨761(2) — STREETS—DUTY TO REPAIR.

While a city must keep streets improved by it in reasonable repair, it is not responsible for defective sidewalks built by private individuals for private convenience on unimproved streets in outlying districts of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1506.]

3. MUNICIPAL CORPORATIONS ⇨761(2) — STREETS—INJURY ON PRIVATE PLANKWAY.

A city is not liable for a pedestrian's injuries caused by a defective private plankway constructed without permission or notice to the city by an individual on an unimproved street, irrespective of whether the city knew, or should have known, such walkway had been constructed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1603.]

4. MUNICIPAL CORPORATIONS ⇨761(2)—“PRIVATE WALK”—WHAT CONSTITUTES.

A plank walkway, constructed by property owner on an unimproved street for convenience in reaching his premises, is a “private walk,” although a mail carrier and some neighbors frequently used it in going to his house.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1603.

For other definitions, see *Words and Phrases*, First and Second Series, Private Way.]

Department 2. Appeal from Superior Court, Grays Hr. County; Ben Sheeks, Judge.

Action by E. G. La Breck and others against the City of Hoquiam. Judgment for plaintiffs, and defendant appeals. Reversed and cause ordered dismissed.

Sidney Moore Heath and Jas. P. H. Callahan, both of Hoquiam, for appellant. F. M. Cook and T. H. McKay, both of Aberdeen, and W. H. Abel, of Montesano, for respondents.

MOUNT, J. The plaintiffs brought this action to recover damages for personal injuries alleged to have been received by Mrs. La Breck, by reason of falling upon a defective walk. On issues joined, the case was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiffs for \$1,625.

The facts, as shown by the evidence, are substantially as follows: Pacific avenue, in the city of Hoquiam, is a street 80 feet in width. This street runs east and west. The center of the street, to the width of 20 feet, was paved to the east line of Twenty-Ninth street, which runs north and south. Twenty-Ninth street is 60 feet wide, and has never been improved, or used as a street, except 16 feet in width in the center, at its crossing with Pacific avenue. At about the center of Twenty-Ninth street, a plank road, 16 feet in width, extended eastward on Pacific avenue. About 100 feet east of the west line of Twenty-Ninth street, Pacific avenue was closed. One Mr. Price resides upon property owned by him at the southeast corner of Twenty-Ninth street and Pacific avenue. In the year 1914, he obtained permission from the city to lay a plank roadway on the east side of Twenty-Ninth street, in order that he might haul wood to his property. This plank roadway was built of boards, 16 feet in length, which had been used previously upon Pacific avenue. Twenty-Ninth street had not been improved by the city, except upon the west side, where a sidewalk had been laid, running to the south. Mr. Price, for his own convenience, and without permission from the city, placed two boards across Twenty-Ninth street, over a ditch, or slough, on the west side of Twenty-Ninth street, to the sidewalk on the opposite side of the street from his house. These two boards were 2½ inches thick, by 12 inches wide, and 20 feet long. They were placed about 4 inches apart. Where the boards crossed the ditch, they were about 3 or 4 feet above the bottom of the ditch. In order to brace these boards, Mr. Price drove a stake into the mud, under each board, at about the middle of the ditch, so as to prevent these boards from sagging when they were walked upon. These boards were laid across Twenty-Ninth street at about the line of the intersection of Pacific avenue where that avenue was unimproved. Mrs. La Breck, on August 5, 1915, in the daytime, went to Mr. Price's house, and, in crossing these boards, one of them swayed down

with her, she fell and caught her leg between the boards, and was injured. This action was brought on account of that injury. At the close of the respondents' evidence, the appellant moved the court for a directed verdict, and, at the close of all the evidence, renewed the motion. These motions were denied, and the case was submitted to the jury.

The principal, and, we think, the controlling question in the case is whether the city is liable for a walkway built by a property owner, for his private convenience, upon an unimproved street. The respondents rely upon the cases of McKnight v. Seattle, 39 Wash. 516, 81 Pac. 998, and Tait v. King County, 85 Wash. 491, 148 Pac. 586. In the first of these cases, we said:

"The walk was not built by the city, but by private parties, and it is claimed that there was no sufficient evidence to the effect that the city had accepted it as a part of the highway. But this street was a public street of the appellant city, opened to the use of the public, and the city was bound to keep it in a reasonably safe condition for use by the public. If this sidewalk rendered the street unsafe, it was the duty of the city to remove it or repair it, and its duty in this regard is not affected by the fact that it may not have constructed the walk."

In that case, it appears that the street was open to the use of the public. In this case, Twenty-Ninth street, south of Pacific avenue, was not open to the public. It was an unimproved street, so far as the city was concerned, except upon the west side, where there was a sidewalk. A large ditch ran south, down near the middle of this street. Mr. Price, on the opposite side of the street, had obtained permission from the city to build a private roadway to his woodhouse on the east side of the street. There is no claim, in the evidence, that Twenty-Ninth street, south of the improved part of Pacific avenue, was open to the public for any purpose. Apparently it was an unusable street, and not open to the public. The case of Tait v. King County, supra, was a case where a roadway had been adopted by the county, and had been permitted to become out of repair. We held, in that case, that it was the duty of the county to repair the road, and that the failure of the county so to do constituted negligence, for which a recovery might be had. Neither of those cases decide the point presented here.

The respondent relies upon a number of cases from other jurisdictions, generally to the effect that a municipality is liable for the defective condition of a street or sidewalk, even though built by private parties. We think there can be no doubt of this rule, in so far as it applies to streets which have been thrown open to public use, or have been improved by the city, or by private owners along the street, at the direction of the city. In the case of *Saulsbury v. Village of Ithaca*, 24 Hun (N. Y.) 12, where one Turner, who owned a house and lot on the east side of Brindley street, had built a sidewalk to enable his tenants to go thereby to and from,

State street, which sidewalk was elevated 3 or 4 feet above an old cellar or excavation, into which the plaintiff fell, after first falling upon the sidewalk, and where it was conceded that the city never aided or contributed to the building, maintenance, or repair of the sidewalk, or any other sidewalk at that place, and had never ordered the sidewalk to be built, the court said:

"Under these facts, the defendant claims that the building of a sidewalk along Brindley street was within its discretion, and that it is not liable in a private action for omission to exercise discretionary functions for the benefit of the public at large. Or, to use the language of Judge Dillon (2 Mun. Corps. § 753): 'Where a corporation has a discretion as to the time and manner, of making corporate improvements, * * * a private action will not lie against the corporation for omitting or neglecting to act; and the reason is that such powers are conferred to be exercised or not, as the public interest is deemed to require.'"

Then, after determining that the power to improve streets is of a judicial nature, the court said:

"The act of Turner in building a walk to his tenant house from state street was his act, and not the act of defendant. It was not an obstruction to the street calling for the action of the trustees to remove it. It was not an illegal use of the street on the part of Turner to which defendant could object. If the work was unskillfully or negligently done, or if it was allowed to remain in an unsafe condition, it was not the fault of defendant. The defendant is not connected with the walk so as to create any liability by reason of its condition. A liability for negligence can be established against a municipality only by showing negligence, actual or constructive, by its officers or authority. In this case it is not shown."

And in *Hiller v. Village of Sharon Springs*, 28 Hun (N. Y.) 344, in referring to the *Saulsbury Case*, above quoted, it was said:

"In *Saulsbury v. Ithaca*, above cited, it was claimed to be the absolute duty of the village to build sidewalks wherever it had streets. And this, it was held, was incorrect. Nor can it be said that whenever a street is opened in any part of a city or village, no matter how unfrequented, if an occupant lays down stones or planks along the side of his property, the city or village at once becomes liable to keep them in repair. In country roads there are usually no sidewalks; and evidently it must be left to the judgment of the municipal authorities to say where sidewalks are needed, and how wide they should be. But if an occupant has constructed a suitable sidewalk, not for his own use merely, but for the public, and if, for many years, the public have used it, then the municipal authorities may be considered to have practically adopted it."

In *Crawford v. Mayor, etc., of City of Griffin*, 113 Ga. 562, 38 S. E. 988, where a private property owner built a bridge from the street to the sidewalk, over a gutter or ditch, for his private convenience, and where the bridge was afterwards removed by the city, and replaced, the court said:

"It was a mere private bridge, built solely for the convenience of an individual. It was not shown that the city had built it. The mere fact that the city took it up and replaced it, and made some repairs upon it, did not constitute it a public bridge. The city being under no duty to keep up the bridge, its failure to do so

was not negligence, and the plaintiff could not recover."

In the case of *Ruppenthal v. City of St. Louis*, a Missouri case, 190 Mo. 213, 88 S. W. 612, where an 80-foot street had been improved, and opened to the public, in the center thereof, and the city had not invited the public to use the strips on each side of the street, it was held that the city was not liable for injuries to a pedestrian caused by a defect in a sidewalk, which was constructed without the consent or authority of the city, the condition of which walk was such as to indicate to a person exercising ordinary care that the sidewalk portion of the street had not been improved.

[1, 2] It is not the duty of cities to improve all streets which are platted within the boundaries thereof. It is the duty of cities to improve only streets which are necessary, and to the extent necessary. The city, of course, is the judge of such necessity. It would be impossible for any city, except one which is thickly populated, to improve all its streets within its boundaries. Where a city has improved its streets, of course it must keep such streets in reasonable repair for the uses for which they are intended. Sidewalks, built by the city, or under the direction of the city, must, of course, be kept in reasonable repair, but the city ought not to be held responsible for sidewalks, or walks of any kind, built by private individuals, for private convenience, in remote, outlying districts of the city, without notice to the city.

[3] In this case, there is no dispute as to the fact that Twenty-Ninth street, south of Pacific avenue, was in a remote part of the city. That portion of the street was not open to public use. It had never been improved. A large ditch, or slough, ran down near the center of the street. Mr. Price, who owned property on the east side of the street, had obtained permission from the city to build a private way from Pacific avenue to the rear of his premises, for the purpose of hauling wood to his premises. Without the permission of the city, and without notice to the city, he had built this two-board plankway, for his own convenience, across the street, to connect with the sidewalk on the opposite side. It was not shown that the city had notice that this walkway was built, or being used. It is claimed that the walkway had remained there for a sufficient length of time that the city should have known it, but the mere fact that the city should have known, or the fact that the city did know it, did not render the city liable, because the walk was a private way, for the private convenience of Mr. Price, who built it.

[4] It is true, one or two neighbors, and the mail carrier, testified that they had used the walkway. Probably other persons had used it for the purpose of going to Mr.

Price's home, as the respondent herself did, but clearly that would not render this private way a public use. It was a private walk for a private person, notwithstanding the fact that a few neighbors frequently used it to go to Mr. Price's house.

We are satisfied, for these reasons, that there was no liability on the part of the city, and that the motion for a directed verdict should have been sustained.

The judgment is therefore reversed, and the cause ordered dismissed.

ELLIS, C. J., and HOLCOMB, FULLERTON, and PARKER, JJ., concur.

DROPPELMAN v. ILLINOIS SURETY CO. (No. 13801.)

(Supreme Court of Washington. April 3, 1917.)

1. CORPORATIONS §630(6)—DISSOLVED CORPORATION—ACTION—JUDGMENT.

A personal judgment cannot be obtained against a corporation that has been dissolved.

2. CORPORATIONS §691—FOREIGN CORPORATIONS—DISSOLUTION—ACTION—"PROCEEDING QUASI IN REM."

An action, asking for the appointment of a receiver of a foreign corporation which has been dissolved, a receiver having been appointed in its home state, is a "proceeding quasi in rem," and cannot be maintained, a defendant to proceed against being essential except in proceedings strictly in rem.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2673-2677.

For other definitions, see Words and Phrases, Second Series, Quasi in Rem.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by M. J. Droppeleman against the Illinois Surety Company. From an order appointing a permanent receiver and overruling defendant's motion to quash, it appeals. Reversed.

Piles & Howe and Earl M. Brockett, both of Seattle, for appellant. Tucker & Hyland, of Seattle, for respondent.

HOLCOMB, J. This is an action to recover a personal judgment against appellant, a foreign corporation, for professional services rendered by the assignors of respondent. The appointment of a receiver was also asked, to take charge of all properties in the state of Washington belonging to appellant. A temporary receiver was appointed, which appointment was later made permanent, although appellant appeared specially and moved to quash the order appointing the temporary receiver, and objected to his being made permanent on the ground that the court was without jurisdiction. This appeal is taken from the order making the receiver permanent and overruling appellant's motion to quash.

There is a jurisdictional question at the

very threshold which is determinative of this appeal. It appears that prior to the appointment of the receiver in this action a receiver had been appointed for appellant in its home state, Illinois, and by the laws there in force the receiver acquired absolute title to the property of appellant as fully as though he had been an assignee thereof and was in fact a quasi assignee or successor. *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328. It is respondent's contention that, because of appellant's nonexistence it had no right to appear and defend, and that the proper procedure would be for the Illinois receiver to intervene and set up the defense interposed here by appellant. While we agree with respondent that appellant no longer has any existence, we do not agree with the conclusion derived therefrom that it is incumbent on the Illinois receiver to intervene. Since respondent has instituted this action she must first acquire jurisdiction, and by advancing the argument that the receiver was the only proper person to defend this action because of appellant's nonexistence, she has, in the same breath, admitted that she has sued a corporation which has been dissolved and no longer exists, and, judging from the Illinois statutes, there can be no doubt of its nonexistence.

[1, 2] Since it is well settled that a personal judgment cannot be obtained against a corporation that has been dissolved (*Martine v. American Union Fire Ins. Co.*, 216 N. Y. 183, 110 N. E. 502), it is apparent that this action must fail unless an action asking for the appointment of a receiver is in the nature of an action in rem to such an extent as to give the court jurisdiction by reason of the property being within the jurisdiction, even when there has been no service on the owner of the property sought to be turned over to the receiver. The most favorable construction on this question that respondent can contend for is that this is an action quasi in rem, which, according to the cases of *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497, and *Freeman v. Alderson*, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372, differs from actions which are strictly in rem, in that in the former there must be service on the defendant. In a proceeding such as this the great object of the remedy is to secure the property or thing in controversy, so that it may be subjected to such order or decree as the court may make. It is held to be a proceeding quasi in rem. 34 Cyc. 18.

Respondent relies largely upon the statement contained in the case of *Pacific Coast Coal Co. v. Esary*, 85 Wash. 448, 450, 148 Pac. 579, 580, as follows:

"The rule sustained by the authorities is that the courts of one state have no jurisdiction to appoint a receiver for a corporation organized under the laws of another state, but that a receiver may be appointed for the assets of the foreign corporation which are within the partic-

ular state where the action is brought, and these may be subjected to the claims of the creditors."

In that case the corporation was one organized in a foreign state, and it was denied that the courts of this state had power to appoint a general receiver therefor, but it was stated that they did have power to appoint a receiver of the assets of that corporation in this state. The distinction between that case and this is that, in that case, the foreign corporation had not been dissolved and was not in process of dissolution, and jurisdiction to appoint a receiver of the local assets could be obtained in quasi in rem proceedings.

In *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 91, 111 Pac. 1073, a case not cited by either party hereto, it was said:

"The complete dissolution of a corporation destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man. It cannot thereafter be made a party defendant in an action brought by a receiver to set aside a fraudulent conveyance of its assets. The necessary effect of the dissolution of a corporation is to abate all actions pending against it at the time of its dissolution, in the absence of a saving statute providing for the continuation of such actions. Decisions are sometimes met with which hold in general terms a doctrine opposed to that just stated. Thus, according to an early decision in Missouri, the expiration of the charter of a corporation does not affect legal proceedings already commenced against it. It is enough to say of such decisions that unless they can be justified by some local statute, they were badly decided. It follows that a judgment rendered against a corporation after it has been dissolved is voidable, in the sense that it will be reversed on error, or that the execution of it will be perpetually enjoined. Other authoritative courts have gone to the length of holding that a judgment, rendered against the corporation after its dissolution, although in an action previously commenced, is not merely erroneous, but absolutely void." 10 Cyc. 131 et seq."

And, to apply the same rule applied in the case just quoted:

"A defendant to proceed against is * * * essential, * * * except where the proceedings are strictly in rem."

The defendant against whom respondent proceeded does not legally exist.

There was no service on the Illinois receiver who was the owner of the property at the time of the commencement of the action, and the action must therefore fail. Reversed.

ELLIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

STRAFFORD et ux. v. NORTHERN PAC. RY. CO. et al. (No. 13655.)

(Supreme Court of Washington. April 3, 1917.)

1. WITNESSES \S 209—CONFIDENTIAL COMMUNICATIONS—PHYSICIANS—RESULT OF EXAMINATION.

Rem. Code 1915, § 1214, providing that "a regular physician or surgeon shall not without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient which was necessary to enable

him to prescribe or act for the patient," does not preclude a physician from testifying without consent of patient, in a personal injury suit by her, as to matters learned in an examination, for the express purpose of testifying, after she had ceased to be his patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771.]

2. WITNESSES \S 287(4)—CROSS-EXAMINATION—REDIRECT EXAMINATION—SCOPE.

Where a part of a conversation is elicited on cross-examination, the whole conversation may be gone into on redirect examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1002.]

3. TRIAL \S 132—ARGUMENT OF COUNSEL—WITHDRAWAL OF STATEMENT.

In a personal injury suit, failure of the court to sustain an objection and instruct the jury to disregard a remark of counsel in argument, to effect that it was not proven that plaintiff sat up in bed on the third day, because "we were not allowed to introduce the evidence," is harmless, where counsel, in response to objection, withdraws statement and asks jury not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 815, 316.]

4. APPEAL AND ERROR \S 1068(1)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

Where, in a personal injury suit by a passenger, the jury returns a verdict in his favor, he cannot complain of error in giving or refusing instructions none of which are upon the amount of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Trial, Cent. Dig. § 525.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by William Strafford and wife against the Northern Pacific Railway Company, Jacob Heether, and another. From a judgment giving partial relief against the named defendants, plaintiffs appeal. Affirmed.

Govnor Teats, Leo Teats, and Ralph Teats, all of Tacoma, for appellants. Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for respondents.

PER CURIAM. Annie Strafford, the wife of the other plaintiff William Strafford, while a passenger upon a train of the Chicago, Milwaukee & St. Paul Railroad Company, was injured through the collapse of a trestle on the railway line over which a train of that company was passing. The trestle, which was built above the intersecting line of the Northern Pacific Railway, had been weakened by the projecting boom of a crane carried as freight on a train of the latter railway company. The boom had swept against the supports on one side of the trestle and broken and shattered them so as to render the trestle insufficient to support the weight of a train. Some eight or ten minutes after the happening of this incident, a passenger train of the Chicago, Milwaukee & St. Paul Railroad approached the trestle, and, either not heeding or not seeing a brakeman of the Northern Pacific Railway, who was

attempting to flag it, passed on to the trestle, which immediately gave way under the weight of the train. Mrs. Stafford was a passenger in the day coach of the passenger train, which was crushed when precipitated to the ground below. She was thrown face downward, and was struck by some object falling or pressing upon the pelvic region of her back, inflicting internal injuries, from which she suffered considerable pain and ensuing weakness. She was transported by the Chicago, Milwaukee & St. Paul Road to the Tacoma General Hospital, where she was attended by the company's physicians, Drs. Willard and Shafer. After being treated at the hospital for 3 weeks and 2 days, she was cared for by her sister in South Tacoma for about 5 months, when she was removed to her home on a farm near McKenna. Mrs. Stafford and her husband brought an action for the recovery of damages for personal injuries, joining as defendants both of the railroad companies and Jacob Heether, conductor on the Northern Pacific's freight train which had caused the injury that weakened the Milwaukee trestle. A general verdict was returned, finding in favor of the Chicago, Milwaukee & St. Paul Railroad Company and finding against the Northern Pacific Railway Company and Jacob Heether, fixing the amount of the recovery against the last-named defendants in the sum of \$1,650. From the judgment thereon plaintiffs appeal, assigning numerous errors which it was claimed were prejudicial because tending to influence the jury to reduce the amount of their award.

[1] The first contention of the appellants is that there was error in permitting Drs. Willard and Shafer, who were respondents' physicians furnished by them to care for Mrs. Stafford, to testify to what they learned respecting the nature of her injuries. The objection is founded on the statute (Rem. Code, § 1214), which provides:

"A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient."

A careful examination of the record, however, at the places pointed out by the appellants does not disclose that the doctors were asked or permitted to testify as to any information acquired by them while attending the appellant as her physicians or surgeons. Dr. Willard was asked to describe, and did describe, the nature and extent of the examination he made while the appellant was a patient in the hospital under his care, but was expressly warned by counsel not to state what he found as the result of his examination, and heeded the admonition. After he had answered counsel's questions he was asked and stated that he had made two subsequent examinations of the appellant, not as her physician or surgeon or for the purpose of treating her, but for the purpose of enabling him to testify as to her condition. As

to discoveries made at these examinations he was permitted to testify fully. Clearly this was not error. As to these examinations he was as competent to testify as any other physician or surgeon would be under the same circumstances; the fact that he had previously treated her did not preclude him from testifying to matters he had subsequently learned as to her condition under circumstances not precluding his right to testify. In order to render a physician incompetent, the information which he is called upon to disclose must have been acquired while he was attending the patient in a professional capacity for the purpose of treating her ailments. There is no privilege when the examination is made by the physician for the express purpose of publishing the results; such, for example, as testifying in an action for personal injuries. There was therefore no error committed in the admission of the doctor's testimony.

The same is true of the testimony of Dr. Shafer. While he had formerly treated the appellant in a professional capacity, he testified to no condition the knowledge of which was acquired by him while so treating her. He also subsequently examined her under circumstances similar to those related of Dr. Willard, and testified to conditions learned at such examination. The statutory rule was not violated in permitting him so to do. *State v. Winnett*, 48 Wash. 93, 92 Pac. 904.

[2] A contention is also made in this connection that the court erred in overruling objections to the redirect examination of Dr. Willard as to the conversations between him and Mr. Teats, of counsel for appellants. But the record discloses that appellants had elicited a part of the conversation on cross-examination, and that respondents on redirect examination merely went into the whole of the conversation. This they were entitled to do.

[3] The next contention is that the court erred in not sustaining an objection to the argument of respondents' counsel questioning the right of appellants to object to Drs. Willard and Shafer testifying in the case, and in refusing to instruct the jury to disregard it. The following appears in the record:

"Mr. Quick (arguing to the jury): Mr. Teats criticizes us because we stated that we would show that Mrs. Stafford got up on the third day, but that we did not prove it. We expected to show that the plaintiff sat up in bed on the third day, but we did not, and you know why we did not, and at whose instance we were not allowed to introduce the evidence. Why were not Dr. Willard and Dr. Shafer permitted to testify (interrupted)—"

"Mr. Teats: We object to that line of argument. In the first place, Dr. Shafer did testify, and in the next place, under the statute he is absolutely precluded from making such argument."

"The Court: I am not certain that the decision goes that far. The plaintiff may have an exception. Proceed."

"Mr. Quick: If counsel objects, I will withdraw that statement and ask the jury not to consider it."

We think the error, if any, was harmless in view of the action of counsel in withdrawing his statement and asking the jury not to consider it. It was an admission that counsel was possibly overstepping the limits of proper argument as potent and emphatic as would have been an admonition of the court that it be disregarded.

[4] The last contention of appellants is that the court erred in giving certain instructions, six in number, and in refusing to give ten instructions requested by them. Conceding that there may have been error in the giving or refusing of any of these instructions, the error was without prejudice, inasmuch as they related to the liability of the respondents Northern Pacific Railway Company and Jacob Heather and the verdict was against these defendants. None of them bore upon the amount of the recovery. In the case of *Peterson v. Wadley & Mt. V. R. Co.*, 117 Ga. 390, 43 S. E. 713, it was held:

"Where, in a suit against a railway company for damages, the jury returns a verdict in favor of the plaintiff, he cannot justly complain of an erroneous charge touching his right to recover, nor of any other error which did not operate to his prejudice."

See, also, *Sears' Adm'r v. Louisville & N. R. Co.* (Ky.) 56 S. W. 725; *Aris v. Mutual Life Ins. Co.*, 54 Wash. 269, 103 Pac. 50.

Finding no errors in the rulings of the trial court of which appellants can justly complain, the judgment herein is affirmed.

BERGEN v. LEWIS COUNTY. (No. 13917.)
(Supreme Court of Washington. April 3, 1917.)

1. COUNTIES ⇨210—ACTION AGAINST—DAMAGE FROM MAINTAINING FERRY.

The fact that Rem. Code 1915, § 951, allowing actions against counties "for an injury to the rights of the plaintiff arising from some act or omission," does not expressly mention damages from operation of a ferry, does not exclude such action, since section 5013, later enacted, authorizes counties to operate ferries; the former section being a general statute and applying to all acts or omissions of counties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 339, 340.]

2. APPEAL AND ERROR ⇨1050(2)—HARMLESS ERROR—IRRELEVANT EVIDENCE.

The admission of irrelevant or immaterial evidence, which was entirely harmless and of no consequence in the case, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154.]

3. APPEAL AND ERROR ⇨1053(3)—HARMLESS ERROR—EVIDENCE—CHANGE OF CONDITIONS AFTER ACCIDENT.

Admission of evidence that, after accident in driving upon a county ferry, chains were furnished to fasten boat to the bank was harmless; condition of fastenings not being claimed as negligence, but failure to use them, and the jury being instructed that the change was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Trial, Cent. Dig. § 977.]

4. EVIDENCE ⇨474(11)—OPINION EVIDENCE—OPERATION OF FERRY.

In action for damages resulting from maintenance of a county ferry, the opinion of persons using the ferry and of the builder as to result of driving thereon in particular ways was competent, being the results of their experience with the particular boat.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2206.]

5. TRIAL ⇨295(1) — INSTRUCTIONS — CONSTRUCTION—CONTEXT.

It is immaterial that words and sentences in an instruction, taken separately, do not state the law, where, construed with the context, they are correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by B. J. Bergen against Lewis County, Washington. Judgment for plaintiff, and defendant appeals. Affirmed.

O. A. Studebaker, of Chehalis, for appellant. Forney & Ponder, of Chehalis, for respondent.

MOUNT, J. The respondent, in May, 1915, lost a horse, some harness, and some seats from a wagon, which were precipitated into the Cowlitz river, while the respondent was endeavoring to cross that river upon a ferry. This ferry was operated as a free ferry by Lewis county. Respondent brought this action against the county to recover the value of the property, and, upon issues joined and trial of the case to a jury, recovered judgment against the county for \$225.

[1] The county has appealed from that judgment. The appellant argues that a demurrer should have been sustained to the complaint, for the reason that the county is not liable for damages resulting from the operation of a ferryboat by the county. The appellant contends that counties are not liable for wrongs committed in the exercise of their corporate powers, except by express legislative enactment, and that such legislative enactments must be construed strictly; that there is no statute in this state, which, strictly construed, authorizes an action for damages against a county in cases of this kind. The statute upon this subject (section 951, Rem. Code) is as follows:

"An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

This statute was originally passed in 1869. At that time there was no statute in this state authorizing counties to operate ferries; but subsequently, in the year 1895, counties were authorized to operate and maintain ferries. Section 5013, Rem. Code.

The appellant reasons that, because, at the time the statute above quoted was enacted, counties were not authorized to operate ferries, the subsequent passage of the act authorizing ferries did not render counties liable for the mismanagement of ferries, because the general act does not specifically mention ferries. We think there is no merit in this contention. Section 951, Rem. Code, above quoted, is a general section, and applies to all acts or omissions of the county. It is not limited to any particular subject. When the county was without authority to operate a ferry, of course, this section did not then apply; but, when the Legislature afterwards authorized counties to operate ferries, the act applied to ferries, as well as to every other endeavor operated or conducted by a county. It was not necessary for the Legislature to again say that, in the operation of ferries, counties should be liable for injuries to the rights of persons using such ferries, because that liability was already provided by a general statute. This court has held that counties are liable in damages for injury to the rights of persons, arising from acts or omissions of counties, where bridges were being operated, and where school districts were involved. See *Redfield v. School District No. 3*, 48 Wash. 85, 92 Pac. 770; *Howard v. Tacoma School Dist. No. 10*, 88 Wash. 167, 152 Pac. 1004, and cases therein cited. We are satisfied, therefore, that the court properly overruled the demurrer to the complaint.

Upon the trial of the case, it was conceded that the ferryboat was being operated by the county as a free ferry; that the respondent reached the ferry when the ferryman was on the opposite side of the river; that he signaled the ferryman to come and take him across. The ferryman came across, and respondent contends that the ferryman, when he arrived across the river, signaled the respondent to drive upon the ferryboat; that the respondent, at that time, was some 40 or 50 feet away, and the approach to the ferryboat was a steep down grade; that, when the respondent received the signal, he drove down the grade, and, as his horses stepped upon the ferryboat, it was pushed out into the stream, and the horses and wagon were precipitated into the river. It was denied by the appellant, upon the trial, that the ferryman had signaled the respondent to drive upon the boat; but it was claimed, on behalf of the county, that the respondent drove upon the boat before he had received any signal, in a careless and reckless manner, and before the ferryboat was fastened to the shore; that the respondent did not obey the direction of the ferryman, but, when his team was wholly upon the boat, and the wagon about half upon the boat, the respondent proceeded to back his horses, and thereby pushed the boat from the landing

into the stream, and caused his own injury.

[2] Upon the trial, a witness was asked: "Was there any skiff or any attending boat attached to the ferryboat, or any in close proximity to it?"

He answered:

"No, not that I saw. Q. Would you have seen them if they had been there? A. I probably would. Q. Was there any skiff or anything of that kind there available for use in time of emergency?"

This last question was objected to, but the objection was overruled, and the witness answered:

"There was a skiff on the other side of the river from where we were; yes, sir."

It is contended by the appellant that this evidence was erroneous. We do not see the relevancy of the evidence; but, even though it was irrelevant or immaterial, we think it was entirely harmless, and of no consequence in the case.

[3] It is next urged that the trial court erred in admitting evidence to the effect that, after the accident, the county furnished chains with which to fasten the boat to the bank. When the ferryman was upon the stand, he was asked this question:

"Did you, when you were running that boat, have chains furnished by the county to you to use?"

An objection was made to this question, and sustained. Then the following occurred:

"Q. Did you request the county commissioners to furnish you with any fastenings for the boat?"

There was an objection to this, and the court said:

"I don't think you can go into that while he was there. Q. Do you know when the county did furnish chains for the mooring of this boat?"

An objection was made to this, and overruled.

"A. Well, it was after I turned the boat over to Mr. Rose, after this accident happened. Q. Before that time, what means did they have for mooring the boat to the shore?"

An objection was overruled, and the witness answered:

"Well I had a piece of rope right there. Q. Furnished by whom? A. It was furnished by the county."

It is contended by the appellant that this evidence was erroneous, because it shows a change of condition after the accident. We think this evidence was not prejudicial, for two reasons: First. The character of the fastening was not claimed as negligence. Negligence was based upon the nonuse of the fastening provided. The rope furnished was not used. That fact was the negligence claimed. Whether the fastening provided was a chain or a rope would make no difference. Second. The court instructed the jury specifically to the effect that:

"Whatever acts have been done or means provided, if any, since such accident, by the defendant, toward making the boat more safe or more

secure, is no evidence of neglect at that time or prior thereto, and you are instructed not to consider the fact that other or different means have been adopted since such accident."

It follows that, if there was any error at all in the evidence offered, it was plainly cured by this instruction.

[4] The appellant argues that the court erred in admitting evidence of certain persons, who had crossed the ferry, as to the way the ferry was operated, and as to their judgment of safe operation. It is argued by the appellant that these witnesses were not experts, and that it was error, therefore, to receive their judgment. These witnesses testified that they had used this ferry upon different occasions. One of these witnesses had built the ferry himself. He testified as to the manner of its operation, and as to the result of driving upon the ferry in particular ways. We are satisfied that these witnesses were competent to give their opinions upon the results of their experience with this particular boat.

The appellant devotes several pages of its brief to a criticism of the instructions. It is not necessary, in this opinion, to set out these instructions. We have read them carefully, and find there is no merit in any of the assignments thereon.

[5] The appellant selects sentences and words from the different instructions, and argues that these sentences and words do not declare the law, but, taken in their setting, as used in the instructions, we are satisfied that they sufficiently stated the law to the jury.

We find no error in the record, and the judgment must therefore be affirmed.

ELLIS, C. J., and HOLCOMB, PARKER, and FULLERTON, JJ., concur.

GULE v. BYERS et al. (No. 13870.)

(Supreme Court of Washington. April 3, 1917.)

1. CONTRACTS §159—"RENEWAL."

In general, a "renewal," as applied to promissory instruments, means a change of something old for something new.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Renewal.]

2. CONTRACTS §159—"RENEWAL" AND "EXTENSION"—APPLICATION OF WORDS.

In general, the words "renewal" and "extension" apply to the particular debt and instruments between the same parties or their successors.

[Ed. Note.—For other definitions, see Words and Phrases, Extend; Extension.]

3. CONTRACTS §159—CONSTRUCTION—INTENTION OF PARTIES.

The words "renewal" and "extension" are not words of art, having no legal nor technical significance, and may mean whatever the parties intended when contracting.

4. MORTGAGES §552—CERTIFICATES OF SALE—TRANSFER—CONSTRUCTION.

A receiver of a bank owned a sheriff's sale certificate of mortgaged realty. An agent act-

ing for an undisclosed principal purchased the certificate from the receiver, acting through another, who had also some interest in the certificate, for \$20,000, taking assignment in blank. Out of the agreed purchase price of the certificate the agent who purchased retained \$1,000, and made an agreement with the receiver of the bank and the party acting for him that the \$1,000 might be held in escrow by the agent, and that so much of it as might be necessary might be used toward securing an extension of the mortgage on the land and a renewal of the mortgage in payment of any bonus or commission that the agent might be required to pay, but that any excess remaining between the amount necessary to negotiate a renewal or the extension of the loan should be paid to the receiver of the bank and the party acting for him. *Held*, that the language of the contract, construed in the light of all the existing circumstances and conditions of the parties, while not apt, did not require the re-establishment of the existing mortgage to the then mortgagee, or its extension of time of payment to the holder of the title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1580.]

5. MORTGAGES §268 — EXTINGUISHMENT — PURCHASE BY OWNER OF LAND.

Technically, the purchase of a former mortgage on land by the purchaser of a sheriff's certificate of sale thereof constituted an extinguishment of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 696.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by E. H. Gule against Ovid A. Byers and J. W. Godwin. From judgment for defendants, plaintiff appeals. Affirmed.

W. A. Keene and J. A. Gule, both of Seattle, for appellant. Byers & Byers, of Seattle, for respondents.

HOLCOMB, J. On the date therein stated the parties contracted in writing as follows:

"This agreement, made and entered into this 12th day of February, 1915, between Ovid A. Byers, party of the first part, and E. H. Gule and E. O. Patterson, parties of the second part, witnesseth: That one thousand dollars (\$1,000.00) of the purchase price of the certificate of purchase of lot one (1), block sixty-six (66), plat of A. A. Denny's addition to the city of Seattle, which the purchase money receipt provides shall be held in escrow, may be and is so held by the said first party, and said one thousand dollars (\$1,000.00), or so much thereof as may be necessary, may be used towards securing an extension of said mortgage and a renewal of said forty thousand dollar (\$40,000.00) mortgage in payment of such bonus or commission that first party may be required to pay, but any excess remaining between the amount necessary to negotiate a renewal or extension of said loan shall be paid to the parties of the second part, which shall be accomplished on or before August 16, 1915.

"In witness whereof, the parties hereto have set their hands and seals, the day and year first above written. Ovid A. Byers, [Seal.] [Signed] by Alpheus Byers. E. P. Patterson, [Seal.] [Signed] by E. H. Gule. E. H. Gule. [Seal.]

The agreement is loosely drawn. It appears from the evidence, however, that on and prior to that date one E. O. Patterson, as receiver of the Nye & Ormsby County Bank of Carson City, Nev., was the owner of a sheriff's sale certificate, as purchaser at

sheriff's sale of the real estate described in the agreement; that on about the date of the agreement, the respondent Byers, acting avowedly for an undisclosed principal, purchased the certificate of sale from Patterson, acting through appellant, who had also some interest in the certificate, for the agreed sum of \$20,000, taking an assignment thereof in blank (to an unnamed assignee); that out of the agreed purchase price of the certificate of sale, Byers retained the \$1,000, and at the same time entered into the agreement set forth; that afterwards the identity of the undisclosed principal for whom Byers was acting was disclosed to be respondent Godwin. The time for the redemption from sale by the execution debtors under the assigned certificate of sale expired on August 15, 1915. At the time of the sheriff's sale and at the time of the transactions between these parties, there was a prior existing mortgage on the real estate securing a note of \$40,000, held by the German Savings & Loan Society of San Francisco, Cal. This note was past due and the mortgage foreclosable. None of the parties to the agreement had the means to pay and satisfy it. Originally and until maturity this note bore interest at the rate of 6 per centum per annum, but after Patterson and appellant had obtained the certificate of sale some arrangement was made, whereby the mortgagee was paid interest at 7 per cent., but no definite extension of time was granted by the mortgagee, and the mortgage was merely continuing by forbearance on its part. It seems that the annual interest charge was apportioned and payable and was paid in monthly payments. After purchasing the certificate of sale and making the written agreement with appellant, Godwin attempted to secure an extension or renewal of the note and mortgage from the mortgagee, but was unsuccessful, the mortgagee refusing to grant such extension or renewal. He then borrowed the money from a bank by a personal loan, purchased the \$40,000 mortgage, and procured the assignment of it and the note from the German Savings & Loan Society, payment of which seems to have been exacted to be made in San Francisco, as the company required interest to be paid to the date of its receipt of the money in San Francisco, some three or four days after the transmission of the money from Seattle. Godwin then negotiated a real estate loan from the Burlington Trust Company of New York upon the real estate mentioned herein, together with some other real estate of his own, and thereby obtained the money with which to satisfy his personal loan from the bank which had been used to satisfy or purchase the former mortgage. In procuring the new loan he expended, for commissions \$787.45, for examination of abstract of title to the new mortgage's attorneys \$50, and he had previously paid out to the former mortgagee, by way of the extra 1 per cent. interest from the date of the

agreement with appellant to July 20th when he purchased the former mortgage, \$211.11; aggregating \$1,048.56. The agreement involved here makes no mention of the extra interest at 1 per cent. which appellant had agreed to pay to the mortgagee, and that mortgage on its face provided for interest only at 6 per cent. instead of 7 per cent. The \$211.11 was therefore a bonus charge for the forbearance of the mortgagee for that period of time, and one which appellant had initiated and knew would be exacted. On August 18, 1915, after the expiration of the time limit specified in the written agreement, appellant demanded of both respondents the payment of the \$1,000 left in escrow with Byers, on the ground that the loan referred to in the agreement "was never extended or renewed, but that Mr. Godwin has paid off the mortgage by taking an assignment of the same." The foregoing quotation fully expresses appellant's contention here. After refusal by respondents to pay the \$1,000, appellant procured an assignment to him from Receiver Patterson, and began his action to recover the money. The trial judge thought that it was "manifest on the face of the contract that the parties contemplated and understood that the purchaser of appellant's certificate of sale (which was subject to the \$40,000 mortgage) had to have a renewal of the loan, that he could not pay it," and that "the spirit and intent was that the purchaser had to have it stayed off." The court also considered that one could renew a loan which he owed one creditor with another creditor; that one could get an extension of an existing mortgage, or, if not, could renew the loan with some other lender. Upon these views the trial court refused the recovery to appellant.

[1] We admit some difficulty in correctly interpreting the agreement. Strictly speaking, the trial judge's statement of the meaning of a renewal or an extension may not be correct. In general a renewal, as applied to promissory instruments, means "a change of something old for something new; as the renewal of a note." *Bouvier's Law Dictionary*. It has been defined as meaning the re-establishment of a particular contract for a longer period of time; to restore to its former condition an obligation on which the time of payment has been extended. *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798. And it has been said that:

"To renew, in its popular sense, is to refresh, revive, or rehabilitate an expiring or declining subject, but is not appropriate to describe the making of a new contract or the creation of a new existence." *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15, 17 N. E. 396.

"Extension" has been defined as the granting of further time in which to do something which has been set down for a particular day; a postponement by agreement of the parties of the time set for acting; the allowance on the part of the creditor to a debt-

or of further time to pay a debt. Century Dictionary.

[2] In general these words apply to the particular debt and instruments between the same parties or their successors. But it has also been said that "renewal" means "the substitution of a new right or obligation for another of the same nature," and that "it is not a word of art; it has no legal or technical significance." Anderson's Law Dictionary. Sponhaur v. Malloy, 21 Ind. App. 287, 52 N. E. 245. In Lowry Nat. Bank v. Fickett, 122 Ga. 489, 50 S. E. 396, it was held that:

"There may be a change of parties. There may be an increase of security, but there is no renewal unless the obligation is the same. What makes the renewal is an extension of time in which to discharge the obligation. If the obligation changes, there can be no renewal, because there can be no such thing as the re-establishment of an old obligation by the creation of a new obligation different in character."

[3] Appellant would have the words "renewal" and "extension" applied strictly to the existing note and mortgage, as implying only that they were to be renewed and extended, and to nothing else. Since the words are not "words of art, and have no legal or technical significance," they may mean whatever the parties intended when contracting. Here there existed a prior and superior incumbrance, securing an indebtedness of \$40,000. It was past due and immediately enforceable. Neither party could then pay and discharge it. Neither party could be safe, and both might lose title to the real estate under the existing conditions. The appellant's assignor and himself sold their right, title, and interest to respondents subject to the incumbrance of \$40,000. \$1,000 was set aside from the purchase price to be paid for renewing a debt and incumbrance of \$40,000. It was assumed that the charges and expenses of resecuring, if possible, the existing loan would approximate \$1,000, or that sum would not have been deducted from the purchase money. The new loan cost no more. Appellant lost nothing. Neither party had any interest whatever in securing a renewal to or an extension by the same incumbrancer. Such renewal to or extension by that incumbrancer had not been theretofore granted, and therefore in all probability would not be. Appellant and his assignor were not in a position to expect it. Nor could they either gain or lose by the making of a new loan by another. The new loan was for the same amount.

[4] The language of the contract, construed in the light of all the existing conditions and the circumstances of the parties, while not apt, did not require the re-establishment of the existing mortgage to the then mortgagee, or its extension of time of payment to the holder of the title. Obviously that was known to be fairly impossible of obtaining.

[5] It is technically true as asserted by appellant that the purchase of the former mort-

gage by respondent Godwin constituted an extinguishment thereof. That, however, was merely a temporary expedient for the prevention of foreclosure and consequent loss of title. He merely proceeded with due business precaution and at the same time with all due diligence to protect his title. Had appellant and his assignor retained the sheriff's certificate of sale in themselves, they would, no doubt, have been compelled, if able, to proceed in the same way and take the same or similar steps to protect their interests.

All things considered, we conclude that the judgment of the superior court is right, and it is therefore affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concurring.

HORWITZ et al. v. UNITED STATES FIDELITY & GUARANTY CO.
(No. 13660.)

(Supreme Court of Washington. April 8, 1917.)

1. INSURANCE — 621 — BURGLARY INSURANCE — ACTION — PREMATURE CHARACTER.

Where a policy of burglary insurance provided that no suit should be brought until three months after the particulars of the loss, as required, had been furnished the company, particulars of loss were furnished January 9th, and the company notified insured by letter that it disclaimed liability and refused payment, making no objection to the form or sufficiency of the proofs, action on the policy was not prematurely commenced on March 9th; the only purpose of the provision being to give the company time to investigate a loss and the extent of its liability without being harassed with suit, so that the requirement was satisfied when the company announced its conclusion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543.]

2. INSURANCE — 559(1) — BURGLARY INSURANCE — INSUFFICIENCY OF PROOFS — WAIVER.

A burglary insurer's refusal to recognize liability for a loss after proofs have been furnished, without a specific objection on the ground of the insufficiency of the proofs, is a waiver of any informality or defects in them.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392.]

3. INSURANCE — 335(2) — BURGLARY INSURANCE — MODE OF ACCOUNTING BY INSURED.

Where holders of a burglary insurance policy on a stock of ladies' ready to wear furs, etc., indicated additions to their stock by notation on pads bound in book form, showing the articles purchased and the price paid, and, when sales were made, made out slips showing the article sold, and ascertained their stock on hand by checking up the pads with the slips, such manner of accounting was a sufficient compliance with the burglary policy, providing that the insurer should not be liable if the accounts of the assured were not so kept that the actual loss could be determined therefrom.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853.]

4. INSURANCE — 665(3) — BURGLARY INSURANCE — ACCOUNTS — SUFFICIENCY OF EVIDENCE.

In an action on a policy of burglary insurance, evidence held insufficient to show that insured's accounts were either faked or inaccurate,

or that the trial court was not justified in finding that sufficient accounts had been kept in compliance with the requirement of the policy that the loss must be ascertainable from the accounts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716.]

5. EVIDENCE §=5(2)—JUDICIAL NOTICE—MATTER OF COMMON KNOWLEDGE.

It is common knowledge that stocks of goods sold under compulsory process issued out of courts sell at a sacrifice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4.]

6. INSURANCE §=665(3)—BURGLARY INSURANCE—OVERVALUATION OF GOODS—SUFFICIENCY OF EVIDENCE.

In an action on a policy of burglary insurance, evidence held insufficient to require a holding that the goods were overvalued by insured when applying for the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716.]

7. INSURANCE §=665(1)—BURGLARY INSURANCE—INSURABLE INTEREST—SUFFICIENCY OF EVIDENCE.

In an action on a policy of burglary insurance, evidence held sufficient to sustain finding of the trial court that plaintiffs were the real owners of the goods and had an insurable interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1708.]

8. INSURANCE §=665(4)—BURGLARY INSURANCE—LOSS—SUFFICIENCY OF EVIDENCE.

In an action on a policy of burglary insurance, evidence held sufficient to show that a loss by burglary was sustained by plaintiffs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722.]

Holcomb, J., dissenting.

Department 2. Appeal from Superior Court, Whatcom County; Wm. H. Pemberton, Judge.

Action by L. S. Horwitz and another, doing business as Horwitz Bros., against the United States Fidelity & Guaranty Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Romaine & Abrams, of Bellingham, for appellant. S. M. Bruce, of Bellingham, for respondents.

FULLERTON, J. The respondents brought this action against the appellant to recover on a policy of burglary insurance. The cause was tried by the court sitting without a jury. The court made findings of fact and conclusions of law favorable to the respondents, and entered judgment accordingly. This appeal is from the judgment so entered.

[1] The first assignment of error is that the action was prematurely commenced. The policy provided:

"No suit shall be brought under this policy until three months after the particulars of the loss as required herein have been furnished to the company, nor at all unless commenced within twelve months after the date of the burglary."

The particulars of the loss were furnished the company on January 9, 1915, and the ac-

tion was commenced by the service of a summons of March 9, 1915, a time within the limitation of three months. But the record shows that the company, on the day it received the particulars of the loss, notified the respondents by letter that it disclaimed liability and refused payment, making no objection to the form or the sufficiency of the proofs. Since the only purpose of this provision of the policy is to allow the company time to investigate the particulars of the loss and the extent of its liability without being harassed with the burdens of a suit, the requirement is satisfied when the company reaches and announces its conclusion thereon. *Cascade, etc., Ins. Co. v. Journal Pub. Co.*, 1 Wash. 452, 25 Pac. 331.

[2] It is suggested that the refusal to pay may have been because of the insufficiency of the proofs; but the announcement of a refusal to recognize liability for a loss after proofs have been furnished, without a specific objection on that ground, is a waiver of any informality or defects in the proofs. *Cushing v. Williamsburg City Fire Ins. Co.*, 30 Pac. 736, 4 Wash. 538.

[3] The policy provided that the company should not be liable if the accounts of the assured were not so kept that the actual loss could be accurately determined therefrom. The insured property consisted of a stock of "ladies' ready to wear furs, raw furs, feathers, cloaks, suits and furnishing goods." The loss claimed was for furs only. These were in part purchased from a person who had purchased them at a bankrupt sale, and were in part furs that had been purchased subsequently to the original purchase and added to the stock. The respondents conducted a cash business, and seem to have kept no regular books of account. An inventory was taken at the time the store was opened, and subsequent additions to the stock were indicated by notation on pads bound in book form, which showed the article purchased and the price paid therefor. When sales were made, slips showing the article sold were also made out. The stock on hand was ascertained by checking the one with the other. It is contended that this is not a sufficient compliance with the requirement of the policy. But we think it is. The requirement is not that regular books of account be kept, but only that the accounts of the assured be so kept "that the actual loss may be accurately determined therefrom." Clearly these would show the stock on hand at the time of the burglary. *Malin v. Mercantile Co.*, 105 Mo. App. 625, 80 S. W. 56.

[4] The appellant argues that the evidence shows that these slips were faked; that is, manufactured for the occasion subsequent to the alleged loss. This is founded on the testimony of an adjuster for the appellant, sent to investigate the loss, who says that no such slips were shown to him. The

slips in evidence are admittedly copies, or, perhaps better, translations from the originals, which were written in Yiddish by the father of the respondents, who had the active management of the business. The originals were not called for by either side, nor were they introduced in evidence; but the accuracy of the copy or translation was testified to by the party who made them, and no effort was made to contradict him. We do not think these facts show that they were either faked or inaccurate, or that the trial court was not justified in finding that sufficiently accurate accounts had been kept.

[5, 6] In the application for the insurance the respondents represented that the value of the stock of goods on which the insurance was desired was \$8,000. It is contended that is such a false representation of the true value as to avoid the policy. The contention is rested largely on the fact that the goods were formerly the property of the respondents' father, who became bankrupt, and were sold by the trustee in bankruptcy to one Schuman, a cousin of the respondents, for the sum of \$3,500. But it was testified by one of the respondents that they paid Schuman for the goods between \$8,000 and \$9,000, and that the goods inventoried at the time of the purchase—valuing them at the current cost prices—in the sum of \$9,750.74. It was testified also that the stock had been augmented by additional purchases between the time of the purchase from Schuman and the time of the application, and that at the time of the application it was of no less value than it was when the inventory was taken. But it is common knowledge that stocks of goods sold under compulsory process issued out of courts sell at a sacrifice. Indeed, it is well known that men engage in the business of buying bankrupt stocks with the idea of profit; and the fact that this stock sold at so high a price at the bankrupt sale rather supports than contradicts the testimony that its inventoried value was in excess of \$9,000. But, be this as it may, we cannot say that the good faith of the transaction was so far impeached as to require a holding that the goods were overvalued.

[7] Another contention is that the respondents were not the real owners of the goods and had no insurable interest therein. But as to this the direct testimony was all the other way, and nothing against it but circumstances, more or less suspicious, perhaps, but seemingly as consistent with one theory as the other. For example, it was shown that the respondents were young men, aged respectively 23 and 24, and were following pursuits not usually very lucrative, that the fire insurance on the goods was carried in the name of Schuman, and that the father had at different times referred to the goods as his own. It is thought that the respondents could not have saved from their earnings a sufficient sum of money to buy the goods at

the price they claimed to have paid in cash for them, and it is concluded that the father must have been the owner, and held the goods in the name of his sons for some ulterior purpose. But the record presents presumptions equally strong supporting a contrary view. The father was in charge of the store, and naturally would speak to customers and others coming into the place as if the property was his own. This is the custom of the trade. One would gather from the pronouns used by the merest tyro in the largest department store that he was the proprietor of the establishment. Again, ownership in the father seems as improbable as ownership in the sons, if the matter is to be tested by ability to buy. As we have before indicated, the goods for the greater part were the property of the father, who became a bankrupt, and were sold, ostensibly at least, to Schuman for \$3,500 in cash at a bankrupt sale. If we conclude that Schuman was a dummy purchaser, and that the cash sum paid was the money of the father, it is difficult to understand how he could have become possessed of so large a sum without the knowledge of his creditors. The business in which he was formerly engaged was not large, and he could hardly have retained so large a sum out of his business without exciting suspicion and inquiry from those trusting him with goods, who must have exercised the usual vigilance displayed in such cases. Clearly we think the greater probability is that the sons could procure the necessary money with more ease than could the father. But, after all, these are mere conjectures, opposed to the presumptions of honesty which obtain in every case, and are contrary to the direct and positive testimony of the parties to the transactions. We cannot think that they overcome the findings of the trial court who heard and saw the witnesses.

[8] Lastly, it is said that there was in fact no burglary, and consequently no loss under the policy. This was the point to which the evidence was principally directed, and the court allowed it to take a wide latitude. We do not feel called upon, however, to discuss it at length. There were some suspicious circumstances. There was evidence tending to show that no trace of the thieves was ever found; that the door through which the thieves apparently entered the store could hardly have been forced without greater injury to the surrounding parts than was shown; that the respondents frequently visited the store and carried away suit cases, which appeared to be heavily laden; that a bunch of keys was found near the store, entangled in which was a short piece of thread similar in appearance to a spool of thread found in a drawer of a sewing machine in the store; that a key was found in the lock of the door twisted and bent, which was similar in appearance to a key stock purchased a few

days before by a stranger; and that the father discovered tracks on the morning of the burglary leading from the open back door of the building which were not visible to searchers examining the place later. There were other similar circumstances of more or less weight, but a careful reading of the whole fails to convince us that no loss by burglary was in fact sustained. Many of the circumstances were explained; others rest on contradictory testimony, and the inferences sought to be drawn therefrom are opposed to the direct and positive testimony on behalf of the respondents.

Nor are the circumstances relied upon inconsistent with good faith. Burglars are not always caught. The amount of force required to open a locked or bolted door depends upon the strength of the lock, and the damage to the door would vary in proportion to the force necessary to be used. It is not inconsistent with good faith that the owners of a store should frequently visit it, nor that in going and coming they should carry suit cases; that the suit cases carried by these young men were ever heavily laden is denied by them, and nothing in the record shows that any goods taken from the store were found in or traced to the possession of either of them. It is not improbable that a burglar entering a store would search the drawers of a sewing machine, and, if he found a bunch of keys, take it out with the idea that the keys might unlock other more secret places. Nor is it strange that he would drop the keys the moment he was through with them, that no unnecessary evidence might be found on his person in case he should be caught. And surely it is just as possible that a thread could adhere to them when carried by the burglar as it is possible for it to adhere when carried by the proprietor or manager of the place entered. The circumstance of the bent and twisted key in the lock of the door has weight only as a link in the chain of circumstances. It was not traced to the possession of the manager of the store, and the merchant who sold a similar key stock a few days before would not say that the purchaser was one of the proprietors. So with the tracks: The father was the first one at the store in the morning after the burglary, and looked when frost was still on the ground, and says they were plainly visible. That others later did not find them would not be strange.

But we need not pursue the inquiry. In our opinion the trial court determined the questions of fact according to the preponderance of the evidence, and did not err in his conclusions as to the law.

The judgment is affirmed.

MOUNT and PARKER, JJ., concur.

HOLCOMB, J. To my mind the circumstantial evidence of respondents, tending to

establish that a burglary was committed, was greatly overbalanced by the circumstantial proof and logical deductions to the contrary. I am therefore convinced that the evidence, by a great preponderance, shows that no burglary was committed.

Believing that the judgment should be reversed, I dissent.

ROGERS et al. v. REYNOLDS. (No. 13779.) (Supreme Court of Washington. April 3, 1917.)

1. MINES AND MINERALS §112(3)—LIENS—ESTOPPEL TO DENY LIABILITY.

Where partners allowed their engines to be operated some months by a mining company in which they were interested, and in negotiations to release the company's property from mechanics' liens agreed to a proposed mortgage covering the engines, they were estopped to deny the engines' liability to laborers' liens filed against the mining company.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235.]

2. ESTOPPEL §114—PLEADING.

The rule that estoppel must be pleaded does not apply to miners claiming laborers' liens, who did not know, when the liens were filed or the action brought, that third parties, against whom they urge estoppel, would claim title to part of the property.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 304.]

3. MINES AND MINERALS §112(3)—ESTOPPEL—NECESSITY OF INQUIRY REGARDING OWNERSHIP OF PROPERTY.

Coal miners need not inquire regarding the ownership of tools and appliances used by them, in order to protect their right to laborers' liens.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235.]

4. MINES AND MINERALS §112(3)—ESTOPPEL—REQUISITES.

The owner of engines used in a coal mine may be estopped to assert his ownership thereof against laborer's lien claimants, although such claimants did not prove they relied upon their employer's supposed ownership of the engines, nor did the owner make any positive representations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235.]

5. ESTOPPEL §95—WHAT CONSTITUTES.

Estoppel may be created by silence, as well as by spoken word or overt act.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 285-287.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Proceedings by J. M. Rogers and others against W. P. Reynolds, administrator of the estate of W. D. C. Spike, deceased, to enforce laborers' liens. Decree for claimants, and the administrator appeals. Affirmed.

Hudson, Holt & Harmon, of Tacoma, for appellant. Brady & Rummens, of Seattle, for respondents.

MORRIS, J. Respondents claim laborers' liens as coal miners upon certain property as the property of the Prince Coal Mines

Company. The appeal is taken from a decree in their favor.

[1] The appeal is narrowed down to two donkey engines, which appellant claims were not the property of the coal mines company, but were loaned to it for temporary use by a copartnership composed of W. D. C. Spike, deceased, and his brother, A. W. Spike. The mine was owned by one Lambert, with whom W. D. C. Spike made a contract under which he entered into possession and commenced operation. Shortly thereafter the Prince Coal Mines Company was organized, to which Spike transferred all his interest. The work for which liens are claimed was performed between November 1, 1914, and April 1, 1915, while the mine was operated by the coal mines company. On behalf of appellant it is claimed that it was established that these donkey engines were at all times the property of W. D. C. Spike and A. W. Spike, and were taken up to the mines in December, 1914, for temporary use only, and that it was the intention at that time that such use should continue 30 days, when the donkey engines were to be returned. Upon reaching the mine the engines were used continuously as part of the operating equipment until the mine was closed the last of March, 1915; one of the engines being used to pump water for the coal washers and the other attached to a boiler furnishing steam used in the operation of the bunkers and fan. So far as the record shows, there was nothing at the time the labor was performed to indicate there was any copartnership relation between the Spikes, or that these engines belonged to any one other than the company operating the mine. W. D. C. Spike was the main spirit in the Prince Coal Mines Company and practically the owner of its stock. There was nothing to indicate that these two donkey engines were other than the remainder of the personal property used in the development of the mine, or that any one other than W. D. C. Spike or the coal mines company claimed any interest in them. So far as the record shows, the present claim to these two engines was made for the first time after the death of W. D. C. Spike in the pleading of appellant. No such claim was made by W. D. C. Spike, who, prior to his death, had permitted a default to run against himself.

During negotiations looking to a settlement of these labor claims, an attempt was made to bring about a settlement by giving a mortgage to a trustee on all the property at the mine. The description of the property in this mortgage was broad enough to include these two engines. During these negotiations W. D. C. Spike informed those present representing the different parties that these two engines were included in some form of security he had previously given a Tacoma bank to secure certain of his obligations to the bank, and that it would be necessary for him to obtain a release from the bank before

they could be listed with the other security in the proposed mortgage. For this purpose he went to the bank and effected some form of exchange of securities, releasing the engines from the claim of the bank and bringing back a form of release to the place where the negotiations were being carried on, in order that the engines might be safely and legally included in the mortgage. A. W. Spike unquestionably was present during a part of these negotiations, and had full knowledge of the intention to include the two engines in the mortgage. He then made no claim that the ownership was other than it was then in effect represented to be, either in his brother or in the coal mines company. He not only failed to make any claim then, but continued in his failure until after the default and death of his brother, when for the first time he puts forth the claim now contended for by appellant. The mortgage above referred to was, for reasons now not necessary to detail, never executed; but its execution was not necessary in order to give due evidentiary weight to the facts. It seems to us that these facts, taken in connection with others, work an estoppel against any claim on the part of A. W. Spike, or those representing W. D. C. Spike, that these engines should be exempt from the liens as property of the coal mines company.

[2-4] It is true, as argued by appellant, that as a general rule an estoppel must be pleaded and proved, and that there must be some element of fraud, either in the intention of the party estopped or in the effect of the evidence relied upon. So far as the pleadings are concerned, no claim to these engines was set up until appellant came into the case, and there is nothing to indicate, at the time the respondents performed their labor, filed their liens, or brought this action to foreclose them, that their right to include the engines would rest upon any form of estoppel. Appellant asserts that respondents made no inquiry into the ownership of these engines, and that, had they done so, they would have learned the truth. We do not think that the law requires that men under such circumstances, in order to protect their rights, should inquire into the ownership of the tools and appliances used by them in the performance of their work. Nor is it necessary to offer proof to the effect that the work was done in reliance upon the ownership of these engines. The men knew by whom they were employed, what they were to do, and what was being furnished them to do with. They knew whoever was operating the property employed them to perform certain labor and furnished them with certain appliances, and that is all that men in like circumstances would ever know or be charged with knowing in the absence of actual or constructive knowledge to the contrary. Nor was it necessary for these claimants to do any act during the performance of this labor at this mine

to indicate that they looked to these engines as security in any other light than they regarded other property, which to all intents and purposes, so far as any outward appearance went, was all of the same character so far as its ownership was concerned.

[5] Neither is it necessary to point to any special word or act on the part of those now represented by appellant to justify an estoppel; for an estoppel will be created by silence, when it operates as a fraud, as effectually as by spoken word or overt act. Estoppel is a doctrine enforceable by the courts whenever the equities of the particular case demand it. Sometimes it may be predicated upon word or action; sometimes upon the lack of them; but, whatever its origin, it is invoked in the interest of equity and good conscience. Reading this record, and giving to all the facts that weight which in our opinion they should receive, we are convinced, as was the lower court, that these lien claimants are entitled to relief as against these engines.

The judgment is affirmed.

ELLIS, C. J., and CHADWICK, MAIN, and WEBSTER, JJ., concur.

BIER v. CLEMENTS et al. (No. 13930.)
(Supreme Court of Washington. April 4, 1917.)
INJUNCTION — 4 — TEMPORARY INJUNCTION.

Regardless of the right of an appellant who was granted a temporary injunction to continue the same pending appeal by giving a supersedeas bond under Rem. Code 1915, § 1723, the Supreme Court, under Const. art. 4, § 4, declaring that the Supreme Court shall have power to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, may, in a suit to enjoin the execution and negotiation of county bonds where judgment was against appellant, issue in behalf of its appellate jurisdiction an order restraining execution and issuance pending determination of appeal, the county officers consenting to the order, for a disposal of the bonds to bona fide purchasers would create obligations not subject to attack, regardless of the outcome of the appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4.]

Department 2. Original proceeding by H. A. Bier against James B. Clements and others, to obtain an order in the nature of a writ of mandate requiring the superior court to fix the amount of a supersedeas bond to keep in force a restraining order issued against respondents at the commencement of the action, or in the alternative an order in substance the same as the restraining order. Order issued.

M. F. Gose, of Pomeroy, Moulton & Jeffrey, of Kennewick, and W. V. Tanner and Scott Z. Henderson, both of Olympia, for plaintiff. Donworth & Todd, of Seattle, C. W. Fristoe, of Prosser, E. A. Davis, of Pasco, and Zent & Powell, of Spokane, for defendants.

PARKER, J. Appellant H. A. Bier seeks an order of this court in the nature of a mandate to the superior court for Benton county requiring that court to fix the amount of a supersedeas bond which he may give to the end that he may have kept in force the restraining order issued against respondents by that court upon the commencement of this action, which order it is insisted became and was in effect a temporary injunction at the time of the rendering of the judgment of dismissal of the action. Appellant also seeks in the alternative an order of this court in substance the same as the restraining order issued against respondents by the superior court and kept in force up to the time of the rendering of the judgment of dismissal, to the end that the judgment ultimately to be rendered in this case upon appeal, should it be favorable to appellant, shall not be unavailing.

Appellant, a resident and taxpayer of Benton county, commenced this action in the superior court of that county on December 4, 1916, against the commissioners, treasurer, and auditor of the county, seeking to have them enjoined from executing, issuing, or negotiating the sale of negotiable bonds of the county which they purposed to execute and negotiate in the total amount of \$125,000 to raise funds for the building of a courthouse. Upon the filing of appellant's complaint and a showing in that behalf, but we assume without notice, the superior court issued a temporary restraining order restraining respondents "from performing any further acts whatsoever in connection with the issuing, signing, executing, delivering, or negotiating of bonds for the purpose of building a courthouse in Benton county, Wash., until the further order of the court." No attempt was made to have this temporary restraining order dissolved, but by agreement of counsel for all parties the cause was heard and submitted to the court for final decision upon the merits on December 13, 1916, when it was by the court taken under advisement and the restraining order continued in force by an order as follows:

"It being deemed necessary that said temporary restraining order be continued in force until the final determination of said matter and until the entry of judgment herein, and the court being fully advised in the premises: It is therefore ordered by the court that the temporary restraining order heretofore issued in this matter be and the same is hereby continued in force until the final determination and entry of judgment herein, and the defendants are restrained and enjoined from performing any of the acts set forth and mentioned in said temporary restraining order until entry of final judgment herein, or until the said temporary restraining order shall have been dissolved."

On December 29, 1916, the court rendered its final judgment as follows:

"The plaintiff's prayer for a permanent injunction against the defendants be and the same is hereby denied, the temporary restraining order

der heretofore issued is dissolved, and the plaintiff's action is dismissed with prejudice."

From this judgment appellant has perfected his appeal to this court. Immediately upon perfecting his appeal he applied to the judge of the superior court for an order fixing the amount of a supersedeas bond which he might give to the end that the judgment be superseded in so far as it dissolved the restraining order, and that that order be kept in force as a temporary injunction pending the appeal in this court. The superior court being of the opinion that the restraining order is not such an order as may be kept in force pending appeal, denied the application to fix the amount of a supersedeas bond, and thereupon this application was made in this court. Since the rendering of the judgment in the superior court and the perfecting of the appeal therefrom, some of the original defendants and respondents, county officers, have been succeeded in office by others elected at the general election held in November, 1916. The members of the new board of county commissioners so formed, now respondents, have by their attorneys filed in this court their consent that the judgment of the superior court be superseded as prayed for by appellant pending the determination of the cause upon appeal in this court. The bonds in question have not yet been executed in form, though they have been prepared and apparently need only the attesting signature of the county auditor and the impression of his seal of office thereon to render them complete in form as negotiable bonds, evidencing indebtedness of Benton county.

[1] Counsel for appellant insist that the restraining order became in effect a temporary injunction such as to entitle him to have it remain in force as a matter of right upon giving a supersedeas bond in view of the fact that it was by express order of the superior court continued in force after hearing the case upon the merits pending a final decision in the superior court. That a temporary injunction issued upon notice and hearing may be so kept in force by superseding the final judgment upon appeal, in so far as the judgment dissolves such temporary injunction, is rendered plain by the provisions of section 1723, Rem. Code. It would also seem that a temporary restraining order may in form be continued in force by the superior court under such circumstances as to become in effect a temporary injunction, and thereby be rendered capable of being kept in force as such by a supersedeas bond, as provided by section 1723, Rem. Code. Such, in substance, was the view expressed by this court in *State ex rel. Ferguson v. Grady*, 71 Wash. 1, 5, 127 Pac. 305. However, being of the opinion that appellant is entitled to a stay of the effect of the judgment here appealed from in so far as it dissolves the temporary restraining order, and it being the settled law of this

state that this court may in its discretion so act in aid of its appellate jurisdiction, we need not bother ourselves with the question of appellant's strict legal right under the statute to have the superior court fix the amount of a supersedeas bond to be given by him to the end that he may thereby have such stay as a matter of right without application to this court. Section 4, art. 4, State Constitution; *Campbell Lumber Co. v. Deep River Logging Co.*, 68 Wash. 431, 123 Pac. 596.

We think that little need be said in view of the facts we have above noticed to show that in the exercise of its sound discretion this court should now make such order as will effectually restrain respondents from proceeding further in the signing, sealing, execution, issuance, or negotiation of the bonds in question pending the disposition of this case upon appeal. No material hardship can come to respondents by such a supersedeas, while great and irreparable injury might result to appellant for want of such a supersedeas in view of the fact that the bonds proposed to be issued are negotiable in form and apparently will carry upon their face such evidence of their negotiability, regularity, and power of the county officers to issue them as to render it highly probable that they would become absolute binding obligations, evidencing a debt of Benton county if they should fall into the hands of innocent holders. This, together with the fact that the county commissioners, the present respondents, have by their counsel consented that such a supersedeas may be had, we think, is sufficient to warrant us in granting supersedeas in aid of our appellate jurisdiction in the case. It seems almost inconceivable that the other respondents can be injured thereby.

Upon the application being made to this court, we caused to be issued a temporary writ of supersedeas and stay of proceedings to remain in force pending a further hearing when all parties could be heard. Appellant executed, with a surety, a bond in compliance with the court's order as a condition precedent to the issuance of the writ. This bond we think is sufficient to protect respondents from all possible damage which can result to them by reason of the continuance of that writ in force until the final disposition of the cause in this court.

It is therefore ordered that the writ of supersedeas so issued out of this court be continued in full force and effect until the final disposition of the cause in this court, and that all of the respondents, including those who have become defendants and respondents as successors in office of the original defendants and respondents, be and they are hereby directed to refrain from proceeding further with the signing, sealing, issuing, negotiation, or sale of the bonds of Benton county in question until the final disposition

of the cause upon appeal in this court, or until the further order of this court.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

STATE v. WILEY. (No. 3822.)

(Supreme Court of Montana. March 23, 1917.)

1. CRIMINAL LAW §829(3) — TRIAL — INSTRUCTIONS.

In a prosecution for grand larceny, where the court charged that a felonious intent must have accompanied the taking to constitute larceny, and that, to find defendant guilty, it was necessary to find that he took the property knowing that it was not his, intending then to steal and convert it, the refusal of requested instructions that the felonious intent to steal must have accompanied the original taking, and that, if it did not, larceny was not committed, though it might appear that defendant afterwards converted the property, was not erroneous; it not being error to refuse a correct instruction whose subject-matter is covered by appropriate instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

2. INDICTMENT AND INFORMATION §59 — CHARGING CRIME DIVIDED INTO DEGREES — STATUTE.

Where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense, it being the jury's duty, under Rev. Codes, § 9324, to determine from the evidence the particular degree of the crime of which accused is guilty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181.]

3. LARCENY §79—INSTRUCTIONS.

In a prosecution for grand larceny, where the information charged theft of a horse, the stealing of which is grand larceny without reference to its value, the court was not in error for defining to the jury the offense of larceny, as well as the particular degree of it of which defendant was guilty, if guilty at all.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 187, 188.]

4. LARCENY §64(1)—"RECENT POSSESSION" OF STOLEN PROPERTY—"RECENTLY."

"Recently," or "recent possession," as used in the proposition that recent possession of stolen property has probative value in a prosecution for larceny, refers to possession in defendant soon after commission of the larceny, and not to possession immediately before the information is filed or trial had.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170, 176.

For other definitions, see Words and Phrases, First and Second Series, Recently.]

5. LARCENY §55 — PRINCIPAL AND ACCESSORY—SUFFICIENCY OF EVIDENCE.

In a prosecution for grand larceny, evidence held to justify the inference that a party other than defendant was the principal in the crime, and that defendant aided and abetted him in its commission.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169.]

6. CRIMINAL LAW §814(19) — TRIAL — INSTRUCTIONS.

In a prosecution for grand larceny, where the court charged, in substance, Rev. Codes, §§ 8119, 9167, defining a principal, and advising the jury that the distinction between accessory

before the fact and a principal in a felony case has been abrogated by statute, and that all persons concerned in the commission of a felony, directly or indirectly, are to be prosecuted as principals, such instructions were not improper as implying that a felony had been committed, though they might have been amplified somewhat to make a concrete application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

B. S. Wiley was convicted of grand larceny, and from the judgment and an order denying him new trial, he appeals. Affirmed.

J. D. Taylor, of Hamilton, for appellant. J. B. Poindexter, Atty. Gen., and J. H. Alvord, Asst. Atty. Gen., for the State.

HOLLOWAY, J. B. S. Wiley was convicted of grand larceny, and appealed from the judgment and from an order denying him a new trial.

The evidence offered by the state discloses that in the spring of 1914 John S. Treece, the owner of a small black gelding branded combination J. T. Inverted, turned the animal out on the range in Ravalli county; that in July following, the same animal was seen in the defendant's possession; that the defendant again turned the animal out on the range; that in October the animal was in defendant's possession, and continued in his possession until about the end of November; that during this period defendant attempted to trade it to Claude Chaffin; that about the last of November he traded it to Tom Randolph, who kept it throughout the winter and branded it in the spring of 1915; that soon thereafter the owner discovered the animal in Randolph's possession and laid claim to it; that Treece, Randolph, and defendant met in Hamilton within a few days, and defendant then stated to Treece that he had secured the animal in good faith from one Jensen from the Big Hole country, and had in turn traded it to Randolph; that later defendant told Treece that his first story was false, and that it was invented at the suggestion of Randolph to clear him from any appearance of wrongdoing; that in fact the animal was gathered in defendant's pasture with animals belonging to defendant; that Randolph, seeing the animal and being informed by defendant that it was apparently an unbranded stray, took it from defendant's possession, and later placed his own brand upon it. Upon the trial the court gave certain instructions which were excepted to by the defendant, and refused two instructions tendered by the defendant.

[1] 1. In each of the two offered instructions the defendant sought to have impressed upon the jury the idea that the felonious intent to steal must have accompanied the original taking, and that if it did not, larceny was not committed even though it might ap-

pear that defendant afterwards converted the animal to his own use with intent to deprive the true owner of his property. Conceding, for the sake of argument, that each of these tendered instructions is correct, it does not follow that the court erred in refusing them. In instruction 3, given, the court charged that "a felonious intent must have accompanied" the taking in order to constitute larceny, and in instruction 5 the jury was informed that in order to find the defendant guilty, it was necessary to find that the defendant took the animal into his possession, that he knew at the time that it was not his property, "and that he intended then to steal and convert it to his own use," etc. We think the jury could not have misunderstood the meaning which the court intended to convey by these expressions. It is not error to refuse a correct instruction when the court has fully covered the subject by appropriate instructions given. *State v. Martin*, 29 Mont. 273, 74 Pac. 725.

2. The court defined larceny in the language of section 8642, Revised Codes, and grand larceny in the language of subdivision 4, § 8645, Revised Codes. Counsel for appellant apparently assumes that the court gave different definitions of the same offense, some of which were not applicable to the facts of this case; but attention is directed to the fact that the substantive crime defined in chapter 5, tit. 13, pt. 1, of the Penal Code is larceny, and that grand larceny and petit larceny are but the two separate degrees of that crime. Section 8642 defines larceny, and section 8644 provides:

"Larceny is divided into two degrees, the first of which is termed grand larceny, the second petit larceny."

There is no punishment prescribed for larceny as such, but the degree of punishment is made to depend upon the degree of the crime. Sections 8647, 8648, Rev. Codes.

[2] Speaking generally, where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense (*State v. Copenhaver*, 35 Mont. 342, 89 Pac. 61; *State v. Mish*, 36 Mont. 168, 92 Pac. 459, 122 Am. St. Rep. 343), and it is then made the duty of the jury to determine from the evidence the particular degree of the crime of which the accused is guilty, if guilt be shown. Rev. Codes, § 9324.

[3] It is true that the information charges the theft of an animal the stealing of which is grand larceny without reference to its value; but, even so, the substantive crime is larceny, and no fault can be found with the court for defining that offense as well as the particular degree of it, of which the defendant was guilty, if guilty at all. There is not anything said in *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539, in conflict with these views. In this instance the court repeatedly impressed upon the jurors the fact

that they must find the allegations of the information to be true in order to return a verdict of guilty.

[4] 3. By instruction 11 the court advised the jury of the probative value of evidence of recent possession of stolen property. The objection urged upon us is that there is not any evidence that the defendant was in possession of the animal in question, recently, that is, immediately before the information was filed in June, 1915. Appellant misconceives the meaning of the term "recently," as applied in this connection in the law of larceny. "Recently" or "recent possession" refers to possession in the defendant soon after the commission of the larceny, and not to possession immediately before the information is filed or a trial had. 4 Words and Phrases, Second Series, 206; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.

[5] 4. The court gave, in substance, sections 8119 and 9167, Revised Codes, defining a principal and advising the jury that the distinction between accessory before the fact and a principal in a felony case has been abrogated by statute, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, are to be prosecuted as principals. The objection urged to these instructions is that there is not any evidence which warrants their submission, but with this we do not agree. Taking the evidence as a whole, we think the jury might, with propriety, have drawn the inference that Randolph was the titular principal, and that this defendant aided and abetted him in the commission of the offense.

[6] Neither of these instructions is open to the charge that it implies that a felony had been committed. They might have been amplified somewhat to make a concrete application, but defendant did not ask that any such application be made.

There is not any merit in the contentions made in behalf of appellant, and the judgment and order are accordingly affirmed.

Affirmed.

SANNER, J., concurs. Mr. Chief Justice BRANTLY, being absent, takes no part in the foregoing decision.

CORKER v. COWEN.

(Supreme Court of Idaho. March 20, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS — 53(5) — NONPERFORMANCE OF DUTIES — INFORMATION — STATUTE.

Where, under section 7459, Rev. Codes, authorizing the district court to entertain an information verified by the oath of any person against an officer within its jurisdiction, accusing him of charging and collecting illegal fees or with having refused or neglected to perform his official duties, an information charges that the defendant knowingly, willfully, and inten-

tionally failed, neglected, and refused to perform her duties, but the record shows that defendant performed her duties, such an information was properly dismissed by the district court.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 133.]

2. SCHOOLS AND SCHOOL DISTRICTS \Leftrightarrow 53(5)—**NONPERFORMANCE OF DUTIES—APPLICATION OF STATUTE.**

Where an information alleges that defendant knowingly, willfully, and intentionally charged and collected large sums of money for her services as clerk of a school board, in addition to the salary allowed her by law, but it appears that such sums of money were paid to her under a contract for services independent of her duties as said clerk, section 7459, Rev. Codes, does not apply.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 133.]

3. SCHOOLS AND SCHOOL DISTRICTS \Leftrightarrow 53(5)—**OFFICERS—MISFEASANCE—CONSTRUCTION OF STATUTE.**

Section 7459, Rev. Codes, in so far as it relates to the performance of official duties, is not designed to cover acts of officers amounting to a misfeasance, and such acts are not within the purview of said section. The section is aimed at nonfeasance, that is, failure on the part of officers to act at all, where an act is required by law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 133.]

Appeal from District Court, Elmore County; Chas. O. Stockslager, Judge.

Action by C. E. Corker to remove Kittle S. Cowen, school trustee, under the provisions of Rev. Codes, § 7459, and to recover a penalty. Judgment for defendant dismissing the information, and plaintiff appeals. Affirmed.

W. C. Howie, of Mountain Home, for appellant. L. B. Green, of Mountain Home, and K. I. Perky and Wyman & Wyman, all of Boise, for respondent.

PER CURIAM. This action was brought under section 7459, Rev. Codes, for the purpose of depriving respondent of her office as member and clerk of the board of school trustees of school district No. 8, of Elmore county, and obtaining a judgment of \$500 against said respondent and in favor of appellant, the informer. Two separate causes of action are set out in the verified information, which was filed by appellant on the 24th day of February, 1914. The first cause of action, after setting out the respondent's election as a member and clerk of said board in 1909 and her continual service since that date, alleges that for the years ending July 1, 1912, and July 1, 1913, the respondent knowingly, willfully, and intentionally charged and collected from said school district large sums of money as compensation for her services as said clerk, in addition to the amount allowed her by law for the taking of the census of said school district. The second cause of action, after alleging the election and service of the respondent as a member and clerk of the said board of school trustees, as above stated, proceeds to enumerate instances in

which the respondent is alleged to have failed to perform the duties required of her by law. It is alleged that the respondent and one other, comprising a majority of said board, knowingly, willfully, and intentionally failed to make a report, both on the 1st day of July, 1912, and on the 1st day of July, 1913, as required by section 61, c. 159, Sess. Laws 1911, but made a pretended report, which was not properly itemized, contained many misstatements, and made no reference to other sums due and owing to the said district; that she knowingly, willfully, and intentionally failed, neglected, and refused to submit to competitive bids, as required by subdivision "g," § 58, c. 115, Sess. Laws 1913, certain construction and repair work of and pertaining to said school district; and that respondent, as clerk of said board, has failed, neglected, and refused to keep the records and minutes of said board's proceedings as required by law. Upon the strength of this information the court issued a citation to the respondent, who thereupon filed her answer, in effect denying all the allegations of said information. The cause came on regularly for trial before the court on the 10th day of March, 1914. A trial was thereupon had and the information was dismissed by the trial court, for the reason that the charges contained therein were not sustained by the evidence. This is an appeal from the judgment of dismissal of said information. The appellant relies upon the following assignments of error, to wit:

"The court erred in his statement, which may be termed his 'findings,' in not passing upon the question as to whether or not the defendant had charged and collected illegal fees for services rendered by her, in not finding as to whether or not she had let the contracts spoken of without calling for sealed bids, and whether or not she had failed to keep proper records as required by law. The court erred in not holding that the penalties of the law should be imposed upon the defendant for her failure to comply with the law."

[1] As to those matters referred to in the first paragraph of appellant's assignment of errors this court is without jurisdiction, for the reason that the errors there assigned have reference to the opinion of the trial court, which, though incorporated into the record, is not properly a part thereof under section 4818, Rev. Codes, as amended by Sess. Laws 1911, c. 375, which specifies the contents of the record on appeal. *Graham v. Linehan*, 1 Idaho, 780; *Williams v. Boise Basin Min., etc., Co.*, 11 Idaho, 233, 81 Pac. 646; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239; *Stewart Mining Co. v. Ontario Mining Co.*, 23 Idaho, 724, 132 Pac. 787; *Smith v. Faris-Kesl Construction Co.*, 27 Idaho, 407, 150 Pac. 25. It is not within the province of this court on an appeal to question the soundness of the trial court's reasons in giving its decision, for they cannot affect the judgment itself, however enlightening they

may be to counsel contemplating an appeal. *Pennsylvania Co. v. Versten*, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.

Under appellant's second assignment of error, above quoted, we think may be considered the merits of this appeal. However, it is not the purpose of the court to discuss all of the details appearing in the record and raised by the briefs of counsel, for the reason that practically every vital issue raised on this appeal has been passed on previously by this court, in cases where the surrounding circumstances were very similar to the one at bar.

The statute in question in effect provides that any officer found "guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or [who] has refused or neglected to perform the official duties pertaining to his office," must be deprived of said office, and a judgment of \$500 entered against him and in favor of the informer. The object of this statute is to enable an individual, having the knowledge that an officer is using his official position as a medium of extortion and wrong, to oust said official; the provision for a judgment of \$500 in favor of the informer being merely incidental to the main object. In *re Smith v. Ling*, 68 Cal. 324, 9 Pac. 171. Its provisions are penal and very severe. *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824; *Triplett v. Munter*, 50 Cal. 644; *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.

[2] Under the charge of collection of illegal fees, the appellant alleges that respondent, in addition to her salary, annually received \$75, under an agreement with the school board. This was for making copies of the census report. It is claimed that this is an illegal contract, and within the purview of the statute in question. This point has been decided by this court in the case of *McRoberts v. Hoar*, 28 Idaho, 163, 152 Pac. 1046, where the court, though finding that a contract, somewhat similar to that alleged in the instant case, was void ab initio, yet held that such an illegal contract was not within the spirit of section 7459, Rev. Codes.

[3] It is contended at some length that the respondent failed, neglected, and refused to perform her official duties, in that she failed to make two annual reports, as required by law. But it is conceded that she did make the reports. Having done so, there was not a failure, neglect, or refusal upon her part to perform her official duties in this respect, although the reports may not have been technically correct, and therefore she would not be subject to removal from office or the payment of the penalty prescribed under the provisions of section 7459, supra. *Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388. In that case it was shown that the board of equalization had failed completely in assessing the property of their county at its fair cash value, but it was held that the fact that they

had met and acted was sufficient to clear them of the accusations with which they were charged. The court also stated that if the parties had acted corruptly they would not be within the purview of section 7459, supra, but rather within section 7445, Rev. Codes.

While the wording of the information in the instant case follows the words of the statute very closely, and if the appellant had proven all that he alleged, the information, no doubt, would not have been dismissed, still without discussing separately the alleged wrongful actions of respondent in connection with other members of the board, namely, her failure and neglect to submit certain work done for and on behalf of the school district to competitive bids, the building of the temporary Reverse schoolhouse without submitting the construction thereof to competitive bids, and her alleged failure and neglect to keep proper records of the proceedings of said school district and proper minutes of the meetings of said board, suffice it to say, the evidence offered in support of these various charges is not, in our opinion, sufficient to warrant us in reversing the judgment of the trial court, and, even if true, would not establish the charges made against respondent, namely, that she was guilty of charging and collecting illegal fees for services rendered, or to be rendered, in her office, or that she refused to perform the official duties pertaining to her office. The acts complained of, if proven, would constitute, not a nonfeasance in office, but a misfeasance in office, and would not come within the provisions of section 7459, supra. *Daugherty v. Nagel*, 28 Idaho, 302, 154 Pac. 375; *Collman v. Gordon*, 27 Idaho, 351, 149 Pac. 294.

Judgment of the trial court is sustained. Costs awarded to respondent.

CORKER v. AKE.

(Supreme Court of Idaho. March 20, 1917.)

Appeal from District Court, Elmore County; Chas. O. Stockslager, Judge.

Action by C. E. Corker against F. P. Ake. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Howie, of Mountain Home, for appellant. E. M. Wolfe, of Twin Falls, L. B. Green, of Mountain Home, and Perky & Crow, of Boise, for respondent.

PER CURIAM. By stipulation, the above-entitled case is submitted with the case of *Corker v. Cowen*, 164 Pac. 85, the record in the latter case to constitute the record in the above-entitled case, with the following exception, to wit:

"That either of the parties to this action may introduce such additional evidence as they shall desire, and shall offer such modifications and re-offers of evidence as they shall desire."

At the trial certain additional evidence was introduced by both parties to this action, but we do not think that any of the evidence so introduced materially differentiates the instant case from that of *Corker v. Cowen*, supra. On

the authority of that case the judgment of the district court is affirmed. Costs awarded to respondent.

REES v. GORHAM.

(Supreme Court of Idaho. March 19, 1917.)

1. CANCELLATION OF INSTRUMENTS — MORTGAGE—SUFFICIENCY OF EVIDENCE.

Held, that the evidence in this case shown by the record is sufficient to support the findings and judgment of the lower court.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103.]

2. JURY — 13(1, 14)—RIGHT TO JURY TRIAL — CANCELLATION OF MORTGAGE.

In determining the question of whether or not parties are entitled to a trial by jury, courts must look to the ultimate and entire relief sought; and where, in order for the court to render a judgment which would give adequate relief, it would be necessary to decree the cancellation of a mortgage and the surrender of a note, such relief could only be available by the exercise of the equitable jurisdiction of the court, and the parties would not be entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35, 52, 53.]

3. EQUITY — 381 — INTERROGATORIES — FINDINGS—EFFECT.

Where specific interrogatories are submitted to a jury in either a legal or equitable action, the findings of the jury in response thereto are not binding upon the court, which may disregard such findings if they are clearly against the evidence, and find the facts as shown by the evidence before it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817.]

Appeal from District Court, Lemhi County; J. M. Stevens, Judge.

Action by John E. Rees against O. W. Gorham, to cancel a mortgage and to require defendant to surrender to plaintiff a note and for the recovery of damages. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Affirmed.

O'Brien & Glennon, of Salmon, for appellant. E. W. Whitcomb, of Salmon, for respondent.

BUDGE, C. J. This is an appeal from an order of the trial court denying a motion for a new trial; no appeal was taken from the judgment. The facts are: On and prior to the 21st day of February, 1911, respondent was in the possession of and was the owner of certain lode mining claims in Lemhi county, location notices of which are recorded in the office of the recorder of that county. On said date the respondent gave appellant his promissory note in writing, dated February 21, 1911, for the sum of \$2,210, payable two years after its date, with interest at the rate of 8 per cent. per annum, payable annually, and to secure the payment thereof gave appellant a mortgage on the said claims, which mortgage is also recorded in the office of the recorder of said county. On or about the 2d day of April, 1912, respondent gave appellant a power of attorney, authorizing and empowering him to sell and dispose of

the said mining claims, and permitting appellant to enter into the possession thereof, with the understanding that appellant should not sell said property for less than \$5,000, which was to be equally divided between respondent and appellant in case of a sale, and respondent's note and mortgage in that event were to be canceled and discharged. The trial court found, and the finding is supported by the evidence, that:

Appellant, "with intent to defraud and deprive the plaintiff of his right, title, and interest in said mining claims and the value and the market price thereof, did wrongfully and fraudulently and with intent to deprive the plaintiff of the title and value of the said claims, permit and allow one J. A. Nash to relocate all of the said claims on or about the 1st day of January, 1913, and thereby the plaintiff lost his title in and to the said claims."

On the 24th of March, 1913, respondent commenced his action against appellant, setting forth the facts as above alleged, and the further fact that at the time of the giving of the power of attorney above referred to appellant undertook and agreed to do the assessment work on said claims, and to deduct from the sale price, when the claims should be sold, a sum sufficient to reimburse him for whatever expense he might incur in doing the assessment work. His complaint contained a prayer for damages, and for a decree canceling the mortgage of record and requiring the appellant to deliver to him the said note, and decreeing both the note and mortgage null and void. The answer put in issue the matters set forth in the complaint, and a cross-complaint was filed for the foreclosure of the said mortgage, to which respondent answered by setting up as a defense the fraud and connivance between appellant and the said Nash, as above set forth. The cause was tried by the court and certain interrogatories were submitted to the jury upon which they returned their verdict. The general issue was not submitted to the jury. The court, in preparing his findings of fact, conclusions of law, and judgment, adopted two of the findings of the jury upon the interrogatories and rejected one. It does not appear from the record that any objection was made by appellant to this method of procedure. So far as the record discloses objection was taken for the first time when appellant filed his notice of intention to move for a new trial. The court having denied and overruled appellant's motion for a new trial, this appeal was prosecuted, and the following errors were assigned: (a) The evidence is insufficient to support the judgment and findings; (b) the findings of fact and conclusions of law and the judgment herein were made and entered by the court contrary to law, and in excess and beyond the authority vested in the court; (c) the court erred in vacating and setting aside the special findings of the

jury and entering a judgment contrary thereto.

[1] As to the first assignment of error, without going into detail, we have to say that the record has been carefully examined, and the evidence appears amply sufficient to support the judgment and findings.

[2] The second assignment of error involves the sole question of whether or not appellant was entitled to a jury trial on the general issue. It is true that a portion of respondent's cause of action was a claim for damages, which, if it stood alone, would undoubtedly entitle appellant to a jury trial, but in determining whether or not the parties are entitled to a jury trial courts must look to the ultimate and entire relief sought. *Johansen v. Looney and Oakes*, 80 Idaho, —, 163 Pac. 303. Applying this test to the present case, we find that in order for the court to render a judgment which would give complete and adequate relief, it would be necessary to decree the cancellation of the mortgage in question and the surrender of the note. Such relief could only be made available by the exercise of the equitable jurisdiction of the court. That courts of equity have jurisdiction of causes where it is sought to have canceled an instrument which ought not to be enforced or which might be used for a fraudulent or improper purpose, or which might be vexatiously litigated at a distance or time where the proper evidence to repel the same may have been lost or obscured, or when the other party may be disabled from contesting its validity with such ability and force as he can contest it at the present time, has long been held to be one of the fundamental principles of equity jurisprudence. *Story, Equity Jurisprudence*, § 700; *Merritt v. Ehrman*, 116 Ala. 278, 22 South. 514; *Ferguson v. Flisk*, 28 Conn. 501; *Buxton v. Broadway*, 45 Conn. 540; *Fitzmaurice v. Mosler*, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854. It appears therefore, that this cause is clearly one cognizable in equity. This court has adhered to the rule that parties are not entitled to a jury trial in equitable actions. *Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256; *Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542; *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391, 3 Ann. Cas. 245.

In jurisdictions where the distinction between actions at law and suits in equity is still observed the rule seems to be well settled that where it is competent for the court to grant the relief sought and it has jurisdiction of the subject-matter, the objection to the adequacy of the remedy at law must be taken at the earliest opportunity, and before the defendant enters upon a full defense. *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 506, 9 Sup. Ct. 594,

32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021.

Upon the issue made up by the cross-complaint and the answer thereto appellant was clearly not entitled to a jury trial, that portion of the proceeding was simply a suit to foreclose a mortgage, and the rule is too well settled to require the citation of authorities that a mortgage foreclosure is an equitable proceeding, in which neither party is entitled to a jury trial.

[3] The third specification of error, namely, that the court erred in vacating and setting aside the special findings of the jury, is equally untenable. The only purpose in submitting specific interrogatories to a jury is: First in equitable actions to assist the court in finding the facts; and, second, in law actions to enable the court to determine whether or not the general verdict which they have rendered can be supported as a matter of law upon the facts as the jury find them. The court is not bound by the specific findings of a jury, but may disregard such findings when they are clearly against the evidence, and find the facts as shown by the evidence. *Brady v. Yost*, supra.

For the reasons given, we have reached the conclusion that the action of the trial court in denying appellant's motion for a new trial was proper, and the order is therefore affirmed. Costs awarded to respondent.

MORGAN and RICE, JJ., concur.

BRUNZELL v. STEVENSON et al.

(Supreme Court of Idaho. March 19, 1917.)

1. INJUNCTION — 11 — RIGHT TO REMEDY.

An injunction will not issue unless it appears that the party against whom the relief is sought is violating, or will or threatens to violate, some right of the party seeking the remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110.]

2. JUDGMENT — 252(1) — RELIEF — ISSUES.

Judgment must be limited to the relief demanded, or to such as is embraced within the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442.]

3. COSTS — 82(1) — PREVAILING PARTY — STATUTES.

Actions involving title to or possession of irrigating ditches are within the meaning of sections 4901 and 4903, Rev. Codes, and the party in whose favor judgment is rendered is entitled to recover costs of suit.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108, 110, 115-132.]

Appeal from District Court, Owyhee County; Carl A. Davis, Judge.

Suit by J. M. Brunzell against J. R. Stevenson and J. S. Stevenson, copartners doing business under the firm name and style of Stevenson Bros., and H. W. Stevenson, to quiet title to an irrigation ditch and to en-

join defendants from interfering with the rights of plaintiff to the same. Judgment for plaintiff, and defendants appeal. Reversed.

Smead, Elliott & Healy, of Boise, for appellants. Perky & Brinck, of Boise, for respondent.

MORGAN, J. It is alleged in the complaint that respondent is the owner and entitled to the exclusive possession of an irrigation ditch running through lands belonging to him situated in Owyhee county; that he built the ditch, and for more than 25 years has used it as a necessary means of irrigating his land; that for more than 5 years preceding the time of the acts of appellants complained of his use of it was open and notorious and in hostility to any right or title claimed by them; that on May 16, 1912, appellants took possession of it for their exclusive use, dammed and blocked it, prevented him from using it, and threaten to continue to do so; that they claim some interest therein; but that their claim is without right or foundation. He asks that appellants be required to set up the nature of their claim; that he be adjudged to be the sole owner and entitled to the exclusive possession of the ditch; and that they be enjoined from interfering with his use of it.

Appellants filed an answer, consisting of general denials and affirmative matter, and alleged that they are owners of lands adjacent to those of respondent; that in 1883 their predecessor in interest, one McDonald, owned and was in possession of these lands, and, together with respondent, constructed the ditch for their joint use, and that each party paid half of the cost of building and maintaining it; that since that time McDonald and his successors in interest have paid half the cost of maintenance, and have used the ditch jointly and as tenants in common with respondent until 1911, when he denied its use to appellants. Appellants denied the acts of trespass and the threats alleged in the complaint to have been made, and prayed that they be adjudged to be the owners of an undivided one-half interest in the ditch, and that respondent be enjoined from interfering with their use thereof.

The court in its findings of fact sustained appellants' contentions, but in its conclusions of law held that respondent was entitled to an order enjoining them from interfering with his possession and use of the ditch. Judgment was rendered adjudging that the parties were jointly entitled to possession and use of the ditch, and for that purpose appellants were entitled to go upon respondent's land in a peaceful manner; that the parties contribute equally toward the maintenance of the ditch; that appellants be enjoined from forcibly taking possession of that part of it running through respondent's land, and from ejecting him therefrom or depriv-

ing him of the use thereof; that it is the duty of the parties to secure a water master. No costs were awarded.

Appellants assign three errors. Assignment numbered 1 is:

"The court erred in concluding as a matter of law that plaintiff is entitled to an injunction against the defendants restraining them from interfering with the possession and use of said ditch by the plaintiff, and that the court erred in enjoining and restraining the defendants."

[1] The court found as a fact that appellants committed none of the acts of trespass complained of, and that they did not threaten to commit them. An injunction is not to be granted unless the party seeking it shows that his rights are being violated, or that the party against whom the injunction is sought threatens to violate them. *Boise Dev. Co. v. Idaho Trust & Savings Bank*, 24 Idaho, 36, 133 Pac. 916; *Bower v. Moorman*, 27 Idaho, 162, 147 Pac. 496; 22 Cyc. 758; 14 R. C. L. 354; *Healy v. Smith*, 14 Wyo. 263; 83 Pac. 583, 116 Am. St. Rep. 1004; *Van Horn v. Decrow et al.*, 136 Cal. 117, 68 Pac. 473; *High on Injunctions* (4th Ed.) par. 22. We hold, therefore, that the action of the court complained of was error.

[2] Assignment numbered 2 pertains to the appointment of a water master. In *Sess. Laws 1909*, p. 104, there is a provision conferring upon the district judge power to appoint a water master upon petition by one or more owners of irrigating ditches, where such owners cannot themselves agree in their choice. In this action, however, neither party petitioned for such appointment. The court cannot grant relief not embraced within the issues (section 4353, *Rev. Codes*; *Yuba Co. v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049), and therefore its action in directing the appointment of a water master was erroneous.

[3] Assignment numbered 3 brings up for review the refusal of the court to award costs of suit. Appellants claim they are entitled to costs. Respondent contends that he was in part successful in his suit, that he was adjudged to have certain rights, which were denied by appellants, and that the action of the court in the matter of costs was therefore proper. A careful perusal of the answer shows that appellants acknowledged the ownership in respondent of an undivided one-half interest in the ditch. Every issue of fact raised by the complaint and answer was decided in their favor. It is true that respondent obtained injunctive relief, but this, we have decided, was erroneously given by the court. It is likewise true that appellants did not obtain the injunctive relief asked, but the court, as a conclusion of law, found they were entitled to it and the findings of fact fully sustain this conclusion.

This action involves title to, the right of possession of, and a right of way for an irrigation ditch. Under section 3056, *Rev. Codes*, ditches are classed as real estate

Ada County Farmers' Irr. Co. v. Farmers Canal Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; Nelson Bennett Co. v. Twin Falls, etc., Co., 14 Idaho, 5, at page 15, 93 Pac. 789; Smith v. Faris-Keal Const. Co., 27 Idaho, 407, at page 431, 150 Pac. 25; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569. Section 4901, Rev. Codes, provides:

"Costs are allowed of course to the plaintiff, upon a judgment in his favor, in the following cases: * * * 5. In an action which involves the title or possession of real estate. * * *"

Section 4903, Rev. Codes, provides:

"Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in section 4901, and in special proceedings."

We hold, therefore, that costs should have been awarded to appellants, and that the court erred in failing so to do. Hoyt v. Hart, *supra*; Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470.

The judgment is reversed, with direction to the trial court to enter judgment for defendants in accordance with the views herein expressed. Costs on appeal are awarded to appellants.

BUDGE, C. J., and RICE, J., concur.

THE MODE, Limited, v. MYERS.

(Supreme Court of Idaho. March 5, 1917. On Petition for Rehearing, April 14, 1917.)

1. PLEADING \S 236(4)—AMENDMENT—DISCRETION OF TRIAL COURT.

An application to amend complaint while motion for nonsuit is pending is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601.]

2. PLEADING \S 432—DEFECTIVE ALLEGATIONS—CURE BY VERDICT AND JUDGMENT.

A defective allegation of a good cause of action, in the absence of a demurrer, is cured by a verdict and judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1442-1450.]

3. QUIETING TITLE \S 10(2)—RIGHT OF ACTION—HOLDER OF SHERIFF'S DEED—STATUTE.

Where a judgment debtor causes real property which he has purchased to be conveyed by his vendor direct to a third person, and the transfer of his interest to such third person is fraudulent and void as to creditors, and the judgment creditor levies upon and sells such property as the property of the judgment debtor, the holder of the sheriff's deed on such sale may, under section 4538, Rev. Codes, maintain an action as owner to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 37, 40, 42.]

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by The Mode, Limited, against Sada Myers, to quiet title to real property. Judgment for plaintiff, and defendant appeals. Affirmed.

Smead, Elliott & Healy and W. A. Ricks, all of Boise, for appellant. Martin & Cameron, of Boise, for respondent.

RICE, J. This is an action to quiet title to lots 7, 8, 9, and 10 of block 29, Ellis addition to Boise. The complaint alleged title to the property in the plaintiff, respondent here, and stated that the defendants, among whom was appellant, Sada Myers, claimed unfounded adverse interests therein. The answer of appellant Sada Myers denied title in the plaintiff, and by way of cross-complaint alleged title in herself, and prayed that her title be quieted. Both respondent and appellant derived title from Walter A. Myers, husband of the appellant. The respondent claims through sheriff's deed executed by virtue of a sale under an execution issued upon a judgment against Walter A. Myers. Appellant claims lots 7 and 8 through deeds of conveyance, and lots 9 and 10 through an assignment of a contract to her by Walter A. Myers and a subsequent conveyance under said contract by the Pierce Suburban Syndicate. Defendant Florence K. Fahrney answered, claiming an interest as an innocent purchaser of a portion of the property. It was stipulated that her interests should be protected, and she is not interested in this appeal. The remaining defendants disclaimed any interest in the property. At the trial, after the plaintiff had rested, the answering defendants moved for a judgment of nonsuit. The trial court permitted the plaintiff to amend its complaint, upon a showing of diligence, and a paragraph was added alleging fraudulent conveyance from the said Walter A. Myers to appellant, Sada Myers.

[1] Permission to amend upon the showing made by counsel for respondent, while motion for nonsuit was pending, is assigned as error. Under section 4229, Rev. Codes, the application was addressed to the sound discretion of the trial court, to be exercised, according to the admonition of the statute, in the furtherance of justice. Havlick v. Davidson, 15 Idaho, 787, 100 Pac. 91. While the showing of diligence on the part of attorneys for respondent, as read from the record, is not very persuasive, we do not think the trial court abused its discretion in permitting the amendment. This is particularly true in view of the offer of the court to continue the case, should the appellant claim surprise and desire further time in which to present her defense. Lorang v. Randall, 27 Idaho, 259, 148 Pac. 468. The amendment to the complaint reads as follows:

"That the defendant Walter A. Myers has made fraudulent conveyances to the defendant Sada Myers, by which said defendant Sada Myers claims some interest, right, or title in and to the lots in controversy herein described, in this: That said Walter A. Myers was in-

solvent, and while so insolvent made conveyances without consideration of his property, the property in question herein, with intent to hinder, delay, and defraud his creditors, and especially the plaintiff creditor in this action. And at the time the defendant Walter A. Myers did cause to be made this pretended conveyance without consideration, and said defendant Walter A. Myers knew he was insolvent, and had sworn less than a month prior to this pretended conveyance without consideration that he had no property out of which the plaintiff creditor could satisfy its judgment. That at the time said conveyance of the property in controversy was pretended to be dated and made by Walter A. Myers to Sada Myers, his wife, said Walter A. Myers had no other property, other than this property in question, whatever, out of which this plaintiff creditor could satisfy his said indebtedness."

[2] The allegation would be entirely insufficient if it were challenged by demurrer, but in the absence of a demurrer such defective statement of a cause of action is cured by a verdict, or findings and judgment. *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091.

"After judgment, the rule by which pleadings before judgment are construed most strongly against the pleader is reversed, and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment." *Plew v. Board*, 274 Ill. 232, 113 N. E. 603.

In this case it was shown that the defendant W. A. Myers was a judgment debtor of the respondent; that while so indebted, without consideration, he executed a conveyance of two of the lots in question to appellant, Sada Myers, and caused to be executed a conveyance of the remaining two lots in question to appellant; that at the time of such conveyances W. A. Myers was insolvent. Appellant offered testimony tending to show that the conveyance to her of the two lots was intended to take the place of a former deed of conveyance made by W. A. Myers prior to the time he was indebted to the respondent, which former conveyance had been lost, and that the assignment of the contract for the conveyance of the remaining two lots was also made by W. A. Myers prior to any indebtedness to the respondent, and that such original conveyance and assignment were made in consideration of her approaching marriage to W. A. Myers. After weighing the conflicting evidence the trial judge found that the said conveyances by W. A. Myers to appellant were made without consideration, and with intent to hinder, delay, and defraud his creditors, of whom respondent was one. The trial court without doubt recognized the rule that where fraud is charged as a basis of recovery the proof must be clear and convincing. Under that rule there was substantial evidence to support the findings of the court and the judgment based thereon.

[3] Appellant also contends that respondent cannot maintain an action to quiet title

to lots 9 and 10, the basis for this contention being that these lots were conveyed by the Pierce Suburban Syndicate direct to appellant, Sada Myers, and that respondent's claim of title, being based upon a sheriff's deed, is not, as a matter of law, well founded, and that an action to quiet title is not the proper remedy. Section 4477, Rev. Codes, provides that any interest in real or personal property of the judgment debtor, not exempt by law, is liable to execution. In the case of *Clifton v. Herrick*, 16 Cal. App. 484, 117 Pac. 622, it was held that under California Civil Code, § 3439, declaring a transfer of property with intent to defraud a creditor void against the creditor, a judgment debtor having bought property with her separate funds and taken title in the name of her daughter with intent to defraud the judgment creditor, such creditor could levy on and sell the property as that of the judgment debtor.

This action is brought under the provisions of section 4538, Rev. Codes. In the case of *Coleman v. Jagers*, 12 Idaho, 125, 85 Pac. 894, 118 Am. St. Rep. 207, the court held the provisions of said section to be very broad, and that under them any person, whether in possession or out of possession, whether holding the legal or equitable title, might bring an action against another who claims an estate in real property adverse to him, and in such action might have the adverse claim determined and settled. No issue of possession or right of possession is involved in this case. Under the construction of section 4538, given above, respondent had the right to levy upon and sell any interest its judgment debtor might have in the two lots in question, and, upon becoming the purchaser thereof, could bring an action to quiet title. The judgment of the district court is affirmed. Costs awarded to respondent.

BUDGE, O. J., and MORGAN, J., concur.

On Petition for Rehearing.

RICE, J. Appellant has filed a petition for rehearing in this case, and raises therein questions which require consideration. There can be no doubt but that a party has the right to test the sufficiency of an amendment to a pleading when offered during the progress of the trial to the same extent as though the amendment were made before trial. He may demur in some instances, or he may raise the question of the sufficiency of the amendment by objections to the allowance thereof, and such objections have the same force and effect as if the questions were presented by demurrer. In this case the objection was—"that the amendment as submitted is a statement of evidence or evidential facts, upon which the plaintiff will rely, rather than the ultimate facts involved."

This objection was not specific in pointing out wherein the amendment was unintel-

ligible or uncertain. We think the trial court did not err in permitting the amendment to be made over this objection.

Appellant also objected to the reception of any evidence in support of the amendment. This objection raises the question as to whether the amendment states a cause of action, and in effect raises the same question discussed in the original opinion. In considering such objection every reasonable intendment will be indulged in favor of the pleading. Section 4207, Rev. Codes, provides:

"In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties."

In *McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999, this court said:

"A pleading should be construed so as to allege all of the facts that can be implied by fair and reasonable intendment from the facts expressly stated."

Where a material fact is only stated inferentially, and the pleading is not properly demurred to specially for this reason, it is good after judgment. *Hill v. Haskin*, 51 Cal. 175; *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603; *Whitehurst v. Stuart*, 129 Cal. 194, 61 Pac. 963; *Chambers v. Hoover*, 3 Wash. T. 107, 13 Pac. 466; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Silver Bow County v. Davies*, 40 Mont. 413, 107 Pac. 81.

In holding that the action to quiet title under the statute was a proper action in this case, we meant it to be understood that, the court having found that the transfer made by W. A. Myers of his interest in lots 9 and 10 to Sada Myers was void as to creditors, and the respondent having levied upon and sold the property as that of the judgment debtor, W. A. Myers, the respondent could plead title to the lots in question as against the appellant, Sada Myers, and the court properly decreed that the respondent was the owner of the property. The appellant had nothing but the naked legal title, without beneficial interest in the property. This, in substance, was the course pursued in the case of *Coleman v. Jagers*, 12 Idaho, 125, 85 Pac. 894, 118 Am. St. Rep. 207, and approved by this court.

The other matters urged in the petition for rehearing were considered by the court, although not discussed.

The petition is denied.

BOWERS v. BENNETT.

(Supreme Court of Idaho. March 12, 1917.
Rehearing Denied April 14, 1917.)

1. REFORMATION OF INSTRUMENTS § 24—PAROL EVIDENCE—MISTAKE OF SCRIVENER.

Parol evidence is admissible for the purpose of showing that, by reason of mistake, a written instrument does not truly express the intention of the parties. A mistake of the scrivener,

whereby he fails to express the agreement of the parties, may be corrected.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156.]

2. REFORMATION OF INSTRUMENTS § 24—INCIDENTAL RELIEF—DEMAND.

Where the suit to reform the contract is incidental to another action, no prior demand for reformation need be made. This is especially true where it clearly appears that such a demand would be refused.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 83.]

3. REFORMATION OF INSTRUMENTS § 24—CONDITIONS PRECEDENT—RETURN OF INITIAL PAYMENT.

Held, that in this action it was not necessary for respondent to return to appellant the initial payment made upon the purchase price of the land or the interest on deferred payments as a condition precedent to the bringing of the suit for the reformation of the contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 83.]

4. VENDOR AND PURCHASER § 187—PAYMENT OF PRICE—TIME—WAIVER.

Where time is agreed to be of the essence of a contract for the sale of real estate, the fact that the vendor accepts an interest payment a short time after it is due does not operate as a waiver of promptness in future payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375.]

5. REFORMATION OF INSTRUMENTS § 45(1)—BURDEN OF PROOF.

In this state the law requiring a party to establish his case "beyond a reasonable doubt" applies only in criminal cases, and not in a suit for the reformation of a contract, and the case of *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37, so far as it is in conflict herewith, is overruled, and the case of *Panhandle Lumber Co. v. Bancour*, 24 Idaho, 603, 135 Pac. 553, approved and followed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 157.]

Appeal from District Court, Elmore County; Chas. O. Stockslager, Judge.

Action by William C. Bowers against Richard Bennett, Sr., to recover damages for breach of an escrow agreement, with cross-complaint for reformation of a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Claude W. Gibson, of Boise, for appellant. Richards & Haga, of Boise, for respondent.

MORGAN, J. This action was commenced by appellant to recover damages for breach of an escrow agreement. He alleges in his complaint, among other things, that on April 5, 1907, respondent executed a deed conveying to him certain land; that he paid part of the purchase price and executed two promissory notes for the balance, one note showing on its face that it was due October 1, 1908, and the other October 1, 1909, and each providing that interest be paid annually; that immediately after the execution of the notes, and on the same day, the parties entered into a written agreement by the terms of which the deed and notes were placed in escrow in a certain bank, the deed

to be delivered to appellant upon the condition that the interest upon the notes be paid at the time provided therein, and that the principal be paid on or before October 1, 1909, and if the principal or interest be not so paid, the respondent, at his option, might declare a forfeiture and retain, as liquidated damages, any and all sums paid under the terms of the contract; that on April 24, 1908, he paid the annual interest on the notes, which was due April 5th, and that respondent accepted the same; that on October 1, 1908, he tendered the interest due on the notes and respondent refused to accept it, unless the principal of the note purporting on its face to be due October 1, 1908, be paid; that he made another tender October 31st of interest, which was refused for the same reason; that on November 2, 1908, respondent declared the contract forfeited, took the deed from escrow and destroyed it, marked the notes void, gave notice that he considered the contract terminated, and demanded that appellant vacate the premises; that on March 2, 1909, and July 1, 1909, appellant tendered the whole amount due, principal and interest, but respondent refused to accept the same or convey the premises.

Respondent filed an answer and cross-complaint admitting the execution of the deed, notes, and agreement and the placing of the same in escrow, but alleged that prior to the execution of the escrow agreement, he and appellant entered into an oral contract, by the terms of which the notes were to be paid when they became due as shown upon their face, namely, October 1, 1908, and October 1, 1909, and that it was the intention of both parties that the escrow agreement should so provide, but that the scrivener who wrote the agreement, inadvertently and through mistake, failed to incorporate the provisions that the notes should be paid when they matured as shown upon their face, but provided instead that both of them be paid on or before October 1, 1909, and that the parties, through a mutual mistake as to the terms of the written agreement in this respect, signed the same. Respondent denied that appellant had ever made any tender to him of the interest or principal, and prayed judgment that the agreement be reformed to conform to the true intent of the parties, that appellant be declared to have been in default since October 1, 1908, and that all sums paid by him be retained as damages.

Appellant answered denying the material allegations of the cross-complaint. By stipulation the case was tried before the judge without a jury. Findings of fact and conclusions of law were made, and judgment was thereupon entered in favor of defendant, from which this appeal is prosecuted.

Appellant contends that the court erred in finding that the real agreement was oral, and that, through the mistake of the scrivener, the written agreement was made to provide

for both notes to be due on or before October 1, 1909, instead of one being due October 1, 1908, and the other October 1, 1909, and that this escrow agreement was signed by both parties under the mutual mistake that it embodied the terms of the oral contract. Appellant testified that there was no oral understanding that one note be paid October 1, 1908, but that both parties, at the time they signed the written agreement and put it in escrow, understood that both notes were due October 1, 1909. On the other hand, respondent and his son testified, and to some extent they were corroborated by the witness, Watkins, a real estate broker, that there was an oral agreement with appellant that one note be paid October 1, 1908, and that the escrow agreement was to be drawn to that effect, and respondent testified that he had always understood that one note was due a year before the other, and that he had thought the written escrow agreement so provided. Respondent and his son testified that a few days prior to October 1, 1908, appellant met respondent and inquired what he would do if the note was not paid, that he did not consent to an extension of time, and that on this occasion no tender was made. This evidence tends to show that appellant himself believed the written agreement provided that one note was due October 1, 1908. Moreover, according to the terms of the written agreement, no interest was due in October, 1908, and appellant's tender during that month has a tendency to show that he understood the agreement to be that one of the notes was due. This is a circumstance which tends to corroborate respondent's testimony.

[1] It is a well-established rule of law that parol evidence is admissible for the purpose of showing that, by reason of a mistake, a written instrument does not truly express the intention of the parties. 17 Cyc. 702, and cases cited in notes 84 and 85. "A mistake of the scrivener whereby he fails to carry out the agreement of the parties may be corrected." 34 Cyc. 915, and cases cited in note 82; *Panhandle Lumber Co. v. Rancour*, 24 Idaho, 603, 135 Pac. 558.

[5] Appellant contends that the evidence was insufficient to warrant the findings of the court that there was an oral understanding and a mistake in reducing the same to writing, and cites some authorities, among which is that of *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37, to the effect that before relief can be obtained in the reformation of a written contract, signed through mistake, the evidence must be such as to leave no reasonable doubt in the mind of the court as to what the mistake was, the real intention, and that the mistake was mutual. *Houser v. Austin*, supra, is, in effect, overruled in case of *Panhandle Lumber Co. v. Rancour*, supra, wherein the court, in construing section 4824, Rev. Codes, in substance, said that

where witnesses have appeared before the trial court and testified, the findings and judgment, upon conflicting evidence, will not be disturbed if there is substantial proof to support them.

The testimony in this case, as to the oral agreement between the parties and as to a mistake having been made in reducing it to writing, is conflicting, but when the rule announced in *Panhandle Lumber Co. v. Rancour*, supra, which is the settled law of this state upon the subject, is applied to the evidence submitted upon that point, we find the proof to be sufficient to sustain the findings of the trial court to the effect that the parties did orally agree that the purchase price should be paid according to the terms of the promissory notes placed in escrow, and that, through mistake of the scrivener, the written contract of escrow did not contain the true agreement. No doubt the trial court had in mind and was governed by the rule that evidence of mutual mistake must be clear, convincing, and satisfactory.

The trial court found as a fact that appellant made no tender on March 2, 1909, or at any other time, to pay either principal or interest, except the interest payment in April, 1908, and a deposit in the bank on account of interest made October 31st of the same year, which latter was returned to him by direction of respondent. This finding is assigned as error. There was some testimony tending to show that purchasers were found who were ready, willing, and able to buy the property and to pay the amount due to respondent, but neither offer amounted to a tender. That such offers were actually made was disputed, and, at most, it constituted a conflict in the testimony, and the evidence upon this point is ample to sustain the findings.

[4] In his brief appellant insists that because, on April 24, 1908, respondent accepted interest due April 5th, he waived time as being of the essence of the contract. We hold, however, that he waived it in regard only to this payment, but not as to future payments. The authorities cited by appellant in this respect are to the effect that where time is agreed to be of the essence of a contract, but that both parties have, by their course of action, waived a prompt performance, or where one party has permitted the other, for a long time, to become slack in his performance, he cannot suddenly change his course of action after thus lulling the other into a sense of security and declare a forfeiture without notice first that if the other does not promptly perform, the forfeiture will be declared.

In this case appellant, though he did not make the interest payment on the very day it was due, made it in a reasonable time, and respondent had not so acted as to give him the impression that he did not consider time to be of the essence of the contract. 39 Cyc.

1395, and cases cited in note 82; *Prairie Dev. Co., Ltd., v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

[2] It is contended by appellant that no demand for reformation was made before suit, and that such demand is necessary. That contention cannot be sustained in this case. Where the suit to reform is incidental to another action, no prior demand need be made. 34 Cyc. 944; *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716. Where a party's conduct plainly shows that a demand would be refused, none need be made, for the reason that the law will not require an idle act to be done. *Sutherland v. Green*, 142 Pac. 636, 49 Mont. 379.

[3] It is insisted that, as a condition precedent to the reformation of the contract, appellant must be placed in statu quo by the return to him of the initial payment he made upon the land, together with interest collected from him upon deferred payments, and appellant cites a number of cases in support of this contention, which, however, are not in point, but apply to cases where the plaintiff has received from the other party some benefit to which he would not be entitled under the instrument as reformed. *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567.

Appellant relies upon a number of assignments of error which are not discussed herein, for the reason we deem them to be immaterial in view of the conclusion reached that the action of the trial court in reforming the written contract of escrow should be sustained, and that its finding that appellant committed a breach of the contract, as reformed, is fully supported by the evidence.

The judgment appealed from is affirmed. Costs are awarded to respondent.

BUDGE, C. J., and RICE, J., concur.

AUSTIN v. BROWN BROS. CO.

(Supreme Court of Idaho. March 7, 1917.
Rehearing Denied April 14, 1917.)

1. PLEADING ~~62~~182—ADMISSION BY FAILURE TO DENY—EFFECT—STATUTE.

Under section 4201, Rev. Codes, the failure to deny a written instrument contained in the answer as therein required admits the genuineness and due execution of such instrument, but the plaintiff is not precluded thereby from taking any position in avoidance of the contract which is not inconsistent with the admission of its genuineness and due execution.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 387, 388.]

2. SALES ~~62~~62—INSTRUCTION — SEPARABLE CONTRACT.

Where three persons gave individual orders complete in themselves for nursery stock to an agent of a nursery company, and thereupon, at the suggestion of the agent, the three orders were combined in one and signed by one of the

three, held, that under the facts of this case the combined order became a separable contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179.]

3. SALES ⇨405—CONTRACT—BREACH—DAMAGES.

Where a contract for the sale of fruit trees, prepared by the seller to be signed by the buyer, contains a provision that "any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded," such contract contains an implied condition precedent, requiring a substantial performance by the seller, for the breach of which the buyer is entitled to compensatory damages, and the foregoing provision of the contract applies only to such mistakes as are liable to occur in the substantial performance of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1147-1155.]

4. CONTRACTS ⇨323(2)—EVIDENCE—INSTRUCTIONS.

Where by the undisputed testimony there is clearly a substantial failure of performance on the part of one of the parties to the contract, it is the duty of the court so to declare as a matter of law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1545.]

5. APPEAL AND ERROR ⇨1068(1)—REVERSAL—ERRONEOUS INSTRUCTIONS.

A judgment will not be reversed, where it appears that the jury took cognizance only of matters proper for their consideration, even though the jury was erroneously instructed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Trial, Cent. Dig. § 475.]

6. APPEAL AND ERROR ⇨1048(2)—EVIDENCE ⇨546—DISCRETION OF TRIAL COURT—COMPETENCY OF EXPERTS.

Qualification of witnesses to testify as experts must be determined in the first instance by the trial court; and, unless it is apparent that the trial court was in error in permitting a witness to testify as an expert, the judgment will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4140; Evidence, Cent. Dig. § 2363.]

7. APPEAL AND ERROR ⇨1066—TRIAL ⇨250—INSTRUCTIONS—ISSUES—HARMLESS ERROR.

An instruction should not be given unless founded on the issues in the case or evidence received at the trial. But where, by examination of instructions given in the trial, it appears that the giving of such instruction did not result in any substantial injury to appellant, the judgment will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Trial, Cent. Dig. §§ 534-536, 596.]

Appeal from District Court, Twin Falls County; Chas. O. Stockslager, Judge.

Action by James S. Austin against the Brown Bros. Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Longley & Walters, of Twin Falls, for appellant. Babcock & Graham and E. M. Wolfe, all of Twin Falls, for respondent.

RICE, J. In June, 1905, the plaintiff and respondent executed an order to the defendant and appellant to furnish him with 500 apple trees, together with 45 pear, cherry, peach, and plum trees, the variety of trees

to be furnished and the prices to be paid therefor being fully set out. At the same time and place, respondent's brother and brother-in-law executed orders for various amounts of nursery stock, the exact number of trees ordered by them being not material in this case. Upon the execution of these orders it was suggested by appellant's agent that for convenience in shipping and in buying the trees a combined order should be made and the three orders shipped in one. The combined order was thereupon prepared and signed by respondent. The combined order differed from the original order executed by the respondent, in that it contained the following provision which the original order did not contain:

"Any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded; and all stock to be delivered in a thrifty and healthy condition."

The trees were delivered at Twin Falls in the spring of 1906. They were taken to the premises of the respondent, and there divided among the three parties, each taking the trees that he had ordered. The trees arrived labeled so as to indicate the variety and number of trees. Respondent planted his trees in the spring of 1906 on his premises, consisting of a 40-acre subdivision, and cared for them until about April, 1910, when he discovered that a large part of the trees so planted and cared for by him were not true to name. Among the 500 trees ordered by him were 300 Jonathan and 130 Rome Beauty trees. No Jonathan or Rome Beauty trees were received, but instead the trees proved to be Wolfe River, Peewaukees, and an unknown variety. Respondent brought suit against the appellant to recover damages suffered as a result of the breach of the contract. The case was tried to a jury, and a verdict was rendered in favor of respondent in the sum of \$1,500.

The appellant assigns 26 specifications of error as ground for reversing the judgment, but relies principally upon those hereinafter considered.

[1] Appellant in its answer set out a copy of the combined order, claiming that said order constituted the contract between the parties. At the beginning of the trial the court, over the objection of appellant, permitted respondent to introduce his individual order. The specific objection was that the order was not the same as the order signed by the respondent in this action, as set forth in the answer; and, inasmuch as there was no denial of the order as required by the statute, it was admitted to have been the order made by the defendant. Section 4201, Rev. Codes, reads as follows:

"When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff

file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

It is admitted that no affidavit denying the combined order was filed or served on appellant. The genuineness and due execution of the contract alleged in the answer was therefore admitted.

In the case of *Cox v. Stage Co.*, 1 Idaho, 376, this court held that due execution of an instrument of writing goes to the manner and form of its execution by persons competent to execute it according to the laws and customs of the country where executed. The genuineness of an instrument in writing goes to the question of its having been an act of the party, just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to or taken from it, which would lay the party signing or changing the instrument liable for forgery.

It does not follow that, by admitting the genuineness and due execution of the instrument pleaded in the answer, the respondent admitted that such instrument was the contract between the parties, nor was the respondent precluded thereby from taking any other position in avoidance of the effect of the contract which is not inconsistent with the admission of its genuineness and due execution. *Cox v. Stage Co.*, supra; *Martin v. Dowd*, 8 Idaho, 453, 69 Pac. 276; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423.

[2, 3] The individual order and the combined order are parts of one transaction, and should be considered together, but the plaintiff could not be relieved of any obligation or provision contained in the joint order, which was the last one signed. The difference between them is material only in view of the fact that the combined order contained the provision, quoted above, which was not in the individual order.

In the case of *Sanford v. Brown Bros.*, 134 App. Div. 652, 119 N. Y. Supp. 333, a contract for nursery stock containing this provision was construed. In considering the contract that court laid down the three following propositions:

First. Where a contract for the sale of fruit trees is prepared by the seller to be signed by the buyer, any uncertainty or ambiguity therein is to be resolved in favor of the buyer.

Second. That such a contract for the sale of nursery stock contained an implied condition precedent, requiring a substantial performance by the seller, for breach of which the buyer was entitled to recover compensatory damages.

Third. That the provision of the contract quoted above applied only to such mistakes as were liable to occur in the substantial performance of the contract, and unless there was a substantial performance, the plaintiff's

recovery for breach was not limited to the price of the trees not delivered.

In view of the foregoing construction of this contract, which appears to be correct, it was necessary to determine whether or not there had been a substantial compliance with the contract by the appellant, for if it failed substantially to fulfill its contract, the rule of damages in the case of breach of the individual order and the combination order would be the same.

It seems that the trial court attempted to submit to the jury the question as to substantial compliance with the order upon the part of appellant by giving the following instruction:

"The jury are instructed that if you find from the evidence that the defendant company failed to substantially perform its contract by delivering to the plaintiff the trees that were ordered or trees of a quality and variety equally as good as those ordered, then your verdict must be for the plaintiff. By substantial performance is meant not a strict literal performance of the contract by delivering the exact number of each variety and kind of trees, but a reasonable compliance with the contract as to varieties, with such mistakes as were liable to occur, considering the size of the order and delivery."

The appellant contends that this instruction is faulty, in that it does not inform the jury of their duty in case they found there was a substantial compliance, and might be construed by the jury as tantamount to an instruction that there was not a substantial compliance. We think, however, that the instruction, under the facts of this case, did not operate to deprive the appellant of any substantial right.

[4] Ordinarily the question of whether there has been a substantial compliance with a contract is a question to be submitted to the jury, but under certain circumstances the court should declare as a matter of law that there has been a failure of substantial performance. In the case of *Pressy v. McCornack*, 235 Pa. 443, 84 Atl. 427, the court said:

"There must in every case be substantial performance of the contract, and unless there be substantial compliance, there can be no recovery; but, whether there has been substantial performance depends upon the character of the changes or alterations complained of, that is to say, do they materially affect the completed structure and were they in good faith honestly intended to fulfill the contract? Whether the party acted in good faith, and whether the departures were material, are generally questions for the jury. *Truesdale v. Watts*, 12 Pa. 73; *Pallman v. Smith*, 135 Pa. 183 [19 Atl. 891]; *Cosgrove v. Cummings*, 190 Pa. 525 [42 Atl. 881]. This is always true if the facts relating to the good faith of the plaintiff and the materiality of the changes or alterations are in dispute. On the other hand, if the undisputed testimony shows a substantial variance, not authorized by the owner, and made without his knowledge or assent, it is the duty of the court to so declare as a matter of law. *Harris v. Sharples*, 202 Pa. 243 [51 Atl. 965, 58 L. R. A. 214]."

In construing building contracts the New York courts have held that where there is clearly a substantial failure of performance on the part of the contractor it is the duty

of the court so to declare as a matter of law. *Gompert v. Healy*, 149 App. Div. 198, 133 N. Y. Supp. 689; *Ketchum v. Herrington*, 18 N. Y. Supp. 429; *Gladius v. Black*, 87 N. Y. 563; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238.

The reasoning of the court in the *Sanford Case*, *supra*, may be considered in relation to the question of performance. In that case the court said:

"It may safely be affirmed that no man in his senses would purchase 3,500 peach trees, and agree that he would be content with the return of the purchase price, if it should turn out, after three or four years of culture, that they were substantially all worthless, and not what he ordered."

The appellant had knowledge of the portion of the combined order that was intended for the respondent. The combined order and shipment was made at the request of appellant, and presumably for its convenience. The combined order, therefore, was separable, and it is proper to consider the individual order in determining the question of substantial compliance on the part of appellant. *Wilson Case Lumber Co. v. Mountain Timber Co.* (D. C.) 202 Fed. 305.

The testimony is undisputed that of the 300 Jonathan and 130 Rome Beauty trees ordered, none were delivered, and that only 70 of the 500 apple trees ordered were true to name. No complaint was made as to the delivery of the pear, cherry, peach, or plum trees. In view of the foregoing facts, there was not a substantial compliance with the contract on the part of the appellant. No error was committed, therefore, in the introduction of the individual contract in evidence.

The second error assigned by appellant is that the court admitted evidence upon an erroneous theory of the measure of damages. It seems to be the theory of appellant that the damage must be limited to the land actually occupied by the orchard, the error assigned being the admission of evidence as to the damage to the 40 acres upon which the orchard, which occupied 7.77 acres, was planted.

In the same connection the appellant complains that the court in instructing the jury adopted the same erroneous view as to the proper measure of damages. The court instructed the jury as follows:

"The jury are instructed that the damages plaintiff is entitled to in this case, if you find from the evidence that he is entitled to any, is the difference in the reasonable cash value of the 40 acres in question at the time that the plaintiff discovered that the said fruit trees were not true to name, or at such time as he, the plaintiff, by the exercise of ordinary care and attention might have discovered that fact, with the trees true to name, and the reasonable cash value of the same 40 acres of land at the same time with the fruit trees thereon as they actually existed, that is, with the trees not true to name, if you so find from the evidence, together with interest on said sum at 7 per cent.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 636.

per annum from the commencement of this action, to wit, August 27, 1912. In other words, the measure of damages is the value that would have been added to the premises, at the time of the discovery of the mistake by the plaintiff, or at such time as he, the plaintiff, by the exercise of ordinary care and attention might have discovered that fact, if the trees had been of the varieties as ordered by the plaintiff."

In this case, however, special questions were submitted to the jury, which questions and their answers are as follows:

(1) What do you find the value of the acreage embraced within such orchard to have been had the trees been planted as contained in the order and the contract of the plaintiff, such value to be determined on or about April, 1910?

We find the value of the ten acres to have been on the above date, \$3,900.00.

D. P. Albee, Foreman.

(2) What do you find the value of the acreage embraced in the orchard to have been on or about April, 1910, in the condition in which it was at such time?

We find the value of the ten acres, including the improvements, to have been \$2,400.00.

D. P. Albee, Foreman.

The general verdict of the jury was for the plaintiff in the sum of \$1,500.

It thus appears that the jury took into consideration only the 10 acres upon which the orchard was planted in arriving at their verdict. The appellant cannot complain that the jury considered the 10-acre tract instead of the 7.77 acres upon which it claims the trees were actually planted. The 2.23 acres making up the 10 acres were occupied by the dwelling house and buildings of respondent, and were so situated that manifestly it would be impracticable to consider the 7.77 acres alone. Conceding appellant's theory to be correct, it was not injured by the evidence received or instruction given.

[5] In this state a judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration, even though erroneously instructed. *Tarr v. Short Lane*, 14 Idaho, 192, 93 Pac. 957, 125 Am. St. Rep. 151.

The appellant also assigns as error the action of the court in admitting evidence, over objections, as to the value of improvements upon the 40 acres aside from the orchard. As the value of the improvements was the same whether the trees in the orchard were true to name or otherwise, we think the admission of the testimony was harmless.

[6] Appellant assigns as error the admission of answers to certain hypothetical questions propounded to witnesses, on the ground that the questions did not include all elements proven in the case, and which necessarily should have been included before the questions could be properly answered. Subsequently, however, the omitted elements were supplied, in substance, and the erroneous admission of the answers was thereby cured.

Appellant also complains that two witnesses were permitted to give opinion testimony without showing proper qualifications as experts. In the case of *Carscallen v. Coeur*

d'Alene Co., 15 Idaho, 444, 98 Pac. 622, 16 Ann. Cas. 544, this court said:

"No very nice distinction has ever been drawn or fixed rule established by which a trial judge shall determine the exact amount of knowledge, experience, and skill a so-called expert shall have before permitting him to testify before the jury. That question must be determined in the first instance by the court. * * * After the evidence is in, its weight and credibility is to be judged solely by the jury, and they will give it such weight as they think it is entitled to, and, indeed, if it runs counter to their convictions of truth in the exercise of their own knowledge and judgment, they may disregard it entirely."

It does not appear, in view of the foregoing expression, that error was committed in permitting the witnesses to testify as experts.

[7] Appellant also assigns as error the instruction of the court, quoted above, to the effect that the jury might give plaintiff interest from the date of the commencement of the action. This being an action for unliquidated damages, the instruction given was erroneous (*Barrett v. No. Pac. Ry. Co.*, 29 Idaho, 139, 157 Pac. 1016); but in view of the fact that the answers to the special questions submitted to the jury show that this instruction was disregarded, the judgment will not be reversed on account of such error.

The appellant also assigns as error the giving of the following instruction to the jury:

"The jury are instructed that under the pleadings in this case it stands admitted that the defendant company is a foreign corporation, and that it failed to comply with the statutes of the state of Idaho in regard to designating an agent in this state upon whom service of summons could be made in this state; and, having thus failed to do so, the said defendant is not entitled to urge the defense of the statute of limitations in this case."

At the opening of the trial the court had denied appellant's motion to amend its answer, so as to plead the statute of limitations. The instruction was gratuitous, in that the statute of limitations was not in issue, nor was any evidence introduced by the appellant tending to show that the cause of action was barred by the statute. The second paragraph of the complaint contained the allegation that the defendant was a foreign corporation, and that during all times mentioned in the complaint it had been, and now is, doing and carrying on business within the state, and that it had neglected to comply with the statutory requirements with reference to foreign corporations doing business within the state. This allegation is expressly admitted by the answer. The instruction, therefore, correctly stated the law, if the question involved had been an issue in the case. The instruction should not have been given; but, in view of the other instructions given by the court, it is apparent that no substantial injury was done to the appellant.

All specifications of error on the part of appellant have been examined, but it appears that the errors committed by the trial court

resulted in no substantial injury to appellant.

The judgment of the lower court will be affirmed. Costs awarded to respondent.

BUDGE, C. J., and MORGAN, J., concur.

GOODING HIGHWAY DIST. OF GOODING COUNTY v. IDAHO IRR. CO., Limited.

(Supreme Court of Idaho. March 24, 1917.)

1. PUBLIC LANDS § 64—HIGHWAYS—ACCEPTANCE—ORDER.

Power to establish highways is vested, inherently, in the Legislature and in order for a board of county commissioners to accept, on behalf of the state, the grant of right of way over the public domain expressed in section 2477, Rev. St. U. S. (Comp. St. 1913, § 4919), or to lay out a road across private property, it must substantially conform to the state law delegating this power to it and prescribing the manner in which it may be exercised. A mere order, made and entered of record by the board, declaring certain section lines to be public highways, is not a substantial compliance with the law.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 222-225.]

2. DRAINS § 55—WATERS AND WATER COURSES § 244—CONSTRUCTION OF HIGHWAY—BRIDGES.

The owner of a ditch or canal constructed across an established highway must provide a bridge, at the point of intersection, for the use and benefit of the public; but if the ditch or canal is constructed prior to the establishment of the road which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 61; *Waters and Water Courses*, Cent. Dig. § 309.]

Budge, C. J., dissenting in part.

Appeal from District Court, Lincoln County; Chas. O. Stockslager, Judge.

Suit by the Gooding Highway District of Gooding County, State of Idaho, against the Idaho Irrigation Company, to recover the cost of construction of bridges over defendant's canal. Judgment for defendant, and plaintiff appeals. Affirmed.

A. F. James, of Gooding, for appellant. N. M. Ruick, Oppenheim & Hodgins, and V. P. Coffin, all of Boise, and E. A. Walters, of Twin Falls, for respondent.

MORGAN, J. Appellant instituted this action pursuant to section 3310, Rev. Codes, to recover the cost of construction of certain bridges built across irrigation ditches and canals of respondent. That section makes it the duty of the owner of a ditch or canal to build substantial bridges at all places where it crosses county or state roads, or any road kept open and used by the people of a

neighborhood for their convenience and benefit, and provides that in case the owner neglects or refuses so to do, the board of county commissioners of the proper county shall, after ten days' notice, proceed to construct the same, and shall collect the cost thereof, together with costs of suit.

It appears from the amended complaint that on January 12, 1909, the board of county commissioners of Lincoln county, by order entered of record, declared all section lines within certain townships in that county to be public highways; that appellant was organized as a highway district on June 20, 1911, and succeeded to the ownership of the roads laid out and constructed within its territory; thereafter Gooding county was created from a portion of Lincoln county and the townships in question were included therein; that, prior to the creation of the highway district and during the latter part of the year 1909 and early in 1910, respondent constructed ditches and canals across certain section lines within the aforesaid townships, and that between September 1, 1911, and December 1, 1912, after the ditches and canals had been constructed and put to use, appellant, while building and repairing highways along these lines, constructed 16 bridges, at points where they intersected the ditches and canals, at an aggregate cost of \$1,220; that at least 15 days prior to building the bridges appellant gave notice to respondent to construct them, but by reason of its refusal to do so appellant was obliged to and did build the bridges at its own cost and expense; that all the land adjacent to the section lines above mentioned, prior to January 12, 1909, the date of the order of the board of county commissioners, was public land of the United States, and had been filed upon as "Carey Act" land, and was reclaimed and watered by the irrigation system of respondent; that the contract between the state of Idaho and respondent, which provides for the construction of the system and for watering the land, contains the following section:

"Sec. 16. *Highways*.—Entries of land are understood to be made subject to a right of way without compensation to the entryman for roads upon all section lines and also upon all half section lines which may be designated by the board of county commissioners, as may be provided by law."

Respondent demurred to the amended complaint. The demurrer was sustained, and, upon appellant's refusal to further plead, judgment of dismissal was entered, from which this appeal is prosecuted.

[1] Section 2477, Rev. Stats. U. S. (Comp. St. 1913, § 4919) provides:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

It is appellant's contention that in view of this act of Congress, which grants a free right of way for roads across the public domain and in view of section 16, heretofore quoted, of the contract between the state and re-

spondent reserving the right to lay out highways along the section lines here under consideration, no other action than that taken by the board of county commissioners was necessary to establish legal highways thereon. In support of this contention the following cases are cited for our consideration: *Schwerdtle v. Placer Co.*, 108 Cal. 589, 41 Pac. 448; *Tholl v. Koles*, 65 Kan. 802, 70 Pac. 881; *Wallowa Co. v. Wade*, 43 Or. 253, 72 Pac. 793; *Walbridge v. Bd. of Com'rs Russell Co.*, 74 Kan. 341, 86 Pac. 473; *Bd. Co. Com'rs Cowley Co. v. Johnson*, 76 Kan. 65, 90 Pac. 805; *Molyneux v. Grimes*, 78 Kan. 830, 98 Pac. 278; *Mills v. Glasscock*, 26 Okl. 123, 110 Pac. 377; *Wells v. Pennington Co.*, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758.

These authorities decide that where the state Legislature declares certain section lines on the public domain to be highways, such lines are thenceforth highways on the theory that such a declaration is an acceptance of the grant made by the government, where no private rights have theretofore intervened, and that where the statutes of the state have provided for laying out highways by action of the board of county commissioners or where a right of way has been acquired by prescription such action by the board, in the manner provided by law, or user for the prescribed period, is as complete an acceptance of the government grant as if the Legislature itself had acted directly.

In order that an act of a board of county commissioners in laying out a highway be valid, whether it be upon the public domain or over private property, the board must conform, substantially, to the law giving it such authority, because the power to establish highways rests, inherently, in the Legislature and not in the board, and the right may be exercised only in such manner as the Legislature prescribes. *Gorman v. Co. Commissioners*, 1 Idaho, 553; *Prothero v. Co. Commissioners*, 22 Idaho, 598, 127 Pac. 175.

Section 916 et seq., Rev. Codes, prescribing the methods to be followed by boards of county commissioners in laying out highways, were in force in 1909, at the time of the action of the board which is relied upon by appellant in this case. These sections, at that time and prior to the amendment of the law upon that subject, provided for the filing of a petition by a certain number of residents of the road district in which the proposed highway was to be built; that the petition must describe the route, state the estimated cost, and the necessity and advantages of the proposed road. It was necessary that a bond accompany the petition to secure the payment, if it was denied, of the costs of the proceeding; viewers must be appointed whose duty it was to make a report upon the facts alleged in the petition, and a time must be fixed at which those in favor of and those opposed to the establishment of the highway might be heard.

Appellant insists that by section 16 of the contract between the state and respondent all proceedings, such as the petition and hearing, appointment of viewers, etc., were waived, and that consent was granted for the establishment of these highways. Section 934, Rev. Codes, was as follows:

"Public roads may be established without the appointment of viewers, provided the written consent of all the owners of the land to be used for that purpose be first filed with the board of county commissioners; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only, shall it be regarded as a public road."

Assuming that respondent could and did give the consent contemplated by that section and that viewers were unnecessary, yet the board must comply with the other provisions of the law. Respondent is not shown by the amended complaint to have waived (even though it could have done so) the presentation of a petition signed by the requisite number of residents of the district, notice of hearing, or the trial of the question of the sufficiency of public importance of the highways, and the amended complaint does not show that these steps, necessary to invest the board with jurisdiction, were taken.

The most favorable construction to appellant of which section 16 of the contract is susceptible is that respondent consented, for itself and for future entrymen, not to the laying out of highways, nor that they would be of advantage or importance, but only that if the board of county commissioners, after proper petition and hearing thereon, should decide that highways were necessary and of sufficient public importance to justify the expense of their establishment and maintenance and should otherwise proceed "as provided by law" in designating, establishing, and laying them out, no compensation would be exacted for necessary land taken for that purpose along section and half section lines.

[2] The owner of a ditch or canal constructed across an established highway must provide a bridge, at the point of intersection, for the use and benefit of the public, but if the ditch or canal is constructed prior to the establishment of a public road which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs. *MacCamelly v. Pioneer Irr. District*, 17 Idaho, 415, 105 Pac. 1076; *Boise City v. Boise City Canal Co.*, 19 Idaho, 717, 115 Pac. 505; *City of Twin Falls v. Harlan*, 27 Idaho, 769, 151 Pac. 1191.

The amended complaint in this case fails to show that the board of county commissioners complied with the statutes in the matter of laying out and establishing the

highways in question, and since it could not, legally, act in an arbitrary manner and without regard to the wishes of those whose property was taxable for the construction and maintenance of the same, it follows that the order relied upon by appellant does not appear from the amended complaint to be valid; that the facts alleged in the amended complaint do not show respondent to be chargeable with the cost of constructing the bridges, and the demurrer was properly sustained. *Canyon Co. v. Toole*, 9 Idaho, 561, 75 Pac. 609.

The judgment appealed from is affirmed. Costs are awarded to respondent.

RICE, J., concurs.

BUDGE, C. J. (concurring in part and dissenting in part). With respect to that portion of the opinion which holds that, "if the ditch or canal is constructed prior to the establishment of a public highway which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs," I concur. But it should be noted that the previous decisions of this court (*MacCamelly v. Pioneer Irr. Dist.*, 17 Idaho, 415, 105 Pac. 1076; *City of Twin Falls v. Harlan*, 27 Idaho, 769, 151 Pac. 1191) make the question of the duty or the lack of duty on the part of those constructing canals to bridge them, turn upon the question of whether or not the roads were in actual use or were actually constructed at the time the canals were built. Applying that test to this case the demurrer should be sustained.

I am unable to concur, however, in that portion of the opinion which holds that the board of county commissioners of Lincoln county exceeded its authority in the order of January 12, 1909, declaring all section lines public highways. Section 2477, Rev. Stat. U. S., grants a right of way for highways over public land. The Carey Act granted certain of the public lands of the United States to the state of Idaho. The Legislature accepted the conditions of the Carey Act. Section 1613, Rev. Codes. Subsection 3 of the Carey Act (Act Cong. Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. St. 1913, § 4685]) provides:

"Any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed."

By section 1613, Rev. Codes, the selection, management, and disposal of said lands is given to the state board of land commissioners. Section 16 of the contract between the state of Idaho and the respondent company, which is binding not only on said company, but upon all settlers taking up land thereunder, provides:

"Entries of land are understood to be made subject to a right of way without compensation to the entryman for roads upon all section lines and also upon half section lines which may be

designated by the board of county commissioners, as may be provided by law."

This would seem to be a sufficient acceptance of the grant on the part of the state, and defines the location upon which roads may be designated. The board of county commissioners of the county in question entered an order declaring all section lines in question to be public highways.

In my opinion the provisions of the Rev. Codes, § 916 et seq., were evidently intended to restrict, limit, and define the mode of exercising the right of eminent domain; that is, the right of the county to take private property for a public use. Section 934, Rev. Codes, provides:

"Public roads may be established without the appointment of viewers, provided the written consent of all the owners of the land to be used for that purpose be first filed with the board of county commissioners; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only, shall it be regarded as a public road."

If I understand respondent's contention correctly, it is that notwithstanding all of the land in question was taken with the right of way on section and half section lines, reserved, and therefore the consent of the owners would not be necessary, that the consent in some manner ought to be filed with the board. It will be noticed, however, that the written consent which is to be filed with the board is "of all the owners of the land to be used for that purpose." Here the owners of the land in question owned it subject to the easement, for the government had granted a right of way over the land, and the state had expressly reserved the rights of way in question, so that there are no owners within the meaning of this section who need be consulted. It is a fundamental principle of law that no one is required, much less a public officer or public board, to do a vain and useless thing, and to require the filing of a written consent where no written consent is necessary, and where there is no one to either consent or dissent, would avail nothing.

The question of whether or not it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance is a question addressed solely to the sound discretion of the board, and the fact that the board made an order which is duly and regularly entered of record, designating certain roads, would be an acceptance of the grant, and would carry with it the presumption that the board was satisfied that the roads were of sufficient importance and necessary.

I am of the opinion that the proceedings of the board were perfectly regular, and constituted a valid acceptance of the grant, but even if they were not, I think the board had ample authority to enter the order. *Street v. Stalnaker*, 61 Neb. 205, 85 N. W. 47.

FIRST STATE BANK OF MOUNTAIN PARK v. SCHOOL DIST. NO. 65, TILLMAN COUNTY. (No. 8734.)

(Supreme Court of Oklahoma. March 6, 1917.
Rehearing Denied April 17, 1917.)

(Syllabus by the Court.)

JUDGES \Leftrightarrow 25(2)—CASE-MADE—EXTENSION OF TIME—AUTHORITY OF JUDGE.

A district judge, who has been assigned by order of the Chief Justice to hold court in a county outside of the district in which he is elected, has no authority, after the expiration of the time fixed in the order assigning him to hold court in said county, to grant an extension of time in which to prepare and serve case-made, in a case tried before him while lawfully holding court in such county.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 100-104.]

Error from District Court, Tillman County; Cham Jones, Judge.

Action between the First State Bank of Mountain Park, Okl., and School District No. 65, Tillman County, Okl. Judgment for the latter, and the former brings error. Appeal dismissed.

S. P. Freeling, Atty. Gen., J. I. Howard, Asst. Atty. Gen., and C. O. Black, of Lawton, for plaintiff in error. John E. Williams, of Frederick, for defendant in error.

HARDY, J. On December 29, 1916, defendant in error filed in this cause motion to dismiss for the reason that the case-made was not signed and settled by the trial judge within any valid extension of time allowed by law or by the court.

This case was tried before Hon. Cham Jones, one of the regularly elected district judges of the state, who had been assigned by the Chief Justice of the Supreme Court to hold court in Tillman county, one of the counties of the Twenty-Fifth judicial district. On May 6, 1916, motion for new trial was overruled, and plaintiff in error given 90 days in which to make and serve case-made. On August 3, 1916, after the expiration of the time fixed in the order assigning him to hold court in said county, the said judge made an order granting an extension of 60 days from last-mentioned date.

In *Osborne v. Chicago, R. I. & P. Ry. Co.*, 45 Okl. 817, 147 Pac. 301, it was held that after a judge pro tempore had ceased to sit as a court, he has no power to extend the time for making and serving case-made in an action tried before him. That was a case tried in the district court of Grady county before R. H. Hudson, the regularly elected district judge of the Twenty-Fourth judicial district, who had been assigned by the Chief Justice to hold court in Grady county, in the Fifteenth judicial district. After overruling plaintiff's motion for a new trial, 60 days was granted within which to prepare and serve case-made. The case-made was not prepared and served within the allowed time,

and before the expiration of the first extension the said judge granted another extension of 60 days from the time theretofore granted. Defendant in error moved to dismiss the appeal for the reason that the judge pro tempore had no power to make said second order of extension after he had ceased to sit in the cause. The court held the contention of defendant in error to be correct.

Upon the above authority, this cause must be and is dismissed. All the Justices concur.

KELLY v. BLACKWELL et ux. (No. 6837.)
(Supreme Court of Oklahoma. Jan. 30, 1917.
Rehearing Denied April 17, 1917.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS §152 —
PURCHASE FROM HEIR—RECOVERY OF PRICE.

B. qualified as administrator of J., a deceased Choctaw minor, and thereafter selected his allotment, which descended to his father and mother him surviving as his only heirs at law. While administrator, they conveyed the land to B., who sold the same to K., who gave back to B. his promissory note in part payment of the purchase money, payable upon the delivery by B. to K. of an abstract showing a clear title in B. There were no debts against the estate of J.; the land was unrestricted; the deed was for an adequate consideration; and there was no fraud in the transaction. *Held*, in a suit by B. against K., to enforce payment of the note, that the abstract containing said deed showed a clear title in B., and that he was entitled to recover on the note.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 340.]

Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Suit by A. P. Blackwell and L. R. Blackwell, his wife, against E. J. Kelly. Judgment for plaintiffs, and defendant brings error. *Affirmed*.

Bridges & Vertrees, of Waurika, for plaintiff in error. Hatchett & Ferguson, of Durant, for defendants in error.

TURNER, J. On August 14, 1913, A. P. Blackwell and L. R. Blackwell, his wife, defendants in error, sued E. J. Kelly, plaintiff in error, in the district court of Jefferson county on the following promissory note: "\$2920.00.

"Waurika, Oklahoma, January 22, 1910.

"I, E. J. Kelly, of Waurika, Oklahoma, hereby agree to pay to A. P. Blackwell of Durant, Oklahoma, the sum of twenty-nine hundred and twenty dollars (\$2920.00), said amount to be due and payable thirty days after abstract is furnished me showing a clear title in A. P. Blackwell to certain lands in Jefferson county, conveyed by A. P. Blackwell and wife to me on the 20th day of January, 1910, for which amount a vendor's lien is retained for the payment of same.
E. J. Kelly."

For answer, after a general denial, Kelly specifically denied liability on the note, because, he said, the abstract tendered him by Blackwell failed to show in him a clear title to the land. After reply filed, the cause was

tried to the court upon an agreed statement of facts, the material parts of which are:

"4. It is agreed that the land in question was allotted to Jim Joel, a Choctaw minor Indian; that the allotment was made on the 27th day of October, 1905, and was made after the death of the said Jim Joel, and was made by A. P. Blackwell as administrator for the said Jim Joel, and the said A. P. Blackwell acting as administrator is the same A. P. Blackwell as plaintiff in this action, and that Jim Joel, allottee, died intestate while a child only about one year old, and left surviving him his father and mother, Hampton and Silen Joel, and no brothers or sisters. * *

"5. That on December 20, 1905, A. P. Blackwell purchased the land in question from Hampton Joel and Silen Joel, father and mother of Jim Joel, the allottee; that the said A. P. Blackwell was appointed administrator on the 17th day of October, 1905, for the purpose of selecting the allotment, and that he purchased the lands on the 20th day of December, 1905, and at the time of purchase he had not been discharged as the administrator, and that the purchase was made from the mother and father direct. * * *

From which the court concluded as a matter of law that plaintiffs were entitled to recover, and rendered and entered judgment accordingly, to reverse which defendant brings the case here.

It is urged by defendant that the deed from Hampton Joel and Silen Joel, father and mother, and only heirs at law of Jim Joel, dated December 20, 1905, is void because, he says, the same was made, executed, and delivered by them to Blackwell as the result of a purchase from them by Blackwell while undischarged as administrator of Jim Joel. Not so. It being conceded that there were no debts against the estate, that the land was unrestricted, and that there was no fraud in the transaction and the consideration was adequate, the deed was good and passed the title of the father and mother—the only heirs of Jim Joel—to Blackwell. 18 Cyc. 349 lays down the rule thus:

"While the purchase by an executor or administrator of real estate of his decedent or any interest therein from the widow, heirs, devisees, or others in interest is highly disfavored, the judicial disposition is usually to do no more than presume strongly against the validity of such a purchase and require the fiduciary to show affirmatively adequacy of consideration and the general fairness of the transaction, and if the transaction is in good faith and without fraud it may be treated as a similar transaction between strangers would be."

In *Haight v. Pearson*, 11 Utah, 51, 39 Pac. 479, the facts were that plaintiff as executor of his father's estate bought, through his attorney, from a brother, another one of the heirs of the estate, the brother's share of the father's lands. When plaintiff brought suit against his attorney to recover the lands, the attorney, among other things, pleaded that:

"The plaintiff was incapable of purchasing an interest in the estate, because he was executor. Being incompetent to purchase himself, he could not have another purchase in trust for him, and cannot therefore enforce any trust."

The attorney relied upon Comp. Laws Utah 1888, § 4196, p. 513, which reads:

"No executor * * * must, directly or indirectly, purchase any property of the estate he represents, nor must be interested in any sale."

He also relied upon the rule of equity to the effect "that contracts in which a trustee both buys and sells to himself are void." But the court held such statute and rule of equity had nothing to do with the case, and that plaintiff had a right to recover, and in passing said:

"But a contract to purchase the interest of an heir in an estate by an executor does not come within the letter or spirit of either the statute or this equitable rule. The executor has no authority, as such, to sell the interest of an heir in the estate. Such interest is not in any sense property of the estate; it is the property of the heir, and he alone can sell it. Owing to the advantage that might be taken of heirs by executors or administrators, if we were called upon to pass upon such a sale where the heir was claiming that he had been overreached or wronged, we should scrutinize the matter, and, if unfair in its terms, would not hesitate to set such contract aside, but not because it was in violation of the statute cited. In other words, these sales by an heir to an executor are not within the statute at all. If they are fair in themselves, they should be upheld the same as other contracts."

In *Barker v. Barker*, 14 Wis. 142, a widow sued for partition of her deceased husband's estate, claiming to be the owner by purchase of the portions of two of the eight heirs, who answered, together with the other six, that the purchase was made with funds of the estate held by the plaintiff as administratrix, and it was insisted that she should be adjudged by the court to hold the same in trust for the heirs, which the court proceeded to do as to the lands so purchased, but as to lands purchased not with the trust funds, the court held the deeds conveyed title, and in the syllabus said:

"An administrator is not a trustee for the heirs, of the real property of the estate not necessary to be sold for the payment of debts, and may purchase in his own right, with his own funds, the interest of any of the heirs in such property."

In the opinion the court said:

"In our former decision we stated that we were satisfied from the evidence that no actual fraud was practiced by the widow in the purchase of those shares, by which the sale could be set aside. We will now add, upon a further consideration of the question, that we are satisfied that she did not stand in any such relation to them as would avoid the sale by an application of the law concerning the purchase of the trust estate by the trustee from the cestui que trust. Where the rule is applicable, we have adhered to it strictly. *Gillett v. Gillett*, 9 Wis. 194. But here we think the relation of trustee and cestui que trust with respect to the real estate did not exist. The administratrix had no title to it, but it descended to the heirs. True, it was liable, if necessary, to be sold to pay the debts of the deceased, by virtue of a statutory proceeding for that purpose. But in this case the necessity authorizing such a proceeding did not exist; no such proceeding was had; and the mere possibility of it in case the necessity had existed does not make the administratrix the trustee of the heir, and incapacitate her from purchasing his interest in the real estate."

In *Carter et al. v. Lee*, 51 Ind. 292, the facts were:

"George Cline died, seized in fee of the premises, and after his death his heirs conveyed the property to the plaintiff in fee. At the time of Cline's death, the property was in possession of the defendants Thomas Carter and Fisher, as tenants of Cline from year to year. Before the commencement of this action, the plaintiff had put an end to the tenancy by a proper notice to quit. The plaintiff was the administrator of the estate of George Cline at the time he took the conveyance from his heirs. The personal assets of the estate amounted to only about \$600, while Allen Carter had a claim allowed against it amounting to nearly ten times that amount. If on these facts the plaintiff was entitled to recover as against Thomas Carter and Fisher, the judgment below was correct. We are of opinion that on the facts the plaintiff was entitled to recover. The land, on the death of Cline, descended to his heirs, and they could convey it, subject to the payment of debts. The purchase by the plaintiff, while he was administrator, from the heirs, may have been voidable, but we do not decide that it was so. He took the land, however, subject to the claims of the creditors of the estate. The purchase was clearly not void, if voidable. Had the debts all been paid, or should they yet be paid, we see no reason why the sale should not stand, in the absence of any actual fraud, which is not shown. If the sale was voidable, it could only be avoided by parties interested, heirs or creditors. The appellants were neither, and it does not lie with them to interpose objections to the sale."

In *Herron v. Herron*, 71 Iowa, 428, 32 N. W. 407, the facts were that plaintiff was the father and defendant the widow of John Herron, who theretofore died intestate and without issue the owner of the real estate involved. Some time after his death plaintiff, the father, gave to a son power of attorney to sell and convey his interest in the real estate, which he did, and thereafter the father came into court and sued to set aside the deed on the ground of fraud. But the court, after affirming the judgment of the trial court refusing to set it aside, said:

"Defendant had been appointed administratrix of the estate of her husband before the transaction in question. It is urged that her position with reference to the estate created a fiduciary relation between the parties; and, as she acquired an interest in the property of the estate in the transaction, it is presumptively fraudulent. But, clearly, this position is not tenable. Defendant did not occupy a position of trust or special confidence towards plaintiff. She did not deal with his attorney in her capacity as administratrix of the estate. On the death of John Herron, the real estate of which he was seized descended in equal shares to plaintiff and defendant. Her interest in the property was a personal interest. In her representative capacity she had no interest whatever. It was a case of tenants in common dealing with each other with reference to the common estate. Neither of the parties was charged with the duty of protecting the rights or guarding the interest of the other in the property. They stood upon an equality, and clearly there can be no presumption of unfairness or fraud in the transaction."

See, also, *Taylor v. Taylor*, 259 Ill. 524, 102 N. E. 1086; *Wright v. Arnold*, 14 B. Mon. (Ky.) 638, 61 Am. Dec. 172; *State ex rel. Jones v. Jones*, 53 Mo. App. 207; *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576; *Matter of Ledrich*,

68 Hun, 396, 22 N. Y. Supp. 978; 22 Cent. Dig. tit. "Executors and Administrators," § 622.

We are therefore of opinion that the deed complained of showed a clear title in Blackwell, and that the judgment of the trial court should be affirmed. All the Justices concur.

PITTS v. PITTS. (No. 7218.)

(Supreme Court of Oklahoma. March 20, 1917.)

(Syllabus by the Court.)

1. BROKERS \S 56(3)—RIGHT TO COMMISSION—SERVICES.

The mere introduction to the owner by a broker of one who thereafter purchases the premises does not entitle the broker to a commission for the sale of the premises, where the purchaser has already seen and is fully advised as to the property, and has already determined to purchase the same.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 86-89.]

2. BROKERS \S 56(3)—RIGHT TO COMMISSION—SERVICES.

The fact that a broker possesses the same surname as the owner of the premises, and by mistake of the intending purchaser is accidentally brought into contact with such purchaser whom he never saw before, where the broker does nothing further than to direct the intending purchaser to the true owner, after an unsuccessful attempt to make a sale, who thereafter negotiates a sale of the property, does not entitle the broker to a commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 86-89.]

3. BROKERS \S 86(4) — ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE—PROCURING CAUSE.

Evidence examined, and held, that plaintiff was neither the procuring cause of the sale nor the efficient agent in effecting same, and was not entitled to a commission therefor.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 117.]

Error from Superior Court, Muskogee County; F. L. McCain, Judge.

Suit by Bert Pitts against S. C. Pitts. Judgment for plaintiff, and defendant brings error. Reversed.

W. P. Z. German, of Muskogee, for plaintiff in error. Bailey, Wyand & Nelson and W. G. Robertson, all of Muskogee, for defendant in error.

HARDY, J. Bert Pitts sued S. C. Pitts in the superior court of Muskogee county to recover certain sums alleged to be due him as commission for services in connection with the sale of a farm, and recovered judgment therefor, and this appeal is from the judgment rendered in his favor. The parties will be referred to in accordance with their positions in the trial court.

The undisputed facts are that one Gilstrap had purchased a piece of land near Featherstone, and after looking it over saw the land adjoining it, and concluded that he wanted to purchase it as an addition to his farm. After inquiry in the neighborhood,

he learned that it belonged to a man at Muskogee by the name of Pitts. Thereafter he went to Muskogee for the purpose of seeing Pitts with reference to the purchase of said land. Upon making inquiry in Muskogee as to where Pitts could be found, he was directed to the office of plaintiff, where he made known his mission. Plaintiff thereupon undertook to sell him said land, but failed to do so. Plaintiff then called defendant S. C. Pitts over the telephone, and a meeting between defendant and Gilstrap was brought about. Negotiations were had between defendant and Gilstrap, but no deal was consummated. Thereafter a Mr. Tinch, who was engaged in the loan business, having learned that Gilstrap desired to buy the Pitts farm, concluded that if he could bring about a trade between Pitts and Gilstrap he could make a loan upon said property. With this object in view, he went to Stigler and induced Gilstrap to come to Muskogee. Having learned that Gilstrap would come to Muskogee, he went to the telephone with a view of calling S. C. Pitts, but instead, by mistake, called Bert Pitts and told him that Gilstrap would be in to close the deal. Plaintiff thereupon called defendant over the telephone, informing him of that fact. Gilstrap and defendant met in Tinch's office, and finally closed the deal, and plaintiff, learning of the sale, demanded a commission therefor.

The first question urged is that plaintiff, having declared upon an express contract, was not entitled to recover on a quantum meruit. The evidence failed to show an express agreement for any certain sum, but plaintiff proved what would be a reasonable commission under the circumstances.

In King et al. v. Stevenson et al., 29 Okl. 29, 116 Pac. 183, plaintiff, who was a real estate agent, brought his action for commissions alleged to have been earned on the sale of land and relied upon a special contract. He recovered upon quantum meruit, and it was held error to admit evidence establishing the same and to instruct the jury that it might return a verdict for such sum as was customary for services shown to have been rendered. In the present case no objection was made to the introduction of this evidence. In the case cited it is stated:

"And where plaintiff declares upon an express contract, he must, except in those cases where on the introduction of evidence by consent a departure is permitted, succeed or fail upon the issue which he thus tenders."

By failing to object to the introduction of this evidence, defendant is not in a position to urge error upon its admission.

[1, 2] The court should have instructed a verdict for defendant. The mere introduction to the owner by a broker of one who thereafter purchases the premises does not entitle the broker to a commission for the sale of the premises, where the purchaser has already seen and is fully advised as to

the property, and has already determined to purchase the same. The mere accident that the broker possesses the same surname as the owner and by mistake of the intending purchaser is accidentally brought in contact with such purchaser whom he never saw before, where the broker does nothing further than to direct the intending purchaser to the true owner after an unsuccessful attempt to make a sale, who thereafter negotiates a sale of the property, is not sufficient to entitle the broker to a commission. Before the broker is entitled to a commission, he must be the procuring cause of the sale and to be the procuring cause of a sale the broker must first call the purchaser's attention to the property, and start negotiations, which culminate in the sale thereof. *Wheelan et al. v. Hunt*, 37 Okl. 523, 133 Pac. 52. In *Shapiro v. Shapiro*, 117 App. Div. 817, 103 N. Y. Supp. 305, Barnett Shapiro owned certain property which was for sale. A brokerage firm called the property and the price to the attention of a prospective purchaser, who made a memorandum, including the owner's name and went to look at the houses. Thereafter, attempting to call the owner to the telephone, by mistake, he called up another Shapiro, who truthfully admitted that he was Mr. Shapiro, and said that he knew about the houses, and who finally made an appointment to bring the intending purchaser and the owner into personal communication. A sale was finally effected by the owner, and the broker sued for commission. Other brokers claiming a right to the commission, same was paid into court, and the owner was relieved by order of interpleader, leaving the question to be litigated between the rival claimants. The claim of Shapiro was denied, and the judgment was affirmed. The court said:

"If the buyers were in fact Michel & Scott, they were in possession of the particulars, knew the name of the owner, and were actually seeking him, when the accident of name and surname permitted the broker Shapiro to get wind of the project, and to proffer his services, which were really nothing more than to secure what direct telephonic communication might have brought to pass, if the right Shapiro had been found under the wrong Shapiro's telephone number."

In *Lord v. United States Transp. Co.*, 143 App. Div. 437, 128 N. Y. Supp. 451, in a similar case, it was said:

"It is perfectly clear on uncontroverted evidence that the defendant was looking for a tenant for part of this pier, and that the French Line was looking for this particular pier before the attention of the plaintiff was drawn to the matter."

In reversing the case the court said:

"It may well be, as indicated by the testimony of Cauchois, that the plaintiff's call on Cauchois expedited their coming together; but it was inevitable in the circumstances that they would meet with respect to this proposition, even had the plaintiff not intervened to precipitate it."

Spotswood v. Morris, 12 Idaho, 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665, reaches a

like conclusion upon a similar state of facts. In that case Mulhall had been dealing with Morris for the lands in question, and was en route to see it and Morris, and while in Moscow, Idaho, happened into the office of Spotswood & Veach, and made some inquiry about Denver land and the country in general, and Spotswood suggested that he give Mulhall a letter of introduction to Morris, the owner. After receiving the letter, Mulhall proceeded to Lewiston, and met Morris, and presented the letter. It was held that under this state of facts, Spotswood & Veach did not call Mulhall's attention to the land, and were not entitled to recover. In passing upon the case the court said:

"He had concluded to go and inspect said land more than a month before he met respondents, having had his attention called to it by B. F. Morris, and had proceeded about 2,000 miles on his way to see the land before he accidentally, or incidentally, met respondents. Those are the undisputed facts. Respondents were informed by Mulhall that he was on his way to see said land. The giving of said letter of introduction was a work of supererogation, and for the evident purpose of laying the foundation for a commission. The respondents had no more right to appropriate as their own a purchaser found by appellants than appellants had to appropriate one found by respondents, provided the land had been listed with them. There must be a little honor between real estate agents."

[3] Under the evidence and in accordance with the rule declared in the foregoing authorities, plaintiff was neither the procuring cause of this sale nor the efficient agent in effecting it. The purchaser obtained his information prior to seeing plaintiff, and accidentally entered his office in his search for the defendant. The moving and procuring cause of this sale occurred before plaintiff knew of the purchaser or of his desire to acquire the property and the plaintiff had no connection with the efficient agency that brought it about, and the sale clearly was not a result of his efforts.

The judgment is therefore reversed. All the Justices concur.

THOMAS v. HUDDLESTON et al. (No. 8273.)*

(Supreme Court of Oklahoma. Oct. 10, 1916.
Rehearing Denied April 10, 1917.)

(Syllabus by the Court.)

1. NOTICE ~~§~~2—VENDOR AND PURCHASER ~~§~~227—STATUTE—"ACTUAL NOTICE."

"The words 'actual notice' do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which if prosecuted with ordinary diligence would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make

such inquiry, and is chargeable with the 'actual notice' he would have received."

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 2; Vendor and Purchaser, Cent. Dig. § 474.]

For other definitions, see Words and Phrases, First and Second Series, Actual Notice.]

2. NOTICE — 6—FACTS PUTTING ON INQUIRY.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person had sufficient information to lead him to a fact, he shall be deemed conversant of it."

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 4-7.]

Commissioners' Opinion, Division No. 3. Error from District Court, Okfuskee County; Geo. W. Crump, Judge.

Action by Elnora Thomas, née Elnora Barnett, against C. T. Huddleston, Scottie Herriford, C. H. Dixon, Porter Grimes, and T. M. Haynes to cancel certain conveyances as clouds upon plaintiff's title, in which Dixon and Grimes filed a cross-petition against Herriford and Haynes, and in which, after the death of defendant Grimes, the action was revived by his widow, heirs, and administrator. Judgment for defendants, and plaintiff brings error. Reversed, with direction to enter judgment in favor of plaintiff canceling all of the deeds mentioned in her petition and quieting in her the title to the land involved.

Fred M. Carter, of Okmulgee, for plaintiff in error. Wm. S. Peters, of Boley, and J. B. Patterson and C. T. Huddleston, both of Okemah, for defendants in error.

BLEAKMORE, C. This action was commenced in the district court of Okfuskee county on May 7, 1914, by Elnora Barnett, plaintiff, against C. T. Huddleston, Scottie Herriford, C. H. Dixon, Porter Grimes, and T. M. Haynes, defendants, to cancel certain conveyances as clouds upon her title to the land therelp described, etc. Huddleston answered, denying possession and disclaiming any interest in the land. Haynes answered likewise. Dickson and Grimes answered separately, denying generally the allegations of the petition, admitting the purchase of certain portions of the lands involved from Scottie Herriford, and by way of cross-petition against her and T. M. Haynes, Scottie Herriford answered, and she with defendant Haynes also answered the cross-petitions. Pending its disposition in the court below, defendant Grimes died, and the action was revived; his widow, heirs, and administrator being made parties. There was trial to the court resulting in judgment for defendants, from which plaintiff has appealed.

The lands involved, 160 acres, constitute the allotment of the plaintiff, Elnora Barnett, a citizen of the Creek Nation, who arrived at her majority, as shown by the enrollment records of the Commissioner to the

Five Civilized Tribes, on January 16, 1912. On November 15, 1911, pursuant to an order of sale in a proceeding in the county court of Okfuskee county, 120 acres of the lands allotted to the plaintiff were sold by her guardian in separate parcels, 80 acres to Polly Barnett, her stepmother, and 40 acres to one D. J. Turner, for \$2,400 and \$1,040 cash respectively. On December 2, 1911, these sales were confirmed by order of court, and the guardian executed deeds to such purchasers. On the same day, D. J. Turner without consideration executed to Polly Barnett a conveyance of the lands described in the guardian's deed to him. Such conveyances were shortly thereafter recorded in the office of the register of deeds of Okfuskee county. No part of the consideration recited in the return of sale, order of confirmation, and the guardian's deed was ever paid.

Inst May, 1912, Polly Barnett approached one Lake Moore to borrow money, to be secured by a mortgage on said 120 acres. Whereupon, at the instance of Moore, he and Polly Barnett and her husband, James Barnett, the father of plaintiff, sought the opinion of the defendant Huddleston, an attorney at law, as to the validity of the title of Polly Barnett to such lands. Huddleston advised them that the guardianship proceedings were irregular, and that to clear the title the land should be resold upon proceeding in the county court, and that it would be best that Polly Barnett execute a quitclaim deed thereof to Moore, and also that the plaintiff, who it was claimed would soon thereafter become of age, execute a deed of conveyance describing said lands to Moore. Accordingly, on May 6, 1912, a deed was executed by the plaintiff to Lake Moore describing her entire allotment of 160 acres, for the recited consideration of \$1,000. No part of such consideration was paid, nor was it contemplated by the parties that it should ever be paid. On the same day, there was filed in the guardianship proceedings in the county court a petition signed by Morris Barnett, purporting to act as the guardian of plaintiff for the sale of her entire 160 acres allotment; and on May 13, 1912, in said guardianship proceedings an order was made authorizing the sale thereof.

On May 29, 1912, Polly Barnett executed her deed describing said 160 acres of land to Lake Moore. No consideration passed to her for this conveyance.

On June 3, 1912, in said guardianship proceeding there was filed a return of sale by the guardian showing the sale of said 160 acres to Lake Moore for the sum of \$1,000.

On July 8, 1912, the county court confirmed the sale of said land, it being recited in the order that the guardian appeared by his attorneys, Huddleston & Hockensmith, and that C. T. Huddleston raised the former bid to the sum of \$2,000.

On July 17, 1912, Lake Moore, without consideration, executed his quitclaim deed describing said land to C. T. Huddleston.

On August 12, 1912, Morris Barnett, the purported guardian of the plaintiff, who had refused to execute a deed to Huddleston pursuant to the order of the county court of July 8th, confirming said sale, was, for that and other reasons, cited to appear before said court and show cause why he should not be removed from office.

On September 18, 1912, Huddleston sold said lands to the defendant Haynes, a negro real estate dealer of Boley, Okl., and his stenographer, Scottie Herriford; the latter appearing as sole grantee in the conveyance.

Thereafter, on September 21, 1912, Morris Barnett was induced to execute his deed as guardian to Huddleston; the consideration being \$2,000.

In the guardianship proceedings subsequent to May 6, 1912, the law firm of which defendant Huddleston was a member appears as attorneys of record for the guardian, and Huddleston was allowed by the court and paid by such guardian the sum of \$200 for his services.

We quote from the brief of defendants Huddleston and Herriford relative to the facts in the case as follows:

"In 1912, and while this land was in this condition, Polly Barnett and James Barnett, the father of the plaintiff in error, came to Lake Moore and wanted to borrow the money. Lake Moore then informed them that, if C. T. Huddleston would say the title to the land was all right, he would make them a reasonable loan, but at no time did he contemplate making anything like the purchase price; and the said Lake Moore, Polly Barnett, and James Barnett came into the office of C. T. Huddleston and asked him to look over the title, and, after investigation, the said C. T. Huddleston informed them that the probate proceedings were very irregular, having been carried through by some negro lawyers at Boley, and the said Lake Moore, Polly Barnett, and James Barnett then informed the said C. T. Huddleston that Elnora Barnett would be of age shortly, but the enrollment records were not produced, and the said attorney had no opportunity to ascertain whether she was of age or not, but said attorney advised them that, if they desired to straighten this title, the best way to do so would be for Polly Barnett to make a quitclaim deed to Lake Moore, and Elnora Barnett also make a deed to Lake Moore in order that the plaintiff in error, who was about to become of age, could not cloud the title while these proceedings were being carried through, and that, when the land was sold, all the outstanding clouds against their title would be in Lake Moore, and the announcement would be made at the sale that whoever purchased this land before they paid any money should have a quitclaim deed from Lake Moore.

"In pursuance to this agreement, deeds were executed by plaintiff in error and Polly Barnett to Lake Moore, and the land was duly and regularly sold through the county court for Okfuskee county, Okl., and sold to the highest bidder at public auction, at the front door of the courthouse, where several persons were present and where \$7,000 worth of land was sold at the same time, and at the request of Lake Moore, who was absent, the said C. T. Huddleston at said time bid said land off for Lake Moore for

the sum of \$1,000. The announcement then and there being made to the public that any party who desired to bid on the said land, before he paid any money, would be entitled to a quitclaim deed from Lake Moore, thereby clearing up the title."

Lake Moore, a witness on behalf of defendants, testified as follows:

"Q. Mr. Moore, at the time you took a quitclaim deed from Elnora Barnett and Polly Barnett and had a bid placed here in your name, was it, or was it not, to take title to yourself, or did you intend to take it and convey to Polly Barnett? A. It was the understanding between all of us that I was to convey to the negro woman. * * * Q. You did not pay Elnora Barnett anything for the deed? A. No, sir; my recollection is that Jim Barnett handled all of those matters. I got the deed from Polly Barnett, the quitclaim, and the agreement was when the land sold for \$1,000 she wanted the tract, and the land was to go to her, and afterwards a man raised the bid to \$2,000, and Jim Barnett agreed that if they got it raised to \$2,000 to let it go, and somebody else bid that for it. Q. You say it was the purpose for taking these deeds from Polly Barnett and Elnora Barnett to convey it back to Polly Barnett? A. Yes, sir; as I remember it, it was this: Just to tell the whole thing as I understood it, it was not known whether Elnora Barnett was of age; it was in dispute, and they wanted to get the land for \$1,000. She already had some kind of probate proceedings, and the idea was to put in a good bid and buy at that price for her. After the bid was raised to considerable more than that, Jim Barnett agreed that if he could get \$2,000 he would let it go, and they were going to make a quitclaim deed to whoever bought it, and my recollection is Mr. Huddleston bought it. Q. Do you mean, when you say it was understood when you took these quitclaim deeds from Polly Barnett and Elnora Barnett, that you were to convey it back to them? A. Yes, sir. Q. Your purpose in doing that was to get the title to the Elnora Barnett land clear and in good shape, wasn't it? A. Yes, sir; now do not misunderstand me that I was bidding on it philanthropically. I was wanting two tracts. Jim was helping me, and I was helping Jim. The land went so high I got an opportunity to draw out."

On December 20, 1912, Scottie Herriford executed her deed of conveyance reciting a consideration of \$1,280, to C. H. Dixon, describing 40 acres of the land involved; on January 22, 1913, she executed a second deed for the recited consideration of \$1,280 to said C. H. Dixon, describing another 40 acres of said land; and on February 1, 1913, she executed a third conveyance reciting a consideration of \$1,320 to Porter Grimes describing an additional 40 acres of said land. On February 8, 1913, T. M. Haynes executed a quitclaim deed to C. H. Dixon describing one of the tracts embraced in the former deed of Scottie Herriford.

It is alleged in the petition that the deed from the plaintiff to Lake Moore was fraudulently obtained and without consideration. In our opinion the evidence sustains this allegation.

Defendants in error assert as the origin of their title: (1) The guardian's deed of date of September 21, 1912, to Huddleston; (2) guardian's deeds of December 2, 1911,

to Polly Barnett and D. J. Turner; and (3) the deed from the plaintiff to Lake Moore.

With regard to the claim of title under the purported guardian's deed to Huddleston, it may be said that plaintiff reached her majority on January 16, 1912; that thereafter the county court of Okfuskee county was without jurisdiction to authorize or confirm the sale of her lands in the guardianship proceedings, and therefore such proceedings and the deed to Huddleston pursuant thereto were void, and ineffectual to convey title.

As against plaintiff, the defendants all rely upon the proceeding in the county court, of which they had notice, the records of the office of the register of deeds, and the enrollment records of the Commissioner to the Five Civilized Tribes. From these sources it was apparent upon the most casual investigation: (1) That, as shown by the record made conclusive evidence of her age by congressional enactment, plaintiff was an adult when the proceedings in the county court looking to the second sale of her allotment, and in which defendant Huddleston participated as attorney for her guardian, and also as purchaser at the guardian's sale, were begun. (2) That 120 acres of this same allotment had been sold for the sum of \$3,440 in a former guardianship proceeding some months previous. (3) That Lake Moore, to whom plaintiff had executed a deed describing her entire allotment of 160 acres on May 6, 1912, and which deed appeared of record at the time of the pretended second sale of such land in the guardianship proceedings, did not regard such deed as operative to convey title to the same, inasmuch as the return of sale disclosed that said land was sold to him at the second guardian's sale upon his bid in the sum of \$1,000, and that thereafter upon confirmation of the sale to Huddleston he executed a quitclaim deed to Huddleston describing said land, for the recited consideration of \$1. (4) That from his purchase of the land upon an increased bid at the time of the confirmation of the sale, obviously Huddleston did not regard the deed of the plaintiff to Lake Moore as a conveyance of her title. (5) That the court and no one connected with the matter considered the original guardian's sales to Polly Barnett and Turner as valid, in the light of the attempted resale in the guardianship proceedings.

These are some of the circumstances which would irresistibly have led an ordinarily prudent person to further inquiry, which would have disclosed the uncontroverted fact that no consideration was ever paid by the grantee in any deed in chain of title relied upon by defendants, save that executed to Huddleston by a person whose authority as guardian had ceased, and made pursuant to an order of a court without jurisdiction; that it was never contemplated that the deed executed by plaintiff should operate as a conveyance of her land; that the entire transac-

tion was but a scheme to exploit the estate of plaintiff by denuding her of her land, to the profit of others.

[1, 2] From the foregoing it is clear that defendants had notice of circumstances sufficient in themselves to excite attention, and put a reasonably prudent person upon inquiry as to the particular facts establishing the fraud with which the entire transaction, culminating in the deeds to Huddleston, was tainted. Having failed to exercise ordinary diligence in the pursuit of such inquiry, defendants are chargeable with the actual knowledge they should otherwise have received. They were not purchasers in good faith and without notice.

By section 2928, Revised Laws 1910, it is provided:

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

In *Cooper v. Fleasner*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29, it is held:

1. "The words 'actual notice' do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the 'actual notice' he would have received."

In *Wood v. Carpenter*, 101 U. S. 141, 25 L. Ed. 809, it is stated:

2. "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy v. Green*, 3 Myl. & K. 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

The trial court found:

"That the said plaintiff, Elnora Barnett, after she arrived at her majority, accepted and used part of the proceeds of the funds of the sale of said land, and that she had knowledge at the time that said money was used by her that it was a part of the proceeds of said sale of said land. Therefore she is estopped from setting up the invalidity of said deed."

If the facts as found could operate as an estoppel (and this question it is unnecessary to determine), the evidence, in our opinion, does not sustain the finding; such evidence being, in substance, that Morris Barnett, who purported to act as guardian received \$2,000 from Huddleston as the purchase price of the land in question, and of this amount he loaned \$1,000 upon real estate security to the father of the plaintiff, and this without the knowledge or consent of

the plaintiff, and that the report of Morris Barnett as guardian disclosed that from September 21, 1912, until October 11, 1918, he paid out for the maintenance and education of the plaintiff a sum slightly in excess of \$200, leaving a balance due him from plaintiff in the sum of \$86.63.

Evidence of the value of the land involved was offered, and there appears a diversity of opinion among the witnesses in this regard. The contention of defendant that \$2,000 was approximately the full value of the land if material in any respect does not impress us favorably in the light of the fact that Huddleston sold the same to Haynes and Scottie Herriford three days before he obtained the guardian's deed, at a profit of \$1,000, and that Scottie Herriford, in less than five months, had sold 120 acres thereof for the sum of \$3,880.

It is unnecessary to consider the questions of misrepresentation and fraud presented by the cross-petitions of Dixon and Grimes against the defendants Haynes and Herriford. The rights of these parties may be determined upon subsequent proceedings.

It follows that the judgment of the trial court should be reversed, with directions to enter judgment in favor of the plaintiff below, canceling all of the deeds mentioned in her petition and quieting in her the title to the land involved.

PER CURIAM. Adopted in whole.

ST. LOUIS, I. M. & S. RY. CO. v. CANTRELL. (No. 6335.)

(Supreme Court of Oklahoma. March 20, 1917.)

(Syllabus by the Court.)

1. CARRIERS §282—NEGLIGENCE—INJURY TO LICENSEE—LIABILITY.

Where a constable, with the express permission of the employé of a railroad company, whose duty is to assist passengers to alight from and to board its passenger train, goes upon said train for the purpose of arresting and taking therefrom persons charged with the commission of a felony, the company is bound to hold its train a reasonable length of time to permit him to make such arrest and alight therefrom, and to exercise ordinary care for his safety, and if such officer is injured by reason of the negligent failure of the railroad company to exercise ordinary care for his safety, the company will be liable in damages for any injuries resulting from such negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116.]

2. DAMAGES §187 — EXPERT TESTIMONY — PERMANENT INJURY.

Where the evidence showed that plaintiff's right arm, side, and leg had been bruised and injured and partially paralyzed, and at the time of the trial his arm and leg were useless, and the effect of his injuries in disabling him from manual labor are stated by him, the jury can judge whether and to what extent he will be permanently disabled, and the testimony of physicians as to the permanent impairment of his

ability to labor is not, of necessity, required to enable him to recover for permanent disability. [Ed. Note.—For other cases, see Damages, Cent. Dig. § 509.]

3. APPEAL AND ERROR §1170(1) — AFFIRMANCE—STATUTORY PROVISION.

Record examined, and held that no prejudicial error, depriving defendant of any constitutional or statutory right, having occurred and the trial having resulted in substantial justice, the judgment is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4082, 4083, 4454, 4540.]

Error to District Court, Sequoyah County; John H. Pitchford, Judge.

Suit by C. A. Cantrell against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas B. Pryor, of Ft. Smith, Ark., and W. L. Curtis, of Sallisaw, for plaintiff in error. T. F. Shackelford and Roy Frye, both of Sallisaw, and Joe Bailey Allen, of Oklahoma City, for defendant in error.

HARDY, J. C. A. Cantrell, as plaintiff, sued the St. Louis, Iron Mountain & Southern Railway Company as defendant, for damages alleged to have been caused by the negligence of the defendant, as will hereinafter appear. The parties will be referred to as they appeared in the trial court.

[1] Plaintiff was constable of district No. 5, Campbell township, in Sequoyah county, and about the 15th of November, 1912, went to the depot of defendant in the town of Gore to meet a train, which was due at such station at 9:54 p. m., for the purpose of searching the same and apprehending two persons for whom he had a warrant of arrest, charging them with the crime of larceny. Upon the arrival of the train, plaintiff notified the employé of defendant who was assisting the passengers to alight that he had a warrant and of his purpose to board the train and requested such employé to hold the train until he could search it, to which the employé assented. After the passengers had alighted plaintiff went aboard the train for the purpose of searching it, when it was almost immediately started up. After completing his search, in attempting to alight, plaintiff fell and was injured.

The principal question presented is based upon the instructions given by the court and in refusing certain requests by defendant, defining the duty owing by defendant to plaintiff under the circumstances. Defendant objected to the introduction of any evidence under the petition, and demurred to the plaintiff's evidence at the close thereof, and requested the court to instruct a verdict in its favor, and duly excepted to instructions given, defining the measure of duty owing by it to plaintiff, and reserved exceptions to the refusal of the court to give certain requests offered. It is the contention of

defendant that the circumstances show that plaintiff was a trespasser or, at most, a mere licensee, and that the measure of its duty to him was to refrain from wanton and willful injury, while it is the contention of plaintiff, and the jury were so instructed by the court, that defendant owed to plaintiff the duty to exercise ordinary care to avoid injury to him. In support of defendant's contention it is argued that the warrant under which plaintiff was acting was insufficient in law and that because the parties for whom he was searching had not committed an offense in his presence, he was not entitled to make an arrest without a warrant. We deem it unnecessary to discuss this question, for the reason that plaintiff's presence upon the train was with defendant's knowledge and permission and in accordance with an agreement to hold the train until he could make search and disembark. In the discharge of his duty as an officer, he was authorized to arrest persons whom he had reasonable grounds to believe had committed a felony, and who were seeking to escape upon defendant's train, without a warrant (section 5654, Rev. Laws 1910) and in entering said train for that purpose he was not a trespasser.

In *Creeden v. Boston, etc., Ry. Co.*, 193 Mass. 280, 79 N. E. 344, 9 Ann. Cas. 1121, which is relied upon by defendant as supporting its contention, the facts were that plaintiff's intestate, who was an officer, on the night of the accident had entered a train of defendant to look for persons whom he had reason to believe were criminals and were escaping from the city; that he found one of such persons on the train, and left the train, which had stopped on a bridge across the Merrimac river, together with the person he had arrested; that when on the bridge and making his way towards the station, plaintiff's intestate hit his foot against a projecting plank on the bridge and fell to the street and was killed. The court held that deceased was at most a mere licensee, and that the company was not liable. Attention was called to the fact that the petition contained no allegation that plaintiff's intestate entered the train for the purpose of serving a warrant for the arrest of any person whom he believed to be there, nor that he had reasonable ground to believe that a breach of the peace or other crime was committed thereon, nor that there were upon said train persons who had committed an offense for which it was lawful to make an arrest without a warrant. The facts in that case are so dissimilar to the facts here that we do not regard it as controlling. Here plaintiff had a warrant for the arrest of certain persons charged with the commission of a crime; and, while the warrant is conceded not to be legally sufficient, that is a question of which the defendant cannot take advantage; but if this be not true, the evidence shows that plaintiff in-

formed defendant's employé that he desired to go aboard the train and arrest two persons charged with the commission of a felony, and that said employé consented that he might do so, and agreed to hold the train until it could be searched and plaintiff could alight therefrom.

In a number of cases it has been held that a police officer who, in the discharge of his duties, enters a building in the nighttime for the purpose of inspecting the premises, and who falls down an unguarded elevator well which is required by ordinance to be protected, is, in such cases, rightfully upon the premises, and that the duty imposed upon the master to protect elevator wells, hoistways, and similar openings is intended for his benefit, as well as other persons rightfully entering the premises, and for a failure of the owner to properly protect such openings resulting in injury to the officer, he is entitled to recover (*Parker v. Barnard et al.*, 135 Mass. 116, 46 Am. Rep. 450; *Leary v. Godfrey*, 138 Mass. 315; *Ryan v. Thomson*, 38 N. Y. Super. Ct. 133; *Racine v. Morris et al.*, 201 N. Y. 240, 94 N. E. 864), and under similar conditions it has been held that a customs or revenue officer, who is required by his duties to go upon the premises of another and while there suffers injury by reason of the defective condition of the premises resulting from the negligence of the owner, is there by the implied invitation of the owner, and is entitled to recover for damages occasioned by the injuries resulting from such negligent condition (*Anderson & Nelson Dis. Co. v. Hair*, 103 Ky. 196, 44 S. W. 658; *Luddington v. Miller*, 36 N. Y. Super. Ct. 1; *Wilson v. Union Works Dry Dock Co.*, 167 Cal. 539, 140 Pac. 250, 51 L. R. A. [N. S.] 361).

Where a quarantine guard whose duty it is to prevent unauthorized persons from passing a "quarantine line" across railroad tracks was injured by the negligence of the railroad company within a few feet of the line, and where the company knew of his presence, the jury are authorized to find that he was upon the premises of the defendant by invitation or right (*Louisville & N. R. Co. v. Goulding*, 52 Fla. 327, 42 South. 854), and where employés of a city are required by their duty to go upon the premises of another in the performance of certain duties imposed upon them, such employés are entitled to maintain an action for damages resulting from injuries occasioned by the negligent failure of the owner to keep his premises in a reasonably safe condition (*Finnegan v. Fall River Gas Works Co.*, 159 Mass. 311, 34 N. E. 523; *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921); and, in a case where a street car company, by arrangement with the post office department, collected mail in boxes attached to its cars to be taken therefrom at its barn by a postal carrier, it was held that such street car company was bound to provide safe access to such cars, and that a postal carrier

upon the premises for the purpose of taking therefrom mail which had been collected by the street car company, and who was injured by reason of the negligent failure of the street car company to discharge its duty in this respect, was entitled to recover for his injuries. *Young v. People's Gas & Elec. Co.*, 128 Iowa, 290, 103 N. W. 788.

A rule which is applied to a state of facts more nearly analogous to those presented than any which we have cited is that, where a person goes upon a train in conformity with a practice adopted or acquiesced in by a carrier, for the purpose of rendering assistance to a passenger; and in such cases this court has held that the carrier, in permitting such persons to enter with knowledge of his purpose, is presumed to agree that he may execute it and is bound to hold the train a reasonable time therefor, and that if such person is injured by reason of a sudden starting of the train or the omission to give the customary signals, the carrier will be liable. *St. L. & S. F. R. Co. v. Lee*, 37 Okl. 545, 132 Pac. 1072, 46 L. R. A. (N. S.) 357; *C., R. I. & P. R. Co. v. McAles-ter*, 39 Okl. 153, 134 Pac. 661; *St. L. & S. F. R. Co. v. Isenberg*, 150 Pac. 123.

The employé from who plaintiff obtained permission to enter the train was the flagman to whom was intrusted the duty of seeing that all passengers had safely alighted and those intending to depart had entered the cars; and it appears from the evidence of the conductor that he always permitted officers, when known to be such, to enter and search his train for persons charged with crime, who were supposed to be thereon. The flagman was requested by plaintiff to permit him to enter the train for the purpose of searching it, and he gave his consent thereto. After all the passengers had alighted plaintiff boarded the train, and within about a minute thereafter the flagman gave the signal to the conductor to start. We believe the facts of this case bring it within the rule applied in the cases where a person goes aboard with the consent of the carrier for the purpose of assisting a passenger, and that under the circumstances, irrespective of plaintiff's right as an officer to make the search, where defendant agreed that he might board the train and search same, it was its duty to hold the train a reasonable time therefor, and to permit plaintiff to alight, and that if plaintiff was injured by reason of the sudden starting of the train or of the omission of the defendant to give the customary signals that the train was about to start, defendant would be liable. The question of contributory negligence was a question of fact for the jury, and was properly submitted to them by instructions which were not excepted to; and, having been so submitted and determined against plaintiff, we will not disturb the verdict.

[2] The petition alleged that plaintiff was

injured by receiving a great gash in his head over the right ear, that his right arm, side, and leg were bruised and injured and partially paralyzed, and that his hearing had been greatly damaged, and that he had been rendered almost totally deaf. The evidence upon the part of the plaintiff reasonably tended to prove these allegations. Exceptions were taken to the instructions defining the measure of damages upon the ground that there was no evidence authorizing the submission to the jury of certain items of recovery therein enumerated. The proof was that plaintiff was a farmer 49 years of age, and that previous to the accident he was in good physical condition, and was an able-bodied man. It showed, however, that he had been suffering somewhat from impaired hearing for which he had been treated by a physician at Muskogee. At the time of the trial his right arm, side, and leg were paralyzed to such an extent that they were almost entirely useless, and the sense of hearing in his right ear was almost totally destroyed. The verdict of the jury was for \$600. Since the appeal has been filed in this court, plaintiff has died, but whether as a result of the injuries received does not appear. It having been shown that plaintiff's arm, side, and leg had been rendered useless by the accident, and the sense of hearing in his right ear greatly impaired, it was proper to instruct the jury to take into consideration, in estimating plaintiff's damages, his future inability to attend to his usual business or to perform the kind of labor to which he was fitted. *Fisher et al. v. Jansen*, 128 Ill. 549, 21 N. E. 598. The character and extent of his injuries were described by him and by a physician, and the effect thereof in disabling him from manual labor was also stated by him to the jury, and they were of such a character that the jury could judge whether and to what extent he would be permanently disabled, and while Dr. Eichling expressed his opinion that the injuries were total and permanent, the testimony of physicians as to the permanent impairment of a person's ability to labor in a case of this character is not, of necessity, required to enable such person to recover for permanent disability. *M. K. & T. Ry. Co. v. Fowler*, 61 Kan. 320, 59 Pac. 648; 1 *Joyce on Damages*, § 248; 13 *Cyc.* 217.

[3] There are various other assignments of error urged, some of which involve the ruling of the court upon a motion to make the petition more definite and certain, and others upon the admission of evidence. The ruling upon the motion to make more definite and certain according to the view we take of this case is immaterial. The assignments based upon the action of the court in the admission of evidence do not set out the evidence with the specific objection thereto, as required by rule 25 (137 Pac. xl), and therefore we will not consider them.

After an examination of the entire record, we have reached the conclusion that substantial justice has been done, unless it be in the smallness of the verdict in plaintiff's favor, and that defendant has been deprived of no constitutional or statutory right, and that the errors alleged have not resulted in a miscarriage of justice, and the judgment is therefore affirmed. Section 6005, R. L. 1910. All the Justices concur.

VANN et al. v. ADAMS et al. (No. 6771.)
(Supreme Court of Oklahoma. Dec. 26, 1916.
Rehearing Denied April 17, 1917.)

(Syllabus by the Court.)

INDIANS ~~§~~ 15(1)—LANDS—SALE.
Syllabus herein same as syllabus in Bledsoe v. Wortman et al., 35 Okl. 261, 129 Pac. 841.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37.]

Error from District Court, Washington County; R. H. Hudson, Judge.

Action by James N. Vann and Sarah R. Vann against Richard C. Adams and others. Judgment for defendants, and plaintiffs bring error. Reversed and rendered, with directions.

Norman Barker, of Bartlesville, and B. T. Hainer, of Oklahoma City, for plaintiffs in error. M. E. Michaelson and John H. Kane, both of Bartlesville, for defendants in error.

TURNER, J. On May 31, 1913, James N. Vann and Sarah R. Vann, plaintiffs in error, in the district court of Washington county, sued Richard C. Adams and Carrie F. Adams, his wife, Wm. A. Copenhagen, the Adams Oil & Gas Company, Elizabeth H. Hemphill, Ben Harned, and M. R. Puckett in ejectment and to clear their title to a certain tract of land in that county known as the allotment of Wm. Vann. The petition alleged that they were the owners of the land as the only heirs at law of Wm. Vann, deceased; that certain of the defendants were in wrongful possession, claiming under a void deed made, executed, and delivered by William to Richard C. Adams on February 15, 1905, and prayed for possession, and that said deed be set aside.

After issue joined, there was trial to the court on the following agreed facts: That the allotment in question was that of Wm. Vann, deceased; that he died September 20, 1908, leaving him surviving as his only heirs at law James N. Vann, his father, and Sarah R. Vann, his widow; that on April 26, 1901, James N. Vann made application to the Commissioner to the Five Civilized Tribes for the enrollment of himself, and, among other of his children, Wm. Vann, then a minor; that thereafter a census card was issued by the commission, showing that fact; that on February 14, 1905, a reservation certificate

was issued to Wm. Vann, and on the next day he duly made application to have set apart to him as his allotment the lands involved herein; that on the same day a plat was made of the lands; that at the time he made application for enrollment, a protest was lodged against his enrollment, but on February 28, 1907, the Commissioner to the Five Civilized Tribes adjudged Wm. Vann entitled to enrollment, and he was enrolled as a Cherokee freedman; that on March 4, 1907, a citizenship certificate was issued to Wm. Vann; that on May 9, 1907, there was issued and mailed to him a certificate of allotment to the land, and on September 15, 1908, a deed therefor, as provided by law. The facts further show that the day on which he made application for enrollment and to have set apart for him the lands in controversy, that is, on February 15, 1905, he made, executed and delivered to the defendant Richard C. Adams a warranty deed to the land in question; and that the other defendants in error deraign their title to the land through him. On this state of facts the court held that plaintiffs were not entitled to recover.

The court erred. This for the reason that his deed of February 15, 1905, was void. This for the reason that it was not only made before he had selected his allotment, but before he had been enrolled as a citizen of the Cherokee Nation. Hence he had not even an equitable title to the land in controversy, but the same was a part of the public domain.

This case is ruled by Bledsoe v. Wortman et al., 35 Okl. 261, 129 Pac. 841. That case was ejectment to recover the allotment of defendant in error. The agreed statement of facts was substantially the same as here. The deed was dated January 27, 1905; at which time the grantee was a Cherokee freedman and entitled to an allotment in the Cherokee Nation, but had not selected the same and did not until March 6, 1905. Under this state of facts the court held the deed void. In the syllabus the court said:

"F., an adult, not of Indian blood, but a member of the Cherokee Tribe of Indians, on January 27, 1905, but prior to the time of the selection of his allotment, conveyed a certain 40 acres of land, which was then a part of the public domain of the Cherokee Nation, but which was afterwards selected by him as a part of his surplus allotment. Held, that Act April 21, 1904, c. 1402, 33 St. at L. 204, removing 'all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes, * * * who are not of Indian blood, except minors,' except as to homesteads, had no application to him until after he had selected his allotment."

Neither did the act of April 21, 1904, have any application to this allottee, nor did section 642, c. 27, of Mansfield's Digest of the Statutes of Arkansas (1884) have any application, as urged. Governing this point, in the syllabus to above case it is further held:

"Section 642, c. 27, Mansf. Dig. of Ark. (1884), providing that: 'If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance'—has no application to said conveyance, the same being at the time of said execution invalid."

See, also, *Brady v. Sizemore et al.*, 33 Okl. 169, 124 Pac. 615; *Scott v. Brakel et al.*, 43 Okl. 655, 143 Pac. 510; *Lynch et al. v. Franklin*, 37 Okl. 60, 130 Pac. 599.

The judgment of the lower court is reversed and rendered, with directions to set aside the deed complained of, and to clear his title and put plaintiffs in possession of the land.

All the Justices concur.

ALEXANDER v. ALEXANDER et al. (No. 8172.)

(Supreme Court of Oklahoma. Jan. 16, 1917.
Rehearing Denied April 10, 1917.)

(Syllabus by the Court.)

1. REPLEVIN —5—RIGHT OF ACTION.

Where property is held by an individual under a bond given in judicial proceedings for the redelivery of the specific property, it is to be deemed in custodia legis, the same as if it had continued in the hands of the officer, and any one claiming such property as owner, except the person against whom the writ runs, may assert his rights to the property by an action of replevin.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 27-37.]

2. REPLEVIN —5—DEFENSE—HOLDING PROPERTY UNDER BOND.

Where the property of one person is seized by the sheriff under a writ running against another, and a third party executes a redelivery bond and obtains possession of the property, it is no defense to the action of replevin instituted by the owner against the person in possession that he is holding the property under such bond.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 27-37.]

Commissioners' Opinion, Division No. 2. Error from District Court, Tillman County; T. P. Clay, Judge.

Action by Loula M. Alexander against Dee Alexander and J. W. Alexander. Judgment for plaintiff, and defendant Dee Alexander brings error. Affirmed.

Mounts & Davis, of Frederick, for plaintiff in error. O. H. Searcy and Geo. A. Ahern, both of Frederick, for defendant in error Loula M. Alexander.

GALBRAITH, C. The defendant in error Loula M. Alexander commenced this action in the trial court to recover the possession of one Overland automobile. A jury was waived and the cause tried to the court

on an agreed statement of facts, from which it appears that the First National Bank of Commerce of Frederick, Okl., commenced an action in the district court of Tillman county, in debt, against J. W. Alexander, and filed an affidavit and bond for attachment in that case, and caused a writ of attachment to issue, directed to the sheriff of Kiowa county, and was there executed by seizing the automobile in controversy as the property of J. W. Alexander, then and there in the possession of Dee Alexander. The attachment was executed on the 19th day of February, 1915, and on the 16th day of April following Dee Alexander executed a redelivery bond to the sheriff of Kiowa county, under section 4821, Rev. Laws 1910, and the automobile was turned over to him and he retained possession of it until the commencement of this action. The agreed statement of facts further recites:

"That the defendant Dee Alexander, is now asserting no title to said property, but is simply claiming right to hold possession of said auto in order to be able to comply with the terms of said redelivery bond. That the case in National Bank of Commerce v. J. W. Alexander, wherein said auto was attached, is still pending, and the attachment order issued therein, levying upon said auto, has never been quashed or discharged. And defendant Dee Alexander is claiming that replevying suit herein cannot be maintained against him at this time, for the reason that he is holding said auto by virtue of said redelivery bond, and that therefore same is now in the custody of law, and that the plaintiff herein has no right to take said auto away from him by virtue of said replevying action. And it is further agreed that the automobile in question is valued at the sum of \$900, and that the defendant Dee Alexander is not disputing or denying plaintiff's ownership in said property. And it is further agreed that, in case said Dee Alexander is not entitled to hold and retain possession of the said auto under the attachment proceedings and redelivery bond as given to the sheriff of Kiowa county on the 16th day of April, 1915, as far as he is concerned, plaintiff herein would be entitled to recover possession of the auto in question. And it is further agreed that J. W. Alexander admitted that the auto in question belongs to plaintiff."

The trial court found in favor of the plaintiff and awarded her the possession of the automobile, or judgment for its agreed value in the sum of \$800. From that judgment the defendant Dee Alexander alone appeals.

The only question presented by the assignments of error, as stated by the plaintiff in error's brief, is as follows:

"Did the defendant in error Loula M. Alexander have the right to deprive the plaintiff in error of the possession and ownership of the automobile by replevin proceedings while the plaintiff was holding the same under a redelivery bond in an attachment suit as provided under the Revised Laws of Oklahoma of 1910, c. 60, art. 9, § 4821, p. 1275?"

[1] It will be observed that the property was attached as the property of J. W. Alexander, and it is agreed that he did not claim to be the owner of it, and also that Dee Alexander makes no claim to the ownership of the automobile, but simply asserts that because he gave a redelivery bond in

the attachment suit against J. W. Alexander, and obtained possession of the automobile by reason of that bond, the property is in custodia legis, and he cannot be deprived of its possession by this action of replevin. There is no denial that the automobile belonged to Loula M. Alexander. The claim is that because the property was seized while held by Dee Alexander under the redelivery bond, she cannot assert her title to it while that suit is pending. The plaintiff cites in support of his contention *McKinney v. Purcell*, 28 Kan. 446, and our own decisions of *Bohannon v. Jennings*, 31 Okl. 254, 121 Pac. 195, and *Grossman Co. v. White*, 152 Pac. 816. It will be observed that our own cases above cited announce the rule as follows:

"Where property is held by a party under bond in a replevin action, conditioned on the redelivery of the specific property, in the event he should not prevail in the action, such property is to be considered in custodia legis, the same as if the actual possession were with the officer"

—and that they do not hold that the rightful owner of personal property cannot assert his title and right to the possession although it be in custodia legis.

The same rule is announced by the Supreme Court of Kansas in *McKinney v. Purcell*, supra, but the facts of that case show that the rule there announced is not applicable to the facts in the instant case. In that case the wholesale merchant, McKinney, and associates sold merchandise on credit to the retail dealer, Campbell, who sold the goods to Purcell, and as a part of the consideration for the sale Purcell agreed, in writing, to pay the balance due the wholesale dealer for the goods. One Woods, a creditor of Campbell's sued him and attached the goods. Purcell replevied the goods from the sheriff, giving a replevin bond, and the goods were returned to him, and he was proceeding to sell them at retail when the wholesale dealer sued Campbell and Purcell for the purchase price and caused the goods to be attached. Purcell moved the court to discharge the attachment on the grounds that the goods were in custodia legis, inasmuch as he was holding them under the replevin bond when the attachment was levied upon them. This motion was sustained by the trial court, and approved on appeal by the Supreme Court. The reasons for the holding of the court as set out in the opinion are as follows:

"The principle upon which the district court discharged the property from the attachment is this: That where goods are replevied pending the action of replevin, they are deemed to be in custodia legis, and not subject to seizure or any other process. While by giving a replevin bond the plaintiff obtains possession of the goods, this does not change the fact that they are still the subject of litigation, and by legal fiction still to be deemed in the possession of the law. If the replevin action be determined adversely to the plaintiff, he has the right to return the very goods replevied, and the defendant has the corresponding right to enforce such return. It is true the judgment in replevin actions ordinarily runs in the alternative to guard against an ina-

bility to make or compel a delivery of the property; but still the action of replevin is in its nature an action to determine and enforce the rightful possession of specific property, and while that action is pending, the law should not permit the seizure, under execution or attachment of that property in such manner as to prevent the full enforcement of the judgment in the replevin action."

Further in support of this distinction the court says in the opinion:

"In the first case, the property was seized upon the claim that the sale from Campbell to Purcell was fraudulent, and therefore void as to creditors. In the second action, the same property was seized upon the claim that the sale was valid and that Purcell, having obtained possession of the property under such valid sale and upon a promise to pay the debts of Campbell, was now fraudulently seeking to repudiate such obligation. In other words, if both actions are maintainable, and both orders of attachment are to be upheld, the same property is to be twice seized in payment of debts contracted originally by the same party."

[2] It has not been held, so far as we are advised, either by the Kansas or our own courts, that the rule under consideration prevents the owner of goods and chattels seized under process issued in an action to which he is not a party, and to satisfy the debt of a third person, cannot assert his right and claim to the property, notwithstanding it may be in custodia legis. The application of the rule seems to prevent creditors from asserting claim to property in litigation in an independent action while preserving this right to the owner.

In *Gross v. Bogard et al.*, 18 Kan. 288, the Kansas Supreme Court upheld the right of a person whose property had been unlawfully seized in attachment suit against another, to maintain an action in replevin against the sheriff holding the same, and in part said:

"And so far as appears from the testimony offered, his property was, without the slightest pretext or excuse, seized and held by the officer in a proceeding to which he was not a party, and in which he could claim no benefit of the plaintiff's undertaking as a protection against injury. While he might have been made a party to that action, yet it could have been done only upon leave of the court (Gen. Stat. § 637, § 42), and the property itself might have been gotten out of the way long before this order could have been obtained, while stipulations between the parties might have settled the judgment to be entered, and released the sureties on the bond. But turning to the statute, and it seems to us that the same rule there obtains, in case of property taken under a writ of replevin, as when taken under execution. The party against whom the writ runs cannot litigate its validity in an action of replevin, but a third party may assert his right to the property in the possession of the officer."

In *Mann v. Ridenhour*, 46 Okl. 565, 149 Pac. 124, the same limitation in the application of the rule is recognized, and it is specifically held that where the property of one is seized by the sheriff under a writ directed against the property of another, the party claiming the property may maintain replevin against the sheriff to recover possession of it. See, also, *Francis, Sheriff et al. v. Guaranty State Bank of Texola*, 44 Okl. 446, 145 Pac. 324, to the same effect.

Taylor v. Smith, 44 Okl. 403, 144 Pac. 1028, was an action in replevin instituted by Taylor against the sheriff, who it was charged had seized and unlawfully held certain personal property that was exempt to him under the law, by virtue of an execution issued upon a personal judgment for debt against him. The trial court sustained a demurrer to the petition on the ground that it appeared therefrom that the property was in custodia legis in another action, where relief might be had by motion to discharge the execution. He stood upon his demurrer and appealed. This court reversed the trial court on the ground that it erred in sustaining the demurrer. It may be true that the court in the above decision extended the application of the rule beyond that prescribed in the cases above considered, inasmuch as it sustained the right of the claimant for property to maintain an action of replevin to recover it, even though held under a writ issued in another action to which he was a party. In any event this decision sustains the right to maintain the action of replevin in the instant case.

It is no answer to the conclusion of the trial court to say that Dee Alexander may have to perform the obligation of his bond, and be compelled to pay the value of the automobile, since he cannot return it, if adjudged to do so in the attachment proceedings against J. W. Alexander. He was not a party to that action, and was not required to execute that bond. He was a volunteer, he "butted" in to that lawsuit. If he should be compelled to perform this obligation, which he voluntarily assumed, he alone is responsible for his misfortune. His protection can afford, in justice, no justification for refusing the lawful owner of the automobile the right to protect her property and prevent it being taken in satisfaction of the debt of another. Nor can it be sufficient reason why she cannot assert her right to possession of her property in this replevin action, notwithstanding a mere volunteer holds possession of it by reason of having given a forthcoming bond, conditioned to hold it subject to the result of another action to which she was not a party.

Wherefore the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

UNION MUT. INS. CO. v. PAGE et al.
(No. 7038.)

(Supreme Court of Oklahoma. Jan. 2, 1917.
Rehearing Denied April 10, 1917.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY §125—LIABILITY OF SURETY—NOTE.

The general liability of a surety upon a note, account, or bond, is not conditioned upon the

exercise of diligence by the holder of the obligation to collect of the principal, and the negligence or passive inactivity of the holder is not a defense available to the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 312-328.]

2. PRINCIPAL AND SURETY §126(3) — PROCEEDINGS AGAINST PRINCIPAL—"REQUIRE"—STATUTE.

The term "require," as used in section 1058, R. L. 1910, which provides that "a surety may require his creditor to proceed against the principal, * * * and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced," means, to demand; to insist upon; to claim as by right and authority; to exact; to claim as indispensable, a synonym as understood by its use in this section, for exact; direct; order, and a simple suggestion to, or request of, the creditor will not suffice.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 343, 344.

For other definitions, see *Words and Phrases*, First and Second Series, *Require*.]

3. PRINCIPAL AND SURETY §126(3) — RELEASE OF SURETY—REQUEST TO SUE PRINCIPAL.

The failure of the payee of a promissory note to sue the principal, upon the oral request of the surety sued, made to the collector or attorney of the creditor, who had the note for collection, without any showing that the collector or attorney was authorized by the creditor to take legal proceedings for the collection of the note, or that such request or notice was not communicated to the creditor by the collector or attorney, will not operate as a release of the surety sued, even though the principal at the time the request was made was solvent and amply able to pay the note and in the meantime he had become insolvent, for the reason that it is the duty of the surety upon the failure of the principal to pay the note when due, to pay the same and pursue his remedy against the principal to reimburse himself for the amount paid as such surety for his principal.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 343, 344.]

Commissioners' Opinion, Division No. 6. Error from District Court, Washita County; James R. Tolbert, Judge.

Action by the Union Mutual Insurance Company against Hattie Page and J. H. Hays. Judgment for defendant Hays, and plaintiff brings error. Reversed and remanded, with instructions to render judgment for plaintiff for full amount of note sued on.

Wilson & Scott, of Enid, and S. O. Burnette, of Cordell, for plaintiff in error. Richard A. Billups, of Cordell, for defendant in error Hays.

ROBERTS, C. This action was brought by the Union Mutual Insurance Company, plaintiff in error, against Hattie Page and J. H. Hays, defendants in error, to recover on a promissory note given by defendants to plaintiff as premium for hail insurance policy on 60 acres of cotton for the season of 1911. The note is as follows:

"Hail Insurance.

"\$76.00

Enid, Okl., March 18, 1911.

"On or before the first day of October of this year, for value received, I, we, or either of us,

promise to pay to The Union Mutual Insurance Company, of Enid, Oklahoma, or order, the sum of seventy-six and $\frac{50}{100}$ dollars, payable at the office of said company in Enid, Oklahoma.

"This note is given for premium for insurance on my crop of grain, now growing on the W. $\frac{1}{2}$ of section 1, township 11, range 20, and on the ——— acres in all, situated in Washita county, state of Oklahoma, and this indenture, made on the day above written, and between the undersigned and the said company, witnesseth: That the undersigned mortgages to said company the said crop of grain, as security for the payment to said company the above named sum of money on or before the first day of October of this year, and this mortgage shall also cover said grain wherever located after it is harvested. This note to bear interest at 10 per cent. per annum from date, if not paid at maturity. Without interest if paid when due. I agree to pay an attorney fee of ten dollars, if it becomes necessary to collect the above sum of money or any part thereof by law, or if it be placed in the hands of an attorney for collection.

"Hattie Page.

"J. H. Hays.

"Witness: Ang. Gumuster.

"Policy No. 05475.

"P. O., Canute."

No service was had upon defendant Page. Defendant Hays answered as follows:

"Comes now the defendant, J. H. Hays, and for answer to plaintiff's bill of particulars denies each, every, and all allegations therein, except such as are hereinafter specifically admitted.

"First. Defendant J. H. Hays admits that he signed the note named in plaintiff's bill of particulars as a surety, and accommodation signer, and received no benefits in consideration therefor, believing that said company was lawfully authorized by the state of Oklahoma to write the kind of insurance that the principal of said note, Hattie Page, desired, to wit, hail insurance on a cotton crop. That on or about the date of the policy here involved, to wit, March 21, 1911, the State Insurance Commissioner, Hon. Perry A. Ballard, revoked the license of said Union Mutual Insurance Company, stating that said company has no legal right to write hail insurance on crops at that date. That by reason of the foregoing state of facts, consideration for which this defendant, J. H. Hays, signed said note never lawfully existed, or if the same ever existed it wholly failed when the said Insurance Commissioner revoked the license of the said company.

"Second. For a further answer and defense, defendant alleges that the plaintiff herein, in the fall of 1911, and after said note was due and collectable, neglected, failed, and refused to make an effort to collect said note from the principal, Hattie Page; that this defendant, J. H. Hays, asked and requested plaintiff to proceed to collect said note while the principal was in possession of a cotton crop from which this note could have been made, if the same was legal; that this defendant informed plaintiff at the time referred to herein that said cotton crop was all the protection that he as a surety had; and that he, defendant, J. H. Hays, wanted this matter settled at once for his protection; that by reason of plaintiff's failure to so proceed against said principal, Hattie Page, as requested, said cotton has been disposed of by Hattie Page, and said Hattie Page is insolvent and has no means out of which any part of said debt can be made, to the damage of said defendant to the amount of his liability and said note."

Upon these issues, trial was had to a jury, verdict returned for defendant, and judgment rendered against plaintiff for costs. Plaintiff brings error.

It is apparent from the verdict that the jury found for this defendant on the allegation that he was only surety on the note, and, while there might be some question as to that fact, we will adopt the finding of the jury and consider the case upon that theory.

[1, 2] This brings us to the proposition as to whether the defendant Hays was released and relieved from payment of the note because of the laches of the plaintiff in failing to proceed against the principal, or taking some steps to obtain payment out of the cotton belonging to the principal and pointed out to the agent of the plaintiff about the time of the maturity of the note. In support of his defense upon that theory, the defendant relies on section 1058, R. L. 1910, which is as follows:

"1058. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

We gather from the record that the defendant relies principally upon that part of the section above quoted which provides that a surety may require his creditor to proceed against the principal, and, if the creditor fails to do so, the surety is exonerated to the extent to which he is thereby prejudiced. The particular steps taken by defendant Hays to require the plaintiff to proceed against the principal are detailed in his testimony given at the trial, as follows:

"A. She got the crop insurance provided I signed her note. I signed her note. She wanted it signed for hail insurance, and I signed it. Q. Had she signed the note at the time you did? A. Yes, sir. Q. And came to you afterwards? A. Yes, sir. Q. Did you have any conversation with the company or any of its agents with reference to this note in the year 1911? A. I did. Q. Tell the jury what it was. A. I had no further conversation until fall. The first conversation I had with the agent was in the spring. That fall there came another man, a collector. Q. State whether or not he had this note for collection? A. He did. Mrs. Page refused to pay it, and so did I. I says, 'There's two bales picked there, three picked, two on the ground and one on the wagon.' I says, 'You go and attach that cotton.' Q. What further statement did you make to him, if any, about attaching the cotton? A. I told him to go ahead and attach the cotton and get his money out of it. Q. Did you tell him in what capacity you had signed the note? A. Yes, sir; he said he didn't want to attach the cotton. He would rather not, but he finally said he would, but he never did attach it. I told him if he would attach the cotton the parties would undoubtedly make a replevin bond and sell the cotton and he would have a bond the court would take, which would be much better than a note on me and he would get his money. That was the only chance he had on it—for him to take the cotton. I couldn't get it. Q. What became of the cotton? A. Mrs. Page sold the cotton. Q. About how much cotton was picked and in the field at the time? A. I believe at that time there had been about five bales sold, and I think the crop made about 23 bales. There was three bales picked at that time, or a little better. Q. There was about 18 in the field and on the ground and the wagon? A. Something like that. There was five bales al-

ready sold and three bales picked, and the rest was in the field. Twenty-three bales out of the whole crop. Q. Where is Mrs. Page at this time, if you know? A. I don't know. Q. Do you know whether she has any property at all in this country, or anywhere else? A. If she has any, I don't know of it. Q. Did she have anything at that time except this cotton? A. She had a few stock. Q. Do you think there was ample cotton at that time to settle this debt? A. There was enough cotton picked there to settle it then. Q. Do you remember who the gentleman was who came and talked to you in October? A. Said his name was Webb. Q. You say you told Mr. Webb to go and attach the cotton? A. Yes, sir. Q. Was that in writing? A. No, sir. Q. You never did give the company any written notice? A. No, sir. Q. You never did offer to pay the expenses or indemnify them against any expense in the matter? A. No, I never did. Q. The only reason you didn't protect yourself was from the fact that you thought you had a way to beat the note? A. Well, I just looked at it like this: I would have to pay the note out of my own pocket, and I couldn't get anything out of her, and if they couldn't I didn't think I could. Q. Why didn't you when you saw that Mrs. Page was disposing of this security that was behind that note that you proposed—why didn't you say something to Mrs. Page about paying the note? A. We did talk about it. Q. Did you ever suggest to her to pay the note? A. I told her I would like to get it off of my hands. Q. When she was telling you what she thought she could do from her advice, did you take any steps or make any remonstrations against her not making security against the note? A. No. Q. You never requested her to make you safe in any way so in case of litigation you would be protected? A. Yes, sir; she told me she was going to leave, and she says, 'If you ever have any trouble about that, I'll pay it.' But she says, 'You'll have never any trouble about it.' Q. And on that assurance from her you let the matter drift and paid no more attention to it? A. That's all I could do. Q. John, when did you last see her? A. I haven't seen her since she left the farm. Q. When did she leave? A. I don't know when she left, whether the first of 1912 or the last of 1911, but some time either the first of that year or the last, some time along there. Q. Where is she now? A. I don't know. Q. At that time she had some stock you say? A. Yes, sir. Q. And she was leaving the state, you say? A. Well, I don't know whether she was moving then to somewhere in the northern part of this state. I forget the name of the place now. Q. The note was then past due? A. Oh, yes. Q. You made no effort to secure yourself at all? A. No. Q. You rested on the assurance or the advice you had received that this company couldn't collect it because of the invalidity of the company as a corporation? A. Well, yes; that's about all there was to it. Q. You didn't think the company had any right to sue you? A. Yes, sir. Q. That was your advice? A. Yes, sir. Q. You went and sought counsel about it? A. Yes, sir. Q. And because of the defense you had on its organization and right to do business in this state—that was the reason you didn't pay it? A. Yes, sir. Q. This crop matured, and Mrs. Page held the policy all during the season of 1911? A. Yes, sir. Q. You retained the policy and received the benefits? A. Which benefits? Q. You had the insurance on the crop? A. She had the insurance. Q. I understand. Your note was outstanding at that time? A. Yes, sir; the note was outstanding at that time."

There is testimony tending to show that at the time the collector demanded payment of the notes, being the time the conversation above related, was had, the agent promised defendant that he would attach

the cotton pointed out to him as belonging to Mrs. Page; but for some reason, which is not explained, he did not do so. There is no evidence on behalf of defendant Hays that he relied on that promise. There is no evidence tending to show that the agent had authority to bring the action, nor that he ever communicated the defendant's request to the company. There is no evidence tending to show that legal grounds existed for attachment against the principal. There is no evidence tending to show that Hays made any other or further effort to require the plaintiff to proceed against the principal. There was no evidence tending to show that the defendant notified the company or its agent that, in case the plaintiff failed to proceed against the principal, he, as surety, would hold himself discharged. The full purport of the evidence is that Hays, for his defense, relied upon the fact that the plaintiff could not recover because the plaintiff's license to transact business in Oklahoma had been revoked. At the conclusion of the testimony, the court gave the following instruction, among others:

"If you find and believe from a preponderance of the evidence of this case that the defendant Hays signed said note as surety, that when the plaintiff presented said note for collection after its maturity the defendant Hays notified the plaintiff that he was surety on said note only, and requested and demanded of the plaintiff that they proceed and take legal steps to enforce collection of the note against the principal, Mrs. Page, by attachment of her cotton, and that the company failed to do so, and that by reason of such failure the defendant Hays has been damaged to the full amount of the note sued upon, if you so find, your verdict should be for the defendant J. H. Hays; otherwise, you should find against him, and in favor of the plaintiff for the full amount of the note sued on."

It is apparent from the language of this instruction that the trial court was of the opinion that all that was necessary to a complete exoneration on the part of the surety was to notify or request the creditor to proceed against the principal. Nor do we overlook the fact that the word "demand" is used in the instruction, but the evidence does not justify in any sense the use of that word. There is no evidence even tending to show that the defendant demanded that the creditor proceed against the principal. The proof is simply to the effect that the defendant suggested or possibly requested the creditor to attach certain property belonging to the principal. As we view the authorities, this is not sufficient. Many of the authorities go to the extent of holding that:

"An unheeded request by a surety that the creditor proceed against the principal, after the maturity of a note, and while the principal is solvent, will not operate to discharge the surety, although the principal afterwards becomes insolvent, unless, accompanying the request to proceed against the principal, there is an explicit notice that, in case the creditors shall fail to sue, the surety will hold himself discharged." *Kennedy v. Falde*, 4 Dak. 319, 29 N. W. 687.

We do not base this opinion solely upon the fact that defendant failed to notify the creditor that he would "hold himself discharged if it failed to proceed against the principal," but cite the rule simply for the purpose of showing the extent to which some authorities go, the strictness to which the surety is held to bring himself within the rule to obtain exoneration from liability. It is well settled that a simple request to proceed against the principal is not sufficient. In the case of *Kennedy v. Falde*, supra, the language of the surety to the creditor was, "You had better collect the sum from Mr. Falde." Perhaps not quite as strong as the language used in this case, but in speaking to that point the court says:

"Can it be claimed that such language was a requirement made upon the principal to proceed and collect the sum from Falde, and, if he neglected so to do, the surety would consider himself released? Clearly not. To require is 'to demand; to insist upon having; to claim as by right and authority; to exact; to claim as indispensable'—a synonym, as we understand its use in this section, for 'exact'; 'direct'; 'order.'"

"If all the other modes provided by law for the protection of a surety are by him to be disregarded, no action upon his part, under the provisions of section 1681 (Dakota, same as section 1058, R. L. 1910, Okla.), will be deemed a compliance with its provision, which falls short of a clear notice to the creditor that he expects and requires him to proceed in collection of the debt against the principal. Such a demand must be made that the creditor should understand that the wish and direction of the surety to him is to proceed against the principal in the collection of the debt. No requirement susceptible of any other construction will be sufficient. Applying this rule to the language used in the case at bar, it will be seen it falls far short of such a 'requirement' as is contemplated by statute."

It is definitely settled by the common law, as well as numerous decisions in this state, based upon statutory enactments, that:

"The general liability of a surety upon a note, account, or bond is not conditioned upon the exercise of diligence by the holder of the obligation to collect of the principal, and the negligence or passive inactivity of such holder is not a defense available to the surety."

[3] It is also held by numerous authorities that notice of the surety to an agent or attorney of the creditor would not suffice unless the authority of such agent or attorney is made to appear by the evidence. *Cummins v. Garretson*, 15 Ark. 132; *Driskill v. Washington County*, 53 Ind. 532; *Sappington v. Jeffries*, 15 Mo. 628; *Adams v. Roane*, 7 Ark. 360; *Bartlett v. Cunningham*, 85 Ill. 22; *Shimer v. Jones*, 47 Pa. 268; *Hellen v. Bryson*, 40 Pa. 472.

Measuring the instruction of the trial court now under consideration by the foregoing rules, it must be apparent to all that it cannot be approved, and that prejudicial error was committed by the court in so instructing the jury.

The recent decisions of this court clearly settle the doctrine in this state upon the questions under consideration here, in favor of the contentions of plaintiff in error. In

the case of *Palmer v. Noe*, 150 Pac. 462, 464, the court says:

"* * * Section 1056, R. L. 1910, provides when sureties may be exonerated, and this section is as follows: 'A surety is exonerated: First, in like manner with a guarantor; second, to the extent to which he is prejudiced by an act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or, third, to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.'"

"Section 1058, R. L. 1910, provides that a surety may require the creditor to proceed against the principal, under certain conditions. This section is as follows: 'A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.'"

"The defendant insists that, under section 1058 and subdivisions 2 and 3 of section 1056, he is released from liability upon the note sued on, for the reason that the plaintiff failed to comply with the oral request made to his attorney to proceed against the principal and sureties upon said note at a time when the principal was solvent and amply able to pay the debt, and that in the meantime the principal and the other sureties became insolvent, and that his failure to so proceed prejudiced his rights and remedies against the principal and his cosureties. With this contention we cannot agree. It was not the duty of the plaintiff to sue the principal, and not being his duty, his failure to do so was not prejudicial to the rights and remedies of the defendant. The defendant obligated himself to pay the debt, and, upon the failure of the principal to pay it, at maturity, it was his duty to pay it and proceed against the principal and his cosureties under section 1061, R. L. 1910.

"Plaintiff had the option to sue any or all of the makers of this note, and, having this option, his failure to comply with the oral request of the defendant would not operate as a release of liability. If, as a matter of fact, the principal and the other sureties thereon were solvent, it was the plain duty of the defendant to pay the obligation and proceed to protect himself under the statute."

Later in a similar case, *Miller v. State ex rel. Lankford*, 152 Pac. 410, this court adopted and approved the doctrine in *Palmer v. Noe*, supra, in the following language:

"On the merits, the question presented in this case cannot be distinguished from *Palmer v. Noe*, 150 Pac. 462, not yet officially reported: 'Under section 4694, Rev. Laws 1910, the payee of a promissory note may, at his option, sue one of the sureties, without joining the maker and the other sureties as parties defendant; and his failure to sue the maker and other sureties does not operate as a release of the surety sued. The failure of the payee of a promissory note to sue the principal, upon the oral request of the surety sued, made long after the maturity of the note to the attorney of the payee, who had the note for collection, does not operate as a release of the surety sued, even though the principal, at the time the request was made, was solvent and amply able to pay the note, and in the meantime he and the other sureties thereon became insolvent; it being the duty of the surety, upon the failure of the principal to pay the note when due, to pay the same, and pursue his remedy against the principal and his cosureties.'"

"Counsel for the plaintiff in error has earn-

estly requested us, in a well-considered brief, to reconsider the question decided in that case and overrule it. But, after a careful consideration of the authorities, we are satisfied that that case was rightfully decided, and in addition the importance of adhering to the decisions of this court once made, and thus preserving a conformity in the law, cannot be overestimated."

Other questions are presented in this case, but we deem it unnecessary to discuss them. The section under which the defense is made came from Dakota, and was adopted here in early territorial days. The case of *Kennedy v. Falde*, supra, was decided by that court long before the section was adopted here, and became a part of the law of this state. That construction has been approved and consistently followed by numerous decisions in this court, and cited with approval by a number of the courts of last resort in sister states.

The case should be reversed and remanded to the district court of Washita county, with instructions to render judgment for the plaintiff for the full amount of the note sued on, in accordance with the terms and provisions of said note.

PER CURIAM. Adopted in whole.

OKLAHOMA RY. CO. v. THOMAS. (No. 5759.)

(Supreme Court of Oklahoma. Jan. 30, 1917.
Concurring Opinion April 10, 1917. Re-
hearing Denied April 10, 1917.)

(Syllabus by the Court.)

1. STREET RAILROADS §99(15)—COLLISION BETWEEN CAR AND FIRE APPARATUS—CONTRIBUTORY NEGLIGENCE.

Because of the exceptional circumstances under which firemen respond to an alarm of fire and under which fire apparatus is operated, the ordinary rules which are almost universal in their application regulating the conduct of persons engaged in their private business or pleasure are not controlling in a case where members of a fire department are hurrying to the scene of a fire in answer to a fire alarm.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 210.]

2. STREET RAILROADS §99(15)—COLLISION BETWEEN CAR AND FIRE APPARATUS—OBSERVANCE OF ORDINANCE—PRESUMPTION.

The fire department of Oklahoma City was by ordinance given the right of way in passing to a fire, and defendant street railway company was required by ordinance to stop its street cars in case of fire, 300 feet from the street intersection on which fire apparatus would cross its track. Plaintiff was riding on a truck to a fire, driven by another. Proper warnings were being given of the approach of the truck, and plaintiff and the others riding upon said truck were justified in assuming that defendant's car would be stopped as required by ordinance.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 210.]

3. STREET RAILROADS §113(7)—COLLISION BETWEEN CAR AND FIRE APPARATUS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for damages for injuries to a fireman caused by a collision between a truck

upon which he was riding to a fire, and a street car, evidence that plaintiff had previously ridden upon the truck when traveling at a similar rate of speed in going to fires, or that plaintiff knew when he boarded the truck on the night of the accident that same would proceed at any particular rate of speed, was inadmissible to prove contributory negligence upon the part of plaintiff at the time of the accident.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 238.]

4. NEGLIGENCE §93(1)—IMPUTED NEGLIGENCE—FIREMEN—DRIVER OF TRUCK.

Where plaintiff and another were riding upon the rear of a truck which was being driven at a high rate of speed to a fire, and plaintiff had no voice in the selection of the driver, and no control over his actions or the speed of the truck, but was required by his duties to mount thereon and proceed to the scene of the fire upon an alarm being given, and render such assistance as was possible, and while riding thereon a collision occurred between said truck and a street car, resulting in injuries to plaintiff, the negligence, if any, of the driver of said truck cannot be imputed to plaintiff.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 147, 148.]

5. DAMAGES §206(6)—PHYSICAL EXAMINATION—POWER OF COURT.

Where plaintiff in an action for damages for personal injuries exhibits a portion of his body to the jury, and physicians called by him testify as to the nature and extent of his injuries, and plaintiff offers to submit to an examination by any physician or board of physicians named by the court other than those in the employ of defendant, who are shown to have been employed by the defendant and who are to receive \$25 per day for testifying in the case, it is not error for the court to refuse to require plaintiff to submit to an examination by the physicians employed by defendant.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 531.]

Thacker, J., dissenting in part.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Suit by Ross Thomas against the Oklahoma Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Shartel and Burke Shartel, both of Oklahoma City, for plaintiff in error. Harris, Nowlin & Singleton and D. K. Pope, all of Oklahoma City, for defendant in error.

HARDY, J. Defendant in error brought suit in the district court of Oklahoma county against plaintiff in error for damages for personal injuries alleged to have been sustained in a collision between one of defendant's street cars and a gasoline automobile truck upon which he was riding to a fire in Capitol Hill, one of the suburbs of Oklahoma City, at about 10 o'clock p. m. May 17, 1912. The parties will be designated as they appeared in the trial court.

The collision occurred at the crossing of Robinson and Poplar streets about two blocks south of the steel bridge across the North Canadian river. Robinson street runs north and south, and is the principal street from the business section of Oklahoma City to

Capitol Hill, being paved the entire distance, and is the route usually traveled by the fire department when making runs in answer to fire alarms in the south portion of the city. Poplar street runs east and west, and the tracks of the defendant company run along said street at the intersection thereof with Robinson street. The truck upon which plaintiff was riding at the time of the injury was being driven by the captain, the regular driver being off duty that night, and was proceeding south, while the street car was proceeding east. Plaintiff and another fireman were standing on the back part of the truck where a step and railing to hold to was provided. The evidence as to the speed of the truck varies. No question is made by the defendant as to the negligence of the crew in charge of its street car at the time of the accident, but error is assigned upon the action of the court in excluding from consideration of the jury the alleged negligence of the driver of said truck, and evidence as to whether the plaintiff had been accustomed to riding upon said truck theretofore at a similar rate of speed, and in the giving of certain instructions and refusing certain requested instructions offered by defendant, and in refusing to require the plaintiff to be stripped before the jury and permit certain physicians selected by defendant to make an inspection of his person and testify in reference thereto.

The first 16 assignments of error are grouped together by counsel and considered as presenting three questions for consideration by this court. First, that notwithstanding the ordinance giving the fire department the right of way its apparatus must be operated with ordinary care and at a rate of speed consistent therewith. Second, that the operation of the auto truck at the rate of speed at which it was going over a crossing with an obstructed view makes a case of contributory negligence, which should have been submitted to the jury, unless the plaintiff was in no way responsible for such negligence. Third, that the madcap pace at which the truck was going was a steady practice participated in by plaintiff for four or five months, whereby he adopted the negligence of the driver and made it his own.

Evidence was admitted without exception that plaintiff had been riding upon this particular truck for several months, and that it had been operated in the same manner and at the same speed. On cross-examination of plaintiff, he was asked whether he had previously ridden upon the truck when going at the same rate of speed; and he was also asked the specific question if he did not know when he got on the machine that evening, it would, in all reasonable probability, be operated at its full capacity. Objection was sustained to these questions and exceptions reserved. In his instruction upon contributory negligence, the court told the jury that in considering the question of contributory neg-

ligence, they should consider only plaintiff's conduct in view of all the circumstances in evidence, and that the acts or omissions of the driver of the truck could not be imputed to or considered as the acts of plaintiff; and, further, that the mere fact that a fire truck or fire apparatus was traveling rapidly when en route to a fire was not negligence of itself, and that if they found the defendant was negligent in causing or permitting one of its street cars to collide with the fire truck upon which plaintiff was riding, and that as a natural and proximate result thereof, considering the speed of the truck and the character of the collision, the fire truck collided with the curbing or with a telephone pole, and the plaintiff was thrown from the truck and injured, and that his injuries were the direct, natural, and proximate result of the negligence of defendant, and that plaintiff was himself free from negligence directly causing or contributing to his injuries, then plaintiff was entitled to recover, regardless of the rate of speed at which such fire truck was being driven at the time of the collision. Exceptions were saved to the giving of these instructions, and defendant presented several requests, which were refused, embodying the proposition that the fire department had no right under the law to run their fire apparatus at a rate of speed or otherwise operate same in a manner which would ordinarily be dangerous to and expose the lives and persons of other people lawfully using the street in the exercise of due and ordinary care to destruction or injury, and that if plaintiff in the performance of his duties as fireman had been in the habit of riding said truck to fires prior to the date of the accident, and that same had been operated on previous occasions at about the same rate of speed at which it was going at the time of the accident, then the plaintiff could not recover.

[1] The ordinary rules which are almost universal in their application regulating the conduct of persons engaged in the pursuit of their own private business or personal pleasure are not controlling in the case of members of a fire department answering an alarm of fire. *Michael v. Kansas City Western Ry. Co.*, 161 Mo. App. 53, 143 S. W. 67; *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; *Houston City Ry. Co. v. Richart* (Tex. Civ. App.) 27 S. W. 918; *Same v. Reichart*, 87 Tex. 539, 29 S. W. 1040. In some states this distinction has the sanction of legislative regulation expressed in the form of a state statute or municipal ordinance, as is the case here. *McBride v. Des Moines City Ry. Co.*, 134 Iowa, 398, 109 N. W. 618; *Geary v. Met. St. Ry. Co.*, 84 App. Div. 514, 82 N. Y. Supp. 1016; *New York v. Met. St. Ry. Co.*, 90 App. Div. 68, 85 N. Y. Supp. 693.

Fire is known to be one of the most useful and beneficial of human agencies, but it is also known to be one of the most destructive, and in case of a fire, unless prompt and

heroic measures are resorted to, it frequently gets beyond control; and especially in large cities its toll of property runs into the millions, and the human lives that are sometimes its prey may be counted by the score. Society has recognized the fact that the individual efforts of the citizens are ineffectual under such circumstances, and has therefore provided trained men and specially equipped apparatus for the public protection, and in the present case to secure the highest efficiency in the operation of the apparatus and the best results in the efforts of the men to preserve life and property, the fire department is given the right of way by ordinance over the streets and alleys of the city, and all other persons are required to yield such right of way so as not to obstruct the rapid passage of men and equipment to the place of danger. In answering calls to a fire the members of the department are sometimes required to take risks which would be negligence upon the part of the person engaged in his private business. It is often their duty to act in the face of considerable danger to themselves, when to hesitate or stop would result in disastrous consequences. Frequently haste and fearless performance of duty will avoid widespread disaster, and result in the saving of both life and property. To give timely warning to all persons of their approach and secure an uninterrupted passage of men and equipment as they rush along the streets to a fire, gongs or other suitable alarms are constantly sounded, and thus ample notice and opportunity is given to all persons to avoid accident and interference. These signals are well known and recognized, and this right has been the outgrowth of necessity for the public good, and the requirement that individuals and vehicles engaged upon less pressing errands shall hold themselves in readiness to yield the right of way to men and equipment, is reasonable and generally recognized. *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661; *Chicago City Ry. Co. v. McDonough*, 221 Ill. 69, 77 N. E. 577; *Farley v. Mayor*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; *Hanlon v. Milwaukee Elec. Ry. & Light Co.*, 118 Wis. 210, 95 N. W. 100; *Michael v. Kansas City Western Ry. Co.*, supra; *Houston City Ry. Co. v. Richart* (Tex. Civ. App.) 27 S. W. 918; *Same v. Reichart*, 87 Tex. 539, 29 S. W. 1040; *Dole v. New Orleans Ry. & Light Co.*, 121 La. 945, 46 South. 929, 19 L. R. A. (N. S.) 623; *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

[2] Plaintiff, with others, riding upon said truck, was proceeding to a fire in the south part of the city, which was believed to be St. Mary's Academy, a large building filled with children in an outlying and thinly settled district of Oklahoma City, and under the ordinance having the right of way, and the proper signals of the approach of said truck having been given, as appears from the evidence, in the absence of knowledge or

notice to the contrary, was justified in assuming that defendant's car would be stopped, as required by ordinance, when within 300 feet of the approaching fire truck. *McBride v. Des Moines City Ry. Co.*, supra; *New York v. Met. St. Ry. Co.*, supra; *Geary v. Met. St. Ry. Co.*, supra.

[3] Defendant urges that the court erroneously sustained objections to the questions asked plaintiff on cross-examination as to whether he had previously ridden upon the truck when traveling at a rate of speed similar to that at which it was traveling at the time of the accident. In this there was no error. It was not competent to prove prior acts of negligence upon the part of plaintiff in support of the claim that he was negligent on this particular occasion. While there is some conflict in the decisions, we think the weight of authority and the better reasoning supports the rule that such evidence is not permissible. To admit evidence of prior acts of negligence injects collateral issues into the case which have a tendency to confuse the minds of the jury, and such evidence should therefore be excluded.

In *Great Western Coal & Coke Co. v. McMahan*, 43 Okl. 429, 143 Pac. 23, which was an action for the death of a mine employé, the court excluded evidence that for a month preceding the explosion, deceased was habitually negligent in remaining in the mine while shots were being fired, and declared the same inadmissible to prove contributory negligence upon the part of the deceased at the time of the accident. This question was again discussed in *St. L. & S. F. R. R. Co. v. Hodge*, 157 Pac. 60. In support of the rule above announced, the following authorities from other jurisdictions are cited: *Harri-man v. Palace Car Co.*, 85 Fed. 353, 29 O. C. A. 194; *L. & N. R. Co. v. McClish*, 115 Fed. 268, 53 C. C. A. 60; *I. & G. N. R. Co. v. Ives*, 31 Tex. Civ. App. 272, 71 S. W. 772; *Aiken v. Holyoke St. Ry. Co.*, 184 Mass. 269, 68 N. E. 238; *Minot, Adm'r, v. Boston & Maine R. R.*, 78 N. H. 317, 61 Atl. 509; *C. B. & Q. R. Co. v. Gunderson*, 65 Ill. App. 638; *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *L. & N. R. Co. v. Berry*, 88 Ky. 222, 10 S. W. 472, 21 Am. St. Rep. 329; *Dalton v. O. R. I. & P. Ry. Co.*, 114 Iowa, 257, 86 N. W. 272; *Kaillen v. N. W. Bedding Co.*, 46 Minn. 187, 48 N. W. 779; *Dunham v. Rackliff*, 71 Me. 345. But taking the view that such evidence was proper, the fact that plaintiff had previously ridden upon the truck when operated in the same manner and at the same rate of speed was established by the testimony of other witnesses, and was not denied.

The other question to which objection was sustained was whether plaintiff knew when he boarded the truck on the night of the injury that same would be operated at its full capacity. Defendant urges that this knowledge upon the part of plaintiff should have been considered by the jury in determining whether the negligent driving of the truck

was concurred in and adopted by plaintiff, and that even though the rate of speed at which the truck was operated was not of itself negligence, this fact, together with the knowledge of the plaintiff that it would be operated at a dangerous and reckless rate of speed, was competent to go to the jury upon the question of contributory negligence. No claim is made that plaintiff selected or had any control over the driver, nor that he had any reason to suspect a want of care, skill, or sobriety upon his part other than he knew that the truck would be driven at a high and dangerous rate of speed. The mere fact that the truck was driven at any particular rate of speed was not negligence of itself, and, this being true, even though plaintiff knew that it would proceed at a high rate of speed, this knowledge did not transform an act not negligent upon the part of the driver to contributory negligence upon the part of plaintiff.

It is not contributory negligence per se for a person to engage in an occupation that is inherently dangerous. Men may properly and lawfully do work that is essentially dangerous in its nature, and a person engaged in the performance of such work may know that it is dangerous, and yet not be guilty of contributory negligence in the performance thereof, unless he voluntarily and unnecessarily exposes himself to the danger. *Wood, Master and Servant*, 763; *Beach, Contributory Negligence*, § 370; 26 Cyc. 1256.

Plaintiff was not riding upon the truck in the prosecution of any common enterprise in which he and the driver had voluntarily engaged, but was riding thereon in pursuance of his individual duty as a member of the fire department and in his capacity as a servant of the city. *McBride v. Des Moines City Ry. Co.*, 134 Iowa, 398, 109 N. W. 622.

The case of *Brommer v. Penn. Ry. Co.*, 179 Fed. 577, 103 O. C. A. 135, 29 L. R. A. (N. S.) 924, among others, is relied upon as sustaining defendant's contention. *Brommer*, with three others whom he had invited to ride with him, was driving his automobile over a grade crossing of the railroad in Camden, N. J., when it collided with a train. Mrs. Henderson, one of the occupants, was killed, and the other three injured. The trial court held *Brommer* guilty of contributory negligence, while Henderson and Mrs. Blackson, the other occupants, recovered a judgment. The judgment in favor of Henderson was reversed because it appeared that all the occupants of the car were united for a common purpose, and had a common object in view, and because Henderson, who occupied the front seat with *Brommer*, was not a passenger and *Brommer* was under no greater duty toward the others than they to him, and it was said to be Henderson's duty to look out for dangers, and to avoid them if practicable by suggestions or protest. The verdict in favor of Mrs. Blackson who rode in the rear seat

of the automobile was sustained, because it did not appear that she knew of the danger or could have known thereof by the exercise of ordinary care. In its opinion, the court cited and followed the rule announced by the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 371, 6 Sup. Ct. 393, 29 L. Ed. 654:

"That one cannot recover damages for an injury to the commission of which he has directly contributed as a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

Applying the rule announced in the above quotation, the action of the trial court herein was right. It is not contended that plaintiff drove the car or that he had anything to do with its management, or could have prevented the accident by any means within his power. The truck was about 60 feet long, and the driver was riding upon the front seat, while plaintiff was riding at the rear, his duty simply being to mount to his position and ride to the scene of the fire and render such assistance as was possible. Should he refuse to do so, he would in all likelihood lose his position, and, if not, he ought to lose it, would be derelict in the performance of his duty and be the object of public scorn and contempt.

We cannot see where, under the undisputed evidence, plaintiff was guilty of any positive act of negligence contributing to his injuries, or that he neglected to perform any duty incumbent upon him which could or might have prevented the accident, and his knowledge of the probable speed of the truck did not tend to show contributory negligence upon his part, and the objection was therefore properly sustained. *St. L. & S. F. Ry. Co. v. Bell*, 159 Pac. 336. There was no error in the instructions given nor in refusing to give those requested by defendant. Neither the relation of master and servant nor principal and agent existed. Nor was there any evidence of a joint enterprise whereby a responsibility existed for each other's acts or a right to direct and govern the driver by the plaintiff.

[4] The authorities in this country are nearly uniform to the effect that where a person is riding in a vehicle over which he has no authority, and where he has no control over the driver, and has no reason to suspect a want of care, skill, or sobriety upon his part, and is injured by the concurring negligence of the driver and some third person or corporation, the negligence of the driver is not imputed to him so as to prevent a recovery for damages from the other tortfeasor. This question was very thoroughly considered by the Supreme Court of Massachusetts in *Schultz v. Old Colony St. Ry.*, 193

Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, in which the authorities throughout the country were collected and reviewed. This case is a valuable one in this respect, and deduces the following rules: That where an adult person possessing all his faculties and personally, in the exercise of that degree of care which common prudence requires under all the attending circumstances, is injured through the negligence of some third person, and the concurring negligence of one with whom the plaintiff is riding, as guest or companion, between whom and the plaintiff the relation of master and servant or principal and agent or moral responsibility in the common enterprise does not in fact exist, the plaintiff being at the time not in position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one through whose wrong his injuries were sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary unconstrained, noncontractual surrender of all care for himself to the caution of the driver. And this same rule applies in cases where the vehicle in question is an automobile. 2 R. C. L. 1207; The Law Appl. to Motor Vehicles, Babbott, § 596, p. 474; Berry's Law of Automobiles, § 180; Huddy on Automobiles, § 114; Daniel's Law of Motor Vehicles, § 230.

In *Geary v. Met. St. Ry. Co.*, 84 App. Div. 514, 82 N. Y. Supp. 1016, affirmed in 177 N. Y. 535, 69 N. E. 1123, the action was for the death of a fireman who was killed by a collision of a fire truck on which he was riding with the street car of defendant company, and the defense there made was that the negligence of the driver of the fire truck should be imputed to the deceased and bar a recovery by plaintiff. In the opinion the court says:

"The question presented by the exception, therefore, is whether contributory negligence on the part of the driver would defeat a recovery. The decedent had no control over the driver, and the driver had no control over the decedent. They were both in a common employment in a sense, it is true, in that they were members of the fire department of the city of New York. The decedent, however, was employed, and it was his duty, to perform services strictly as a fireman, while the driver was employed and it was his primary, if not his exclusive, duty to drive, manage, and look after the team. The case is not distinguishable on principle from *Bailey v. Jourdan* [18 App. Div. 387], 46 N. Y. Supp. 899, where it was held that the negligence of a driver of a patrol wagon was not imputable to a patrolman riding in the wagon, where the patrol wagon, with the driver and patrolman, was sent out by the sergeant to bring in a prisoner."

The case of *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 South. 618, involved a like question, and the third paragraph of the syllabus is as follows:

"Where the concurring negligence of the driver of a hose cart and employes in charge of a street car results in a collision, the negligence of the driver cannot be imputed to a fireman riding on the truck, but having nothing to do with the driving, who is injured in the collision, and it will not preclude him from recovery from the street car company."

The Supreme Court of Iowa announced the same rule in *McBride v. Des Moines City Ry. Co.*, 134 Iowa, 398, 109 N. W. 618, in the following language:

"We are satisfied, however, that the facts do not afford the slightest occasion for applying or even discussing the common enterprise rule. The deceased was not riding on the hose wagon in the prosecution of any common enterprise in which he and the other members of the fire department had voluntarily engaged, but in the pursuance of his individual duty as a member of the fire department, and in that capacity a servant of the city. He had nothing to do with the selection of the driver, and he had no control over his acts. Under such circumstances it has been frequently held by other courts that there is no relation of common enterprise which would justify the imputation to the deceased of any negligence on the part of the driver of the hose wagon."

And the St. Louis Court of Appeals in *Burleigh v. St. Louis Transit Co.*, 124 Mo. App. 724, 102 S. W. 621, held to the same doctrine in the following language:

"Where plaintiff, a fireman, was riding as a passenger on a fire truck which was being driven home from a fire, and plaintiff had no control over the driver of the truck, the latter's negligence was not imputable to him."

The Supreme Court of Michigan, being one of the states which recognizes the doctrine of imputed negligence, upon a similar state of facts, held that the negligence of the driver of a fire engine cannot be imputed to a fireman engaged in his duties upon the engine so as to defeat recovery by him. In determining this question the court said:

"Whatever may be the rule as to joint undertakers, where one may be said to be the agent of the other, * * * or between a driver and a mere volunteer, in which case, perhaps, an implied agency may be said to exist, we are unable to see why, in a case like the present, where two fellow servants having duties to perform, the one wholly distinct from the other, are severally engaged in the performance of such duties, the negligence of the one should be imputed to the other. The cases are numerous in which the courts have refused to apply the doctrine of imputed negligence in such cases." *McKernan v. Detroit Citizens' St. Ry. Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

In the case of *St. L. & S. F. Ry. Co. v. Bell*, 159 Pac. 336, Powell had planned an automobile trip to the country with his wife and two lady visitors, but, finding it impossible to go, arranged with one Dubose to drive his car. At the suggestion of Dubose, the deceased was invited to accompany the party. On their return to the city, the automobile in which they were riding, while being driven along the highway, ran upon the brink of a hole therein, negligently left open

by the defendant, into which it fell, and in falling overturned, killing deceased, and it was held that the contributory negligence of the chauffeur could not be imputed to one traveling in a vehicle by invitation of the owner; that in order to render one liable for the negligence of the chauffeur the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise whereby a responsibility for each other's acts exists, and that parties cannot be said to be engaged in a joint enterprise unless there be a community of interests in the object or purpose of the undertaking and an equal right to direct and govern the movements and conduct of each other with respect thereto, and that before the negligence of the chauffeur could be imputed to the passenger, each must have some voice and right to be heard in its control or management; and it was held that the court did not err in refusing to submit to the jury the question of whether the deceased at the time he was killed was engaged in a joint or common enterprise for the reason that there was no evidence from which a joint enterprise might have been reasonably inferred. It was contended that the negligence of the chauffeur was properly attributable to the deceased, and should have been submitted to the jury in support of the defense of contributory negligence to be determined by the jury as a question of fact under the Constitution (article 23, § 6), but this court held it was the duty of the trial court to decide as a matter of law upon the undisputed facts that the acts of the chauffeur could not be imputed to deceased, and therefore was not contributory negligence upon his part.

[6] At a former trial of this case at the request of the defendant and with the consent of the plaintiff, the court appointed a board of physicians composed of Drs. McNair, Moorman, and Ferguson, who, after making an examination of plaintiff's injuries, returned into court and testified in the case. Upon the present trial Dr. McNair testified in plaintiff's behalf indicating on plaintiff's person the particular condition to which he testified. Plaintiff also called other physicians, but they were not called upon to explain their testimony by indicating on plaintiff's body the injuries about which they testified. Defendant called Dr. Moorman, also a member of the board appointed by the court, during whose examination plaintiff, without objection, stripped his body and permitted said witness to explain his testimony by pointing out the particular injuries concerning which he testified as had been done by Dr. McNair. In addition to Dr. Moorman, defendant called Drs. Cunningham and Reed, and requested that plaintiff submit to an examination by them in the presence of the jury for the purpose of testifying on behalf of defendant. Plaintiff objected to an examination by physicians named, for the reason they were in the employment of defend-

ant, but offered to submit to an examination by two or more disinterested physicians, to be selected by the court, which proposition defendant declined to accept. Thereupon the court refused to require plaintiff to submit to an examination by said physicians, and error is assigned upon this ruling.

It has been held that the courts of this state, in the absence of a constitutional or statutory provision authorizing them to do so, have no authority in an action for damages to order a plaintiff to submit in advance of or during the trial of a case to a physical examination by a physician to be appointed by the court. *City of Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107; *A., T. & S. F. Ry. Co. v. Melson*, 40 Okl. 1, 134 Pac. 388, Ann. Cas. 1915D, 760.

Defendant contends that because plaintiff called Dr. McNair as a witness and exhibited his body to the jury, he thereby waived his exemption, and conferred upon the court power to compel him to submit to an examination by any physician or physicians to be selected by defendant, and that the court erred in not requiring plaintiff to submit to an examination by the two physicians offered by it, and in support of this contention cite a number of decisions declaring the rule that where a plaintiff submits his body to the jury, and permits physicians in his behalf to testify with reference to his alleged injuries, the court thereby is authorized to compel him to submit to an examination by physicians for the purpose of permitting them to testify on behalf of defendant. None of the decisions cited appear to be based upon a state of facts similar to those here involved. Upon the former trial, plaintiff waived his exemption upon the condition that the examination should be made by a board of three physicians to be selected by the court, and defendant, in order to obtain the privilege of such an examination and the testimony of the physicians making same, agreed to these conditions. Had plaintiff not made this agreement, an examination could not have been had nor testimony based thereon procured by defendant in the absence of a waiver of his exemption by plaintiff. Does the fact that a new trial was granted relieve the parties from the agreement entered into, and authorize the court to compel the plaintiff to submit to an examination? We think not, in the absence of additional waiver upon the part of plaintiff. While calling other physicians, plaintiff only exposed his person to the jury in connection with the testimony of Dr. McNair, and without objection permitted Dr. Moorman to examine his body and testify in connection with such examination. Not having permitted any physician other than the one appointed by the court to make an examination in the presence of the jury and testify with reference thereto, plaintiff cannot be said to have waived his exemption further

than he had done upon the former trial; and having permitted defendant, without objection, to call another member of the board, he has submitted to all of the conditions upon which the exemption was originally waived. For another reason there was no error in the ruling of the court. If it be said that calling Dr. McNair was a waiver of his exemption, independent of the agreement entered into at the first trial, the court was authorized to impose such reasonable restrictions as it might deem best upon the right of the defendant to such an examination. In *Pronskevitch v. Chicago & Alton Ry. Co.*, 232 Ill. 136, 83 N. E. 546, plaintiff removed his clothes from the upper part of his body and exhibited his injuries to the jury. The defendant requested the court to require him to submit to an examination by its physicians in the presence of such witnesses as he might desire in a private room or place convenient to the courtroom. Plaintiff expressed a willingness to be examined in the presence of the jury, but not out of their presence, and the court refused to compel an examination as requested by defendant, and it was held that plaintiff, having offered his body voluntarily to the inspection of the jury, it became a subject of examination under such reasonable restrictions as the court might see fit to require, and inasmuch as he had offered to submit to an examination in the presence of the jury, there was no just cause for complaint.

In *Wheeler v. Chicago & W. I. R. R. Co.*, 267 Ill. 306, 108 N. E. 330, defendant requested the right to have plaintiff examined by their experts, whereupon plaintiff offered to submit to an examination by the physician of defendants who had previously examined and treated him for the injury. The court said that the offer was fair, and that there was no error in refusing to require plaintiff to submit to a further examination by other physicians to be selected by defendant.

In the present case we think the offer of plaintiff was fair under the circumstances, and there was no error in refusing defendant's request. There is no assignment in the petition in error nor in the briefs of counsel, nor any claim made that the damages awarded plaintiff were excessive. The negligence of defendant is admitted; as to the accident there is no controversy; nor is there any contention that defendant was not injured; the defendant's chief reliance being the defense of contributory negligence.

The judgment is therefore affirmed. All the justices concur.

THACKER, J. (concurring). This case in respect to the defense of contributory negligence is similar to and follows the case of *St. L. & S. F. Ry. Co. v. Bell*, 159 Pac. 336, in which I concurred in the conclusion reached, but dissented from the reasons given for the same.

In the instant case the defendant asked the trial judge to give the jury several instructions in its own favor as to this species of contributory negligence as a defense, all of which went beyond a mere definition of the defense and some of which in effect closely approached a direction to the jury to find that the evidence in the case established this defense, thus invading the province of the jury under section 6, art. 23 (Williams', § 355), of our Constitution; but, instead of invading what I regard as the province of the jury to instruct them for the defendant on this defense, the trial judge invaded their province and instructed them for the plaintiff to the effect that the evidence was not sufficient to establish this species of contributory negligence, which, although he may have been justified in thinking, he had no right to instruct because of this section of the Constitution.

As I understand the opinion of the court in these cases, they hold that there is no evidence of imputed negligence, and thus, in effect, that the question of the existence of this species of contributory negligence is not a question of fact to be left to the jury under the evidence, which holding necessarily involves a denial of the converse of the statement in *St. Louis & S. F. Ry. Co. v. Hart*, 45 Okl. 659, 146 Pac. 436, that:

"In no event is the court authorized to direct a verdict or sustain a demurrer to the evidence upon the ground that it conclusively appears that the plaintiff is guilty of contributory negligence as a matter of law."

This statement in the Hart Case seems to be in perfect accord with the provision of section 6, art. 23 (Williams', § 355), of our Constitution that:

"The defense of contributory negligence * * * shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

And this right seems to forbid the trial court to instruct the jury as it did in effect in this case that the negligence of the driver of the motor truck upon which the plaintiff was riding could not be imputed to the plaintiff as the contributory negligence of the latter.

I cannot say what these cases presage as to other phases of the question of imputed contributory negligence not involved in them, nor what, if any, grounds are thought to exist for differentiating them from cases in which the rule just quoted from the Hart Case seems applicable, although I see nothing different in the facts of either of these cases, except that this species of contributory negligence was not under consideration in the Hart Case, and here the defendant instead of the plaintiff invokes the above-quoted constitutional right; but, be this as it may, I am wholly unable to understand why, as I think is certain, this plain and simple provision of our Constitution is not allowed in these cases the effect demanded by its language, which is broad enough to include every spe-

cies of contributory negligence and every question as to whether it exists, and to be equally as available to the defendant as to the plaintiff. It is certain that no practical or theoretical difficulty would be encountered in allowing this provision of the Constitution equal effect as to every species of this defense and as a right of each party.

Imputed negligence is unquestionably a species of contributory negligence, as I undertook to show by both reason and indubitable authority in the case of *St. L. & S. F. Ry. Co. v. Bell*, supra; and, if this was not so, it could be allowed no effect whatever as an affirmative defense. The effect of the negligence of a third party as an affirmative defense against a plaintiff is the result of imputing it to the plaintiff as his own contributory negligence; and this species of contributory negligence is as clearly within the provision of the Constitution above quoted as any other species can possibly be.

If, as seems to be well settled (*St. L. & S. F. Ry. Co. v. Hart*, 45 Okl. 659, 146 Pac. 436), under this provision the court can in no case say, as a matter of law, that the evidence establishes the defense of contributory negligence, it must follow as a necessary corollary that the court can in no case say, as a matter of law, that the evidence does not establish this defense; and the trial court should do no more, when this defense is pleaded and insisted upon, than define it and advise the jury of its legal effect in leaving it to them. If any reason for a different view has ever been conceived, it has found no expression in any opinion by this court; but, as inexplicable as it seems to me, it has been repeatedly assumed, as in the instant case, that this provision of the Constitution does not apply to this species of contributory negligence or, at least, does not apply as a right of a defendant. Such a discrimination against this species or between the parties as to their rights under this provision seems unreasonable and unthinkable to me.

It does not follow from allowing the parties an equal right to the benefit of this provision of the Constitution that the trial courts could not exclude evidence clearly irrelevant and immaterial to such a defense, and thus fully protect itself from bad faith or any character of intolerable wrong in admitting evidence; but the parties are certainly entitled to the greatest reasonable latitude in introducing evidence they deem relevant and material to the issue made by this defense; and, although the trial judge may protect himself, the jury, and the adverse party from mere trespasses upon their time and attention, he, in respect to the evidence before the jury, has no more right to instruct them that it is insufficient to establish the same than he would have to instruct the jury that evidence clearly showing such defense was sufficient to establish the same.

If a defendant, without reason, should

urge upon a jury that the evidence before it showed contributory negligence on the part of the plaintiff, it may be safely assumed that the fruits of his folly would prevent its repetition in subsequent trials; but, as stated in my concurring opinion in *St. L. & S. F. Ry. Co. v. Bell*, 159 Pac. 336, this provision of the Constitution would not prevent a new trial where it was clear that the finding of the jury as to the existence or nonexistence of contributory negligence was not fairly reached; and, where it is absolutely clear that there is no room for difference of opinion as to the existence or nonexistence of this defense, except upon the theory of mistake (other than an error of judgment), prejudice, or corruption, I have no doubt that the trial judge will usually find that he is able to set aside a wrong verdict upon some statutory ground, as I stated in *St. L. & S. F. Ry. Co. v. Bell*, supra.

The provision of the Constitution under consideration, if allowed the effect required by its language, would greatly simplify the duties of the trial judge and of this court in respect to this defense; and, so far as I know, no one has so far suggested any substantial reason for not allowing it that effect; but, without explanation, it is simply denied such effect.

Although other and especially unrelated rights are not destroyed or impaired by this defense, and the latter may at least be incidentally affected and limited during the trial by the action of the trial judge in performing his duties in respect to such other rights, as, for instance, in the prevention of mere trespasses upon the time and attention of the adverse party, the jury, and himself, and in the correction of any error either in the express or implied disclosure of his own opinion as to the relevancy or materiality of evidence admitted upon this defense, the question of the actual or absolute existence of this defense, including the question as to whether any or all of the evidence that has been properly admitted is sufficient to prove the same, however far short of such proof, or however conclusive, the judge may think such evidence, is clearly for the jury under said section 6, art. 23 (*Williams*, § 355), of our Constitution; and, since this section of our Constitution relates primarily to the state of the evidence when both parties have closed, and to the instructions of the court to the jury, whenever the trial judge does more than define this defense in his instructions, and tell the jury what its effect is upon the plaintiff's right to recover, if found to exist, which seems to be but an act of leaving it to them, especially if he does more than this for the purpose of affecting the result of the issue upon this defense, he invades their exclusive province, and violates a constitutional right of a party to the action.

It seems clear to me that this section of our Constitution should, and in most respects must of necessity, be construed as if the fol-

lowing parenthetical interpolations were a part of the same, that is, as now follows:

"The defense of contributory negligence or of assumption of risk shall (when pleaded and insisted upon), in all cases whatsoever (where under the law the proof of the same would defeat the plaintiff's right to recover), be a question of fact, and (the question as to whether this defense in fact exists) shall, at all times, be left to the jury (so that, although the trial judge may define this defense in order that the jury may know what he is leaving to them and may instruct them that its proof defeats recovery, he shall never instruct the jury that this defense or any element of the same has or has not been proven, whatever may be the state of the evidence in respect to the same)."

I think the opinion of the court clearly wrong in this respect. However, since the defendant invited the trial judge to invade the province of the jury upon the question of imputed negligence to instruct in its own favor, contrary to what it appears the jury probably should and would have found as to this defense, the defendant is not in a good position to ask a reversal because the judge did invade the province of the jury upon this question, and instruct in favor of its adversary what the jury probably should and would have found.

Although I dissent from the views of this court in respect to the defense of contributory negligence and in respect to the instructions of the trial judge thereon for the same reasons and to the same extent that I dissented from views to the same effect expressed in the opinion of this court in the case of *St. L. & S. F. Ry. Co. v. Bell*, supra, and, although I have the same slight doubt that I there expressed as to whether I should concur in the conclusion reached, I here, as there, resolve the doubt in favor of the verdict and judgment of the trial court for the reasons here stated and more fully set forth in my concurring opinion in that case.

ANDERSON et al. v. STATE. (No. A-2699.)
(Criminal Court of Appeals of Oklahoma. April 9, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW — § 814(1) — HOMICIDE — § 300(7) — INSTRUCTIONS — APPLICABILITY TO CASE.

In a criminal case instructions to a jury must be applicable to the case. The law applicable is determined by the accusation and the evidence introduced upon the trial, and on a trial for assault with intent to kill, where the evidence tends to show justification in self-defense, it is the duty of the court to submit instructions properly embracing the law of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Homicide, Cent. Dig. § 622.]

Appeal from District Court, Johnston County; J. H. Linebaugh, Judge.

Happy Anderson and Babe Anderson were

convicted of assault with intent to kill, and they appeal. Reversed.

Cornelius Hardy, of Tishomingo, for plaintiffs in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. Happy Anderson and Babe Anderson were jointly charged, tried, and convicted of the crime of assault with a dangerous weapon with intent to kill, and their punishment fixed at imprisonment in the penitentiary for three years. From the judgments rendered in pursuance of the verdict they appealed by filing in this court on April 10, 1916, a petition in error with case-made. The Attorney General has filed the following confession of error:

"In this case we feel impelled to confess error, though we regret to have to do so. But before we get to the confession we wish to say that we fail to find so many errors in the record as defendants allege. We have read it through carefully and digested every syllable. It was an ugly family row. The two Andersons, the defendants herein, were brothers, and their father and sister were in part mixed up in this trouble that originated through family gossip. Happy and Babe had a row with one Sam Toons, and Sam and Happy were brothers-in-law, each having married a girl by the name of Coffee, and these two were sisters. They all lived on almost adjoining lots and blocks in the same little town of Ravia. Sam Toons, the victim, had heard that the Andersons were snubbing his wife; in fact, she told him so. He went to them and told them they must stop it, and this originated the fuss in which the two Anderson boys on the night of May 3d, after dark, met up with Sam alone, coming from town, and a fight was had. These two defendants, the Anderson boys, admit that a heavy and dangerous piece of iron was used by Happy Anderson in beating Sam, but claimed that they took it away from Sam before they used it. Sam came out of the fray with a knot on the back of his neck with a gash in it, a bruise in the side over his heart, a lick over the eye, one ear marked, and the other one nearly off, and the question is, as the three were together alone at the starting of the fight, as to who struck first.

"The defendants attempt to assail the character of Sam's wife, and introduced two witnesses for that purpose, but in asking the question as to whether or not her character was good on the subject of peace and quietude, or truth and veracity, they do not put the question in the usual and authorized form, but ask if the witness was acquainted with her character for truth and morality, and especially for morality. The attorney who did this was doubtless a practitioner in the eastern part of the state, the Indian Territory part, where the laws of Arkansas were in force. The question authorized by the statute of that state is set out in *Mansfield's Digest of the Laws of Arkansas*, § 2902, and has been construed more than one time by the courts of that state. The words used in that statute are 'truth and immorality.' See said section; *Majors v. State*, 29 Ark. 112; *Lawson v. State*, 32 Ark. 222.

"A certain district judge in this state, the exact question to be asked under the circumstances not having been fully set forth, permitted the question asked as to the truth and immorality of a witness in the case of *Litchfield v. State*, 8 Okl. Cr. 177, 126 Pac. 707, 45 L. R. A. (N. S.) 153, and there this court very promptly ruled that that was a mixture of the truth and other elements of the moral character of a

witness, and could not be answered. The Supreme Court of Oklahoma Territory had noticed this question in *Flohr v. Territory*, 14 Okl. 490, 78 Pac. 565, but, as this judge thought, had not permanently settled it.

"Though this is a mixed question, by the authorities we think that it is now settled in this state, and we refer to the authorities above and to *Kansas Taylor v. Clendening*, 4 Kan. 532; 40 Cyc. 2495; 38 A. & E. 1075; 5 A. & E. 587. So we think there is nothing to this exception.

"This court has passed on the question repeatedly where the inquiry was as to the character of the defendant. See *Cannon v. Territory*, 1 Okl. Cr. 607, 99 Pac. 622; *Morris v. Territory*, 1 Okl. Cr. 643, 99 Pac. 760, 101 Pac. 111; *Dickinson v. State*, 3 Okl. Cr. 158, 104 Pac. 923; *Friel v. State*, 6 Okl. Cr. 533, 119 Pac. 1124; *Edmonds v. State*, 9 Okl. Cr. 618, 132 Pac. 923; *Gilbert v. State*, 8 Okl. Cr. 548, 128 Pac. 1100, 129 Pac. 671. But this has no reference to a witness.

"We notice another objection as we go along, thinking it may possibly arise at the next trial, and that is that the court charged on flight. There is no error in this. See 12 Cyc. 610; *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *Cleavinger v. State*, 43 Tex. Cr. R. 273, 65 S. W. 89.

"We notice another objection, and that is the speech that was made by the prosecuting attorney. This was in accord with the law. The prosecuting attorney had the right to argue that case from the standpoint of the state. Sam Toons appears to have been doing what any other man of self-respecting character would have done—defending the character of his wife. The Andersons had been maligning her. Old man Anderson, the father, had told Sam in her presence that 'she would work him into trouble.' Babe relates a conversation that the two Anderson boys had with Sam just preceding the fight, and which occasioned the fight, and that is that Happy told Sam when Sam had told him he must quit talking about Sam's wife, this: 'Haven't you seen enough, and don't you know enough to know that you have got no wife?' Happy himself confirms this. Now Sam's wife was the sister of Happy's wife. Happy claims that he caught her in some sort of attempted assignation in the night with a man by the name of Faulkner, but it is strange in all this record that Happy is the only man that ever saw aught wrong with her, and she says that Happy himself ruined her sister while at her own house, and that it was four months before she could get Happy to marry the girl after the baby was born. All this comes out in the evidence, and the attorney for the state has a right to discuss it. See *Williams v. State*, 4 Okl. Cr. 534, 114 Pac. 1114; *Morgan v. State*, 9 Okl. Cr. 26, 130 Pac. 522; *Thacker v. State*, 3 Okl. Cr. 489, 106 Pac. 986.

"In defense of Sam we say that there is nothing to show that he knew of this alleged adventure of Happy in catching Sam's wife and Faulkner at the door of the old house in the night. We are not pretending to defend the character of Sam's wife, but Sam had the right to do so. They had a family of children, and while we do not think that Sam had the magnificent character of the philosopher Cato, who is said to have lent his wife to his friend, Hortensius, yet he was just an ordinary man, an ordinary husband, who seemed to know nothing against his wife, and to have had affection for her and trust in her, and a husband like this may sometimes be the blindest of human beings. In fact, we see nothing to censure in Sam. He did right in fighting for his wife among this family of slanderers, and the county attorney had the right to discuss it.

"But we get now down to the proposition where there is real error, as we think. We say

again, we hate to make this confession, because these defendants should have been convicted. The evidence in the case was in sharp conflict as to who brought on the difficulty. Sam says the Andersons brought it on and turned back and struck him from behind. The Andersons say that Sam brought it on by first trying to strike them with a piece of iron concealed in his hand.

"The court in charging the jury (see instruction 3), tells them that the defendant admits making an assault on Sam Toons; he does not say the first assault, and leaves the jury in confusion. The defendants deny that they made any first assault on Sam; but in his statement to the jury the court assumes that they brought on the difficulty. This, we think, was error. See *Kelley's Cr. Pro. § 394*; *Clark's Cr. Pro. 468*; 12 Cyc. 602. In making this statement to the jury, and this proposition is referred to nowhere else, the court ignored the theory of the defendants that Sam was himself the aggressor. This should not have been done. See 11 Pl. & Pr. 194; *Clark's Cr. Pro. 470*; *Douglas v. Territory*, 1 Okl. Cr. 589, 98 Pac. 1023; *Gray v. State*, 7 Okl. Cr. 104, 122 Pac. 265.

"The theory of the defendants was that of self-defense; but the court gave no charge to that effect. We agree with the court below and with the witnesses and with the jury that there is little or nothing in this framed up contention of the defendants under the proof. But it was their theory of the case, however futile, and to ignore it has been time and again held as error by this court. See the recent case of *McClatchey v. State*, 152 Pac. 1136, not yet officially reported, and other cases of similar character.

"Before leaving the case we must refer to the hip pocket movement alleged to have been seen by the defendants and their father at different times. As a fact, on the night of the fight, Sam was in his shirt sleeves, and he avers that he had no pistol nor even a pocketknife, and there is not a line in this record to show that he ever had had a pistol, and he swears that he never owned one.

"This was a pretty brutal, dirty affair. The jury arrived at the right conclusion, but we think that these defendants were entitled to the charges before indicated in this confession, and that their failure to get them was error.

"However guilty a defendant may be, he must be convicted according to law. So we confess error herein."

A careful examination of the record leads to the conclusion that the confession of error is well founded. It is apparent that the court failed to instruct the jury upon the issue of self-defense relied upon as a justification for the assault charged.

We also think that the verdict was not warranted by the evidence. The defendants testified that Toons, the prosecuting witness, was the aggressor, but, discarding entirely the theory of self-defense, the evidence, at most, sustains only the conclusion that the assault was with intent to do bodily harm. The information was not questioned in the lower court. However, we deem it necessary to say that it is demurrable. It attempts to charge the common-law crime of assault with intent to murder. The case was tried and the instructions of the court were based upon the statutory crime of assault with intent to kill.

Because of the error in the charge of the court and the error in refusing to give the requested instructions on the law of self-

defense, the judgment is reversed, and the cause is remanded.

ARMSTRONG and BRETT, JJ., concur.

Ex parte DOZA. (No. A-2869.)

(Criminal Court of Appeals of Oklahoma.
April 14, 1917.)

(Syllabus by the Court.)

JURY ~~11~~(6)—RIGHT TO JURY TRIAL—VIOLATION OF ORDINANCE—CONSTITUTIONAL PROVISIONS.

The Bill of Rights of the Constitution of Oklahoma declares that "the right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men" (Const. Art. 2, § 19), and that "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed" (Const. art. 2, § 20). *Held*, that a person prosecuted under a city ordinance for an offense which is also made a misdemeanor by statute, or an ordinance, the punishment for a violation of which is or may be imprisonment, is entitled to a jury trial in the court of original jurisdiction, and to accord to the accused the right to be tried by a jury in the county court on appeal after conviction in the municipal court does not satisfy the requirements of the Constitution. In such cases a judgment of conviction in the municipal court not based upon a verdict of guilty by a jury is void.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 24.]

Application of Owen Doza for writ of habeas corpus. Writ allowed, and petitioner ordered to be discharged.

Firman S. Winn, of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, and Frank Watson, both of Oklahoma City, for respondent.

DOYLE, P. J. On the 11th day of November, 1916, a duly verified petition for writ of habeas corpus was presented to the presiding judge, averring in substance that the petitioner, Owen Doza, was unlawfully restrained of his liberty by W. B. Nichols, chief of police of Oklahoma City, upon a mittimus issued upon a judgment of the municipal court of said city on November 1st, wherein the petitioner was adjudged guilty of being drunk, and was sentenced to pay a fine of \$99 and to be confined for 90 days in the city jail; that petitioner by reason of his poverty is unable to procure bond for appeal in said case, and further averring:

"That the ordinance of said city authorizing punishment as above set forth for being drunk is in conflict with the laws of the state of Oklahoma, in that the punishment prescribed by the state for said offense is a fine of \$10, no more or no less, and for the reasons above stated his imprisonment is wholly illegal and without authority of law."

The writ was issued, and in obedience to the writ petitioner was brought before the court on the following day and return made to the writ. The issue in this case is the same as in the case of Ex parte Johnson 12 Okl. Cr. —, 161 Pac. 1097. For the reasons given in the opinion in that case we are of opinion that the proceedings had upon the trial and conviction of the petitioner in the municipal court were illegal and void, and it is ordered that he be discharged.

ARMSTRONG and BRETT, JJ., concur.

Ex parte GOWNLOCK. (No. A-2894.)

(Criminal Court of Appeals of Oklahoma. April 16, 1917.)

(Syllabus by the Court.)

JURY ~~11~~(2)—RIGHT TO JURY TRIAL—VIOLATION OF ORDINANCE.

Section 1, c. 147, Laws 1915, define "municipal courts" "to mean and include all the courts of the state of Oklahoma, organized and existing in the various towns and cities thereof which shall have and possess, under the laws of the state, original jurisdiction to hear and determine offenses against the ordinances of municipalities," and defines an "offense" "to mean the doing of some act, or the failure to perform some duty, commanded by some municipal ordinance or by law, and for the violation of which a penalty or punishment is provided thereby," and declares such proceedings to be "criminal in their nature; and except as otherwise specifically provided, shall be governed by, and subject to, general laws relating to criminal procedure." *Held* that, in respect to "offenses" under city ordinances, the punishment for which is or may be imprisonment, conviction of the accused without a jury trial would be in contravention of section 7 of the Bill of Rights, providing that "no person shall be deprived of life, liberty, or property, without due process of law," because under the constitutional provisions a jury is an essential part of every tribunal for the trial of criminal cases, and such constitutional provisions places the right to trial by jury beyond the power of the Legislature to abrogate or abridge it, and it is beyond the power of the Legislature to confer jurisdiction on any tribunal to try criminal cases without providing for jury trials.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 153.]

For other definitions, see Words and Phrases, First and Second Series, Municipal Courts; Offense.]

Petition by George Gownlock for writ of habeas corpus. Petitioner ordered to be discharged.

O. A. Cargill, of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, and Frank Watson, both of Oklahoma City, for respondent.

DOYLE, P. J. On the 20th day of December, 1916, a duly verified petition for writ of habeas corpus was presented to the presiding judge, averring in substance that the petitioner, Geo. Gownlock, is unlawfully restrained of his liberty by the officers of the city of Oklahoma City, upon a judgment of the municipal court of said city entered on the

18th day of October, 1916, imposing a fine of \$99 and confinement for 30 days, and further averring:

"That he was deprived of a fair trial, in this, that he was deprived of an opportunity to produce witnesses to prove that he was not guilty of the offense charged; that he was deprived of his statutory right to plead, and that there was no competent evidence introduced to show that he was guilty of the offense charged; that immediately after his summary conviction, he was transferred to the county roads, where he has been confined and working for the last 30 days."

The writ was issued, and in obedience to the writ petitioner was brought before the court on the following day, and return made to the writ.

The issue in this case is the same as in the case of *Ex parte Johnson*, 12 Okl. Cr. —, 161 Pac. 1097. For the reasons given in the opinion in that case, we are of the opinion that the proceedings had upon the trial and conviction of the petitioner in said municipal court were illegal and void, and it is ordered that he be discharged.

ARMSTRONG and BRETT, JJ., concur.

SPESS v. STATE. (No. A-2701.)

(Criminal Court of Appeals of Oklahoma.
April 12, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW — 629 — LIST OF ADVERSE WITNESSES—CONSTITUTIONAL PROVISIONS.

Section 20, art. 2, of the Constitution construed, and *held*, that under the last provision of this section the accused in capital cases does not have to demand a list of the witnesses to be used by the state in chief, but that the Constitution makes the demand for him, and that a trial court has no more authority to force the accused to trial until he has waived this demand of the Constitution, or it has been complied with, than he would to force the accused to trial without an information or a jury; for each of these rights rest upon the same authority, and are guaranteed to the accused in the same section of the Constitution, and no one can nullify them, and the accused alone can waive them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436.]

Error from District Court, Pawnee County; Conn Linn, Judge.

James Spess was convicted of murder and sentenced to life imprisonment, and he brings error. Reversed.

McNeill & McNeill, of Pawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. Plaintiff in error, James Spess, was convicted of murder, and sentenced to life imprisonment. The material facts are that plaintiff in error and two others robbed a bank at Terlton, and in resisting arrest plaintiff in error shot and killed Robert Moore, the deputy sheriff. When the case was called for trial in the district court, plaintiff in error filed a motion and affidavit

asking for a continuance on the ground that he had not been served with either a copy of the information or a list of the witnesses, with their post office addresses, which the state expected to use as its witnesses in chief. This motion and affidavit of the plaintiff in error was not traversed in any way by the state, but, regardless of that fact, the court overruled the motion and forced the plaintiff in error to trial. Plaintiff in error continued to raise this objection at every stage during the progress of the trial, and in no way waived this constitutional right, or neglected to call the court's attention to the fact that he did not waive it.

Regardless of our feelings in the matter, or any resentment we might have against the atrocious crime charged against the plaintiff in error, the violation of a plain, simple, and unambiguous demand of the Constitution must not be tolerated by the courts; and responsibility in such cases must rest upon the tribunal in which it is practiced or attempted.

Section 20, art. 2, of the Constitution provides that:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed: Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information, together with their post office addresses."

Under the last provision of this section of the Constitution the accused in capital cases does not have to demand a list of the witnesses together with their post office addresses, but the Constitution makes that demand for him. And, unless he waives it, he cannot be legally put upon trial until that demand has been complied with.

Ordinarily in applications for continuance the court may exercise a sound judicial discretion, but it would be absurd to say that this discretion could go to the extent of nullifying a plain, simple, unambiguous demand of the fundamental law of the state, made exclusively for the benefit of the accused.

The court in the case at bar had no more authority to force the plaintiff in error to trial until he had waived this demand of the Constitution, or it had been complied with, than he would have had to force him to trial without an information or a jury. For each of these rights rest upon the same authority and are guaranteed to the accused in the same section of the Constitution; and no one can nullify them, and the accused alone

can waive them. *State v. Frisbee*, 8 Okl. Cr. 406, 127 Pac. 1091.

In the case at bar the court should have continued the case until the plaintiff in error could be served with a list of the witnesses as required by law. And by reason of his failure to do this the plaintiff in error was clearly denied a plain constitutional right, and the judgment must be reversed.

The judgment is therefore reversed, and the cause remanded for a new trial.

DOYLE, P. J., and ARMSTRONG, J., concur.

**FARMERS' STATE BANK OF TEXHOMA
v. STATE.** (No. A-2848.)*

(Criminal Court of Appeals of Oklahoma.
April 14, 1917.)

(Syllabus by the Court.)

1. CONTEMPT \Leftrightarrow 44—PUNISHMENT—JURISDICTION.

A contempt being an offense against the dignity and authority of the particular court to which the affront was offered, if the court has jurisdiction of the parties and the subject-matter out of which the contempt grows, it has jurisdiction to try and punish the contemnor, regardless of where or in what state the acts constituting the contempt may have been committed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128-130.]

2. CONTEMPT \Leftrightarrow 61(2)—JURY \Leftrightarrow 21(4)—INDIRECT CONTEMPT—QUESTION FOR JURY—JURY TRIAL.

A party charged with indirect contempt is entitled to have a jury pass upon the question of his guilt or innocence, before penalty or punishment is imposed. But the jury's province is limited solely to the question of guilt or innocence, and they have nothing to do with the penalty to be imposed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 189; Jury, Cent. Dig. § 139.]

3. INJUNCTION \Leftrightarrow 230(2)—VIOLATION OF INJUNCTION ORDER—INFORMATION.

Where an information charging contempt for violating an injunction order is attacked upon the ground that it did not specifically plead an injunction bond had been given, it is held that, since it did plead that the injunction order was "duly and legally issued," it was sufficient as against demurrer, since the essentials of the legality of an injunction order are so well understood and so thoroughly established.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 507, 508.]

Error from District Court, Texas County; W. C. Crow, Judge.

The Farmers' State Bank of Texhoma was found guilty of indirect contempt, and it brings error. Affirmed.

Breslin & Breslin, of Guymon, Embry, Crockett & Johnson and E. L. Fulton, all of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. In this case the plaintiff in error appeals from a judgment finding it guilty of indirect contempt, by reason of it having willfully and knowingly violated an

injunction order of the district court of Texas county, enjoining it from selling or disposing of certain property, a portion of which was situated in the state of Texas, just across the state line. And this charge of contempt is based solely upon the sale of the property situated in the state of Texas.

[1] 1. The principal and most serious contention relied upon by plaintiff in error is that contempt is criminal in its nature, and, since all the acts constituting the contempt were committed in the state of Texas, that the district court of Texas county, Okl., had no jurisdiction to try or punish plaintiff in error for contempt, by reason of these acts. But plaintiff in error fails to distinguish the difference between contempt and other criminal acts. Murder, larceny, arson, and such offenses in law are considered as an offense against the peace and dignity of the state; hence the jurisdiction to try and punish a person for such offenses is placed alone in the hands of the particular county and state against which the offense has been committed. But contempt is an offense against the dignity and authority of the particular court, to which the affront is offered. If that court is willing to overlook and condone the insult, no other court, even in the same county, has a right to interfere. But if a court has jurisdiction of the parties, and the subject-matter out of which an indirect contempt grows, the affront is none the less directly against the dignity and authority of that court, no matter to what county or state the offender may go to violate the order of the court. If that were not true, then injunction orders in many instances would be a farce. It would be ridiculous, to say that an order enjoining the sale of personal property, over which the court had jurisdiction, could be violated with impunity, if the litigant only took the pains to cross the state line before disposing of it. And it makes no difference as to the character of the property, whether real or personal, or where it is situated; if the court has jurisdiction to enjoin its sale, a violation of that order, wherever committed, is an offense against the dignity and authority of the court making the order, and that court, and that court alone, has the right to punish or complain. And it has that right, regardless of the location or the place, to which the contemnor may have gone to violate its order. This distinction to our minds is so clear and essential that we deem it unnecessary to discuss that feature further.

[2] 2. The next assignment of error deserving attention is that the court refused to instruct the jury that if they found the defendant guilty, they might fix the punishment; and plaintiff in error relies upon section 5933, Revised Laws 1910, to support this contention. But plaintiff in error has clearly overlooked the provisions of section 25 of the Bill of Rights, which are that:

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 21, 1917.

"Any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused."

Under this section, the province of the jury is specifically limited to the question of "the guilt or innocence of the accused." For it provides that in matters of contempt growing out of the violation of injunction orders, not committed "in the presence or hearing of the court, or judge sitting as such," that, "before penalty or punishment is imposed" the accused shall "be entitled to a trial by jury as to the guilt or innocence of the accused." Under such conditions, the offense not being committed in the presence of the court, the court is wholly dependent upon evidence to establish the guilt or innocence of the accused. Hence it is provided that under these conditions a jury may be had, and may make a finding "as to the guilt or innocence of the accused" under the evidence introduced. But the province of the jury provided for in that section is only to pass upon the guilt or innocence of the accused, and they have nothing to do with the penalty or punishment to be imposed, for that is not even fixed by law, but is, and should be, left to the sound discretion of the court.

[3] 3. The only remaining assignment that does not present questions that have been passed upon so frequently that we deem it unnecessary to repeat what has heretofore been so frequently said goes to the sufficiency of the information, objecting particularly because the information did not specifically allege that an injunction bond had been given. But the information does repeatedly and in various ways allege that on a certain date the order of injunction was "duly and legally issued." And it can hardly be maintained that for the purpose of that pleading, this is not sufficient, as against a demurrer. In charging bigamy it would be sufficient to allege that the accused and his first spouse were duly and legally married, without alleging that a license was had, and a minister performed the ceremony in the presence of certain named witnesses. The facts of that allegation might be traversed, but the essentials to the legality of the transaction are so well established that to say they were duly and legally married would be sufficient as against a demurrer. And so it is in the instant case. The plaintiff in error might have traversed the allegation that an injunction order was duly and legally issued by showing by way of defense that, as a matter of fact no bond had been given; but the essentials of the legality of an injunction order are so well established and so thoroughly understood that to plead that the injunction order was duly and legally issued is sufficient as against a demurrer. But in this case the

record shows, and plaintiff in error admits, that an injunction bond was duly given; hence, in the trial of the case, it did not attempt to traverse that fact.

Finding no reversible error, the judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

Ex Parte CROUCH. (No. A-2736.)

(Criminal Court of Appeals of Oklahoma. April 18, 1917.)

(Syllabus by the Court.)

HABEAS CORPUS ~~§~~53—DISCHARGE—SUFFICIENCY OF PETITION.

Where the facts averred in a petition for a writ of habeas corpus, if established, will not warrant the discharge of the prisoner, the writ will be denied.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 50, 50½.]

Application by James H. Crouch for writ of habeas corpus. Writ denied.

W. F. Harn, of Oklahoma City, for petitioner. R. McMillan, Asst. Atty. Gen., for respondent.

DOYLE, P. J. This was an application to this court for a writ of habeas corpus. It appears from the petition that the petitioner was tried in the district court of Oklahoma county, Edward Dewes Oldfield, presiding judge, and was convicted of manslaughter in the first degree, and was sentenced to imprisonment in the penitentiary for the term of ten years. Under said sentence he was committed into the custody of M. C. Binion, sheriff of said county, on a commitment directing said sheriff to transport petitioner to the penitentiary at McAlester, and the petitioner claims that his imprisonment is illegal, and among other things states that such illegality consists in this:

"That the alleged verdict of the jury and purported judgment and sentence imposed by the said Edward Dewes Oldfield, pretending to act as a judge of the district court of the Thirteenth judicial district of the state of Oklahoma, is within and for Oklahoma county, said state, is void for the reason that said Edward Dewes Oldfield at the time of said alleged verdict was returned by the jury, and at the time said judgment and sentence were imposed upon this petitioner was not and at this time is not a de jure or de facto judge of the Thirteenth judicial district of Oklahoma, but at the times last aforesaid said Edward Dewes Oldfield was, and now is, an usurper of the office of judge of the said district court."

To the petition the state interposed a demurrer on the ground that the facts stated in the petition if established will not warrant the discharge of the prisoner. The demurrer was sustained, and the writ was denied.

Ex parte COUCH (two cases).
(Nos. A-2916, A-2917.)

(Criminal Court of Appeals of Oklahoma. April 18, 1917.)

Petitions by John M. Couch for writs of habeas corpus. Demurrer to petitions sustained, and writs denied.

Homer Hurst, of Oklahoma City, for petitioner. R. McMillan, Asst. Atty. Gen., for respondent.

PER CURIAM. On February 5, 1917, there was filed and presented two petitions for writs of habeas corpus on behalf of John M. Couch, and demurrers were filed thereto. The demurrers sustained, and the writs denied.

Ex parte MITCHELL. (No. A-2895.)
(Criminal Court of Appeals of Oklahoma. April 18, 1917.)

(*Syllabus by the Court.*)

JURY §31(1)—RIGHT TO JURY TRIAL—VIOLATION OF ORDINANCE.

The constitutional guaranties intended to secure the liberty of the citizen and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipality under its charter or the nature of the jurisdiction conferred upon the municipal court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214.]

Application of Freeman Mitchell for writ of habeas corpus. Writ allowed, and petitioner discharged.

O. A. Cargill, of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, and Frank Watson, of Oklahoma City, for respondent.

DOYLE, P. J. On the 20th day of December, 1916, a duly verified petition for writ of habeas corpus was presented to the presiding judge, averring in substance that the petitioner, Freeman Mitchell, is illegally restrained of his liberty by the officers of the city of Oklahoma City, and is now compelled to work upon the county roads; that on the 29th day of November, 1916, he was convicted in the municipal court of said city on a charge of theft, and was sentenced to pay a fine of \$99 and the costs and to serve a sentence of 90 days in the city jail. The writ issued, and in obedience to the writ the petitioner was brought before the court the following day and return made to the writ.

The issue in this case is the same as in the case of *Ex parte Johnson*, 12 Okl. Cr. —, 161 Pac. 1097. For the reasons given in the opinion in that case, we are of opinion that the conviction of the petitioner in the municipal court was illegal and void, and it is ordered that he be discharged.

ARMSTRONG and BRETT, JJ., concur.

HAWTHORN v. STATE. (No. A-2870.)
(Criminal Court of Appeals of Oklahoma. April 18, 1917.)

(*Syllabus by the Court.*)

OBSTRUCTING JUSTICE §11—INFORMATION—DEMURRER.

An information in a criminal case should plead sufficient facts to constitute an offense against the laws of the state, and when such facts are not pleaded and a demurrer is seasonably filed, the same should be sustained by the trial court.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19-28.]

Appeal from County Court, Love County; J. H. Hays, Judge.

Tom Hawthorn was convicted of resisting an officer, and he appeals. Reversed.

T. B. Wilkins, of Marietta, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Tom Hawthorn, was convicted at the January, 1916, term of the county court of Love county, charged with interfering with an officer in the discharge of his official duties, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days.

The information, after alleging venue and time, is as follows:

"That in the county and state aforesaid and on the day and year aforesaid the said Tom Hawthorn did unlawfully, willfully, and purposely interfere with W. H. McGaugh, a deputy sheriff then and there engaged in the execution of a legal search warrant upon the premises located on Main street in the city of Marietta, and known as the Rock Hotel, by then and there advising the person in charge of said premises not to permit said officer to seize certain intoxicating liquor there found, and for the seizure of which said search warrant was issued, contrary to," etc.

A demurrer was filed to the information on the ground, among others, that it failed to state facts sufficient to constitute an offense against the laws of this state. It will be noted that the information charges Tom Hawthorn with interfering with the execution of a search warrant, by advising the proprietor of the hotel to refuse to permit the seizure of certain intoxicating liquor there found. There are no acts of conduct set out in the information further than this general statement.

The proof shows that the controversy out of which this trouble arose occurred at a hotel where Tom Hawthorn was rooming: that a search warrant was being executed against the hotel; that four pints of whisky were found in the hotel; that at the time the search warrant was being executed Hawthorn was present and said to the proprietor of the hotel: "I wouldn't let them have it; the law allows you a gallon of whisky." Hawthorn apparently had been drinking.

The remark referred to was made concerning the deputy sheriff, Culwell. There is no proof tending to indicate that the person addressed heard the statement, or, if he did hear it, that he paid any attention to it. There was no resistance offered to the search. The statute under which the prosecution was brought reads as follows (R. L. § 2150):

"Any person who attempts, by means of any threat or violence, to deter or prevent any executive officer from performing any duty imposed upon such officer by law, is guilty of a misdemeanor."

The foregoing information does not charge that the officers were interfered with by any threats or violence. It simply charges that plaintiff in error advised the owner of the hotel not to permit officers to seize four pints of whisky.

There is nothing disclosed by the record which indicates that any force or violence was offered or intended by any of the remarks made.

The information fails to state an offense and the facts disclosed fail to prove any. The demurrer should have been sustained.

For the reasons stated, the judgment is reversed.

DOYLE, P. J., and BRETT, J., concur.

Ex parte BURTON (two cases).
(Nos. A-2850, A-2880.)

(Criminal Court of Appeals of Oklahoma.
April 12, 1917.)

(Syllabus by the Court.)

1. BAIL §47—HABEAS CORPUS §33—SCOPE OF HEARING—JURISDICTION OF APPELLATE COURT.

Prior to filing the petition in error in this court, only the question of excessive bail will be considered on habeas corpus. When an appeal is perfected, this court will on proper showing make all necessary orders relating to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165-183, 257; Habeas Corpus, Cent. Dig. §§ 18, 31.]

2. CRIMINAL LAW §1084 — APPEAL — BAIL BOND—SUPERSEDEAS.

The power and authority of trial courts to allow bail pending appeal can only be exercised in the manner provided by statute, and, where the trial court fixes the amount of defendant's bail bond to be given as a supersedeas on appeal, it must fix the time within which such bond shall be given and the time within which the petition in error shall be filed in the Criminal Court of Appeals; otherwise such an appeal bond will not be effective as a supersedeas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2728, 2729, 2731, 2733-2735.]

Habeas corpus by Joe Burton against the Sheriff of Greer County. Petitioner remanded to custody.

F. E. Riddle, of Chickasha, and Moman Pruett and Victor Sniggs, both of Oklahoma City, for petitioner. R. McMillan, Asst. Atty.

Gen., and S. B. Garrett, Co. Atty., of Altus, for respondent.

PER CURIAM. On the 28th day of September, 1916, there was filed an application to this court for a writ of habeas corpus, alleging that petitioner, Joe Burton, was convicted in the district court of Greer county of manslaughter in the first degree, and on September 1, 1916, was sentenced to imprisonment in the penitentiary for 15 years; that said district court at the time of passing sentence fixed the amount of his appeal bond at \$12,000, to be filed and approved within 20 days from date; that petitioner has filed and presented to the court clerk of Greer county his appeal bond in proper and legal form, with good and sufficient sureties, and that said court clerk arbitrarily refuses to approve the same; that all necessary steps have been taken to perfect his appeal from said judgment to this court; that unless said bond is approved the sheriff of Greer county will transport the petitioner to the penitentiary. On the same day a hearing was had upon the petition and a demurrer thereto filed by counsel for the state.

[1] In the case of Ex parte Tyler, 2 Okl. Cr. 453, 102 Pac. 716, it is said:

"If a party feels himself aggrieved by the action of a clerk of the district court in refusing to approve a bail bond, and complains that the action of the clerk is unreasonable, arbitrary, and oppressive, he should present his grievance to the trial court or judge thereof. Before filing the petition in error in this court, only the question of excessive bail will be considered. However, when an appeal is perfected, and the crime is a bailable one, pending the appeal this court will on proper showing make all necessary orders relating to bail."

Following this rule, the demurrer was sustained, and the writ denied.

On the 29th day of November, 1916, another and similar application to this court for writ of habeas corpus was filed, and further alleging that the sheriff of Greer county is now in Oklahoma City with petitioner on his way to the penitentiary.

A writ of habeas corpus was thereupon issued out of this court directed to the sheriff of Greer county, commanding him to produce forthwith before this court the petitioner, then in his custody, to the end that the matters and things therein alleged may be duly inquired into. The sheriff in obedience to the demand of the writ brought said petitioner before the court and made return to the writ.

It appears that when the court pronounced judgment no time was fixed for filing the petition in error in this court, and said court has since fixed no time for filing the same in this court.

[2] In the case of Killough v. State, 6 Okl. Cr. 811, 118 Pac. 620, it is said:

"If the crime of which the defendant is convicted be a bailable one, and the trial court fixes the amount of the defendant's bail bond

to be given as a supersedeas on appeal, it must fix the time within which such bond shall be given and the time in which the petition in error shall be filed in the Criminal Court of Appeals; otherwise such bail bond shall not be effective as a supersedeas. The power and authority of trial courts to allow bail and to fix the amount of the bail bond pending appeal can only be exercised in the manner provided by statute; * * * otherwise a plaintiff in error, when he has perfected his appeal, must apply to this court for a supersedeas order fixing the amount of his bail bond."

Following this rule the petitioner must be remanded to the custody of the respondent.

KERRIEL et al. v. STATE. (No. A-2806.)
(Criminal Court of Appeals of Oklahoma.
April 19, 1917.)

(Syllabus by Editorial Staff.)

INTOXICATING LIQUORS \S 236(11)—UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for the unlawful sale and delivery of intoxicating liquor, held insufficient to justify a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 313-315.]

Appeal from County Court, Coal County; P. E. Wilhelm, Judge.

Vincent Kerriel and Mary Kerriel were convicted of a violation of the prohibitory law, and they bring error. Reversed.

George Trice, of Coalgate, for plaintiffs in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error were informed against, tried, and convicted in the county court of Coal county on a charge that they "did unlawfully sell and deliver to Sim McGee, certain intoxicating liquor, to wit, a drink commonly called 'Choctaw Beer.'" In pursuance of the verdict they were each sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgments they appeal.

In the view we have taken of the disposition necessary to be made of this case it is neither important nor necessary to consider more than one of the questions presented; that is the sufficiency of the evidence to sustain the verdict.

Sim McGee was the only witness called by the state. He testified that he was a full-blood Choctaw, and that some time in March he went to the defendants' place. He was asked if he bought any beer from the defendants, and he answered "that he bought some Choc;" that he bought 25 cents worth. He was then asked:

"Q. Who gave it to you? A. She did. Q. Who did you pay? A. Paid her."

On cross-examination he said he had been in jail four times, and was drunk at that time.

The defendant Vincent Kerriel testified that this Indian came to his home one morn-

ing and was very drunk, and asked his wife for something to eat and something to drink, and she put him out of the house, and he said he was going to have her arrested.

Mary Kerriel testified that she had to drive this little Indian away from her house two or three different times; that the last time she drove him away he said, "I go tell Pat Wilhelm and get you arrested;" that she never sold him or gave him any Choctaw beer.

This was substantially all the evidence in the case.

On a consideration of the evidence we are of opinion, as a matter of law, that the evidence was insufficient to justify a conviction. The judgment is therefore reversed.

Ex parte BLUM. (No. A-2876.)

(Criminal Court of Appeals of Oklahoma.
April 19, 1917.)

(Syllabus by the Court.)

HABEAS CORPUS \S 1, 29—NATURE OF WRIT—DISCHARGE—"HABEAS CORPUS."

The writ of "habeas corpus" is a writ of right, granted to inquire into all cases of illegal imprisonment, and a person imprisoned in the penitentiary under a void commitment issued by a court clerk upon the verdict of a jury, where no judgment was rendered upon such verdict, will be discharged from such illegal imprisonment and remanded to the custody of the trial court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 1, 3, 24.

For other definitions, see Words and Phrases, First and Second Series, Habeas Corpus.]

Application of Grover Blum for writ of habeas corpus. Sheriff of Tulsa county directed to take petitioner into custody and to commit him to county jail subject to further orders of superior court of Tulsa county.

Jno. J. N. Sykes, of Tulsa, for petitioner. The Attorney General and R. McMillan, Asst. Atty. Gen., and J. P. Evers, Co. Atty., of Tulsa, for respondent.

DOYLE, P. J. A writ of habeas corpus having been duly issued out of this court, directed to the warden of the state prison at Granite, commanding him to produce before this court Grover Blum, then in his custody, to the end that the legality of his imprisonment might be inquired into, such warden, in obedience to the mandate of the writ, has brought the said Grover Blum before the court and made return to the writ. It appears, both by the petition upon which the writ was allowed and issued and by the return of the warden to the writ, that the petitioner was convicted in the superior court of Tulsa county on an information charging him with the crime of conjoint robbery, and his punishment fixed at five years' imprisonment in the penitentiary. Said verdict was returned on the 27th day of February, 1914.

It is averred in the petition that a motion for new trial was duly filed and was not passed upon by the court. It is further averred that no judgment was ever entered or sentence imposed upon the verdict rendered in the case. These facts are admitted in the return of the respondent, but respondent further answers:

"That shortly after said verdict was rendered, and while said court was still in session, the defendant escaped from custody. That the defendant afterwards was arrested by the sheriff of Tulsa county, brought before the court, and the clerk of said court without having looked back to ascertain whether said judgment had been entered, and assuming that judgment had been entered, thereupon issued a commitment on which the petitioner is now and has been confined in the state penitentiary. Therefore this respondent denies that the petitioner is illegally incarcerated inasmuch as the failure to enter the judgment by the clerk, or the failure of the judge to pronounce judgment after verdict rendered, was merely directory so far as the defendant was concerned, and was not such error as to authorize the issuance of the above writ."

Upon the answer and return of the respondent we are of opinion that the petitioner is illegally imprisoned, and it is ordered that he be discharged therefrom.

The sheriff of Tulsa county present in court is directed to take the petitioner into his custody and commit him to the county jail of Tulsa county, there to remain subject to the further orders of the superior court of Tulsa county.

ARMSTRONG and BRETT, JJ., concur.

**FIRST NAT. BANK OF HERINGTON v.
LYONS EXCH. BANK. (No. 20655.)**

(Supreme Court of Kansas. Feb. 10, 1917.
On Rehearing April 7, 1917.)

(Syllabus by the Court.)

**1. BILLS AND NOTES — 352 — DRAFTS —
"HOLDER IN DUE COURSE"—STATUTE.**

The debtor of one bank fraudulently procured another bank to issue to him a draft payable individually to the president of the bank to which he was indebted. The president took the draft from the debtor and delivered to him the evidence of his indebtedness and securities, at the same time indorsing the draft individually and delivering it to the bank. He had paid nothing for the draft and received no consideration for indorsing it. *Held*, the bank was not under these circumstances a "holder in due course."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 814, 898-908.

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

**2. BILLS AND NOTES — 352—DRAFT—HOLDER
IN DUE COURSE.**

When the creditor bank learned that the draft had been protested, it negotiated with the debtor and secured from him a restoration of the securities and evidences of debt which it had surrendered. *Held*, that in any event, having lost nothing by the transaction, it could not claim the protection afforded a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 814, 898-908.]

Appeal from District Court, Rice County.

Action by the First National Bank of Herington against the Lyons Exchange Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Nicholson & Pirtle, of Council Grove, and Hurd & Hurd, of Abilene, for appellant. Jones & Jones and Brinckerhoff & Stahl, all of Lyons, for appellee.

PORTER, J. This is an action by one bank to recover from another bank the amount of a draft, which was protested and not paid. There was a judgment in favor of defendant, and the plaintiff appeals.

On September 1, 1914, Frank O. Johnson was indebted to the First National Bank of Herington to the amount of \$2,407, for which the bank held his notes secured by certain chattel mortgages. He had also left with the bank as additional security a purported note for \$2,200, dated May 19, 1914, payable to himself or order, and falling due September 19, 1914, which was signed with the names of fictitious persons. This note had been in the bank's possession for some time, but was not put up as collateral security until June 2, 1914. On September 1st, when the notes held by the Herington bank were due, Johnson went to Lyons, in Rice county, and procured from defendant, the Lyons Exchange Bank, a draft for \$2,407, payable to F. E. Munsell or order. Munsell was president of the Herington bank, but Johnson was not indebted to him. In pretended payment for the draft Johnson gave the Lyons bank his check, drawn on the Delaven State Bank, representing that he had funds on deposit there sufficient to meet it. He had no account in the Delaven bank. Relying upon the fraudulent representations, the Lyons bank issued the draft which is the subject of this action, accepting Johnson's check in payment therefor. Johnson took the draft to the Herington bank, and stated to Mr. Munsell that he had obtained it in payment of the \$2,200 collateral note, and desired to take up that note and to pay all his indebtedness. Munsell indorsed the draft in his own name and delivered it to the bank. At the same time he turned over to Johnson the notes the bank held against him, and also handed him the collateral note, without marking it paid. It had never been indorsed by Johnson. Immediately upon being notified that the defendant had stopped payment on the draft, the plaintiff repossessed itself of the securities surrendered to Johnson when the draft was accepted, and procured from Johnson and wife a chattel mortgage securing all his indebtedness to the bank, and turned back to him the draft. It sent the mortgage to the register of deeds for record. Subsequently, upon the advice of its attorneys, the bank withdrew the mortgage

from record, and in the presence of Johnson destroyed it.

The petition alleged that Johnson indorsed and delivered the draft to Munsell, as president, to and for the use of the bank, in payment of an indebtedness due from Johnson to the bank, that the bank accepted it in full payment and surrendered to Johnson his notes and securities and canceled his indebtedness. The answer stated the facts relied upon by defendant, showing that the draft had been obtained by false and fraudulent representations of Johnson and without consideration. It alleged that the Herington bank was not, at the time the action was brought or at any time, a good-faith holder of the draft in due course. It alleged that F. E. Munsell, president of the bank, knew Johnson and the facts concerning the fictitious note; that Munsell delivered the draft to the bank without any liability on his part, and received no consideration for indorsing the same; that the securities held by the bank on Johnson's indebtedness were worthless; and that the bank parted with nothing of value in consideration for the delivery of the draft. One of the principal defenses alleged in the answer was that, after plaintiff was informed of the manner in which Johnson obtained the draft, it negotiated with him and accepted from him a good and sufficient chattel mortgage upon his personal property as security for all his indebtedness. In the amended answer defendant sets out the facts, showing that after the draft had been protested the plaintiff restored itself to the position in which it was prior to the time the draft came into its possession.

[1] 1. Complaint is made of two instructions, one of which charged that, if the jury believed from the evidence that the instrument sued upon was made payable to F. E. Munsell by the maker thereof, and that the plaintiff bank received the same by indorsement from Munsell, and that the indorsement was without consideration, then plaintiff would not be a holder in due course and for value. The second of these instructions reads:

"If you believe from the evidence that the plaintiff is not a holder in due course, for value, as hereinbefore defined, and you further believe from the evidence that the issue of the draft sued upon was procured by F. O. Johnson by false and fraudulent representations, and that the said draft was issued, no consideration having been paid therefor, then, and in such case, you should find for the defendant."

The plaintiff concedes that, if these instructions state the law correctly, there was nothing left for the jury but to find for the defendant, in view of the undisputed evidence. The first instruction merely states the law as to what is meant by "a holder in due course." To constitute a holder in due course the instrument must be negotiated; that is, must be held by indorsement if payable to order, or by delivery if payable to bearer. Gen. Stat. 1915, § 6557; Bank v.

Vaughn, 96 Kan. 402, 151 Pac. 1118; Nelson v. Southworth, 93 Kan. 532, 539, 144 Pac. 835. In the case last cited it is said that, where there has been no indorsement, the holder's rights "are no greater than those of the payee." Munsell was not a holder of the draft in due course of business, because he was the payee. Was the plaintiff a holder in due course? Among the conditions required by the Negotiable Instruments Law to constitute a holder in due course is "that he took it in good faith and for value." Gen. Stat. 1915, § 6579 (3). Munsell was president of the bank, and whatever he knew concerning the draft, the bank knew, and as between Munsell and the bank, the latter was not a holder for value. It paid nothing to Munsell, and it knew he had parted with no consideration when he obtained the draft.

The plaintiff relies upon the case of Mann v. Bank, 34 Kan. 746, 10 Pac. 150. In that case a note was made payable to "Amos Whitely, President." Whitely was president of the Champlin Machine Company, and in fact the note belonged to the company. He indorsed the note as president, and the company also indorsed it and sold it before maturity to a bank. Of course, the bank, having taken the note by indorsement, was a holder in due course, and it was held that it could recover, notwithstanding the consideration for which the note was given had failed. If the note had been executed to the bank in the first place, it would not have been a holder in due course, and failure of the consideration would have been a defense. The plaintiff does not need to rely upon that case. The same thing is expressly declared in the Negotiable Instruments Law, of which section 6569 of the General Statutes of 1915 reads:

"Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer."

The draft in this case, however, was not made payable to Munsell as president. It was not the intention that it should pass to the bank until it had been indorsed by the payee. To constitute the bank a holder in due course required an indorsement, but when we come to the proof it appears that the payee obtained the draft without consideration and indorsed it to the bank without consideration. So in its last analysis the transaction is the same as though the draft had been made payable direct to the bank. It could not then claim to be a holder in due course.

[2] 2. For another sufficient reason the judgment must be sustained. The undisputed facts are that, when the Herington bank learned of the manner in which the draft had been obtained and that it had been protested, the bank made a new arrange-

ment with Johnson, repossessing itself of all that it had surrendered in the way of notes and securities, and taking a chattel mortgage to secure the old indebtedness and the expenses incurred. The mortgage recited the new arrangement as follows:

"It is hereby agreed that, said Johnson having given one certain draft issued by the Lyons Exchange Bank of Lyons, Kansas, Number 144,532 in favor of F. E. Munsell, for \$2,407.00, dated September 1, 1914, said draft having been protested for nonpayment, that in the event of its collection by the said First National Bank of Herington the proceeds of the same, after paying all expenses, shall be applied to the payment of the above-described indebtedness."

This chattel mortgage covered all crops on Johnson's farm, all his cattle, horses, buggies, wagons, harness, and machinery of every description, and was given to secure payment of \$2,505.87, representing the identical indebtedness of Johnson to the bank, for which the draft had been accepted, and expenses incurred since the draft went to protest. By the express terms of the contract plaintiff undertakes to prosecute this action for the benefit of Johnson in order to protect him by collecting the draft on the theory that it is a holder in due course. Any sum recovered in the action would inure to the benefit of Johnson, who paid nothing for the draft, and who obtained it through rank fraud. Since plaintiff was fully restored to its former position, and had in its possession all the evidence of indebtedness that it had exchanged for the draft, and the same or better security therefor than it possessed before the draft sued upon was issued, it cannot claim to be a holder for value. The Negotiable Instruments Law declares that, except to the extent of the amount paid by him before he learned of the infirmity, even a holder in due course is not protected.

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." Gen. Stat. 1915, § 6581.

When the Mann Case, *supra*, was before the court for the first time (30 Kan. 412, 421, 422, 1 Pac. 579, 583), Mr. Justice Brewer stated the general rule:

"That a bona fide holder is protected to the amount he has paid, or lost, by virtue of the discount. * * * When he has parted with nothing, there is nothing to protect."

It may be insisted that the rights of the bank became fixed before it learned of the infirmity; but it had not parted irrevocably with anything of value. It was able within a few hours, and before the rights of third persons had been affected, to restore itself to its former position.

Another rule which plaintiff invokes, that, of two innocent persons, the one whose negligence placed it in the power of others to do wrong must suffer, rather than the one who is not at fault, can hardly be said to apply,

since the plaintiff has not suffered an actual loss, but is seeking to better its situation at the loss of the defendant.

Instruction number one requested by the plaintiff was properly refused. Bank v. Reid, 86 Kan. 245, 120 Pac. 339. It charged that plaintiff was, on the admitted facts, a holder in due course, unless the jury should find "that F. E. Munsell knew or had reason to know that Frank O. Johnson obtained the draft sued on from the defendant fraudulently and without consideration." It entirely omitted any reference to "knowledge of such facts that his action in taking the instrument amounted to bad faith." Gen. Stat. 1915, § 6583. See *Leavens v. Hoover*, 93 Kan. 661, 667, 145 Pac. 877.

We find no error in the instructions given or in the refusal of those requested. After the defendant had offered evidence to establish the fraudulent manner in which the draft was procured, the burden fell upon plaintiff to show that it was a holder in due course. *Abmeyer v. Bank*, 76 Kan. 877, 92 Pac. 1109. The general verdict in defendant's favor is a finding of every issue of fact against plaintiff.

The judgment is affirmed. All the Justices concurring.

On Rehearing.

In the opinion by way of argument was made the statement:

"So in its last analysis the transaction is the same as though the draft had been made payable direct to the bank. *It could not then claim to be a holder in due course.*"

This statement is seized upon to form the basis of a vigorous and ably argued petition for a rehearing. The portion not italicized is conceded by counsel to be correct. The statement that "It [the bank] could not then claim to be a holder in due course," it is claimed, is wholly at variance with the definition of what constitutes a holder in due course in the Negotiable Instruments Law as construed by the decided cases. It is said by counsel:

"Certainly, if the payee of a bank draft has no notice of any fraud in the inception of the draft, he may hold the drawer, when such payee has given valuable consideration for the draft. He becomes a holder in due course as such is defined by the Negotiable Instruments Act. * * * It would be contrary to present-day custom and ordinary business usage to hold that the payee of a bank draft, having obtained such bank draft from the purchaser thereof for value and in good faith, cannot maintain an action against the drawer of such draft for the face value thereof, when payment on such draft is refused."

Various sections of the Negotiable Instruments Act are quoted to sustain plaintiff's contention, including section 6522, Gen. Stat. 1915, which provides in part that:

"'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."

The foregoing is from the section of the act defining in general terms what certain

words used in the body of the act mean; but obviously this section does not in the slightest respect attempt to distinguish between various kinds of "holders," or to state what will constitute "a holder in due course." It is conceded that the plaintiff bank was a holder of the draft in controversy. Was it a bona fide holder? Was it a holder in due course? These were controlling questions on the trial of the case, but section 6522 does not answer or shed any light upon them. The Negotiable Instruments Law is the result of years of study and effort by legal minds to secure a uniform code covering the field of controversy in respect to such instruments, and if the general definition of words used in the body of the act, as expressed in section 6522, had been intended to include what constitutes a holder in due course, the preparation and adoption of article 5 of the act, specifically defining "a holder in due course" and his rights, must have been a work of supererogation.

The statement in the opinion that the situation was the same as though the plaintiff bank had been the payee named in the draft was not necessary to the decision, and no part of the statement formed a basis for the conclusion reached by the court. The statement may therefore be considered as eliminated from the opinion. The conclusion that, if the bank had been the payee, it could not claim to be a holder in due course, is, however, a statement of law which finds strong support in decisions construing the Uniform Negotiable Instruments Law, although the question is one upon which the courts are not in harmony.

"There is some conflict in the decisions, under the Negotiable Instruments Law, as to whether the payee may be a holder in due course. It has been held in Iowa, Missouri, Oregon, and Washington that he is not a holder in due course under such statute. On the other hand, it has been held in Alabama, Massachusetts, and New York that the payee may be a holder in due course. In England the decisions construing the Bills of Exchange Act are more or less conflicting; it being held in some cases that the payee is not a holder in due course, while in a later decision the authority of earlier decisions has been at least limited on the theory of an estoppel. In Canada it has been held that the payee may be a holder in due course." 8 C. J. 469.

The following text from the same compilation is directly in point, and sustains the statement in the opinion to which objection is made:

"On the other hand, one who is *in effect* the payee is not a holder in due course, although the bill or note is made payable to another and then transferred to the real payee." 8 C. J. 469. (Italics ours.)

In this case the draft was made payable to another (Munsell) and by him indorsed to the bank. So that, if we were to regard the

bank as *in effect* the payee, this authority sustains our statement that the bank would not then be a holder in due course. The text quoted cites and is sustained by *Johnson v. Harrison*, 177 Ind. 240, 97 N. E. 930, 39 L. R. A. (N. S.) 1207.

Among the authorities cited in *Corpus Juris* upholding the other view are *Armstrong v. Exchange Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747, and *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, and note to the same case, L. R. A. 1915B, 144. Both cases are cited in plaintiff's petition for a rehearing. The first was decided in 1889, before the adoption of the Uniform Negotiable Instruments Law. We refer to the cases merely to show that this contention raised by the petition is one upon which there is a conflict of authority. Manifestly, an expression of our view of the interesting question would not at this time be profitable. The question is not involved in the present action, for the reason that the draft sued upon required the indorsement of Munsell, the payee, before plaintiff could become a holder at all, and because he paid nothing for it, and received nothing in consideration for his indorsement, the plaintiff was not a holder in due course. See authorities cited in the original opinion.

It is complained that the court had no right to assume as a fact that the \$2,200 note, which Johnson left with the plaintiff as collateral, was not genuine, but was signed with the names of fictitious persons. It is said this fact was not proved. The answer alleged that the signatures were fictitious and that the note was not genuine. Munsell, president of the bank, was examined, a year and four months after the draft was protested, as to his knowledge respecting the parties to the note, and he testified that he did not know either of the alleged makers of the note, and had made no inquiry about the note, except from Johnson. He supposed the note was genuine, but understood it was claimed by defendant to be a forgery. The defendant had raised the issue, and while it produced no witness to swear that the note was fictitious, neither did plaintiff produce evidence that the parties purported to have signed it ever existed. It would seem that, the facts being naturally more within the scope of plaintiff's knowledge than defendant's, it ought not to have been difficult for plaintiff to assume the burden and show that the note was genuine. As there was no evidence connecting the plaintiff with fraud in the inception of the note, the assumption in the opinion that the note was fictitious did not prejudice plaintiff.

A rehearing is denied. All the Justices concurring.

KINGTON v. EWART et al. (No. 20448.)
(Supreme Court of Kansas. March 10, 1917.
Rehearing Denied April 13, 1917.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER — §315(3)—VENDOR'S POSSESSION—LIABILITY FOR TAXES.

A contract for the sale and purchase of a tract of land was entered into in 1905. A warranty deed from the grantor to the purchaser and the purchase money were placed in escrow to be held until the grantor perfected his title as against a third party. The land was sold for the taxes of 1906, and in 1910, while the litigation between the grantor and the third party was pending, a tax deed issued, which cut off the rights of all the parties. In a controversy over the ownership of the fund deposited in escrow the case turned upon the question upon which of the parties to the contract rested the obligation to pay the taxes of 1906. *Held*, there was sufficient evidence to the effect that the grantor continued in possession to sustain a judgment that it was his duty to pay the taxes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 931.]

2. EVIDENCE — §208(3), 265(7)—PLEADINGS—ADMISSIONS—CONCLUSIVENESS.

Although admissions contained in a pleading of a party in other litigation are admissible against him in a subsequent action between him and a stranger, they are not conclusive of the facts alleged, but are open to explanation or rebuttal. They are admissible as statements against the present interest of the party who made them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 715, 1035.]

Appeal from District Court, Finney County.

Action by Orville Kington against John McClurg Ewart, revived after his death by Elizabeth Ewart as administratrix, and E. J. Pyle, revived after his death in the name of his executor, and O. B. Looney intervened. Judgment for Looney, and the other parties to the action appeal. Affirmed.

Milton Brown, of Oklahoma City, Okl., and Mulvane & Gault and D. R. Hite, all of Topeka, for appellants. R. J. Hopkins, Albert Hoskinson, and R. W. Hoskinson, all of Garden City, for appellee.

PORTER, J. This action was commenced in August, 1906. Originally it involved the right to possession of the west half of the northwest quarter of section 32, township 25, range 32, in Finney county, which the plaintiff, Kington, claimed to own. The defendant John McClurg Ewart claimed title under a tax deed, from which plaintiff asserted the right to redeem. Prior to the commencement of the action, Ewart had contracted to sell to O. B. Looney at \$4 an acre the quarter section which included the 80 acres in controversy. Under their contract made in 1905, Ewart was to perfect his title to the land claimed by plaintiff. A warranty deed for the quarter section from Ewart to Looney was deposited with E. J. Pyle, to-

gether with the sum of \$640 deposited by Looney, to be held until Kington's claim was disposed of. The case went to trial and resulted in a judgment in favor of Ewart, from which Kington appealed. Although not a party to the judgment, O. B. Looney, by stipulation with Kington and by leave of court, entered his appearance and submitted a brief in this court in support of the judgment rendered in Ewart's favor, the stipulation reciting that he was the real party in interest by virtue of his contract of purchase. On July 7, 1911, the judgment was reversed and a new trial ordered. *Kington v. Ewart*, 85 Kan. 292, 116 Pac. 495. Ewart paid the taxes on the Kington 80 acres for the year 1905, but the land was sold for the taxes of 1906, and in 1910 a tax deed issued, which has cut off the rights of all the parties to the original controversy.

After the cause had been returned to the trial court Ewart died, and the action was revived in the name of Elizabeth Ewart, his administratrix. E. J. Pyle was made a party, and when he died the action was revived in the name of his executor. In December, 1914, by agreement of all the parties, an order of court was entered, by which Pyle's executor deposited the \$640 and the deed with the clerk of the court, and was thereby released from further liability. In March, 1914, Kington and Elizabeth Ewart agreed on a settlement by which a decree was to be entered quieting the title to the Kington 80 in favor of the estate of John McClurg Ewart, grantor in the deed to Looney. Mrs. Ewart was to make a quitclaim deed as sole legatee and administratrix, and deliver the same to the clerk of the court for Looney's benefit; and after the payment of court costs, the purchase money was to be divided between the attorneys for Kington and for the Ewarts. Supplemental pleadings were filed asking the court to carry into effect this arrangement by a proper decree. The sole controversy now arises over the disposition of the fund in the hands of the clerk of the court. On the theory that he has never obtained the title he contracted for, Looney resisted the efforts of the other parties to obtain possession of the fund. The trial court held Looney entitled to a return of the purchase money deposited by him, upon the ground that Ewart had permitted the land to be sold for the taxes of 1906, and thereby had rendered himself incapable of conveying the title. It is from this judgment the appeal is taken.

[1] The correctness of the judgment depends wholly upon the question of whose duty it was to pay the taxes of 1906. The appellants' contention is that Looney became the owner of the property as of November, 1905, when the contract was made and the purchase money and deed were placed in escrow, that as such owner it was his

duty to pay the taxes, and his loss if he permitted the land to go to tax deed. Each side relies upon estoppel. Appellants insist Looney is estopped from now claiming it was Ewart's duty to pay the taxes because of the stipulation filed in this court on the other appeal in which he asserted he was the real party in interest and the equitable owner of the land; also that he is estopped by the position taken by him in certain ejectment actions involving the same property and brought by parties claiming under the tax deed of 1910. Appellees on the other hand insist that Ewart's administratrix is estopped from claiming it was not his duty to pay the taxes subsequent to the year 1905, because of the position taken by him in August, 1906, when he filed an answer to Kington's petition in this case and admitted that he held possession of the land. If there are any equities in the case in favor of one party and against the other, we have failed to find them. Both parties in the course of this litigation have taken positions more or less at variance with those asserted by them at other times; but if, as Ewart alleged in his answer, he was in possession, the fact that he had contracted to sell, and that the conveyance and purchase money were placed in escrow, to be delivered when he perfected his title against Kington, did not relieve him from the obligation to pay taxes on the land up to the time he was prepared to complete the conveyance and deliver possession. His unqualified admission that he was in possession made at an early stage of the prolonged litigation and when no adverse tax claims had arisen must be held evidence sufficient to sustain the judgment of the trial court.

[2] The theory that he is estopped to claim the contrary cannot be sustained. Although the admission was made in this action, it was by way of an answer filed in respect to another issue in litigation, to which at that time Looney, who attempts to raise the estoppel, was not a party. The present controversy over the ownership of the fund deposited by Looney is not the same litigation, and it is well settled that a party is not estopped by an admission made in a pleading in other litigation. The admission had only the effect of a waiver of proof as to possession in the litigation between the original parties. "But this effect ceases with that litigation itself; and when we arrive at other litigation and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi admissions—i. e. ordinary statements, which now appear to tell against the party who then made them." 2 Wigmore on Evidence, § 1065.

The admission is taken merely as some evidence because it is a statement of one of the parties against his present interest. An

abandoned pleading was held to be in the nature of an admission and receivable in evidence for what it was worth. *Watt v. Railway Co.*, 82 Kan. 458, 108 Pac. 811. In *Every v. Rains*, 84 Kan. 560, 115 Pac. 114, a petition filed in a previous action by defendant was held admissible in evidence in a later action against him, if it contained statements material to the issue in the nature of admissions or allegations tending to contradict his testimony. Other cases in point are *Arkansas City v. Payne*, 80 Kan. 353, 102 Pac. 781, 18 Ann. Cas. 82; *Meek v. Deal*, 87 Kan. 319, 124 Pac. 160; *Bank v. Duncan*, 80 Kan. 196, 101 Pac. 992, 28 L. R. A. (N. S.) 327; note, 18 Ann. Cas. 79, 86.

It is urged with much insistence that the court erred in permitting Looney to testify to transactions had with Ewart in the latter's lifetime. His testimony was that when the contract for the sale of the land was made with Ewart it was in writing, that the paper was lost, that he had searched and failed to find it. He was then permitted over appellant's objection to testify to its contents, and said that it contained the somewhat remarkable provision that after Ewart perfected his title he was to make a "new deed" to the land. One of the reasons urged for sustaining the judgment is that the court must have found the agreement to make a new deed a condition precedent, the failure of which was a breach of the contract of sale. As any subsequently acquired title in Ewart would pass to Looney by the warranty deed placed in escrow, it would seem that a provision in the contract requiring a new conveyance after perfecting title was a wholly unnecessary and useless formality; and if the right to the fund in question or the right to specific performance of a contract of sale depended upon such a provision, it is, we think, quite clear that a court of equity would not regard the failure to make a new conveyance as of much importance. The testimony was not incompetent on the ground that it concerned a transaction with a deceased person. It was the same as though the writing itself had been produced. Its existence as a writing prior to the death of one of the parties to it was established and its loss accounted for. Looney's appearance in this court claiming to be the equitable owner of the land and the real party in interest did not amount to an assertion that he was in possession of the land. We fail to find in the stipulation or in any papers and briefs filed in this court the statement or admission that he was ever in possession. On the other hand, as already observed, Ewart's admission, made in 1906, that he was in possession, together with all the facts and circumstances of the case, warrants an affirmation of the judgment.

It is affirmed. All the Justices concurring.

CARROLL v. BOWERSOCK. (No. 20752.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. CONTRACTS §319(2)—BUILDING CONTRACT—RECOVERY.

In an action by a contractor to recover for part performance of a contract to construct a reinforced concrete floor in a warehouse which burned before the floor was completed, recovery cannot be predicated on the fact that the owner declined, on request of the contractor, to rebuild the warehouse, or on the fact that the owner collected insurance on the building, purchased before the contract was made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1496, 1502.]

2. CONTRACTS §319(2)—BUILDING CONTRACT—DESTRUCTION OF BUILDING—RECOVERY.

In such a case, recovery is limited to the amount of contract work done, which at the time the structure was destroyed had become so far identified with it that the material furnished and labor performed would have inured to the owner's benefit as contemplated by the contract, if destruction had not occurred.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1496, 1502.]

Johnston, C. J., and Dawson, J., dissenting in part.

Appeal from District Court, Douglas County.

Action by Martin Carroll, doing business as the Martin Carroll Company, against J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions.

J. D. Bowersock and Robert B. Fizzell, both of Kansas City, Mo., and M. A. Gorrill, of Lawrence, for appellant. S. D. Bishop, of Lawrence, for appellee.

BURCH, J. The action was one to recover for part performance of a contract to construct a reinforced concrete floor in a warehouse, which was destroyed by fire before the floor was completed. The plaintiff recovered, and the defendant appeals.

The contract was formed by acceptance of the following proposal:

"We hereby propose to furnish all labor and material, and construct reinforced concrete floor in warehouse with necessary columns and column footings, using Turner system of reinforcing as designed by O. A. P. Turner of Minneapolis, Minn. This floor to consist of a 7" rough slab, mix-1-2-4, with a ¾" finish top, mix-1-2, for the sum of eighteen hundred and twenty-five (\$1,825) dollars.

"This floor to be designed for a working load of 400 lbs. per sq. ft., and a test load of 800 lbs. per sq. ft., and is guaranteed to comply in all respects with these requirements.

"We propose to use the old floor now in place for forms for concrete, but will cut the old floor away from walls and remove all or part of the upper floor, the subfloor and joists to remain in place. We are to have the use for construction purposes of any of the old lumber removed.

"We will begin the work when the details are received or within two weeks from this date, and complete same within two weeks after reinforcing steel is received.

"Payment for this work to be made as follows: \$600.00 when footings and reinforcing steel are in place.

"\$600.00 when concrete of floor slab is poured.

"\$375.00 when work is completed.

"The balance of \$250.00 to be retained for sixty days, and to be due and payable at that time providing contract has been satisfactorily completed.

"It is also agreed that the Lawrence Paper Manufacturing Co. will have the right to test this floor with a superimposed load of 800 lbs. per sq. ft., sixty (60) days after completion of same."

The plaintiff gave testimony abstracted as follows:

"That the first work to do under the contract was putting in concrete footings, then building pillars on these footings, then laying the concrete floor on top; that the columns are given form by building wooden boxes the desired height, putting in reinforcing rods connected at the bottom with dowels, and pouring the boxes full of concrete; that then the floor rods are so laid so that they come over into a bell on top of the column made by bending the column rods over horizontally in four directions at the top, and running the floor rods into the bell so formed; that when he last saw the building the footings were all in, the column rods set up and forms made, but no floor rods had been laid; that no cement had been poured in the columns at the time of the fire, and very few floor rods had then been put in place; that no lumber was used in the building, except in the temporary forms for columns intended to be later removed; that nails amounting to \$4.40 were the only hardware that went into the construction, and this went into the forms; that there should be a credit of \$6.40 on the cement bill for returned sacks; that the cement, sand and rock went into the footings; that the upright rods in the columns were wired together, but not fastened to the building; and that some spirals and some column rods were not yet in place."

The court stated the following findings of fact and conclusion of law:

"Findings of Fact.

"The plaintiff entered upon the performance of the work in harmony with said contract, and worked for about three weeks. Before commencing the work he procured

Blueprints to be prepared therefor by an engineer at an expense of.....	\$ 85 00
Prior to the fire hereinafter mentioned he actually used of the steel for reinforcement	in value 248 63
Labor for forms for cement.....	" 25 80
Hardware	" 4 80
Cement	" 23 30
Sand and rock.....	" 17 20
Labor	" 819 90
Some miscellaneous items.....	" 3 65
Expended for drayage.....	" 3 15
Blacksmithing	" 6 50
In addition to these he paid freight on tools	" 7 25
Railroad fare for men.....	" 5 95

"The reasonable value of superintending the work and for use of tools is 10 per cent. of the cost of the material and work actually used in the improvement.

"At the end of the third week, the building was totally destroyed by fire, without fault of either party to the contract. It was insured in the condition in which it was before the plaintiff commenced work, but there was no insurance upon the improvements made by the plaintiff. The defendant collected the insurance, and failed and refused to reconstruct the building upon demand of the plaintiff, so that it was impossible for the plaintiff to complete his contract.

"Conclusion of Law.

"The plaintiff in this case should recover from the defendant a judgment for \$698.00, the same being made up as follows:

Steel actually used.....	\$248 63
Lumber used	28 80
Hardware used	4 80
Cement used	23 00
Cost of drayage.....	3 15
Cost of blacksmithing.....	6 50
Cost of sand and rock.....	17 20
Cost of superintending and use of tools...	63 46
Money paid for labor and miscellaneous items	323 55
	\$698 00"

[1] It is apparent that the court permitted recovery for substantially what the plaintiff had done by way of performance of the contract before the fire.

The contract was to place the floor in a specific warehouse. Destruction of the warehouse without fault of either party put an end to construction of a floor in that warehouse. No warehouse except the one destroyed having been contemplated or contracted about, the defendant could not be charged with delinquency for not building another. To do so would be to charge him with breach of an obligation which he did not assume. If continued existence of the particular warehouse to which the contract related were not taken for granted by both parties, the plaintiff would be bound by his contract and could not recover at all; no concrete floor having been constructed.

It was not material that the defendant collected insurance on the warehouse, purchased before the contract was made. The insurance covered nothing but property of the defendant. He paid for the insurance and was entitled to it, just as the plaintiff would have been entitled to insurance on his property had he seen fit to insure. If any part of the plaintiff's labor and material was incorporated into the insured building, so that the insurance covered it as substance of the structure, the plaintiff can recover, if at all, not because of the insurance, but because of the incorporation.

If a contractor should engage to furnish all labor and material and build a house, and the house should burn before completion, the loss falls on him. If a contractor should engage to refloor two rooms of a house already in existence, and should complete one room before the house burned, he ought to be paid something. So far the authorities are in substantial agreement.

The principle upon which the contractor may recover in a case of the character last instanced has been variously stated. Sometimes it is said that it was a material and substantive part of the contract on the owner's side that he would have the house in existence as long as might be necessary for the contractor to do the work. This statement of the principle arbitrarily attaches to the contract a warranty which the parties did not put there, and places the owner in

default when he has been guilty of no wrong. Impossibility of performance because of destruction of the building was not contemplated by either party. Performance was prevented without fault of either party, and the true rule is that neither party can be charged with delinquency because the contract cannot be fulfilled. Annotation, L. R. A. 1916F, 10, 52.

The contractor cannot give and the owner cannot obtain that which they contracted about. Neither one can complain of the other on that account, and the law must deal with the new situation of the parties created by the fire. The owner cannot be called on to reimburse the contractor merely because the contractor has been to expense in taking steps tending to performance. A contractor may have purchased special material to be used in repairing a house, and may have had much millwork done upon it. If the material remain in the mill, and the house burn, there can be no recovery. If the milled material be delivered at the house ready for use, and the house burn, there can be no recovery. It takes something more to make the owner liable for what the contractor has done toward performance. The owner must be benefited. He should not be enriched at the expense of the contractor. That would be unjust, and to the extent that the owner has been benefited, the law may properly consider him as resting under a duty to pay. The benefit which the owner has received may or may not be equivalent to the detriment which the contractor has suffered. The only basis on which the law can raise an obligation on the part of the owner is the consideration he has received by way of benefit, advantage, or value to him.

[2] The question whether or not the owner has been benefited frequently presents difficulties. Sometimes the question is answered by the owner's own conduct, as when by taking possession, or by insuring as his own property, or by other act, he evinces a purpose to appropriate the contractor's material and labor. Sometimes the circumstances are such that the owner is precluded from rejecting the fruits of the contractor's efforts if he would, as when one room is finished under a contract to refloor two. In such cases it merely confuses the matter to bring in the terms "acceptance," "assent," and similar expressions indicative of the owner's attitude. If he should pay, it is not because assent or acceptance of benefit is "implied," or because he is "regarded as accepting benefit," but because of the fact that he has been benefited.

The test of benefit received has been variously stated. Sometimes it is said that benefit accrues whenever the contractor's material and labor, furnished and performed according to the contract, have become attached to the owner's realty. The facts of particular cases suggest different forms of ex-

pression. After considering all the authorities cited in the briefs, the court is inclined to approve, for the purposes of this case, the form adopted by the Supreme Court of Massachusetts, in the case of *Young v. Chicopee*, 186 Mass. 518, 72 N. E. 63, cited by the plaintiff. The action was one for labor and material furnished to repair a bridge destroyed by fire while the work was proceeding. The contract required at least half of the material to be "upon the job" before work commenced. The contractor complied with this condition, and distributed material "all along the bridge" and on the river bank. A portion of the material thus distributed but not wrought into the structure was destroyed by fire. Liability for work done upon and material wrought into the structure was not disputed, but the contractor sought to make good his entire loss. The court said:

"In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract." 186 Mass. 520, 72 N. E. 64.

Applying the test stated to the facts of the present controversy, it is clear that the plaintiff should recover for the work done in cutting the old floor away from the wall and in removing such part of the old floor as was necessary. The warehouse was improved to that extent by labor, the benefit of which had inured to the defendant when the fire occurred. If the fire had not occurred, the undesirable floor would have been out of the way, precisely as the contract contemplated. Likewise, the contractor should recover for the completed concrete footings.

The contractor should not recover for material furnished or labor performed in the construction of either column or floor forms. They were temporary devices, employed to give form to the structure which was to be produced. They were not themselves wrought into the warehouse, were to be removed when the work was completed, and inured to nobody's benefit but that of the contractor.

The contractor should not recover for either upright or floor rods, or for the labor of putting them in place. While the rods were wired together, they were not attached to the building and would not have been wrought into the structure until the concrete was poured. If the fire had not occurred, the contractor could have removed the rods without dismembering or defacing the warehouse, and the defendant could not have held the rods as amalgamated into the fabric of his structure.

There should be no recovery for superintendence and use of tools, except as regards that part of the work done which had become identified with the warehouse itself. Other items sued for should be allowed or

disallowed by application of the principle indicated.

The rule adopted and applied has been foreshadowed by utterances of the court in earlier cases. In the case of *Duncan v. Baker*, 21 Kan. 99, an entire contract for personal service was partially performed, when it was terminated by the fault of the employé. He was allowed to recover for what the work done was reasonably worth, less damages for his breach of the contract. In the course of the opinion it was said:

"Suppose a miller purchases a thousand bushels of wheat for a thousand dollars, the wheat to be delivered within one month; he receives the wheat as it is delivered, and grinds it into flour; when the vendor has delivered 500 bushels he refuses to deliver any more—what choice has the miller, except to retain what he has already received? This kind of supposition will also apply to the purchase and sale of all other kinds of articles, where the purchaser on receiving them changes their character so that he cannot return them. Or suppose that an owner of real estate employs a man to build or repair some structure thereon for a gross but definite sum, the owner of the real estate to furnish the materials or a portion thereof in case of building, and either to furnish them in case of repairing, and the job is only half finished; what choice has the owner of the real estate with reference to retaining or returning the proceeds of the workman's labor? This kind of supposition will also apply to all kinds of work done on real estate, and will often apply to work done on personal property. Of course, in all cases where the employer can refuse to accept the work and does refuse to accept it or returns it, he is not bound to pay for it unless it exactly corresponds with the contract; but where he receives it and retains it, whether he retains it from choice or from necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial nonfulfillment of the contract. Of course, he is not bound to pay anything unless the work is worth something, unless he receives or may receive some actual benefit therefrom; and where he receives or may receive some actual benefit therefrom, he is bound to pay for such benefit (and only for such benefit), within the limitations hereinbefore mentioned." 21 Kan. 108.

In this case nonperformance was not the result of the contractor's fault, and no damages can be deducted on that account. In other respects the doctrine stated applies.

The defendant says he had a right to a specific kind of completed floor which he could test and which would comply with a prescribed test, and that cutting away the old floor from the walls of the building, and concrete footings for a floor which was never laid, were of no value to him. The test is whether or not the work would have inured to his benefit as contemplated by the contract if the fire had not occurred. The cutting away of the old floor was done according to the contract, and the defendant had the benefit of that work as soon as it was finished. The evidence was that putting in the concrete footings was the next step in the construction of the concrete floor. Those footings would have inured to his benefit, in accordance with the contract, if the fire had not occurred. They became a part of his

warehouse. Unless he could reject them for want of substantial compliance with the contract so far as they were concerned, he was benefited by them at the time of their incorporation into his structure. Test of a completed concrete floor was one of the things rendered impossible by the fire.

The case of *Kanzius v. Jenkins*, 98 Kan. 94, 157 Pac. 417, is cited by the defendant. In that case a construction company agreed with a board of county commissioners to construct a bridge with a concrete floor. The floor was laid in the latter part of March. The night following there was a sudden change of temperature, which resulted in freezing and disintegrating the concrete, so that the floor had to be relaid. It was held that the loss caused by the freezing of the concrete should be borne by the contractor. The case is not applicable here. The occurrence of freezing weather in March was a mere embarrassment to performance. It did not render performance impossible, and consequently did not excuse the promisor. Annotation, L. R. A. 1916F, 10, 31.

The judgment of the district court is reversed, and the cause is remanded, with direction to take such additional evidence as may be necessary and determine the rights of the parties according to the views which have been expressed.

MASON, PORTER, WEST, and MARSHALL, JJ., concurring.

JOHNSTON, C. J. (dissenting in part). I am of opinion that the upright rods set up and tied together were a part of the building, and a recovery for them should be allowed.

DAWSON, J. I concur in this statement.

FARMERS' NAT. BANK OF LINCOLN v. FRANCIS et al. (No. 20512.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 538(7)—INSTRUCTION—WAIVER OF DURESS.

An instruction that one who has signed a note under duress waives such duress by subsequent payment, "unless it is shown that at the time of such payment * * * was made he was still deprived of his freedom of mind or will by reason of such duress," held proper, in view of all the other instructions given.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1905.]

2. BILLS AND NOTES \S 538(5)—INSTRUCTION—DURESS.

A charge that the law requires proof of duress to be "clear, convincing, and decisive" held not to have misled the jury by the use of the latter word.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1908.]

3. APPEAL AND ERROR \S 1005(1)—VERDICT AND FINDINGS—REVIEW.

The verdict and findings, having been approved by the trial court, will not be disturbed. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 3860-3876, 3948.]

West, J., dissenting.

Appeal from District Court, Lincoln County.

Action by the Farmers' National Bank of Lincoln, Kan., against John K. Francis and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Kagey & Anderson, of Beloit, for appellants. Z. C. Millikin, of Salina, and J. J. McCurdy, of Lincoln, for appellee.

WEST, J. The plaintiff bank sued to recover on two promissory notes of \$144.41, with interest, and another for \$36.05, all signed by the defendants February 16, 1910. From a judgment for \$241.41 the defendants appeal. The answers, in addition to a general denial and an allegation of an unlawful alteration, set up the defense of duress. It was averred that the plaintiff's cashier represented to the defendant J. K. Francis, that his son, W. G. Francis, had sold cattle upon which the plaintiff had a mortgage, and that, unless the amount of his indebtedness were paid or secured at once, the bank would prosecute him and send him to the penitentiary; that such indebtedness amounted to \$722.05; that if J. K. Francis and his sister Emma Snook, the other defendant, would execute five notes for \$144.41 each, the bank would not prosecute the son, but would accept such notes in full settlement of the claim against him; that the father believed and relied on these statements and signed the notes solely to save his son from a criminal prosecution; that he took them to his sister and repeated to her the statements that had been made to him by the cashier, and she, believing and relying thereon, signed the notes solely to protect her nephew from arrest and imprisonment; that afterwards on finding that the son had not been guilty of any crime and had not defrauded the bank they demanded the return of the notes which had not yet been paid and the repayment of what the bank had received on account of the others. The jury made special findings that the signatures were not obtained by duress, and that the notes were not altered after their execution and delivery. Error is assigned on giving instructions Nos. 9 and 18 and on refusing a new trial, and it is asserted that there was no evidence to warrant the jury's special findings as to duress.

[1, 2] Instruction No. 9 was to the effect that, when a note has been obtained by duress and the maker thereafter pays a part of it or renews it, he is held to have waived the right to defend on the ground of duress,

"unless it is shown that at the time such payment or renewal was made he was still deprived of his freedom of mind or will by reason of such duress."

It is contended that this was equivalent to telling the jury that, notwithstanding the defendant's refusal to ratify the execution of the notes upon learning of the fraudulent statements by the cashier, the defendants could not escape liability unless it was shown that at each time they paid one of the notes these false statements were repeated. The charge hardly bears this construction, and in instruction No. 8 the jury were told, touching the plaintiff's claim, that the defendants had by their acts ratified the notes; that:

"Such contract would not constitute ratification so long as the influence of duress continued and so long as the minds of the aggrieved defendant, or defendants, continued to be dominated by the threats."

It will be observed that instruction No. 9 assumes that the subsequent payment therein mentioned was made "with the knowledge of such circumstances." Certainly if one who has been induced by duress or fraud to sign a note makes a payment thereon after he knows the circumstances, he should not be relieved from liability unless he made such payment under the influence of the same duress or fraud which induced him to sign it in the first place.

Instruction No. 18 was in these words:

"A mere preponderance of evidence is not sufficient in law to establish duress or fraud as claimed by the defendants in this case. The law requires that the proof of duress or fraud must be clear, convincing, and decisive."

Counsel present numerous definitions of the latter word, and argue therefrom that this charge placed the defendants in the attitude of having to prove duress beyond reasonable doubt. To this counsel for the plaintiff respond that the language used means substantially the same as that repeatedly approved by this court, such as "strong and convincing," "strong and satisfactory," "decided and satisfactory," and one decision from another state that the evidence must be satisfactory and conclusive. It is further suggested that if there be any slight distinction between the language used and that judicially approved, it is too slight for a ground of reversal, because practically non-prejudicial. The jury were previously told, at least half a dozen times, in effect, that the defense of duress must be established by a preponderance of the evidence. Instruction No. 17 advised the jury that whether the evidence preponderated in favor of one side or the other must be determined from its weight and probability, and not from the number of witnesses. Then followed the instruction in question. The court takes the view that the jury were not misled by the word "decisive" in connection with the other language and other instructions, and that no error was committed in this respect. The jury were charged that duress exists when the person

signing the notes is induced so to do "by reason of being put in fear by threats of arresting him or one of his relatives and charging such person with a crime, when the threats and the fear induced thereby are such as to deprive the party, signing the notes, and do deprive such party, of the exercise of his free will in the signing of the notes." Further, that in addition to threats to prosecute the son, "It must also appear that there was an express or implied promise on the part of Stelson not to prosecute said Walter Francis if the notes were given. And it must further appear that such threats so operated upon the minds of the defendants as to deprive them of their freedom of mind and will for the time being, and that they signed said notes solely by reason of such threats;" also that unless the statements made by the cashier, Stelson, to the defendant John K. Francis were made to Mrs. Snook at the direction and by the authority of Stelson they should find against Mrs. Snook.

Instruction 11 was as follows:

"The jury are instructed that, if the witness Stelson stated to the defendant John K. Francis, in substance, that unless he fixed up the matter of Walter G. Francis selling mortgaged property by giving notes signed by him and defendant Emma Snook, the bank would send and get Walter, and it would mean from three to five years in the penitentiary, and that said Stelson further stated to said John K. Francis that if the notes were given, the matter would be dropped, and that said John K. Francis was thereby solely induced to sign said notes, such action upon the part of said Stelson would amount in law to duress by the plaintiff bank upon the defendant John K. Francis. * * *

No complaint is made of any of these instructions. And in view of this fact it is necessary to revert to the evidence in order to see whether the jury had any evidence on which to base their findings that there was no duress. Plaintiff's counsel take the position that the defendants, as "exhibits" so impressed the jury that their verbal testimony was deemed entirely negligible, but their own counter abstract contains the following, among other items of the cashier's evidence:

"Q. Then you said to him you would either get him or get the cattle? A. Yes, sir. Q. You did not say anything about the penitentiary? A. No, sir; I do not think so. Q. Never said a word about the penitentiary? A. I do not think I did. Q. Well, do you know? A. I know that I did not."

In another place the witness testified:

"I told him that I thought he must have some cattle because I had a mortgage on the cattle, and I read the mortgage to him. I said if he hasn't got any cattle, we could get him, because they had got him at one time down in Oklahoma. Then he wanted to know if there was not some way to settle this up."

At another place:

"Q. After you made this threat you think he said that he would get it fixed up with a note? A. He wanted to know if we could not fix it up. Q. Then you promised him if they fixed it up you would not get the boy? A. It would be satisfactory if we got our note fixed up."

John K. Francis testified that:

Stelson told him that if he would fix it up, he would not prosecute, "but if I didn't, he would prosecute and send him to the penitentiary. That it would mean from three to five years. He said, 'If you will get your sister and your father on these notes, they will make them good, and I will give you all the time you want; I will make it for five years without interest, as you don't get anything out of it, and we could be spending more money to get him back and send him to the penitentiary, but we don't want to do it; we want our money back.' Q. Now, what did you say at that time that you say he asked you to have your father and Mrs. Snook sign these notes? A. I told him I would take them up there and see what they had to say. He says, 'You tell them the circumstances in the case,' he says, 'You tell them just how the circumstances are; if there isn't something done we will have to send and get him, and it looks like a shame to send him over the road from three to five years for a small amount like that.'"

Mrs. Walter Francis testified as to what Stelson said to her father-in-law:

"Well, he said that he wanted some notes fixed up; he would hunt my husband, go after him and pen him, he said, from three to five years."

Frank B. Francis, a brother of John K. Francis, testified that:

The latter told Mrs. Snook he had drawn up some notes to get her and her father to sign; "that his boy Walter had got into trouble, and threatened to fetch him back and put him in the penitentiary if he didn't get these notes fixed up, and wanted to know if she would sign them, her and father. Q. Did he say who threatened? A. He said the bank did; Mr. Stelson had been there to his house. * * * He asked her if she would sign the notes, her and father, and she said she didn't want father to sign them on account he was poorly; if it was going to cause him trouble without her signing them, she would sign the notes with him to help him out. He told her Mr. Stelson had sent him up there and requested him to see her and have her sign those notes, and if she didn't sign them, he would have the boy brought back and prosecuted."

Mr. Stelson testified, among other things:

"I said we would get him. Q. He didn't say anything about getting this fixed up until after you made the threat you would get the boy if I wasn't fixed? A. I think that was about the first thing I said; I would get the boy if I didn't get the cattle. Q. After you made this threat, you think he said that he could get it fixed up with a note? A. Wanted to know if we couldn't get it fixed up. Q. Then you promised him if they fixed it up you wouldn't get the boy? A. It would be satisfactory if we got our note fixed up. Q. You kept your promise? A. Yes, sir."

Mrs. John K. Francis testified:

"Is defendant's wife; was present at a conversation between Stelson and her husband and heard Stelson tell him that if he didn't fix up the notes he would send the boy to the penitentiary for a certain period of years."

[3] The jury and the trial court saw and heard the witnesses. The former returned the verdict and made the findings. The latter approved them. The court is not disposed to set them aside. Certain other matters are complained of, but require no discussion. Finding no substantially prejudicial error, the judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring.

WEST, J. (dissenting). To my mind the evidence of duress is convincing and overwhelming. For all practical purposes it was admitted by the cashier himself, at least so far as John K. Francis is concerned. The trial court's definition of duress was in line with *Williamson v. Ackerman*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484, referred to with approval in *Bank v. Bay*, 90 Kan. 506, 135 Pac. 584. The case itself somewhat resembles *Smith v. Bank*, 90 Kan. 299, 133 Pac. 428; only there the threatened prosecution was entirely without basis, and here there appears to have been some ground for claiming that the young man had, to some extent, violated the law concerning the disposal of mortgaged property. While, as counsel suggest, the two defendants may have been fitly regarded as exhibits by the jury, there is no indication that their brother or that Mrs. Francis or the wife of the young man bore any facial evidence of mendacity, and certainly when the testimony of all of them was practically admitted by the cashier of the bank, mannerisms and lack of pulchritude should not subvert the rules of law and the principles of justice. Again, it was said in *Tanton v. Martin*, 80 Kan. 22, 101 Pac. 461, that:

"The preponderance which overcomes the presumption of honesty and innocence and all opposing evidence, and is such as will lead a reasonable man to the conclusion that fraud exists, meets the requirements of the law."

In view of all the positive evidence on behalf of the defendants and the admission of the cashier upon the stand, the jury should not have been told that before the defense of duress could be established, it must be proved by evidence not only clear and convincing but decisive. We are required by the statute (Gen. Stat. 1915, § 10973, subd. 2) to construe words and phrases according to the approved uses of the language. Dictionaries are supposed to determine what approved usage is. The dictionaries tell us what "decisive" means:

"Having the power or quality of determining a question, doubt, contest, event, etc., final; conclusive; putting an end to the controversy; as, the opinion of the court is decisive on the question." *Century Dictionary*.

"Having the power or quality of deciding a question or controversy; putting an end to contest or controversy; final; conclusive." *Webster's New International Dictionary*, Edition of 1911.

"Putting an end to uncertainty, debate, or question; determinative; conclusive; as decisive action; the decisive element was the weather." *Funk & Wagnalls New Standard Dictionary*.

"Having the quality of deciding or determining (a question, contest, etc.); conclusive; determinative." *Oxford English Dictionary*.

The result of these definitions is that it is something which turns the scale and decides the case. No such strictness of proof is required, and it was not fair to the defendants

to make such requirement in this case. If the able and astute counsel did not avail themselves of the opportunity to impress the weighty meaning of this word upon the minds of the jurors, it was not because they lacked the opportunity so to do.

It is not the purpose or policy of the law to compound felonies or withhold prosecutions for criminal offenses by the execution of promissory notes. Whether the bank had a trumped-up claim against the boy or whether he had removed the security for the amount it claimed due could make no difference. The question is not the legality of its claim, but the effect of its threat. *Williamson v. Ackerman*, 77 Kan. 902, 94 Pac. 807, 20 L. R. A. (N. S.) 484.

The judgment should not be affirmed.

ATCHISON SAVINGS BANK v. POTTER. (No. 20802.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. TRIAL ⚡251(7) — ACTION—INSTRUCTION—WAIVER.

In this case it was not error to refuse an instruction touching the matter of waiver.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 592.]

2. BILLS AND NOTES ⚡539—GENERAL VERDICT—SPECIAL FINDINGS—CONSISTENCY.

Under the rule requiring the harmonization of special findings with themselves and with the general verdict, the one returned by the jury, touching knowledge of the circumstances under which the note sued on was obtained by the plaintiff, did not constitute sufficient inconsistency to warrant a reversal.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934; Trial, Cent. Dig. § 859.]

3. EVIDENCE ⚡135(2)—SIMILAR REPRESENTATIONS—ADMISSIBILITY.

When a party is charged with having made fraudulent representations, others of a similar character, made about the same time to other persons, may be shown in order to shed light upon the question of motive, but such statements made by others in the absence of the person charged are incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405.]

4. BANKS AND BANKING ⚡40—TRANSFER OF BANK STOCK—STATUTE.

The statute prohibiting the transfer of shares of stock in a failing bank (Gen. Stat. 1915, § 570) is for the protection of creditors, but as between the buyer and seller of stock the transfer may be binding.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 49, 51-54.]

5. BANKS AND BANKING ⚡40—TRANSFER OF STOCK—CONSIDERATION FOR NOTE.

The stock of a bank in a failing condition may still be a sufficient consideration for a note given for its purchase, and in this case it was error to instruct that no legal sale could be made if the bank was in a failing condition, and that the note given therefor would be without consideration if such stock could not, at the time, be legally transferred.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 49, 51-54.]

Appeal from District Court, Logan County.

Suit by the Atchison Savings Bank against W. A. Potter. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded.

Kagey & Anderson, of Beloit, for appellant.
H. A. Russell, of Scott City, for appellee.

WEST, J. The bank sued to recover on a promissory note for \$1,100 executed by the defendant July 3, 1912. The defense was that the note was obtained by fraudulent representations, and was wholly without consideration. It was alleged that James Bowie and H. J. Harwi, president and cashier of the Russell Springs State Bank, and Rollin Buell came to the defendant at his farm, whereupon Bowie offered to sell him certain stock in the last-named bank, representing that the shares belonged to T. M. Walker, president of the plaintiff bank, and that Walker wanted to sell to the farmers of Logan county to interest them and their friends in the local bank, which was in first-class condition and able to pay a dividend of 20 per cent. for the year 1912; that the stock would be sufficient to pay off and discharge the note, and the defendant would not be called upon to pay anything, but that it would be liquidated by the dividends, and if defendant was not satisfied, the stock would be taken back and some one procured to take it and the defendant's note returned to him; that Bowie was agent for the plaintiff, and that the Russell Springs bank was hopelessly insolvent; that the statements made by Bowie as president of the latter bank were false and fraudulent, and known to be so by him and were made for the purpose of inducing the defendant to purchase the stock from the plaintiff; that Bowie was agent for the plaintiff in the sale of the stock, which was never delivered to the defendant. The reply, after a general denial, specifically denied that the plaintiff was the owner or had any interest in the stock sold to the defendant, denied that Bowie, Harwi, or Buell was its agent or agent of its president, T. M. Walker, or that they ever were authorized by him to make any statements with reference to the stock; that Walker, president of the plaintiff bank, was not the owner of the stock sold and had no interest in it. The jury found for the defendant, and answered special questions to the effect that the plaintiff did not own the stock sold; that it paid the amount of the note when it received it, that it authorized or permitted false representations to be made to the defendant to procure the note sued on; that the defendant was induced to execute the note by the false representations as to the dividends and condition of the bank; that these were made by Bowie, that the consideration for the note was \$1,100; that the Russell Springs bank was in a failing condition on July 3, 1912.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 13, 1917.

"At the time it took the note, did plaintiff have knowledge of the circumstances under which the note was obtained? Answer: No."

The plaintiff appeals, and assigns as error the admission of improper evidence, the refusal of certain instructions, and the denial of the motion for new trial.

Underneath all these complaints is the further one that the testimony failed to show agency on the part of the man who sold the stock to Mr. Potter. The plaintiff did not own the stock, but did pay the face of the note when it received it, and so the jury found. It would seem logically inevitable that in order to convict the bank of the alleged fraud, there must be testimony showing that Bowie was acting as its agent in making the representations to the defendant touching the dividends and condition of the bank. It is clear enough that Bowie, Harwi, and Buell went out to the defendant's farm and in about 15 minutes he was talked out of a note for \$1,100. The answer charges the three men with making the false representations, but the jury acquit two of them and convict only Mr. Bowie. Buell was cashier of the Russell Springs bank, Harwi had been and wanted to be, and Bowie was its president. Mr. Buell had been recommended for cashier of the Russell Springs bank by Mr. Walker, president of the plaintiff bank. Mr. Walker was well advised as to the condition of the latter bank and of the complaints to and the demands by the bank commissioner. Mr. Woodford, the plaintiff's cashier, was kept posted by Mr. Buell as to the situation at Russell Springs, and when the note sued on was executed, the Russell Springs bank was technically insolvent. On the 20th of June, 1912, the bank commissioner wrote Mr. Walker advising him not to take any action without talking with the commissioner about it, adding:

"We might get our objects crossed unless we work together. I would be glad indeed to keep you fully informed, as the case goes on."

On the same day he wrote Harwi to cease all further making of loans, allow no further overdrafts, and honor no checks on the bank which would result in overdrafts. On the 24th of June he wrote the directors of the Russell Springs bank, including James Bowie, ordering them to remove Mr. Harwi as cashier, basing the order on the condition of the bank. On June 27th he wrote Mr. Walker that his assistant had succeeded in establishing Mr. Buell as acting cashier "in accordance with your wishes as expressed in your letter introducing Mr. Buell." On the 7th of July Mr. Buell wrote the bank commissioner touching the condition in which he found things in the bank, which letter was on the 9th forwarded to Mr. Walker. From Mr. Woodford's testimony we learn that when Mr. Buell was sent out to the Russell Springs bank it owed the plaintiff bank between \$40,000 and \$50,000; that some of the stockholders were stockholders of the plain-

tiff bank, including Mr. Walker, the president; that some of the others who sold stock at this time were customers of the plaintiff bank, and had purchased stock on the recommendation of the president or some officer thereof.

"Q. And as a matter of fact, you folks felt some responsibility for them, didn't you, for recommending it? A. Not as a bank. Q. Not as a bank? They purchased the stock on your recommendation, and you didn't feel responsible? A. Your question was to me, upon recommendation of an officer of the bank. Q. What officer? A. Mr. Walker. Q. Mr. T. M. Walker? Now, when you received these notes, particularly this note of Mr. Potter's from Mr. Harwi's hands, at Atchison, you knew that it was for the purchase of stock of the Russell Springs State Bank, didn't you? A. I did. Q. You knew the condition of the Russell Springs State Bank, didn't you? A. Pretty well. Q. You were acquainted with the conditions out here? A. Yes, sir."

There were emphatic and repeated denials of any authorization to anyone to make the representations complained of, and the most positive declaration that neither Harwi, Bowie, nor Buell was its agent to look after his interests. A good deal is said about the alleged representation that the stock sold to Mr. Potter belonged to Mr. Walker, the president of the plaintiff bank. We find no proof as to whom the stock belonged, but the testimony of Mr. Harwi would indicate that it was treasury stock, as he testified that the certificate was still attached to the stub at the time of the trial. At any rate, the jury confined the false representations to the dividends and condition of the bank, eliminating any question as to the ownership of the stock.

The theory of the defense is that the Atchison people undertook to unload the stock of the Russell Springs bank by going out into the remote regions and selling it to the well-to-do farmers, that part of the scheme was to have the local man in whom farmers had confidence go out and induce them to buy; that by telling the defendants that Mr. Walker of the Atchison bank wanted to sell his stock because it was too far away from him the farmer would be led to believe that what was good property for Mr. Walker would be good for him. The theory of the plaintiff is that the stock selling project was largely for the purpose of reinstating Harwi as cashier. Mr. Harwi wrote to the bank commissioner September 7, 1912, inclosing a request of stockholders that he be reinstated, saying:

"You will see that not counting my mother's stock and mine, that all the stock has signed this request except 46 shares, and they would have all signed had they been able to be here."

Another letter on the same day stated that certain named stockholders had sold all of their stock, among them T. M. Walker, that it was bought by people whose names were inclosed, including W. A. Potter, 10 shares. On the same day a letter from the stockholders, all requesting the reinstatement of Harwi was written signed by 13 stockholders in-

cluding the defendant. This was but little more than two months after he had bought the stock and given his note therefor. While there may be some foundation for both theories, the jury adopted the former.

[1] It is urged that the defendant, by paying no attention to his investment for two or three years, not even paying the interest or requiring the stock to be delivered to him or attempting to exercise the rights of a stockholder, should be held to have waived any defense on the ground of failure of consideration, as he knew of Harwi's deposal and reinstatement and of the condition of the bank within a short time after he had bought the stock. But waiver was not pleaded; and, in any aspect of the case it should not be decided on this point.

[2] Complaint is made that the findings are inconsistent, in that one was to the effect that the bank authorized or permitted somebody to make false representations to procure the note and another that it did not know the circumstances under which the note was obtained. It is suggested with considerable force that if according to still another finding the plaintiff authorized Bowle to make false representations, it knew what they were. The word "circumstances" as used in the finding is a very uncertain term, and might include the number of men who went together, the kind and amount of talking done and by whom, or various other things. If, as found by the jury, the bank authorized some unnamed person to secure the note by fraud, and Bowle did so secure it, and it took and paid for such note, it cannot make much difference how detailed a knowledge it had of the circumstances, for in effect it would be receiving the fruits of its own wrong. And it can hardly be said that the finding is so inconsistent with the others and with the general verdict as to require reversal.

[3] It is complained that evidence of similar representations made to other purchasers of stock about the same time were admitted. Assuming that the agency was established, similar transactions on the part of the same agents would be competent as showing motive, but in one of these other instances Bowle was not present, and as no one is accused by the jury of having made any false statements except Bowle, it is not perceivable how statements made by others to other purchasers could show any motive on the part of Bowle, and to this extent the evidence was erroneously admitted.

The defendant seems to have paid no attention to his investment for a long time, and finally, when sued on his note, defended on the ground that it was procured by fraud and wholly without consideration. While the bank was technically in an insolvent condition, it does not necessarily follow that the stock was of no value whatever, for after

a time conditions were changed for the better, and doubtless at many times during his long ownership he could have sold for a fair consideration.

Four days after the note was given Mr. Buell wrote the bank commissioner that, while the bank had loaned too liberally, he believed the employees of the bank had done no crooked work; that the notes were well secured. "The makers of the notes have the stuff and so it is only a question of time until everything will be in good condition." This letter was transmitted by the recipient to Mr. Walker, and Mr. Woodford wrote back saying, among other things:

"Buell is a man who forms his own opinions regardless of his surroundings and we are forced to admit and glad to do so that Mr. Walker found the conditions exactly as set forth by Mr. Buell."

On September 7th, after the Buell letter was written, Harwi wrote to the bank commissioner, giving a list of stockholders who had bought stock, including "W. A. Potter, 10 shares, Pence, Kansas."

[4, 5] In the ninth instruction the jury were told that:

If the bank was in a failing condition on July 3, 1912, "then no legal sale of stock in said bank could be made, and the note sued upon would be without consideration, if nothing was given for it by the plaintiff, or nothing other than the attempted sale and transfer of bank stock if such stock could not at the time be legally transferred."

This means that stock which sold at 110, in a bank regarded so highly by Buell and Woodford could constitute no consideration for the note. The statute prohibiting the transfer of shares of a failing bank (General Statutes of 1915, § 570) is for the protection of creditors, but as between the buyer and seller of stock the transfer may be binding.

"An unregistered transfer of stock would not be invalid as between vendor and vendee. * * * " Bank v. Strachan, 89 Kan. 577, 582, 132 Pac. 200, 46 L. R. A. (N. S.) 668.

See, also, Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273; Barnhouse v. Dewey, 83 Kan. 12, 109 Pac. 1081, 29 L. R. A. (N. S.) 166; Telephone Co. v. Longfellow, 85 Kan. 353, 356, 116 Pac. 506.

Other matters are pressed which, in view of the conclusion reached, need not be discussed.

For the reasons indicated, the judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

TERRY v. MILLER et al. (No. 20776.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. INFANTS ~~vs.~~ PROCESS—PUBLICATION—TITLE TO LAND.

In an action against nonresident minors, where the only service obtained is by publication, no judgment can be rendered by any court

in this state that will affect the title of the minors to land situated in another state.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 255-272.]

2. WILLS §740(4)—MISTAKEN CONSTRUCTION—RELIEF.

Relief will not be granted against a mistake in the construction of a will where that relief must be given at the expense of minors, beneficiaries under the will, who had nothing to do with the mistake, and whose interests cannot be adequately protected by any judgment that the courts of this state can render.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1892-1894.]

Appeal from District Court, Cowley County.

Action by Edgar L. Terry against George E. Miller and others. Demurrer of guardian ad litem for minor defendants to petition sustained, and plaintiff appeals. Affirmed.

Hackney, Lafferty & Moore, of Winfield, for appellant. J. E. Torrance and O. W. Torrance, both of Winfield, for appellee.

MARSHALL, J. This case comes to this court on an appeal from a judgment sustaining a guardian ad litem's demurrer to the plaintiff's petition. The action arises out of the will discussed and construed in *Williams v. Bricker*, 83 Kan. 53, 109 Pac. 998, 30 L. R. A. (N. S.) 343, and in *Bullock v. Wiltberger*, 92 Kan. 900, 142 Pac. 950.

The petition discloses the following: Lenora A., Helen F., and Frank L. Wiltberger are minor children of Frank L. Wiltberger, deceased, and are residents of McHenry county, Ill. Stella and Dale E. Wiltberger are minor children of Walter O. Wiltberger, deceased, and reside in De Kalb county, Ill. Charles L. Wiltberger died in Cowley county, Kan., and at the time of his death owned the northwest quarter of section 25, in township 32, south of range 3 east. He left surviving him his widow, Emorette A. Wiltberger, and their children, Ella L., Dora A., Frank L., and Walter O. Wiltberger. Charles L. Wiltberger left a will, which was duly probated in Cowley county. The parts of this will material to the present controversy are as follows:

"After the death of my said wife, it is my will that all of my property, both personal and real, wherever situated, being at present in the states of Kansas, Illinois and South Dakota, shall be divided equally among my four children, namely: Walter O. Wiltberger, Ella A. Wiltberger, Frank L. Wiltberger and Dora A. Wiltberger.

"If any of my said children shall die before my wife, Emorette A. Wiltberger, then it is my will, that the share which would go to my deceased child or children, if living, shall be divided among his or her children in equal parts; and if any of said children shall die without issue, prior to the death of my said wife, then it is my will that his or her share shall be divided equally among my children then living, or if any of them be dead, then, his or her share, equally among their children."

Ella L. and Dora A. Wiltberger were single at the time of the death of Charles L. Wiltberger, while Frank L. and Walter O. Wilt-

berger were then married. February 15, 1905, Emorette A., Ella L., Dora A., Frank L., and Walter O. Wiltberger executed and delivered a general warranty deed, conveying the northwest quarter of section 25, in township 32, south of range 3 east, in Cowley county, to George E. Miller; and on March 30, 1905, George E. Miller and his wife executed and delivered a general warranty deed conveying that real property to the plaintiff. At the time these deeds were executed and delivered, all the parties believed that, under the will, the Wiltbergers, grantors in the deed to George E. Miller, had perfect right to, and that their deed did, convey a fee-simple title to the real property. H. T. Trice, a real estate agent, acted as the agent for the Wiltbergers in making the sale to George E. Miller, who was an employé of H. T. Trice, and to whom the deed was made for convenience. \$10,400 was paid to the Wiltbergers for the land. This money, together with other money received from the sale of the other property devised by the will, was invested in land in McHenry county, Ill. The deed conveying the Illinois land to the Wiltbergers contained the following provisions:

"It is expressly understood and agreed that the respective interests which the several grantees above mentioned shall take hereunder is as follows: Emorette A. Wiltberger is to have a life estate so long as she may live and during her lifetime is to have control and enjoy the possession, income, rents, profits and all emoluments of said real estate so long as she may live and the said Walter O. Wiltberger, Ella L. Wiltberger, Frank L. Wiltberger and Dora A. Wiltberger shall have the remaining fee title in and to said real estate, subject only to the life estate of their mother, Emorette A. Wiltberger, their respective interests being equal, each of them taking the undivided one-fourth interest in said remaining fee title; but in the case of the death of any of said four last-named grantees before the death of their mother, Emorette A. Wiltberger, without leaving living issue, then his or her share shall be divided equally among the remaining last-named grantees."

After the Illinois land had been purchased, Frank L. and Walter O. Wiltberger died, leaving their wives and the minor children above named. In September, 1915, Emorette A., Ella L., and Dora A. Wiltberger commenced a suit in equity in the circuit court of McHenry county, Ill., to determine the interest of the widows of Frank L. and Walter O. Wiltberger, and of their minor heirs, in the Illinois land, and to compel the minor heirs to elect whether they would take the Illinois land conveyed by the deed or the Kansas land devised by the will. That suit is still pending and undetermined. The estate of Walter O. Wiltberger is in process of administration in De Kalb county, Ill.

The plaintiff asked equitable relief. To the petition the guardian ad litem for the minor defendants filed a demurrer, which was sustained by the court. Service was made on the minors by publication.

[1] 1. The first question for consideration is the extent of the jurisdiction of the district court of this state over the minor defendants. The land conveyed to the plaintiff is situated in this state, and over that land and over the title of the minor defendants thereto the trial court had jurisdiction; but it had no jurisdiction of the persons of the minor defendants, and could not render any judgment that could be carried into execution only by exercising authority over their persons. The jurisdiction of the trial court was limited to the control of the title to the Kansas land. That court could not render any judgment or order which directly or indirectly affected the title of the minor defendants to the Illinois land, because such a judgment could be carried into execution only by exercising power or authority over the persons of the minors. *Iles v. Elledge*, 18 Kan. 96; *Gordon v. Munn*, 87 Kan. 624, 125 Pac. 1, Ann. Cas. 1916A, 733. This power or authority cannot be exercised on service by publication. There must be personal service on the minors. The guardian ad litem had no authority to give the trial court jurisdiction over the persons of his wards by entering a general appearance for them. Jurisdiction over the interest owned by the minors in the land in this state was obtained by publication, and the authority of the court was not extended by anything the guardian ad litem did.

[2] 2. Does the petition state a cause of action against the minor defendants—such a cause of action as will justify the courts of this state in rendering any judgment that affects the minors' title to the Kansas land? They were not in any way responsible for the mistake of the adult Wiltbergers or of Miller or the plaintiff. The parties to the conveyances of the Kansas land, together with their attorneys, misconstrued the will. They made a mistake. If they were the parties, and the only parties to this action, the court would be warranted in granting, and probably should grant, such relief as would protect the plaintiff; but the courts should not grant relief to the plaintiff where that relief will deprive the minor defendants of the property devised to them by their grandfather.

The courts of this state cannot compel the minor defendants to elect between the Kansas land and the Illinois land. There is no power in this state, after depriving the minors of their title to the Kansas land, that can protect them in their title to the Illinois land. Relief cannot be granted the plaintiff without arbitrarily depriving the minor defendants of their interest in the Kansas land. This should not be done. The plaintiff is compelled to resort to his action against the grantors in the deeds, or to seek a remedy in a court that has jurisdiction of the persons of the minor defendants. The peti-

tion did not state a cause of action against the minor defendants.

The judgment is affirmed. All the Justices concurring.

COOPER v. COOPER. (No. 21033.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

HUSBAND AND WIFE \S 298(3) — SEPARATE MAINTENANCE—EXCESSIVE ALLOWANCE.

An allowance of separate maintenance to a wife, who is living apart from her husband, is held to be excessive and unwarranted under an antenuptial agreement adjudged to be valid and binding upon the parties.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 1093.]

Appeal from District Court, Shawnee County.

Action by Cora T. Cooper against John G. Cooper, her husband, for separate maintenance. Judgment for plaintiff for \$2,500, and that defendant pay \$15 per month during marriage relation. Motion for new trial denied, and defendant appeals. Award for future maintenance affirmed, judgment allowing plaintiff \$2,500 reversed, and cause remanded.

Crane, Hayden & Helzer, of Topeka, for appellant. J. S. Ensminger, of Topeka, for appellee.

JOHNSTON, O. J. Cora T. Cooper brought this action for separate maintenance against her husband, John G. Cooper, and recovered judgment decreeing that the defendant pay to her the sum of \$2,500 within 60 days for her separate maintenance and support, and also payments of \$15 per month during the existence of the marriage relation. Judgment was rendered July 21, 1916, and on July 25th defendant filed a motion for a new trial, which was denied, and he appeals.

Prior to their marriage the plaintiff and the defendant entered into an antenuptial agreement which, among other things, provided that, in the event plaintiff should outlive the defendant, she should have as her separate property a half interest in two city lots, and she expressly waived all claim to any interest in his other property. There were also provisions as to support and maintenance while she should live with him as his wife. In a divorce proceeding in 1911 between these parties, wherein neither was awarded a decree, the antenuptial contract in question was passed upon by the court, who found it to be valid, fairly entered into, and binding upon the parties.

It is contended that the judgment awarding to the plaintiff the lump sum of \$2,500 is an unjust allowance and a direct violation of the antenuptial agreement, which the district court has held to be valid and binding. As no motion for a new trial was made in due time, it follows that only questions ap-

parent on the face of the record are open for consideration.

The antenuptial contract provided that the defendant should provide plaintiff with a comfortable home and maintenance in keeping with his pecuniary circumstances so long as she should live with him as his wife, and she in turn was to perform the duties ordinarily incumbent upon a wife. At his death, as we have seen, she was to have certain specific property, and was not to claim or have any other property rights or benefits. In the earlier litigation between these parties it was shown that they lived together for a little over a year, during which time a child was born to them, and shortly afterwards there were disagreements, followed by separation. The court held that the parties were in equal wrong, and that the conduct complained of by each against the other did not constitute either gross neglect of duty or extreme cruelty, and hence a divorce was refused. The provisions of the marriage contract were examined and adjudged to be valid, property was placed in the hands of a trustee for the care of their child, the husband was required to pay the fee of his wife's attorney, and jurisdiction was reserved by the court to require the husband to contribute to his wife's support in case they should not be able to live together.

That judgment was rendered in 1911, five years before the commencement of this action; and while the defendant has furnished plaintiff a comfortable house in which to live, it appears that he has not furnished her suitable support during this period. Ordinarily a wife is entitled to reasonable support so long as the marriage status continues. Under the marriage contract, plaintiff is not entitled to support if she neglects to perform her wifely duties, or refuses to live with the defendant as his wife. Although she is not living with him, it must be assumed in this case, as the record stands, that the separation is due to the fault of the defendant. Of course, he cannot escape responsibility for her support, if her failure to live with him and perform the conditions of the contract was caused by his wrong. On the other hand, if the failure to live with him is the result of her wrong, she would not, under the terms of the contract, be entitled to support. In providing for support, allowances should be made in the form of periodical payments, so that they may be varied as conditions may change. Allowances for support, which should have been, but were not, furnished by defendant, may be made in gross; but they cannot be allowed, except on proof of actual expenditures that were reasonably necessary and appropriate for the maintenance of the plaintiff. *Cheever v. Kelly*, 96 Kan. 269, 150 Pac. 529. Periodical allowances for the future were made by the trial court; that is, that defendant should pay her \$15 per month

in addition to the home furnished, which must be deemed to be a reasonable provision.

The award of the gross sum of \$2,500 for the five years that intervened between the rendition of the first judgment and the one in which this allowance was made is excessive, and wholly inconsistent with the allowance made for the future. She was awarded at the rate of \$180 a year for the future, but was given \$500 per year for the time that is past. That award is deemed to be unwarranted, under the antenuptial contract and under any view of the case, and it is therefore determined as a matter of law that error was committed in awarding her a judgment in the lump sum of \$2,500.

The award for future maintenance is affirmed, but the judgment allowing plaintiff \$2,500 is reversed, and the cause remanded for further proceedings. All the Justices concurring.

BRUNSWIG v. FARMERS' GRAIN, FUEL & LIVE STOCK CO. (No. 20664.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. SALES \S 89—CONTRACT—MODIFICATION.

Three contracts having been made for the shipment of wheat from Alden to Galveston, the seller wrote to the buyer saying: "Your favor of the 28th at hand. We regret that you will require us to load capacity cars on all grain sold. We will load them that way. We are ready to load out the first car for July shipment. Please give us billing to-morrow. The Santa Fé refuses to accept Galveston shipments. Please state what you want us to do with the wheat. What are you going to do about it?" On the next day the buyer wired the seller: "Bill wheat to Ft. Worth, Texas." Held that, in the absence of extraneous evidence indicating a different intention, the telegram is to be interpreted as authorizing a shipment to Ft. Worth of all the wheat contracted for, and as effecting a modification of the contracts to that extent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

2. SALES \S 220—MODIFICATION OF CONTRACT—RIGHTS OF ASSIGNEE.

One to whom the contracts were assigned after such modification, regardless of his knowledge thereof, could assert no rights against the seller under the original contracts, except as so modified.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 606.]

3. SALES \S 220—MODIFICATION OF CONTRACT—ACTION BY ASSIGNEE.

Where such assignee refused to accept and pay for a car of wheat shipped under the first contract, giving as a reason that the shipment had not been made to Galveston, and showed by his conduct that he would not receive shipments made to Ft. Worth, in an action brought against the seller for damages resulting from a failure to deliver wheat at Galveston, it is held that a judgment for the defendant was justified irrespective of other questions presented.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 606.]

Appeal from District Court, Rice County. Action by A. J. Brunswig against the Farmers' Grain, Fuel & Live Stock Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Fairchild & Lewis, of Hutchinson, and George W. Groves, of St. Joseph, Mo., for appellant. Jones & Jones, of Lyon, for appellee.

MASON, J. A. J. Brunswig, doing business as the A. J. Brunswig Grain Company, of St. Joseph, sued the Farmers' Grain, Fuel & Live Stock Company, of Alden, for failure to deliver two shipments of wheat according to the terms of two contracts made with the Smith-Mann Grain Company, of Kansas City, and by it assigned to the plaintiff. An appeal is taken from a judgment rendered upon a verdict for the defendant.

The evidence was mainly in the form of documents, and there is little or no room for dispute as to the material facts. The defendant, as seller, and the Smith-Mann Grain Company, of Kansas City, as buyer, contracted by the execution of three separate instruments, two being dated July 11, and the third July 14, 1914, for the delivery of four cars of wheat at Galveston. The first writing called for one car at 82 $\frac{1}{4}$ %, to be delivered in July; the second for two cars at 82, in August; and the third for one car at 80 $\frac{1}{2}$ %, in 20 days (from July 14th). On July 30th the defendant notified the Smith-Mann Company, that it was ready to load out the first car, stating that the Santa Fé refused to accept Galveston shipments, and asking what to do about it. The Smith-Mann Company on the next day wired: "Bill wheat to Ft. Worth, Texas." The defendant at once shipped a carload to Ft. Worth, under the first contract, and made a draft upon the Smith-Mann Company for the price, with the bill of lading attached. The draft was not paid, the buyer apparently having become financially embarrassed. On August 1st the Smith-Mann Company assigned the three contracts to the plaintiff, and notified the defendant to that effect. At the request of the Smith-Mann Company the defendant had the draft presented to the plaintiff, who refused to pay it, because of the wheat having been shipped to Ft. Worth instead of to Galveston. Before the defendant knew of the final refusal of the plaintiff to pay for the car of wheat it had shipped to Ft. Worth, it wrote to him (on August 5th), stating the details with regard to the wheat it had contracted to the Smith-Mann Company, and asking him to give it the billing on the 80 $\frac{1}{2}$ % cent car as soon as possible, adding that it would hold the other two cars for shipment later in the month. On August 10th the defendant wrote to the plaintiff, in effect notifying him that by reason of the nonpayment of the draft it had canceled the contracts. On August 11th the plaintiff wired and wrote to the defendant, asking

that the wheat be shipped to St. Joseph. The defendant, in a letter of August 13th, denied all liability, and refused to reopen the matter.

The court submitted to the jury the question whether the telegram from the Smith-Mann Company to the defendant, reading, "Bill wheat to Ft. Worth, Texas," referred to all the wheat covered by the three contracts, or only to that part of it covered by the first contract, which was then ready for shipment. Instructions were given to the effect that if the telegram referred to all the wheat, the defendant was justified by the plaintiff's conduct in refusing to make further shipments, but that if it referred only to the wheat covered by the first contract, the defendant was liable to the plaintiff for such refusal. The jury obviously decided that the telegram referred to all the wheat.

[1] 1. The plaintiff contends that, as all the competent evidence concerning the meaning of the telegram was in the form of unchallenged documents, its effect was a question of law, and that the court should have decided that it related only to the shipment under the first contract. The error, if any, in submitting to the jury the question of the effect of the telegram, was not material if they gave it the proper construction. *Hull v. Manufacturing Co.*, 92 Kan. 538, 141 Pac. 592. And this court is of the opinion that such was the case. The letter to which the telegram was a reply was written July 30, and read as follows:

"Your favor of the 28th at hand. We regret that you will require us to load capacity cars on all grain sold. We will load them that way. We are ready to load out the first car for July shipment. Please give us billing to-morrow. The Santa Fé refuses to accept Galveston shipments. Please state what you want us to do with the wheat. What are you going to do about it?"

The telegram reading, "Bill wheat to Ft. Worth, Texas," was sent the next day. The sentence "Please give us billing to-morrow" may be regarded as having special reference to the car that was ready for shipment, as to which it was necessary that direction should be given at once to avoid delay. But the letter obviously refers to more than the one shipment, where it discusses the matter of the kind of cars to be used, and the inference is reasonable that the writer had in mind the later shipments as well as the earlier one when he wrote:

"The Santa Fé refuses to accept Galveston shipments. Please state what you want us to do with the wheat. What are you going to do about it?"

He had already asked that he be given specific instructions on the next day as to the car that was ready. There was no occasion to say more to elicit information concerning that particular shipment. When he added:

"Please state what you want us to do with the wheat. What are you going to do about it?"

—the company addressed was fairly advised that he was inquiring with regard to all the wheat the defendant had contracted for Galveston delivery. The inquiry was natural, because, while the need of immediate information may have been confined to the one car, the defendant was authorized to ship all the remaining wheat within 2 days, and was required to ship a part of it within 4 days. We conclude that, when the Smith-Mann Company in answer to this letter ordered the "wheat" to be billed to Ft. Worth, making no distinction between that covered by the first contract and the rest of it, and giving no other instructions concerning the matter inquired about, in the absence of any extraneous evidence indicating a different interpretation, it must be held to have authorized a shipment to Ft. Worth under all of the contracts, and thereby effected a modification of them to that extent.

In a letter already referred to, written to the plaintiff on August 5th, the defendant said:

"Please give us billing on the 80 and 7/8 cent car as soon as possible and then we will hold the two cars for Aug. shipment until later in the month."

But the request for instructions as to the billing did not imply that the plaintiff could require delivery at Galveston, or any point other than Ft. Worth.

[2] 2. The contracts were not negotiable instruments, and the plaintiff could not, by assignment, acquire any greater rights than were held by the Smith-Mann Company. 5 Enc. L. & P. 940. "An assignment of a contract, after the same has been modified by the parties thereto, is an assignment of the contract as modified, and not of the original contract." 5 C. J. 947.

[3] 3. A number of other questions have been argued, but need not be discussed or decided, as the interpretation placed upon the letter and telegram referred to is fatal to a recovery by the plaintiff, and therefore requires an affirmance of the judgment. While his correspondence with the defendant had relation specifically to the car of wheat which was actually shipped, his attitude was and continues to be that he was under no obligation to recognize, and would not recognize, a shipment to Ft. Worth. His demand is based solely upon the nondelivery of the wheat at Galveston. His offer to receive at St. Joseph the wheat covered by the two later orders was made after the defendant had notified him of its cancellation of the contract, and in any event it was not under a legal obligation to conform to his directions in this regard. In accepting an assignment of the three contracts the plaintiff assumed their obligations, as well as became entitled to their benefits. 5 C. J. 947. The rule with regard to distinct and independent contracts between the same persons is that

the breach of one of them does not permit the party aggrieved to refuse to perform another. Williston on Sales, § 467, p. 806. But by the weight of authority a wrongful refusal to pay for one of several installments of merchandise covered by one contract justifies the seller in refusing to make further deliveries. 9 Cyc. 649; 35 Cyc. 133; Williston on Sales, § 467, p. 810; Lumber Co. v. Lumber Co., 86 Kan. 131, 119 Pac. 321.

The effect of such a breach does not depend upon how many contracts have been entered into, but upon the relation they bear to each other. Although two separate contracts of sale are made, if the buyer elects to connect them, as by refusing payment on one, in order to aid in effecting a settlement of the other, his refusal becomes a just ground for the seller to decline further performance. Lumber Co. v. Lumber Co., supra. Here the three original contracts were modified by the same correspondence, and assigned to the plaintiff by a single instrument. The plaintiff refused to accept the wheat on the first contract for a reason that applied with equal force to the other two. In that situation his conduct would seem to have relieved the defendant from further obligation. But that need not be determined because, as stated, this is not an action for the failure to deliver wheat at Ft. Worth.

The judgment is affirmed. All the Justices concurring.

LOGAN-MOORE LUMBER CO. v. BOWER-SOCK et al. (No. 20780.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. MECHANICS' LIENS ⇨236—RELEASE—CONSTRUCTION.

A recital in a writing purporting to release a mechanic's lien, that the "owner" has paid for the construction of the house involved, is held to refer to payments made by the person in possession under a contract entitling him to a deed upon the completion of the purchase price, and not to the holder of the legal title.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 419.]

2. MECHANICS' LIENS ⇨217, 281(1)—WAIVER—PARTIES—EVIDENCE.

A waiver of a mechanic's lien, expressed to be made in favor of any mortgagee of the property, inures to the benefit of one who had lent money to the purchaser of the property under an arrangement that the original owner should hold the title as security both for the balance due on the purchase price and the amount of such loan. And held, that the pleadings and evidence justified a finding that such an arrangement had been made in this case.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 403, 565-507.]

3. MECHANICS' LIENS ⇨208—WAIVER—EFFECT.

Such a waiver is held to preclude the signer from asserting a lien except in subordination to that of the mortgagee.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 382.]

4. MORTGAGES — 151(3) — PRIORITIES — MECHANIC'S LIEN.

Where the owner of property on which there is a mortgage begins the construction of a house thereon, but before its completion abandons the work and disappears, the mortgagee who takes possession and completes the building according to the original plans is held to have a lien for the amount so expended superior to a mechanic's lien for material sold to and used by the owner, where the value of the property at the time work was abandoned, including the improvements, was less than the amount of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 332-336.]

5. MORTGAGES — 151(3) — PRIORITIES — MECHANIC'S LIEN—AMOUNT.

The lien of the mortgage cannot be increased, as against such lienholder, by the cost of improvements made by him, which were not contemplated in the original plan.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 332-336.]

6. CASE DOUBTED AND DISTINGUISHED.

The rule announced in *McCrie v. Lumber Co.*, 7 Kan. App. 39, 51 Pac. 986, that a mechanic's lien has priority over a pre-existing mortgage, so far as relates to the structure erected, apart from the land, is doubted, and held in any event not to be applicable to the present case.

Appeal from District Court, Douglas County.

Action by the Logan-Moore Lumber Company against M. G. Bowersock and others. From a judgment determining the priority of liens and making plaintiff's lien subordinate to a mortgagee's lien, plaintiff appeals. Modified and affirmed.

John J. Rilling and Edward T. Rilling, both of Lawrence, for appellant. M. A. Gorrill and H. H. Asher, both of Lawrence, for appellees.

MASON, J. This action involves the priority of liens upon two city lots, described as lots 7 and 8 in block 9 in an addition to Lawrence. The claim of the plaintiff, the Logan-Moore Lumber Company, to a mechanic's lien, was sustained, but it was made subordinate to a lien given to J. D. Bowersock for a loan made to Louis C. Brown to enable him to improve the property by building two houses upon it, and for the expenses of completing the buildings after Brown had abandoned the work. The plaintiff appeals from the judgment upon the ground that it was entitled to a prior lien. The facts are the same with respect to each of the lots, except as to the amounts, and for simplicity of statement the matter will for the present be treated as though but one of them (lot 7) were involved. The facts as found by the trial court are challenged in but two particulars, which will be mentioned later.

The lot originally belonged to Bowersock's wife, who contracted to sell it to Brown for \$600. At the same time, and as a part of the same transaction, it was arranged that Bowersock was to make a loan to Brown of \$2,-

000, for which the lot was to be security, and which was to be used in erecting a house thereon. Brown paid \$300 down, and on May 17, 1915, Mrs. Bowersock executed to him a contract by which she acknowledged this payment and agreed to deed him the lot upon his paying \$2,300 additional—\$300 in 90 days, \$500 in one year, and \$1,500 in two years; the \$300 being for the balance of the agreed purchase price, and the remaining \$2,000 representing the money to be lent to Brown, the legal title being thus retained by her as security for the repayment of the loan to her husband, as well as for the payment to herself of the balance of the purchase price. It was agreed that the money constituting the loan was to be turned over by Bowersock in installments as the work upon the building progressed (the first one, for example, of \$600, to be made upon the completion of the foundation), and Brown was required to show in each instance that all liens for labor and material had been waived before he was entitled to receive the money. Brown entered upon the construction of the building, and Bowersock at different times made payments to him amounting in the aggregate to \$1,600. These payments were made by Bowersock upon the faith of documents shown him by Brown, which were signed by laborers and materialmen, including the plaintiff, releasing their right of lien in favor of any one making a loan on the property, and agreeing that such a mortgage should have priority over any claim on their part; a statement was added (which was in fact untrue) that the owner had paid up in full to that time for the construction of the house. At this stage of affairs, on June 12, 1915, Brown abandoned the work and left the community. The plaintiff had at this time furnished material to the amount of \$537, for which it was entitled to a lien, which was afterwards perfected. All of its claim, however, excepting \$37.28, had accrued prior to its signing of the last statement with regard to the waiver of a lien. The improvements on the lot at this time were worth about \$800, and the building, being incomplete, was exposed to the weather, and if left in that condition would have been subject to rapid deterioration. Bowersock caused the building to be completed according to the original plans (except for changes which made a net addition of \$140 to the cost), at an expenditure of \$2,275.80.

The facts with respect to the other lot are the same, except that the amount loaned upon it by Bowersock was \$1,100, the value of the improvements at the time Brown abandoned work was \$500, and the amount spent in completing the work was \$2,385.50. The lien allowed Bowersock on the entire property was \$7,662.39, which included some expenditures for sidewalks and small items in finishing the buildings outside of the original

plans. The lien of Mrs. Bowersock for the unpaid part of the purchase price was made subsequent to those of her husband and the plaintiff.

The material part of the documents referred to as waivers of liens read as follows:

"Now, therefore, in consideration of \$1 cash, in hand paid to us, and each of us, by the owner, we, the undersigned, do hereby release all our right of lien on the above-described property that we have, or may have on account of labor performed or material furnished, or that was caused to be furnished by or through us, that is now used and in position in said house, in favor of any private individual, bank, or loan association that has made a loan on said property, or that may make a loan on the same, and that said mortgagee shall have priority over any claim that either of us may have on account of labor performed or material furnished that is now used, and in position in said house, on lot heretofore described.

"And we further state that the owner has paid up in full, as per his agreement, to this date, for the construction of said house."

[1] 1. The plaintiff suggests that Bowersock could not have been misled by such a statement, purporting to be based on payments made by the "owner," because his wife was the owner of the property, and he, as her agent, must have known what she had paid. The word "owner," however, as used in the writing, obviously referred to Brown, and such a description of him was both natural and proper. Although the cross-petition of Bowersock alleges that his wife was still the owner of the two lots, the specific facts set out showed that she had delivered possession to Brown under a contract that he was to have a deed when he completed the payment of the agreed amount. In that situation Brown was the real or equitable owner, and Mrs. Bowersock merely had a lien for which she held the legal title as security. *Courtney v. Woodworth*, 9 Kan. 443.

[2] 2. The plaintiff contends that the waiver of a mechanic's lien did not protect Bowersock, because it was expressly made in favor of a mortgagee, and he had no mortgage on the property. If, as the court found, it was agreed between the three parties that Mrs. Bowersock should hold the legal title as security not only for the part of the purchase price due to her, but also for the money loaned by her husband to Brown, then Bowersock did have a mortgage, the holding of the legal title by his wife as security for the money due him making him in effect a mortgagee. But the plaintiff insists that neither the pleadings nor the evidence warranted that finding. It is true that the cross-petition filed by the Bowersocks jointly did not say in so many words that Mrs. Bowersock was to hold the legal title as security for the loan made to Brown by her husband, but it contained a paragraph reading as follows:

"Defendants further allege that it was understood and agreed between the defendant L. O. Brown and defendant J. D. Bowersock that contract marked Exhibit A [the contract by which Mrs. Bowersock agreed to make Brown a deed upon his paying her \$2,300], and application marked Exhibit B, above referred to

[Brown's application to Bowersock for a loan], should be treated and considered as a part of one and the same transaction. That while the amount of the purchase price stated in contract Exhibit A is \$2,600, it was and is, in truth and fact, to be only \$600, \$300 of which was paid in cash at or before the time of the execution of said written contract, and the balance of \$300 to be paid within ninety days from the date thereof."

The fair inference from these allegations is that the \$2,000 was added to the amount of the purchase price to represent the loan to be made by Bowersock to Brown, and that the holding of the title by Mrs. Bowersock after the receipt of the \$300 due her was for the benefit of her husband. The evidence on this point was not as explicit as it might have been, but we regard the finding referred to as justified by the following questions and answers from the examination of Bowersock:

"Q. I hand you the two contracts relative to those lots; you will observe there that the consideration stated, or the amount to be paid, is \$2,600. Tell the court why that was \$2,600 instead of \$600; for what purpose that was inserted there. * * * A. Because it had been arranged that I would advance him \$2,000 as the buildings progressed. Q. What security were you to have for this advancement? * * * A. I had this property. Q. Providing what? A. Providing that he didn't get a deed until he paid for it."

The sufficiency of the cross-petition is challenged on the ground that the verification in behalf of Mrs. Bowersock is defective in not showing the grounds upon which it was made by her husband as her agent. It recited that the facts were within his personal knowledge, which is all that the statute requires when that condition exists. *Civ. Code*, § 116 (*Gen. St.* 1909, § 5709); *Gibson v. Shorb*, 7 Kan. App. 732, 52 Pac. 579.

[3] 3. Inasmuch as the plaintiff signed a writing consenting that any lien for material furnished that might be asserted on its part should be inferior to that of any one who should lend money to Brown upon the security of a mortgage on the property, and Bowersock made his loan in reliance upon such consent, the plaintiff is in no position to assert a lien to the disadvantage of Bowersock, whether the ownership of the property is conceived as being in Brown or Mrs. Bowersock. Moreover, that matter is rendered immaterial by the fact that the court made the plaintiff's lien paramount to the interest of Mrs. Bowersock. Merely as an explanation of the plaintiff's course it may be said that the reply contained a statement that its signature to the waivers had been procured by fraud on the part of Brown, in misrepresenting its contents, but as it is not suggested that Bowersock had any knowledge of this, the legal rights of the parties to the present controversy are not affected by it. Moreover, the plaintiff was necessarily negligent in signing a statement that the bills for material had been paid when the fact was otherwise, and doubtless Bowersock would have been protected as to money loaned on the property in reliance upon such

statement, even in the absence of an express waiver. These considerations require the approval of the decision giving Bowersock's lien for the money he advanced to Brown (amounting on both properties to \$2,700) priority over the plaintiff's claim.

[4] 4. The question as to the lien awarded to Bowersock for the money expended in completing the buildings according to the original plans stands upon a different footing. As Brown had abandoned the property with the buildings incomplete and in such condition as to deteriorate rapidly, unless something were done to preserve them, it was natural and proper that Bowersock should assume control and take steps to that end. It cannot be said that his possession, so taken was acquired under such circumstances that he ought not in equity to be permitted to retain it, and therefore he was entitled to the privileges of a "mortgagee in possession." *Stouffer v. Harlan*, 68 Kan. 135, 146, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396. As against the owner, Brown, he was entitled to make expenditures for such improvements as were reasonably necessary for the upkeep of the property—to prevent deterioration, and to add the cost to the amount of his lien. 27 Cyc. 1265, 1266. And Brown would hardly have been in a situation to object to this principle being so applied as to cover the finishing of the work which he had begun. A difference must be recognized, however, between the position of the owner, who is necessarily benefited by any increase in the value of the property, and who is under an obligation to the mortgagee to prevent waste, and that of a lienholder, who might or might not be benefited according to circumstances, and who has made no contract with the mortgagee, and owes him no duty. Here, before Bowersock began work upon the completion of the buildings, he had a first lien for \$2,700. The two lots, with the improvements, were worth but \$2,500. The plaintiff's second lien was therefore practically worthless as things stood. The only reasonable prospect of its realizing anything upon its claim was through the investment by some one of enough more money to give added value to what had already been done. The mere covering in of the incomplete buildings so as to protect them from the weather would not have accomplished this, nor have appreciably bettered the plaintiff's condition. The natural and reasonable method of increasing the value of the partially constructed buildings was to complete them according to the original design. Under the peculiar circumstances presented we think the trial court was justified in giving Bowersock a first lien for the money expended in this way.

[5] 5. But the character and extent of the improvements to be made could not fairly be

left merely to the judgment or taste of the mortgagee making them, but must be subject to some definite limitation. And the only practical limit that suggests itself is that resulting from conformity to the original plans. A net addition of \$140 was made to the cost by changes in these plans, and the mortgagee was given a first lien for expenditures outside of the completion of the buildings, amounting to \$211.39. We conclude that the plaintiff's lien should have precedence over the part of the mortgagee's claim based on these expenditures.

[6] 6. The plaintiff invokes a decision of the Court of Appeals holding that a mechanic's lien upon the improvements, as distinguished from the lots on which they are placed, has priority over a pre-existing mortgage. *McOrle v. Lumber Co.*, 7 Kan. App. 39, 51 Pac. 966. The interpretation there given to the statute seems out of harmony with expressions of this and other courts. *Martolf v. Barnwell*, 15 Kan. 612; *Basham v. Goodholm & Sparrow Inv. Co. (Okla.)* 152 Pac. 416. Moreover, the doctrine of that case, if sound, would not avail the plaintiff here, since it was given a lien prior to that of Mrs. Bowersock, and the waiver which it signed must be construed to refer to its lien upon the buildings as well as upon the bare lots.

The judgment is modified by giving the plaintiff's lien precedence over \$351.39 of the mortgagee's claim, and as so modified is affirmed. All the Justices concurring.

PEVER v. ATCHISON, T. & S. F. RY. CO.
(No. 20724.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS §55(7)—INJURY TO LAND.

The action was one for damages for injury to a tract of 140 acres of land, caused by enlargement through operation of the forces of nature of a ditch rightfully and properly dug by the railway company on its right of way to drain its roadbed. The ditch had deprived the plaintiff of the use of $3\frac{1}{4}$ acres of land adjoining the right of way. Damages were claimed for this injury, and for depreciation in the market value of the entire tract occasioned by the ditch. *Held*, a cause of action accrued when the ditch invaded the plaintiff's land, damages for permanent injury were then recoverable if desired, and the action was barred because not commenced within two years after the cause of action accrued.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 305.]

Appeal from District Court, Montgomery County.

Action by Ezra Pever against the Atchison, Topeka & Santa Fé Railway Company. Demurrer to plaintiff's evidence sustained, and he appeals. Affirmed.

W. L. McVey and O. L. O'Brien, both of Independence, for appellant. W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, and Chester Stevens, of Independence, for appellee.

BURCH, J. The action was one to recover damages for injury to land adjoining a railroad right of way, caused by the encroachment of a ditch dug originally on the right of way to drain the roadbed. An injunction against future injury was also prayed for. A demurrer to the plaintiff's evidence was sustained on the ground the action was barred by the two-year statute of limitation, and he appeals.

Some ten years before the action was commenced, the roadbed was rebuilt and drainage was secured by construction of the ditch complained of. There was neither allegation nor proof that the ditch was not necessary for the purpose for which it was designed, or was not properly constructed. It was alleged that the ditch was negligently placed so near the plaintiff's land that the defendant knew, or should have known, it would deepen and widen by process of erosion to such an extent as to deprive the plaintiff's land of lateral support, but there was no evidence that from the standpoint of expert railway construction the ditch was not properly located. The ditch, which was quite small when dug, did deepen and widen until in some places it passed under the plaintiff's fence and invaded his field. In some places the ditch is now 14 feet wide, and in some places it is now 8 feet deep. Surface water flowing into the ditch from the plaintiff's land has cut some gulleys, one of them extending back 40 feet into the field. In some places the water has cut back under the sod for the distance of a foot and left the sod hanging. The soil crumbles and caves in from freezing, thawing, and drying out. In this way the plaintiff has been deprived of $3\frac{1}{4}$ acres of land out of a tract of 140 acres.

The action was commenced on December 15, 1914, and the trial occurred in October, 1915. The plaintiff testified that it had been five or six years since he first complained of the ditch and tried to get the defendant to fix it; that is, to fix a place which he saw was going to break through. On February 26, 1912, the plaintiff complained of the ditch in a letter to the defendant's superintendent, in which he said the ditch was damaging him a great deal, that it was ruining the field, and that he wanted it attended to, to save damage. There was evidence that the value of the use of the land taken by the ditch was \$15 per acre per year for the years 1914 and 1915. Three witnesses were called to prove that the market value of the entire tract of 140 acres had been diminished because of the washouts described. The witnesses estimated the damage at from \$3 to \$5 per acre for the entire tract.

Proper drainage of the defendant's roadbed was a matter of importance. Duty to the public and duty to employes required that the track and grade be made secure from the action of water. So far as the evidence disclosed, the ditch when dug did no more than subserve these necessary purposes, and no legal duty to the plaintiff was violated. From natural causes, the ditch in course of time encroached upon the plaintiff's land. The injury arose from not confining an essential feature of the defendant's roadbed to its own right of way, and in such cases the fact that the ditch was necessary and was not negligently constructed does not relieve from liability to make reparation.

The injury was in the nature of a trespass on real estate, and action for such an injury is barred in two years. Civ. Code, § 17, subd. 3 (Gen. St. 1909, § 5610). There can be no doubt that a cause of action arose in favor of the plaintiff more than two years before suit was commenced, and the question is whether all relief is foreclosed, or whether the plaintiff may recover damages sustained within two years next preceding the commencement of suit. The plaintiff seeks to avoid the statute of limitation by claiming that his injury consisted in destruction of lateral support of his land occurring within the two years next preceding December 15, 1914.

In the case of *Railroad Co. v. Schwake*, 70 Kan. 141, 78 Pac. 431, a railroad company appropriated an alley of a city for the purpose of laying its tracks. A deep excavation was made near the lot line. It was held that a cause of action for deprivation of lateral support did not accrue until subsidence of the soil of the lots occurred. The same rule was applied in the case of *Audo v. Mining Co.*, 99 Kan. 454, 162 Pac. 344, in which subjacent support of the surface of land was removed by mining. If no cause of action accrue until subsidence occurs, the implication from these decisions would appear to be that no cause of action for a future subsidence accrues until it occurs.

In case of subsidence resulting from causes the operation of which is concealed from observation and the results of which cannot clearly be foreseen, as from mining, recovery for future injury is impossible, and each new caving gives rise to a new cause of action. In case of subsidence resulting from common surface excavations, like drainage ditches, there is no difficulty in assessing, once for all, damages both present and prospective, and that is the common practice in condemnation cases. Landowners usually prefer that remedy, and the policy of the law to discountenance multiplicity of suits favors it. Each season's experience demonstrates afresh what water in a drainage ditch through erodible soil will do. In this instance the plaintiff alleged that the defendant knew, or ought to have known, when the

ditch was dug, that it would cut into the field. Treating the case as one in which lateral support has been removed, it would be quite practical to say that although no cause of action accrued until subsidence occurred, permanent damages were then recoverable as they would be if the plaintiff chose to treat the encroachment of the ditch as a permanent appropriation of the land.

It is not easy to call this a lateral support case. Weathering of banks is indeed one way in which injury from removal of lateral support is caused; but the cutting of channels in the plaintiff's field by surface water flowing over it into the ditch was erosion, and the cutting away of the banks of the ditch by water which it was designed to carry was erosion. While the water undermines the bank somewhat and the bank crumbles somewhat in dry weather, the widening and deepening of the ditch is no different in legal contemplation from what it would have been if the water had always washed away the top soil first. What in fact occurred was that a larger channel was opened, rather than that lateral support of the plaintiff's field was removed, causing it to slide into the ditch. If the defendant's graders had cut into the field with their plows and scrapers, the plaintiff would have had at once a complete and adequate remedy at law for the injury done and for all future injury resulting from the action of water; and it seems quite artificial to say that because the graders stopped just at the plaintiff's fence, the future action of the same water on the same land occasioned an injury of a different character, giving rise to a remedy of a different character. If, therefore, it be conceded that under the lateral support doctrine, damages for future subsidences into this ditch, certain to occur after the next rain, could not be recovered in an action for subsidence occasioned by the last rain, there is no reason for applying the doctrine here.

At the trial the plaintiff indicated the real purpose of the lawsuit. The petition claimed damages to the amount of \$600. The evidence disclosed that \$500 of this sum consisted of damages for permanent injury through depreciation in market value of the entire tract of land. A right of action for this purpose accrued at least as soon as the ditch extended itself into the plaintiff's field, which, according to the plaintiff's own declaration, was earlier than February, 1912. *McDaniel v. City of Cherryvale*, 91 Kan. 40, 136 Pac. 899, 50 L. R. A. (N. S.) 388.

The plaintiff concedes that the railroad was a permanent thing, but argues that the ditch was not. The court regards the ditch as an integral part of the defendant's roadbed. The plaintiff says he had a right to assume the defendant would fix the ditch before it caused him substantial injury. The plaintiff testified at the trial that he had

tried to get the defendant to fix the ditch "five or six years ago." The plaintiff says it was not the purpose of the ditch to undermine the plaintiff's land. It was not the purpose of the oil refinery in the Cherryvale Case to pollute the stream. The purpose was to refine oil. The ditch was designed to serve as a waterway, and its use for that purpose caused injury, just as the operation of the refinery caused injury. By electing to claim damages for permanent injury, an adequate remedy, the right to further equitable relief was waived.

The judgment of the district court is affirmed. All the Justices concurring.

STATE v. McLEMORE. (No. 20680.)

(Supreme Court of Kansas. Feb. 10, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1169(2)—EVIDENCE—IDENTITY—HARMLESS ERROR.

In a prosecution for rape, it is incompetent for the party to whom the assailed made complaint to give in evidence the name of the assailant; but where there is no question concerning the identity of the party making the assault, and where there is no question that he was present at the time and place of the alleged assault, no reversible error is committed where the name of the assailant is thus given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

2. CRIMINAL LAW §1169(1)—WITNESSES §405(1)—CROSS-EXAMINATION—COLLATERAL MATTER.

Evidence should not be admitted to contradict a statement of a witness elicited on cross-examination, on an immaterial, collateral matter; but where such evidence is admitted, a judgment will not be reversed where the evidence could not have produced any prejudicial effect on the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Witnesses, Cent. Dig. §§ 1273, 1275.]

3. CRIMINAL LAW §1170½(5)—WITNESSES §372(2)—EVIDENCE—AGREEMENT WITH ATTORNEY—HARMLESS ERROR.

In a prosecution for rape, on the cross-examination of the person assaulted, it is proper to show that she contracted with attorneys to bring an action for damages for the alleged assault; but the refusal of the court to permit such a cross-examination will not cause a reversal of the judgment, where it does not appear that any harm was done by its exclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Witnesses, Cent. Dig. §§ 1193-1196.]

4. RAPE §59(20, 21)—INSTRUCTIONS—ASSAULT WITH INTENT TO COMMIT RAPE.

It is not error to fail to instruct the jury concerning assault with intent to commit rape, where the evidence to prove the offense shows a completed offense at a certain time and place, and the statements of counsel and the evidence of the witnesses are all directed to that time and place, although there may be other incidental evidence which proves acts which tend to show that the accused attempted an assault at another time and place.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 99.]

5. RAPE §51(1)—EVIDENCE—SUFFICIENCY.

It is *held* that the evidence was sufficient to show that the crime of rape was committed.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 71.]

6. CRIMINAL LAW §730(1)—TRIAL—MISCONDUCT OF COUNSEL.

Misconduct of counsel in the presence of the jury, where the court immediately directs the jury to disregard such misconduct, will not cause a reversal of a judgment, unless it appears that the misconduct was such as could not be thus cured by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693.]

7. JURY §99(2)—COMPETENCY—EXPRESSION OF OPINION.

A juror, on his voir dire, testified that "he had no opinion and had expressed no opinion" (as to the result of the trial of the defendant). Three witnesses testified that they had heard the juror say, substantially, that "they will stick Dr. McLemore," the defendant. The juror denied making these statements, or anything in substance like them. He was accepted. The court did not commit reversible error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 439, 443, 445.]

Appeal from District Court, Bourbon County.

B. A. McLemore was convicted of rape, and he appeals. Affirmed.

A. M. Keene and Connolly & Connolly, all of Ft. Scott, for appellant. S. M. Brewster, Atty. Gen., and J. G. Sheppard, of Ft. Scott, for the State.

MARSHALL, J. The defendant appeals from a conviction of rape.

[1] 1. The charge was that the defendant did forcibly rape and ravish Maude Morrison, she being then a woman between 35 and 36 years of age. There was evidence that tended to show that a half hour after the offense was committed, Maude Morrison met her husband. He was a witness for the prosecution, and testified as follows:

"Q. Did your wife make complaint to you of Dr. McLemore's actions, in which she told you what his actions were, on October 28, 1915?

"Mr. Keene: To which the defendant objects as incompetent, irrelevant, and immaterial and prejudicial.

"The Court: He may answer.

"A. Yes, sir."

After that evidence was introduced, the defendant asked that it be stricken out. The court refused to strike it out. The defendant insists that the witness should not have been permitted to give the name of the person committing the offense. In *State v. Daugherty*, 63 Kan. 473, 65 Pac. 695, this court said:

"In prosecutions for the crime of rape, neither the name of the assailant nor the details of the transaction, as given by the assailed, may be repeated in evidence by the party to whom she made timely complaint." Syl. par. 7.

In *State v. Hoskinson*, 78 Kan. 183, 188, 96 Pac. 138, 140, this court said:

"Some courts have admitted a full relation of the details told by the prosecutrix, but the weight of authority admits only the fact that a complaint was made; it is not permissible to

relate the name of the person of whom she complained. * * * A probable exception to this rule is where the complaint was made in such immediate relation with and sequence to the act complained of as to be part of the *res gestæ*, but that has no application here."

It must be noticed that the authorities are not unanimous in excluding the name of the assailant. The purpose of the rule is to permit the fact to be shown that the injured party did make complaint, but to exclude all hearsay evidence of every other fact necessary to prove the crime. Where the identity of the assailant is unquestioned, and where the defense is that there was no rape either because there was no intercourse, or, if there was intercourse, that the woman consented thereto, it is not easy to see what harm is done by giving the name of the assailant in connection with the fact that complaint was made. In the present case, there was no question about the identity of the assailant if a rape had been committed. The defendant admitted being at the place where the crime was charged to have been committed at the time when Mrs. Morrison testified it was committed, but he denied having intercourse with her. One of the propositions argued by the defendant on this appeal is that if the evidence shows that he did have intercourse with the complainant, the evidence, shows that she consented to that intercourse. On the trial, Mrs. Morrison testified positively that it was the defendant who assaulted her. The husband's testimony concerning the name of his wife's assailant did not add one particle of evidence to show that a rape had been committed, or, if the other evidence established that one had been committed, that the defendant was the guilty party. Section 293 of the Code of Criminal Procedure (Gen. St. 1909, § 8867) provides that:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

That evidence was incompetent, but, under the circumstances surrounding this case, it cannot be said that the introduction of that evidence affected any substantial right of the defendant. Its admission was not reversible error.

[2] 2. The state sought to prove that the defendant was intoxicated at the time he was charged to have committed this offense. Mrs. Morrison testified that she could smell intoxicating liquor on his breath. On cross-examination, the defendant testified as follows:

"Q. I am asking you if you haven't been in the habit of frequently getting partially intoxicated? A. No, sir; never in my life was I intoxicated. Q. Sir? A. Never in my life have I been intoxicated. Q. You have never been drunk or half drunk? A. I don't know what you call half drunk. Q. I mean under the influence of liquor so people would know it and understand it by seeing you. A. I was never drunk, tipsy, or full in my life; never."

James D. Stroud, a witness for the prosecution on rebuttal, testified as follows:

"Q. Now on this date (meaning the time that the state claimed that McLemore was in Stroud's restaurant, after the alleged crime was committed and after this prosecution was begun) the defendant came in there, what was his condition with reference to being intoxicated or otherwise?

"Mr. Keene: Defendant objects as immaterial and not rebuttal.

"The Court: He may answer.

"Mr. Keene: Exception.

"A. Well, I took him to be intoxicated."

The defendant complains of the introduction of this evidence. In *State v. Alexander*, 89 Kan. 422, 131 Pac. 139, this court said:

"Evidence should not be admitted to contradict a statement of a witness elicited upon cross-examination upon a purely collateral matter which does not tend to prove or disprove an issue in the case, the contradictory evidence being offered by the party eliciting the statement." Syl. par. 3.

See *State v. Sexton*, 91 Kan. 171, 136 Pac. 901.

It is unnecessary to cite other cases. The defendant's intoxication when he was in Stroud's restaurant was a matter wholly immaterial; and except as that evidence may have affected the credibility of the defendant as a witness, it could not have produced any effect on the jury. While the evidence was immaterial and inadmissible, its introduction was not sufficient to cause a reversal of the judgment.

[3] 3. After laying her complaint before the county attorney, and before she succeeded in getting the county attorney's office to file a complaint and cause a warrant to be issued for the arrest of the defendant, Mrs. Morrison entered into a contract with other attorneys to bring a suit against the defendant for damages for the assault. On the cross-examination of Mrs. Morrison, the defendant sought to show that she had made such a contract. The court refused to permit that evidence to be introduced. The defendant contends that this was error. In *State v. Abbott*, 65 Kan. 139, 69 Pac. 160, this court said:

"For the purpose of impairing his credibility, a witness who gives material testimony may be cross-examined as to his past conduct and character, and as to specific acts which tend to discredit him." Syl. par. 1.

See, also, *State v. Pugh*, 75 Kan. 792, 796, 90 Pac. 242, 243.

In the last case cited, the court said:

"The extent permissible in such cases must be left to the discretion of the trial court, whose action will not be disturbed by this court except for such abuse as works an injury to the party complaining."

Grant that this evidence was within the rule and should have been admitted; no harm was done by its exclusion. The plaintiff had a right not only to contract with attorneys to bring a suit for damages, but to bring a suit and prosecute it at the same time that the criminal charge was being prosecuted. The exclusion of this evidence was

not sufficient to cause a reversal of the judgment.

[4] 4. The court did not instruct concerning an assault with intent to commit rape. The defendant contends that this was error. The evidence tended to show that the offense was completed and committed at the barn at the complainant's home, and that immediately after the commission of the offense, Mrs. Morrison ran to the house. There was evidence tending to show that the defendant followed Mrs. Morrison to the house and there did other things which tended to show his intention to commit another assault on Mrs. Morrison, but that he voluntarily desisted and went away. The defendant was tried for the transaction at the barn. In the opening statement to the jury for the state, it was charged that the offense was committed at the barn. The whole trial concerned the transaction at the barn. All the evidence introduced was to establish the commission of the offense at the barn. The evidence showed that if any offense was committed at the barn, it was the completed offense of rape, and not an assault with intent to commit rape, or an attempt to commit rape. The rule is that where the evidence shows a completed offense, the defendant should not be convicted of a mere assault with intent to commit the offense. *State v. Mitchell*, 54 Kan. 516, 38 Pac. 810. No request for an election between two offenses, separate transactions, was made by the defendant. There was no error in not instructing the jury concerning an assault with intent to commit rape.

[5] 5. The defendant contends that there was no evidence to show that the crime of rape was committed. In support of this contention he argues that the evidence of the prosecuting witness clearly showed that she did not resist to the extreme. The defendant contends (quoting from his brief):

"That the law is that where a rape is committed by physical force, the party raped must not only cry out, but must resist to the extreme limit of her strength, doing everything in her power to prevent the ravishing."

The rule contended for by the defendant was condemned by this court in *State v. Ruth*, 21 Kan. 583, 591, in the following language:

"To make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law and to common sense."

In 33 Cyc. 1427, the author says:

"It is said in some of the cases that there must be the utmost reluctance and the utmost resistance, but this rule is repudiated in other jurisdictions."

The circumstances attending the commission of the offense charged against this defendant, as related by Mrs. Morrison, are offensive, revolting, and disgusting. They will not be here detailed. They show that she resisted until after resistance was useless and unavailing, and that she never con-

sented to the acts of the defendant. The rule contended for by the defendant is a barbarous rule. It has no place in twentieth century civilization in this state. When a mature man invades another man's home, and there seeks to debauch the latter's wife or daughter, he should be compelled to see to it that he uses no force whatever to accomplish his purpose; and he should be compelled to see to it that his victim willingly submits to his embraces before he asks an appellate court to draw fine distinctions to relieve him from the penalties fixed by law for rape, after he is found guilty by a jury and sentenced by the trial court. The defendant's contention that the offense charged was not proved by the evidence is without substantial merit.

[8] 6. The defendant complains of the conduct of counsel for the state. At the conclusion of the opening argument for the state, the defendant waived his right to argue the cause, and submitted the same to the jury without further argument. After the jury had been out for a number of hours, it sent a request to the court for information concerning certain of the evidence that had been introduced. That evidence was read to the jury. One of the attorneys for the state then made the following request:

"Now, if your honor please, before this jury returns, in the interest of law enforcement, and that justice may not go wrong, I request the privilege of you of addressing this jury on the law and facts in this case. They have come back in here for some testimony, and the testimony seems to be indistinct in their minds, and in order that the law may be enforced, and justice be done, I request the privilege of addressing them."

The court refused this request in the following language:

"The request is denied, and, gentlemen of the jury, you will pay no attention to statements of counsel made in here. You will determine this case from the evidence as given to you from the witness stand, under the court's instruction. You may retire to further consider of your verdict."

The attorney's request was improper, and should not have been made; but the jury understood that it was an attorney that made the request, and when it was refused and the jury was instructed to pay no attention to the statements of counsel, all effect that might have been momentarily produced by the request was obliterated, and if any effect then remained, it must have been one of condemnation for the conduct of the attorney. This misconduct of counsel for the state was not sufficient to justify this court in reversing the judgment.

[7] 7. The defendant argues that a new trial should have been granted for the reason that one of the jurors had, prior to being impaneled as a juror, expressed an opinion concerning the result of the trial of the defendant. This juror, D. R. Keith, testified on his voir dire that he had no opinion, and had

expressed no opinion as to the result of the trial of the defendant. Three witnesses made affidavit that in conversations with the juror Keith, prior to the trial, he had said to either of these witnesses that "they will stick Dr. McLemore." Keith made affidavit that he never made the statement that "they will stick Dr. McLemore," or anything in substance like that. On these affidavits and on the examination of Juror Keith, on his voir dire, the court found the facts involved in this matter against the defendant. There is nothing to show that the finding was incorrect. The matter was one primarily for the trial court, and that finding will not be disturbed.

There are a number of errors disclosed, each of which is of minor importance, and none of which is sufficient to cause a reversal of the judgment. There was nothing in any of the errors committed that deprived the defendant of a fair trial in the court, or of fair consideration at the hands of the jury.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and DAWSON, JJ., concurring. WEST, J., concurring in the result, but not in all things said.

EASDALE v. ATCHISON, T. & S. F. RY. CO. (No. 20771).*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. COMMERCE \S 35—INTERSTATE SHIPMENT.

Continuous transportation of a car, containing household goods and horses from West Plains, Mo., to Princeton, Kan., under separate billing, by the St. Louis & San Francisco Railway Company from West Plains to Kansas City, Mo., and by the Atchison, Topeka & Santa Fe Railway Company from Argentine, Kan., to Princeton, held to be interstate, although the shipper intended when the car started to unload the horses at Kansas City and drive them to Princeton.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 23, 26, 89.]

2. CARRIERS \S 32(2)—LIVE STOCK — CONTRACT—WAIVER.

The Santa Fe was not at liberty to waive, in favor of the shipper, a provision of its contract with him, limiting the time within which an action might be commenced to six months.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84.]

Appeal from District Court, Franklin County.

Action by Earl Easdale against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to enter judgment for defendant.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. W. S. Jenks, of Ottawa, for appellee.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

BURCH, J. The action was one for damages for injury to live stock occurring in course of transportation from West Plains, Mo., to Princeton, Kan. The plaintiff recovered, and the defendant appeals, the principal question being whether or not the shipment was interstate.

West Plains is a station on the St. Louis & San Francisco Railway. Princeton is a station on the Atchison, Topeka & Santa Fé Railway. The plaintiff loaded an emigrant car with household goods and horses at West Plains, and billed the car to Kansas City, Mo., over the Frisco. The car was there delivered to the Santa Fé and was re-billed by the Santa Fé to destination. The Santa Fé billing read from Argentine, Kan., to Princeton. Argentine is separated from Kansas City by the line between the two states, but the Santa Fé yards at Argentine extend into Kansas City. The car was placed on the Santa Fé tracks by the Frisco. The car in fact passed in course of continuous transportation, without unloading, from West Plains to Princeton. The plaintiff testified that the Frisco agent at West Plains would not bill the car to any place in Kansas unless the horses were inspected. In order to avoid inspection, the plaintiff billed the shipment to Kansas City, intending to drive the horses from there to Princeton. On the way to Kansas City, or when the car arrived there, he changed his mind, and after inspection, the horses went on in the car with the household goods. The horses were injured while on the line of the Santa Fé. The court allowed the jury to determine the character of the shipment, under an instruction that they might find it was not interstate if they found the plaintiff's original intention was to ship the horses by rail to Kansas City and then take them overland to Princeton. The jury found the shipment was not interstate.

The only conflict in the evidence was whether the Frisco, when it placed the car on the Santa Fé tracks, left the car on the Kansas side, or the Santa Fé switch engine which picked up the car crossed the state line to get it. The court does not regard this matter as material, and, applying the law to the undisputed facts, concludes that the shipment was interstate.

The plaintiff relies on the case of *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. In that case corn was shipped from Hudson, S. D., to Texarkana, Tex. While in transit the corn was sold. After arrival at Texarkana, and after a delay of five days, the purchaser reshipped the corn to Goldthwaite, Tex., to fulfill a contract. It was held that the shipment was intrastate. At the commencement of transportation the corn had no destination but Texarkana. The carrier's contract with the shipper ended there. While the corn was in transit the shipper parted

with title. The purchaser paid for the corn and received it at Texarkana. Not until then did he have any control over its destination. The purchaser might have fulfilled his contract with his customer at Goldthwaite with other corn. He did not start to fulfill this contract until after the carriage initiated by the original shipper had been completed, and the subsequent forwarding of the corn to Goldthwaite was an independent shipment.

The plaintiff also cites the case of *C. & St. P. Ry. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988. A coal company at Davenport, Iowa, received cars of coal from the state of Illinois over various railroads and paid the transportation charges to Davenport. The cars would be placed on an interchange track, and the coal company would then bill them to designated points, according to the demands of its trade. The railway company refused to receive coal billed to stations on its own line in Iowa in cars of other companies. The state Railroad Commission ordered it to accept such billing. It was held that the local billing was intrastate and that the Railroad Commission had jurisdiction over the subject. The decision was controlled by the following finding of the Railroad Commission, which the court approved:

"Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport." 233 U. S. 342, 34 Sup. Ct. 594, 58 L. Ed. 988.

[1] Neither of the cases cited governs the present controversy. It is well settled that the essential character of commerce, as disclosed by all the facts, and not its incidents, such as local or through bills of lading, determines its character as interstate or otherwise. *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Louisiana R. R. Comm. v. Tex. & Pac. Ry.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; *Atchison, Topeka & S. F. Ry. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

In this instance, Kansas City was at no time the destination of the horses, any more than it was the destination of the household goods in the same car. All the articles in the car were destined from the beginning for Princeton. To avoid the burdens of inspection, the plaintiff at first intended to change the method of transporting the horses on arrival at Kansas City, but with the exception that the horses were to be unloaded there for driving, all the property placed in the car started on a continuous journey, not to Kansas City, but to Princeton. On the way to Kansas City, or on arrival there, the plaintiff concluded not to substitute driving for railway transportation of the horses from Kansas to Princeton, and the car with its

original contents proceeded uninterruptedly to its previously determined destination. The necessary rebilling was a mere incident to the shipment as to both the horses and the household goods. In taking the car from the Frisco, the Santa Fé was apprised of the fact that it was completing a shipment originating on that road. To hold that the Santa Fé billing was an independent, intrastate matter would open the way to evasions which would deprive Congress of control over interstate commerce.

[2] The bills of lading issued by both railroads required an action to be commenced within six months. This was not done. There was evidence of conduct on the part of Santa Fé employes which under local rules might have amounted to a waiver of the limitation. Since the shipment was interstate, the railway company could not favor the plaintiff by granting him a grace period within which to bring suit. It is said there was no evidence that the form of contract used was the form adopted for interstate shipments. Neither was there any evidence that it was not the form adopted for completing interstate shipments received by the Santa Fé at Argentine and requiring rebilling. Illegal preferences by the railway company will not be presumed, and, the shipment being governed by federal law, which condemns discrimination by waivers of contract limitations, the parties were bound by the contract made.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant. All the Justices concurring.

DEVER v. EUREKA BANK. (No. 20818.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. LIS PENDENS §24(1) — PURCHASE PENDING SUIT—RIGHTS.

One who purchases property pendente lite is bound by the decree in the pending suit, and that decree is not subject to collateral attack at the instigation of the purchaser.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 38, 42, 44.]

2. LIS PENDENS §24(2) — FORECLOSURE — SALE—INTEREST OF MORTGAGOR—COLLATERAL ATTACK.

Where irregularities occur in a sheriff's sale of property which has been subjected to mortgage foreclosure, one who purchases the interest of the mortgagor in the foreclosure suit after the mortgagor as defendant has been served with summons must make his complaint of such irregularities in the foreclosure suit, and will not be heard to complain thereof by a collateral attack in an independent action against the grantee holding the sheriff's deed pursuant to the mortgage foreclosure sale.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 39.]

Appeal from District Court, Clay County.
Action by Joseph M. Dever against the

Eureka Bank to quiet title to property acquired by him pendente lite, and cross-action by defendant to quiet title and for possession. Judgment for defendant, and plaintiff appeals. Affirmed.

George L. Davis, of Clay Center, for appellant. R. P. Kelley, of Eureka, and F. L. Williams, of Clay Center, for appellee.

DAWSON, J. This is an action by plaintiff to quiet title to property acquired by him pendente lite, and a cross-action by the defendant to quiet title and for possession on a title founded on a sheriff's deed. The plaintiff claims title and possession of certain fractional town lots in Clay Center by virtue of a deed procured by him from one Paul W. Wolff while the latter was a defendant in a mortgage foreclosure suit brought by one George W. Hanna, which sought to subject these lots to the satisfaction of a debt secured thereby. Wolff had been served personally with summons before executing the deed to plaintiff. The defendant bank was a defendant and cross-petitioner in Hanna's mortgage foreclosure suit, and was awarded a lien on the town lots in question, subject to the prior lien held by Hanna, and subject also to another lien superior to both, but which was not then in controversy.

The property was ordered sold to satisfy Hanna's mortgage, the defendant's lien, and other claims. The defendant bought the property at sheriff's sale. Its bid was \$1,000, and the sheriff's return so recited. Later the bank filed a motion reciting that its bid of \$1,000 was a mistake, and that it intended to bid \$1,917.50, and asked leave to increase its bid, and that the sheriff's return be amended to show a sale of the property at the latter price. This was allowed, the sale confirmed, and a sheriff's deed issued to the bank. The defendant claims title and the right of possession under the sheriff's deed. The court gave judgment for the bank, and the plaintiff appeals, on the ground that the district court had no authority to permit the bank to raise its bid in purchasing the property at the foreclosure sale, that the court had no power to permit the sheriff to amend his return, and that the decree confirming the sale was void.

[1] The plaintiff purchased the title of Paul W. Wolff pendente lite. He stepped into Wolff's shoes, and acquired no better claim to the property nor any better position than Wolff's. Civ. Code, § 86 (Gen. St. 1909, § 5679). He is as much bound by the proceedings in the foreclosure suit as if he were an active participant and litigant therein. *Bell v. Diesem*, 86 Kan. 364, 121 Pac. 335, syl. par. 4. The proceedings were not void. At most they were irregular, although that point need not be decided. This case amounts to no more than a collateral attack, and as such it cannot prevail. *Paine v. Spratley*, 5 Kan.

525; *Anthony v. Halderman*, 7 Kan. 50; *Wilkins v. Tourtellott*, 42 Kan. 176, 22 Pac. 11; *Bank of Santa Fé v. Haskell County Bank*, 51 Kan. 50, 32 Pac. 627; *Rhodes v. Spears*, 63 Kan. 218, 65 Pac. 228; *Beal v. Jones*, 98 Kan. 582, 158 Pac. 1113; *Sheehy v. Lemons*, 99 Kan. 283, 161 Pac. 662.

[2] If there was any irregularity in the Hanna foreclosure suit that case furnished the opportunity for the plaintiff, as Wolff's grantee, to complain. As Wolff's grantee he now invokes the aid of a court of equity, but he does not offer to do equity. The defendant has paid its money into court, and the money has been applied to satisfy Hanna's judgment against Wolff, to the satisfaction of defendant's judgment against Wolff, and to the satisfaction of other debts and claims against Wolff, which were also determined in Hanna's suit. Neither in Hanna's case nor here does the plaintiff offer to return that sum or any part of it. While these reasons do not include all that might be said on this unusual but simple case, they will serve to show that the judgment of the district court was correct.

Affirmed. All the Justices concurring.

HAGLUND v. BURDICK STATE BANK
et al. (No. 20753.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. ARREST §39 — SUPPLEMENTAL PROCEEDINGS—IMPRISONMENT—STATUTE.

In a proceeding supplemental to execution, a sheriff holding a warrant issued under the provisions of section 7429, Gen. St. 1915 (Code Civ. Proc. § 525), authorizing him to arrest the debtor and bring him before the probate judge, has no power to imprison the debtor in the county jail, even temporarily for safe-keeping; and this is true, although the arrest be made at a distance from the county seat, which the sheriff, returning with the debtor in custody, cannot reach until late at night, when the probate judge would not be at his office.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. § 94.]

2. FALSE IMPRISONMENT §40—INSTRUCTIONS—EVIDENCE.

An instruction to the jury complained of was properly given, and findings of fact returned by the jury were sustained by the evidence.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. § 119.]

Appeal from District Court, Morris County.

Action by Victor H. Haglund against the Burdick State Bank and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Anderson & Lindquist, of Council Grove, and Clad Hamilton and Clay Hamilton, both of Topeka, for appellants. C. B. Daughters, of Manhattan, and Stanley & Stanley, of Kansas City, for appellee.

BURCH, J. The action was one for damages for false imprisonment. The plaintiff recovered, and the defendants appeal.

The plaintiff resided in Kansas City, Mo., and at the inception of the proceedings resulting in his imprisonment was visiting his father, Charles Haglund, who resided at Burdick, a city in Morris county, 26 miles distant from Council Grove, the county seat. The Burdick State Bank was located at Burdick. E. T. Anderson was its cashier. Edwin Anderson was the cashier's brother, and an attorney at Council Grove. The bank held an unsatisfied judgment, rendered on a promissory note given by the plaintiff, and instituted proceedings against him in aid of execution. Instead of taking an order of appearance for examination, the bank, through the attorney, procured a warrant of arrest to be issued and placed in the hands of the sheriff, under the provisions of section 7429, General Statutes 1915 (Code Civ. Proc. § 525), which reads as follows:

"Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the judge may, upon proof to his satisfaction, by affidavit of the party or otherwise, that there is danger of the debtor leaving the state, or concealing himself, to avoid the examination herein mentioned, issue a warrant requiring the sheriff to arrest him and bring him before such judge, within the county in which the debtor may be arrested. Such a warrant can be issued only by a probate judge or the judge of the district court of the county in which such debtor resides or may be arrested. Upon being brought before the judge, he shall be examined on oath, and other witnesses may be examined on either side; and if on such examination it appears that there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment, he may be ordered to enter into an undertaking, in such sum as the judge may prescribe, with one or more sureties, that he will, from time to time, attend for examination before the judge or referee, as shall be directed. In default of entering into such undertaking, he may be committed to the jail of the county, by warrant of the judge, as for a contempt."

The warrant was issued at about 5 o'clock in the afternoon of June 15, 1914, and the plaintiff was arrested at his father's house in Burdick at about 7 o'clock in the evening. The sheriff told the plaintiff he could pay \$600 or go to Council Grove. The plaintiff said he would go to Council Grove. When the plaintiff and the sheriff reached the sheriff's automobile, standing in the street, the cashier of the bank was there. The plaintiff's father was a depositor, having funds in the bank to the amount of \$600. The cashier made a talk to the plaintiff about the disgrace of being taken to Council Grove and put in jail, and asked if it would not be better to pay the note, or have his father pay it. The plaintiff owned nothing at the time, except some lots in Illinois which he had traded for. They cost him \$1,500, and were assessed at \$1,200. His papers were in the house, and he went for them. When he produced them, the cashier observed that the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

plaintiff's name was not in the deed, and the deed had not been recorded. The cashier urged the plaintiff to pay, and urged the plaintiff's father to pay, to save all the trouble of having to go to Council Grove. The plaintiff's father was willing to pay if the plaintiff would request it, but the plaintiff preferred to go to Council Grove. The plaintiff had read the warrant and understood he would be taken before the probate judge. An accident to the automobile caused delay, and Council Grove was not reached until about 11 o'clock at night. The sheriff placed the plaintiff in the county jail and locked him in. About 7 o'clock the next morning the sheriff called the plaintiff for breakfast and the plaintiff ate breakfast in jail. After that the plaintiff saw no one until about 10 o'clock in the forenoon, when the sheriff admitted the attorney for the bank into the jail. The attorney remained in the jail talking to the plaintiff until about noon, the sheriff being present part of the time. Among other things, the attorney said it would be better for the plaintiff to have the attorney telephone the plaintiff's father at Burdick to pay the note than for the plaintiff to be kept in jail, and that the plaintiff was to be kept in jail until the note was paid. Because of the threat to keep him in jail until he did it, the plaintiff gave the attorney permission to telephone the plaintiff's father. About noon the probate judge, who had issued the warrant, heard from some source that the plaintiff was in jail. He went to the jail, procured a key from the women there, went in, got the plaintiff, and took the plaintiff to his office, arriving there about 1 o'clock in the afternoon. Some time afterward the attorney came to the probate judge's office, told the plaintiff his father had settled the note, and said the plaintiff could go back to Burdick at any time. The attorney had telephoned the cashier at Burdick, and the cashier had interviewed the plaintiff's father. The plaintiff's father related the conversation as follows:

"He told me Vic was in jail, and it would be the best thing if you go over to the bank and would write out a note, and then they will let him out. And another thing he says, 'He ain't got no folks in there, and nobody knows him there,' he says: 'I don't like to sign any note,' says I, 'because he says last night that he didn't want to ask me to do it.' 'Well, you had better come over to the bank, and you sign a note, and then I will telephone to Council Grove, and he will get out and be free.'"

The bank collected from the plaintiff's father the sum of \$600, which the jury found to be \$124.10 more than the debt, with interest, to the time of satisfaction. The plaintiff settled with his father for the money which his father paid. This story is taken from the evidence favorable to the plaintiff, upon which, under the familiar rule, it is assumed the verdict in favor of the plaintiff rests.

[1] The jury were instructed that, notwithstanding the fact the sheriff arrived at

Council Grove with the plaintiff in the nighttime, when the probate judge would not be at his office, the sheriff had no right to lock the plaintiff in jail and keep him there until the next day. The defendants say the instruction was wrong, and was prejudicial. In view of other instructions given, it is not entirely clear that the instruction complained of would have been prejudicial, if erroneous; but it was not erroneous. Imprisonment under civil process still occupies a restricted field in the jurisprudence of this state, but none of the restrictions will be removed and the field enlarged by judicial interpretation. In the case of *Hynes v. Jungren*, 8 Kan. 391, the action was one for false imprisonment. In a civil action for debt, Hynes procured the arrest of Jungren on process issued to a constable by a justice of the peace. The syllabus reads:

"Where an order of arrest commands the officer to arrest the debtor and take him forthwith before the justice, the officer is not justified in arresting and confining him in jail." Paragraph 2.

In the opinion it was said:

"The judge charged the jury that the original process in the hands of the constable justified him in making the arrest and obeying its commands. This, to say the least, was as favorable to plaintiffs as the facts would permit. * * * The order of arrest commanded the constable to arrest Jungren and bring him forthwith before the justice. Instead of so doing, he, in conjunction with Hynes, carried him to the county jail, and kept him there for a part of a day before taking him to the justice. The excuse which they attempted to make on the trial in the district court was that Jungren was intoxicated. In reference to this the learned judge charged the jury as follows: 'This, if true, would be no justification to disobey the command of the writ, and incarcerate the plaintiff in jail, and keep him there excluded from counsel and friends.' This we think is correct. It was the duty of the constable to take his prisoner *forthwith* before the justice; and if the latter found him to be in such a condition as not to be able to protect his rights in court, he could make such order for his safe-keeping, and for a postponement of the case, as should be right and proper." 8 Kan. 395.

In the present case the warrant required the sheriff to arrest the plaintiff and bring him before the probate judge. The warrant was the measure of the sheriff's authority. He could arrest the plaintiff and take him before the probate judge, but nothing more. He could not incarcerate the plaintiff for any purpose. Furthermore, the probate judge could not order incarceration of the plaintiff, except as for contempt for disobedience of an order made after the plaintiff had been brought before him for examination. In arrest and bail cases, the statute authorizes the sheriff to commit the defendant to jail, to be kept in custody until discharged by law. Civ. Code, § 154 (Gen. St. 1915, § 7046). In case of execution against the person, the execution authorizes the sheriff to commit the execution debtor. Civ. Code, § 507 (Gen. St. 1915, § 7411). The power to commit to jail was withheld from the sheriff in supple-

mental proceedings of the kind invoked by the Burdick Bank, and the defendant could be restrained of his liberty no further than the statute, and the warrant issued in compliance with the statute, required. The road to the probate judge and the road to the county jail were separate roads, and the sheriff could not abandon the one, because night inconveniently overtook him, and take the other.

The defendants cite the case of Grab v. Lucas, 156 Wis. 504, 146 N. W. 504, in which it was said:

"Officers having persons under arrest in their custody may lawfully place them for safe-keeping in any proper and suitable place, such as a city or county jail; otherwise, they could not be safely kept. While the primary function of a jail is a place of detention for persons committed thereto under sentence of a court, they are also the proper and usual places where persons under arrest or awaiting trial are kept till they appear in court and the charge against them is disposed of." 156 Wis. 506, 146 N. W. 505.

In that case the defendant had been arrested on civil process, had been taken before the justice of the peace issuing the process, and had been committed to the custody of the constable for failure to give the bond required of him. The defendant was in default for failure to comply with an order of court, and safe-keeping was the purpose of his detention.

In this case, the plaintiff occupied the legal status of the defendant in the case of Hynes v. Jungren, who was put in jail while on the way to the court which had required his presence. The defendants ask: What was the sheriff to do? The answer is: Do what the warrant directed, and, if delayed in reaching or finding the probate judge, do as the sheriff would have done, if unable to get to Council Grove at all the night of the arrest. Invasion of a debtor's liberty by merely taking him to a court to be examined respecting his property is so slight, and is attended with so little loss of respect and self-respect, while invasion by imprisonment in the county jail is so great, so odious, and attended by so much opprobrium, that the court declines to recognize power to imprison as an incident to the authority vested in the sheriff by a warrant issued under the statute quoted. If the statute be weak, the Legislature can make it as drastic as may be desired, keeping in mind, however, the constitutional provision prohibiting imprisonment for debt except in case of fraud. Bill of Rights, § 16.

[2] The court instructed the jury that, if the defendants did not direct the sheriff to imprison the plaintiff, or to keep him in prison after he was there, the sheriff alone, who was not sued, would be liable for the illegal detention. This instruction is complained of. It was given for the benefit of the defendants, who gave testimony sufficient

to relieve them from liability, if the testimony were believed and the instruction were followed.

The verdict was for \$1,635.26, \$1,500 plus \$135.26, the amount, with interest, which the bank collected above the full amount of its debt. The jury returned the following special findings:

"1. What was the amount of the judgment and costs upon which the proceedings set out in the plaintiff's petition were had?"

"Answer: \$475.90.

"2. What was the sum paid to the bank by Charles Haglund, for his son Victor?"

"Answer: \$600.

"3. If the payment referred to in the last question exceeded the amount due on the judgment in question, how much was the excess?"

"Answer: \$124.10.

"Apply on No. 3, \$11.16 interest, excess \$124.10; total \$135.26."

It is said there was no evidence to sustain the first and second findings, and that as a consequence the verdict should be set aside and a new trial granted. There is no ground whatever for the challenge to the second finding. The proof was abundant and clear, and in fact there was no dispute about the matter. Documentary evidence furnished data for the computation, the result of which was stated in the first finding, and the question really called for nothing but the result of a mathematical calculation. As a matter of fact, the third finding is \$5.51 too large. If the error in calculation had been called to the attention of the trial court, doubtless the judgment would have been reduced accordingly. Modification of the judgment by this court is not requested.

The judgment of the district court is affirmed. All the Justices concurring.

SCHENCK v. SCHOOL DIST. NO. 34 OF HAMILTON COUNTY et al. (No. 21162.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

JUDGMENT — § 517—JURISDICTION—COLLATERAL ATTACK—GROUNDS.

A judgment rendered by a court having jurisdiction of the parties and subject-matter is not open to collateral attack on account of illegality or fraud which was in issue and open for consideration in the trial in which the judgment was rendered, although such judgment may have been taken by default or consent on the day following the bringing of the original action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 959, 960.]

Appeal from District Court, Hamilton County.

Action by Eugene Schenck, Sr., for injunction against School District No. 34 of Hamilton County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. Easton Hutchison and C. E. Vance, both of Garden City, for appellant. George Getty, of Syracuse, and H. E. Walter, of Kingman, for appellees.

JOHNSTON, C. J. This was an action by Eugene Schenck, Sr., to enjoin the collection of a tax levied for the purpose of paying two judgments rendered against the defendant, school district No. 34 of Hamilton county. Plaintiff appeals from the ruling sustaining a demurrer to his evidence and the holding that the judgments sought to be enjoined are not open to collateral attack.

The judgments on account of which the tax was levied were obtained by Ross, who built a new school building for the district and by Ford who furnished the material for its construction. It was alleged that the judgments were fraudulently obtained through the collusion of the plaintiffs in those actions with the director and treasurer of the district, who knew that the contracts upon which the judgments were based were void because they were entered into by the director and treasurer without any authority "from a district meeting or meeting of the district board of said district," and that "the construction of such a schoolhouse had not been authorized by the voters of said district, and no provision had been made at any district meeting for funds to construct the same, and that said contracts and all alleged indebtedness incurred by said director and treasurer in and about the construction of said schoolhouse were and are wholly null and void as against said district."

It appears that school district No. 34 comprises territory 8 miles long and 5 miles wide. The district had a school building in the eastern part of the territory, and at their annual meeting in April, 1916, the electors voted in favor of erecting another building in the western part of the district and that the selection of a site should be left to the decision of the board. At a meeting of the board held on July 6, 1916, it was voted that the new schoolhouse should be located at a certain point in the west end of the district, and that a frame building 34 feet long, 18 feet wide, and with 10-foot studding should be erected. The district was then without funds, but the electors voted a levy of 12 mills for general school purposes. At an election held in June, 1916, a proposition to issue bonds in the amount of \$800 to pay for the new school building was voted down. Shortly after the selection of a site and the decision of the board as to the size and character of the new building a majority of the board entered into the contracts with Ross and Ford, who thereafter built a frame building of the size mentioned. In the minutes of the board meeting of July the clerk made a note that he objected before witnesses to building a schoolhouse of that size.

At a board meeting held on September 5th it was voted to allow warrants for the cost of the material and labor for the building, the clerk voting against the measure, and soon thereafter a teacher was hired, who began work as early as September 11th, since which time the schoolhouse has been in use by the district. On September 22, 1916, Ross and Ford each brought an action against the district, and on the next day the board had a meeting not attended by the clerk, when they voted to ratify the contracts with Ross and Ford and the action taken by the director and treasurer in respect to the contracts, and the building was accepted. They also voted to empower the director to employ counsel to look after the interests of the district in the actions brought by Ross and Ford "either by suit or compromise." On the same day the board's attorneys entered into a stipulation with the plaintiffs in the actions mentioned wherein it was agreed that the cases should be tried immediately without a jury. At the trial the plaintiffs were each awarded judgment; the district filing no answers and offering no evidence. To pay these judgments the board on September 27th authorized a tax levy of 8½ mills, which is the tax sought to be enjoined in this action. After the judgments were secured the clerk issued a call for a meeting to be held on October 2d, pursuant to a petition signed by over ten of the taxpayers of the district, at which meeting it was voted to disaffirm the contracts made by the board, and they also authorized the clerk and another to make application to the court to set aside the judgments.

The plaintiff contends that the contracts were void because the board acted without authority in the selection of a site, in that no provision was made as to the kind of a schoolhouse to be built, and in that no proper provision for funds to pay for the building had been made. It is also contended that the judgments were procured and entered by fraud and collusion.

This proceeding is a collateral attack upon judgments that are regular and valid upon the face of the record. The court which rendered them had jurisdiction of the parties and of the subject-matter, and its decisions are not open to collateral attack unless they were procured by fraud. The fraud available in such an attack is what has been called extrinsic fraud, but relief against a judgment cannot be had for intrinsic fraud, something which was in issue and might have been decided at the trial at which the judgment was rendered. Acts of illegality and other matters which might have been interposed in those actions are foreclosed by the entry of the judgments so long as they stand unreversed. *Snow v. Mitchell*, 37 Kan. 636, 15 Pac. 224; *In re Wallace*, 75 Kan. 432, 89 Pac. 687; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546; *Weedman v. Fowler*, 84

Kan. 75, 113 Pac. 390; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93.

It is contended that the judgments in question were founded upon acts of the school board which were not warranted under the law and were not performed in good faith, but these were defenses which might have been made in the district court in the cases wherein the judgments were rendered and were open to review here upon appeal.

In *Elder v. Bank of Lawrence*, 12 Kan. 242, it was decided that a judgment based on transactions which were forbidden by law and on securities that were void—matters that might have been set up and determined in the case—cannot be set aside in an injunction proceeding.

It has been decided that an application for a mandamus to compel the levy of a tax for the payment of a judgment against a county could not be defeated by showing that the judgment against the county was based on a groundless claim, one for which no recovery could have been had if a defense had been made in the original action. *Investment Co. v. Wyandotte County*, 86 Kan. 708, 121 Pac. 1097.

In *Plaster Co. v. Blue Rapids Township*, 81 Kan. 780, 106 Pac. 1079, 25 L. R. A. (N. S.) 1237, it was ruled that fraud involved and open to determination in an action wherein a judgment was rendered is deemed to be intrinsic, and if error was committed and a wrong result reached it can be corrected only upon appeal. It was there held that a judgment obtained upon perjured testimony is a fraud which is inherent in the action and judgment which cannot be set aside in an injunction or other independent proceeding. See, also, *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681.

In an action on a judgment taken by default against defendant in a county other than that in which he resided it was held not to be a defense that the joinder of the two defendants was collusive to enable plaintiff to sue a nonresident out of the county wherein he resided, nor yet that after the judgment against him had been obtained the action was dismissed as to the other defendant. *Ayres v. Deering*, 76 Kan. 149, 90 Pac. 794. See, also, *In re Luttgerding*, 83 Kan. 205, 110 Pac. 95.

The fact that no defense was made by the board against the actions of Ross and Ford is not a sufficient ground for an attack upon the judgments in this proceeding. These parties had claims against the district for the material and labor used in the new school building which was then in use by the district. They brought their actions against a proper party in a court of competent jurisdiction, and the director, as he had authority to do, employed attorneys to represent the district. It is true that no answer was filed nor defense made, and according to

the testimony it may be said the judgments were taken with the consent of counsel for the district. However, the fact that no answer was filed and that the judgments were taken practically by consent so soon after the actions were brought is not good ground for treating them as void and setting them aside.

In *Armstrong v. Grant*, 7 Kan. 285, it was held that a judgment rendered by default on the return day of the summons, although seriously erroneous, was only voidable, and must be treated as valid when questioned collaterally. See, also, *Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 859.

It is also held that compromise judgments and those taken by consent in cases where the courts have jurisdiction are not open to collateral attack. *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; *Crouse v. McVickar*, 207 N. Y. 213, 100 N. E. 697, 45 L. R. A. (N. S.) 1159, case note 36 L. R. A. (N. S.) 980.

In several respects the action of the school board was irregular and illegal, and this action might have been available for the reversal of the judgment if an appeal had been taken in the original action, but under previous rulings of this court, the judgments, having been rendered by a court having jurisdiction of the parties and subject-matter, are not open to attack in this proceeding upon any of the grounds set forth by the plaintiff.

The judgment of the district court is affirmed. All the Justices concurring.

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HAMMOND et al. v. MARTIN et al.
(No. 20754.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

WILLS — 634(8)—CONSTRUCTION—RIGHT OF REPRESENTATION—HUSBAND.

Where a will devises a life interest to the testator's wife, with a remainder in equal shares to their five children, a provision that, if any of the children should die before the inheritance passed to them, the issue, if any, of such deceased child should take his share, even if construed to relate to the situation arising from death of a child after that of the testator and before that of the mother, does not prevent the spouse of a deceased child, who died after the father and before the mother, from inheriting the share of such child.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1496.]

Appeal from District Court, Doniphan County.

Action by Thomas B. Hammond and another against R. H. Martin and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Campbell & Campbell, of Wichita, for appellants. A. L. Perry and J. J. Baker, both of Troy, for appellees.

MASON, J. W. G. Hammond died, leaving a will purporting to devise a life interest in property to his wife, with a remainder to their five children, a provision being added that if any of them should die "before the inheritance passes to them" the child or children of such deceased child should take his share. One of the testator's children, Lura Hammond, died without issue, and intestate, after his death, and before that of his widow. In an action for the partition of a part of the property devised, the trial court decided that a fifth interest, being the share of such deceased child, belonged to her husband. From this ruling the other children of the testator appeal.

The exact language of the will, so far as it bears upon the question involved, is as follows:

"I also give devise and bequeath to my said wife, all the balance of my real estate including said sixty acres herein described and all the balance of my personal property for and during her natural life and widowhood, with remainder to our children, Thomas B., Robert C., Mattie, James, and Lura, share and share alike; and if any of said children should die before the inheritance passes to them I desire the child or children of said deceased, if any, shall take the share of such deceased parent. It is my express wish that none of the lands I have granted or devised to my wife shall be sold or incumbered by mortgage, during her lifetime but kept as an inheritance for the benefit of our children after we have both passed away."

If the will is construed according to the technical meaning of the terms employed, although the right of the children to the possession and enjoyment of the property was withheld during the life of their mother, the fee vested in them at the death of their father, and the expression "before the inheritance passes to them" relates to the time the testator died. Under this construction, as all the children survived their father, each at the time of his death took a one-fifth interest, subject to the life estate, and the share of Lura Hammond was inherited by her husband. But the appellants contend that the intent of the testator should control, and that in using the phrase "before the inheritance passes to them" he had in mind the time the children would come into the enjoyment of the property, rather than the time at which the legal title would vest in them; that he was thinking of conditions as they should exist when the mother died, rather than at the time of his own death. If it be assumed that this contention is sound we conclude that the judgment of the district court must still be upheld.

Assuming that by the phrase "before the inheritance passes to them" the testator meant the same as though he had said "before the children shall become entitled to the possession of the property," that is, before the death of the mother, the will made express provision that the share of a child who died before the mother, leaving issue, should go to such issue, but omitted to say in so many words what should become of

the share of a child who died at that time without issue. The disposition intended in that event is a matter of interpretation. The appellee maintains that as no other course was specifically indicated, the title should go to the heirs or assigns of the dead child, in this instance of her husband. The appellants contend that the title should go to the other children. The appellee's theory, in this aspect of the case, is that the will devised a fifth interest to each child, subject to a life interest in the mother, and to a restriction that if any child died before the mother, leaving issue, the whole of the fee should pass to such issue, a condition which it was competent for the testator to create (40 Cyc. 1593, 1683); in other words, that one-fifth of the remainder, or fee, vested in each child upon the death of the father, subject to being divested only by the death of such child before that of the mother, leaving issue. The appellants' theory is that if the fee vested in the children at the time of the father's death, it was subject to divestment as to any child by its death, with or without issue, before that of the mother; that the purpose of the testator was that when the mother died the property should pass to the children who were then alive and to the lineal descendants of any who were dead.

The circumstance that the testator named the children tends to show that he had in mind the devise of a fifth interest to each rather than of the entire property to a class. 40 Cyc. 1474, 1507. The wish expressed in the concluding sentence of the quoted portion of the will, with regard to the property being kept as an inheritance for the children, after the death of both parents, seem to have been suggested by an apprehension that the principal of the fund might be impaired, rather than that one of the children might dispose of its share by sale or will, or by remaining interest suffer it to pass to a surviving husband or wife. The decision, of course, must turn upon the construction of the particular language used, and the interpretation given to phraseology of the same general import is not controlling. In some of the cases relied upon by the appellants the wills involved contained provisions quite similar to those of the will under consideration, but all doubts as to the meaning intended were put at rest by specific clauses to the effect that, if any of the children should die without issue, prior to the death of their mother, its share should be divided among those then living. *Bullock v. Wiltberger*, 92 Kan. 900, 142 Pac. 950; *Lachenmyer v. Gehlbach*, 266 Ill. 11, 107 N. E. 202.

See, also, *Almand v. Almand*, 141 Ga. 372, 81 S. E. 228. In *Marsh v. Consumers' Park Brewing Co.*, 82 Misc. Rep. 198, 143 N. Y. Supp. 359, language is used sustaining the view of the appellants, but no question was there involved or discussed as to the effect

of the death of a child without issue. The point determined was that the children of a deceased child were entitled to the share it would have received had it survived the mother. In *Flanagan v. Staples*, 28 App. Div. 319, 51 N. Y. Supp. 10, the controversy was between the legatee and heir of a deceased child. (The decision in *Bowen v. Hackney*, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440, tends to sustain the appellants' position, but the language of the will there construed differed materially from that now under consideration. On the other hand, the interpretation contended for by the appellees finds support in *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, and the cases there cited. However, in the argument there presented perhaps more stress is laid upon the technical aspect of the matter than conformity to modern practice would suggest. As already indicated, we are of the opinion that the trial court correctly held that the surviving husband of Lura Hammond was entitled to the share of the property which she would have received if she had outlived her mother.

Complaint is made that the allowance made to the appellants' attorneys did not cover some items of expense. The abstract, however, does not present the evidence upon which the claim was based, and while the amount allowed is described as attorneys' fees, it may have been intended to cover expenses.

The judgment is affirmed. All the Justices concurring.

HEGWOOD et al. v. LEEPER et al.*
(No. 20828.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. MORTGAGES § 37(2)—DEED OR MORTGAGE—SECURITY—PAROL EVIDENCE.

An instrument in the form of an ordinary warranty deed may be shown to be in effect a mortgage, by oral evidence that it was intended as security for debts owing by the grantor to the grantee and to other persons, and may be enforced as such at the instance of any of the beneficiaries. The statute forbidding the creation by parol of express trusts concerning lands does not apply to that situation.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 98, 99, 101, 103-107.

For other definitions, see *Words and Phrases*, First and Second Series, *Mortgage*.]

2. MORTGAGES § 186(5)—PREFERENCES—EVIDENCE.

The evidence held to support a finding that no preference was intended between the several debts secured by a deed.

3. APPEAL AND ERROR § 1073(1)—HARMLESS ERROR—JOINT JUDGMENT.

The rendition of a joint judgment in favor of the plaintiffs, instead of a separate judgment for each in half the amount, held to have been nonprejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4240.]

4. MORTGAGES § 209, 277—LOSS OF LIEN—LIABILITY.

The court having found that the grantee of a deed, which was intended in part as security for debts owed by the grantor to third persons, had exchanged the land for another tract, which he caused to be conveyed, in satisfaction of his indebtedness, to a creditor of his own, who was conversant with all the facts, a judgment is held to have been warranted, holding both of them liable to the claimants whose liens were thereby lost.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 466-468, 726, 727.]

Appeal from District Court, Franklin County.

Action by Mrs. C. W. Hegwood and another against Truman E. Leeper and others. Judgment for plaintiffs, and Pearl S. Leeper and others appeal. Affirmed.

W. S. Jenks, of Ottawa, for appellants.
Noah L. Bowman, of Garnett, and W. B. Pleasant, of Ottawa, for appellees.

MASON, J. Truman Leeper and Pearl S. Leeper, his wife, executed to his father, J. M. Leeper, an instrument in the form of an ordinary warranty deed to a quarter section of land. The grantees afterwards conveyed the land to W. M. Glenn, receiving in exchange a deed to a town lot, valued at \$5,000, the title to which was taken in N. E. Stucker, an uncle of Truman Leeper, who canceled a debt of \$4,000 owed to him by J. M. Leeper, and paid \$1,000 to Glenn. Later Mrs. C. G. Hegwood and Perry Wilcox, the mother and uncle of Pearl S. Leeper, brought an action against all the persons named excepting W. M. Glenn, asserting that the deed from Truman Leeper and his wife to his father was in effect, by virtue of an oral agreement, a mortgage given to secure an indebtedness of \$2,700 owed by the grantors to him, and also two notes of \$900 each due from the grantors to the plaintiffs, and that by the transfer of the property they had wrongfully been deprived of their security, whereby a personal liability had arisen against J. M. Leeper, and also against Stucker, who had acted with full knowledge of the facts. The trial court found the facts to be substantially as stated by the plaintiffs, and as the land had been valued at \$4,000 in the trade with Glenn, that amount (subject to additions for income and to deductions for expenses, reducing it to \$3,907) should be regarded as a fund pledged to the payment of the \$2,700 (with interest \$2,914) due from Truman Leeper and his wife to his father, and of the plaintiffs' notes, amounting with interest to \$2,169. The security diverted having been sufficient to cover but 76⁸/₁₀ per cent. of the entire indebtedness, J. M. Leeper and Stucker were held liable for that proportion of the plaintiffs' claims, and judgment was rendered accordingly, from which this appeal is taken.

[1] 1. The principal contention of the ap-

pellants is that the plaintiffs could not have acquired a lien to the quarter section of land under the circumstances stated, because the arrangement relied upon would amount to an attempt to create an express trust concerning lands by parol, whereas the law makes a writing necessary to produce that result. Gen. Stat. 1915, § 11674. An oral agreement that J. M. Leeper, to whom the land was deeded, was to accept it as security for the payment of the indebtedness due from the grantors to himself and to the plaintiffs, implying as it does an obligation to hold the title for that purpose, and to account for the proceeds accordingly, results in a relationship which in a sense may be spoken of as an express trust concerning real estate. But we do not regard it as within the prohibition of the statute. In this state, and in most others where the matter has been passed upon, oral evidence is admitted to show that an instrument in the form of a deed was intended as a mortgage. And the practice is sustained not only against the objection that it violates the rule forbidding the varying of a written contract by parol, but also against the specific objection that it is within the prohibition of the section of the statute of frauds relating to the creation of trusts concerning lands. *Moore v. Wade*, 8 Kan. 380; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; 20 A. & E. Encycl. of L. 949, 953; 27 Cyc. 1006, 1023, 1034. See, also, 1 *Perry on Trusts and Trustees* (6th Ed.) § 76, p. 68, note a.

The circumstance that the deed was made to secure debts owing by the grantor to third persons as well as to the grantee does not in our judgment make it any the less a mortgage, or bring it within the prohibition of the trust statute. It is conceded that the deed was in effect a mortgage as between the grantors and the grantee, but the appellants contend that it was not a mortgage in favor of the plaintiffs. When proof was complete that the deed had been executed and accepted merely as security, its character as a mortgage was established. The reception of oral evidence that the plaintiffs were among the beneficiaries intended to be protected by it did not alter the essential nature of the court's action—did not convert it into a recognition of a trust concerning real estate created by parol in any different sense from that in which it might otherwise have been so characterized. "A deed from a debtor to a third person, if made to secure the payment of money, is as much a mortgage as if made to the creditor himself for the same purpose." 27 Cyc. 992; *Bradford v. Helsell*, 150 Iowa, 732, 130 N. W. 908. An agreement that a grantee is to handle land conveyed to him in the interest of certain designated beneficiaries, and in case of a sale to distribute the proceeds among them is ordinarily

an attempt to create an express trust, and must be in writing to be valid. *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804. But a deed intended as security, although made to a trustee, who by its express terms is authorized to sell the property and pay debts owed to the grantor and to other persons, is merely a mortgage. *McDonald & Co. v. Kellogg, Trustee*, 30 Kan. 170, 2 Pac. 507. "If land is conveyed by absolute deed, but with an agreement that the grantee shall effect a sale of it, and out of the proceeds satisfy an existing debt due to him from the grantor, or repay himself for advances then made to the grantor, and also pay other creditors of the grantor, and account to the latter for any surplus remaining after the payment of such debts and the expenses, it is generally held that the transaction is in the nature of a mortgage, and may be enforced as such in equity." 27 Cyc. 1004.

[2] 2. The appellants further contend that even if the plaintiffs were held to have had a lien upon the land, under the evidence it should have been found to be inferior to that of J. M. Leeper. There was positive testimony tending to show that such a preference was intended, but there was also evidence fairly warranting an inference to the contrary. In that situation the decision of the trial court must be regarded as final. The fact that the issue presented was one which the plaintiffs were required to support by more than a mere preponderance of the evidence does not enlarge the powers of the reviewing court, since there is always a presumption that the judgment was reached by the application of the proper test. *Wooddell v. Allbrecht*, 80 Kan. 736, 104 Pac. 559.

[3] 3. Complaint is made that although each plaintiff owned a note in which the other had no interest, judgment was rendered in their joint behalf for the combined amount. No change in the judgment is required, for it does not appear that any substantial prejudice could have resulted, or that this matter was called to the attention of the trial court.

[4] 4. An argument is made that the judgment rendered was inequitable, at least as to Stucker, particularly because it was found that shortly before the land was exchanged he had been advised by Truman Leeper and his wife that Mrs. Hegwood had released her claim against it, although she had not in fact done so. The trial court was justified in concluding that inasmuch as Stucker knew that the deed to J. M. Leeper was in effect a mortgage securing Mrs. Hegwood's note, as well as the other debts, he acted at his peril in accepting without further inquiry the statement that she had waived her rights in that regard.

The judgment is affirmed. All the Justices concurring.

LONG v. KANSAS CITY, M. & O. R. CO.
(No. 20811.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶959(4)—PLEADING
¶238(3) — DISCRETION OF TRIAL COURT —
TRIAL AMENDMENT.

After a case has been called for trial, it is within the judicial discretion of the trial court to refuse permission to amend pleadings so as to present new issues; and unless there has been an abuse of discretion, a new trial will not be ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3831; Pleading, Cent. Dig. § 601.]

2. ATTORNEY AND CLIENT ¶167(2)—ACTION
FOR FEES—SUFFICIENCY OF EVIDENCE.

The evidence introduced by the plaintiff proved the cause of action alleged in the petition; and a demurrer to the evidence was properly overruled.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 374.]

3. TRIAL ¶350(1)—SUBMISSION OF ISSUES—
PLEADING.

The special question submitted by the court was within the issues raised by the pleadings, and the answer of the jury was supported by evidence. There was no error in submitting the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 828.]

4. INSTRUCTIONS.

The instructions properly submitted the issues to the jury under the pleadings and the evidence.

5. ATTORNEY AND CLIENT ¶165 — ACTIONS
FOR COMPENSATION—ISSUES AND VARIANCE.

There was no variance between the petition and the plaintiff's evidence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365-367.]

Appeal from District Court, Sedgwick County.

Action by Chester I. Long against the Kansas City, Mexico & Orient Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John A. Eaton, D. W. Eaton, and H. J. Eaton, all of Kansas City, Mo., and Holmes, Yankey & Holmes, of Wichita, for appellant. A. M. Cowan, of Wichita, for appellee.

MARSHALL, J. The defendant appeals from a judgment against it for attorney's fees.

[1] 1. The defendant contends that the trial court abused its discretion in refusing to permit an amendment of the answer. The plaintiff alleged the incorporation of the defendant and the agency of a number of persons to act for it. The answer filed consisted of a general denial not verified. At the commencement of the trial the plaintiff dismissed that part of its cause of action depending on quantum meruit. The defendant's counsel then examined the petition, and noticed that it alleged that Arthur M. Wickwire was the duly authorized attorney and

agent of the defendant, and asked leave to amend the answer by verifying it so as to put in issue the agency of Wickwire. The court denied the application, and stated:

"We will try the case. If judgment goes against you, then you can file your motion for new trial. If there is a reasonable showing made that Mr. Wickwire was not the attorney for the Orient Railroad Company, so that that question should go to the jury, I would be inclined to grant a new trial."

The action was tried, judgment was rendered against the defendant, and a new trial was refused. On the hearing of the motion for a new trial it was established that Wickwire was not the attorney or agent of the defendant. Under the evidence the agency of Wickwire for the defendant was not material. This will more clearly appear from a statement of the facts established on the trial, and which are set out in another part of this opinion. The defendant's answer was filed December 21, 1915. On the day of the trial, March 30, 1916, and while a jury was being examined to try the case, the application to verify the answer was made. Even if the verification of the answer had been material, it was within the sound discretion of the court to permit the answer to be verified at the time the application was made. *Benfield v. Croson*, 90 Kan. 661, 136 Pac. 262; *Bank v. Badders*, 96 Kan. 533, 536, 152 Pac. 651; *Scott v. King*, 96 Kan. 561, 152 Pac. 653; *Bank v. Brecheisen*, 98 Kan. 193, 157 Pac. 259. There was no reversible error in refusing to permit the verification of the answer.

[2] 2. At the close of the plaintiff's evidence a demurrer thereto was overruled. Of this the defendant complains. The plaintiff's evidence—the defendant did not introduce any evidence—established facts as follows: For some time previous to the 6th day of July, 1914, receivers appointed by the United States District Court for the District of Kansas, were operating the Kansas City, Mexico & Orient Railway. While the receivers were in control of and operating the railway, a bondholders' or reorganization committee, representing the bondholders of the railway company, took charge of and perfected proceedings for the reorganization of a new railway company, which, when the property was sold, should become the purchaser and thereafter operate the road. The plaintiff was appointed attorney for the receivers within the state of Kansas, and acted in that capacity until the defendant, the reorganized company, took charge of the road, having purchased it on the 6th day of July, 1914. S. W. Moore, of Kansas City, Mo., was from the 6th day of July, 1914, until about the 1st day of December, 1914, the general solicitor for the defendant. On November 9, 1914, Mr. Moore appointed the plaintiff district attorney for Kansas for the defendant, the appointment to take effect

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

July 7, 1914. Under the terms of this appointment, plaintiff's charges were to be reasonable; and in case of dispute all controversies in reference to compensation were to be determined by the general solicitor for the company, whose determination should be binding on the plaintiff and the defendant. John A. Eaton, of Kansas City, Mo., succeeded S. W. Moore as general solicitor for the defendant. The plaintiff's appointment was terminated soon after Eaton was made general solicitor. A question arose and much correspondence was had between the plaintiff and Eaton concerning the plaintiff's claim for compensation for his services. Eaton directed the plaintiff to submit his claim to the bondholders' committee and to Mr. Untermeyer, of New York, the attorney for the committee. Untermeyer was an attorney of the firm of Guggenheimer, Untermeyer & Marshall. The plaintiff submitted his claim to Mr. Wickwire, an attorney in the office of Guggenheimer, Untermeyer & Marshall. Wickwire had charge of the business of the bondholders' or reorganization committee, and did most of the legal work for the committee. He and the plaintiff agreed on the amount that should be paid to the plaintiff by the defendant. A few days later the plaintiff told Eaton of the arrangement made with Wickwire, and asked Eaton if he would close the matter up. Eaton said that he would, and that he would present the matter to the board of directors at the earliest possible opportunity, so that the securities agreed on could be issued to the plaintiff. The matter then came up in court, on the settlement of the accounts of the receivers and their attorneys and the discharging of the receivers. The plaintiff had a claim for compensation for services rendered the receivers. In open court, in the presence of Eaton, the plaintiff stated that a settlement of his claim for compensation for services rendered the defendant had been made with Mr. Wickwire, and that a part of the arrangement was that the plaintiff should waive his claim for additional compensation for services rendered the receivers. The plaintiff waived that claim, and Eaton made no objection nor response. The defendant refused to comply with the arrangement made with Wickwire.

Although Wickwire was not the agent or attorney for the defendant, yet the general solicitor of the defendant referred the plaintiff for an adjustment of his claim to the firm with which Wickwire was connected. That adjustment was made and communicated to the defendant's solicitor, who by his words and conduct ratified and approved it and made it the contract and arrangement of the defendant. The facts established by the evidence were those alleged in the petition and proved a cause of action against the defendant. The demurrer to the evidence was rightly overruled.

[3] 3. The court submitted the following special question to the jury:

"Did the plaintiff in this action and John A. Eaton, the general solicitor of the Kansas City, Mexico & Orient Railroad Company, agree upon a settlement of the plaintiff's claim that is sued on in this action?"

The defendant insists that the special question asked by the court submitted an issue not raised by the pleadings, and that the answer of the jury was contrary to the evidence. It has been shown that the question was warranted by the plaintiff's evidence, and that the question was rightly answered by the jury. The fact established by the question and answer was alleged in the petition. There was no error in submitting that question.

[4] 4. Defendant contends that the instructions given by the court were contradictory, conflicting, misleading, and erroneous. The instructions have been examined. They were not contradictory, conflicting, misleading, or erroneous. They properly submitted the issues to the jury under the pleadings and the evidence.

[5] 5. Defendant insists that the cause of action pleaded was not proved. The petition alleged certain facts. These facts were proved substantially as alleged. There was no variance between the cause of action alleged in the petition and that proved by the evidence. In another part of this opinion the material facts established by the evidence have been detailed. Those facts were alleged in the petition.

The judgment is affirmed. All the Justices concurring.

SYLVESTER v. RIEBOLT et al. (No. 20559.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

JUDGMENT ~~ON~~ 298—CONTROL—TERM.

Rule applied that the district court has absolute control of its judgments during the term at which they were rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 582.]

Appeal from District Court, Sherman County.

Action by Frank Sylvester against William Riebolt, the Farmers' National Bank of Goodland, garnishee. From an order setting aside a judgment requiring garnishee to pay money into court, and for application of money to satisfaction of plaintiff's judgment against defendant, plaintiff appeals. Affirmed.

S. N. Hawkes, of Topeka, and John Hartzler, of Goodland, for appellant. E. F. Murphy, of Goodland, for appellees.

BURCH, J. The appeal is from an order setting aside a judgment requiring a garnishee to pay money into court, and for application of the money to the satisfaction of

a judgment in favor of the plaintiff and against the defendant.

Sylvester sued Riebolt for damages for breach of a covenant of warranty contained in a deed. The Farmers' National Bank of Goodland was garnished, and answered that it had funds in its hands to the amount of \$1,270, but was unable to determine whether the money belonged to Riebolt or to the Ramsey County State Bank of St. Paul, Minn. Judgment was rendered against Riebolt by default, and it was adjudged that the garnishment fund be paid into court, and then be paid to Sylvester. The latter portion of the judgment was complied with. The Ramsey County State Bank then moved for permission to interplead and have its right to the garnishment fund adjudicated. At the same time it filed an interplea, which prayed, among other things, that the judgment, so far as it related to the garnishment fund, be set aside. The judgment was set aside to that extent, and was set aside because the court had been misled concerning the character of the garnishee's answer.

The defendant Riebolt contends that the Ramsey County State Bank could not intervene after judgment, and that the court could not restore the garnishment fund to its treasury after the fund had been disbursed in accordance with the judgment.

The conclusive answer to this contention is that the judgment relating to the garnishment fund was set aside at the same term of court at which it was rendered. The journal entries show that the judgment and the order vacating it were both entered on adjourned days of the April, 1915, term of court.

It is scarcely necessary to cite authorities sustaining the plenary power of the court over its judgments during the term at which they were rendered. An admirable statement of the rule and the reasons for it, by the late Justice Benson when on the district bench, may be found in the case of *Cornell University v. Parkinson*, 59 Kan. 365, 53 Pac. 138:

"The first rule to be considered is this: The court has absolute control of its decrees and judgments during the term at which they are rendered; they are, as expressed by some writers, within the breast of the judge during the term. This is a wholesome provision of the law, and necessary to the administration of justice. In the hurry of business, and confusion incident to a term of court, it often becomes necessary to correct during the term the mistakes that have been made, and these can be corrected at any time during the term, and the term is only one day, in law, and persons who purchase property upon decrees must understand that rule, and purchase with reference to it." 59 Kan. 371, 53 Pac. 140.

A person who takes funds pursuant to a judgment, which may be set aside before the term closes, is in no better situation than a purchaser of property under such judgment.

It is said that no motion to set aside the

judgment relating to the garnishment fund was ever made by anybody. This was not essential. At the hearing on the application to intervene, the court discovered that it had been induced to misinterpret the garnishee's answer, which was the sole basis for the judgment relating to the garnishment fund. The court needed no prompting by motion of a party to set aside its mistaken judgment.

It is not necessary to consider the standing of an applicant to interplead in relation to a satisfied judgment, because the judgment purporting to conclude the interpleader in this instance is no longer in its way.

The judgment of the district court is affirmed. All the Justices concurring

McADOW v. KANSAS CITY WESTERN RY. CO. (No. 20772.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. ESTOPPEL \S 107 — PRINCIPAL AND AGENT \S 189(4) — PLEADING — AUTHORITY TO ENTER INTO CONTRACT.

The usual form of averment, that the contract sued upon was made by "defendant's duly authorized agent," or words of like import, is sufficient to sustain evidence of any appropriate manner of authorization short of estoppel, which must generally be pleaded before evidence thereof is admissible.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 297; *Principal and Agent*, Cent. Dig. \S 716, 717.]

2. APPEAL AND ERROR \S 1099(1) — SUBSEQUENT APPEAL — LAW OF CASE.

The former decision of this case, holding that "a railroad corporation has incidental power to contract with its own employees to pay them half wages during disability resulting from service accidents" (*McAdow v. Railway Co.*, 96 Kan. 423, 151 Pac. 1118), is applied as the law of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4370, 4374.]

3. PRINCIPAL AND AGENT \S 194(2) — ACTIONS AGAINST PRINCIPAL — INSTRUCTION — AUTHORITY OF AGENT.

In this case it is held there was sufficient evidence to justify the giving of an instruction substantially following the law, as declared in *Townsend v. Railway Co.*, 88 Kan. 260, 128 Pac. 389, syl. 2, that "an act is within the apparent scope of an agent's authority when a reasonably prudent person, having knowledge of the nature and usages of the business, is justified in supposing that he is authorized to perform it, from the character of the duties which are known to be intrusted to him."

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. \S 728, 729.]

4. APPEAL AND ERROR \S 1050(1) — PRINCIPAL AND AGENT \S 163(3) — AUTHORITY OF AGENT — EVIDENCE OF RATIFICATION — HARMLESS ERROR.

It is a general rule that an agent cannot ratify his unauthorized act, so as to bind the principal. If the defendant's superintendent had no authority to bind the defendant by the contract in question, his statements, made long afterward, would not amount to a ratification; but, evidence of his statements having been admitted

solely for the purpose of proving a demand, it is held there was no prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Principal and Agent, Cent. Dig. § 621.]

5. APPEAL AND ERROR §289 — ASSIGNMENT OF ERROR—EXCLUSION OF EVIDENCE—STATUTE.

Error cannot be predicated upon the rejection of testimony which is not produced at the hearing of the motion for a new trial. Civ. Code, § 807 (Gen. St. 1909, § 5901).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1691-1696.]

6. MASTER AND SERVANT §80(9) — ACTION FOR WAGES DURING DISABILITY — QUESTION FOR JURY.

The evidence being substantially the same as in the former hearing of the case, it is held sufficient "to take to the jury the question whether a railway company had contracted with an employé to pay him half wages during any disability resulting from an injury received in the course of his service." *McAdow v. Railway Co.*, 96 Kan. 423, 151 Pac. 1113, syl. 1.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118.]

7. DAMAGES §64 — FEDERAL EMPLOYERS' LIABILITY ACT—REDUCTION BY INSURANCE OR BENEFITS PAID.

The provision of section 5 of the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 66 (U. S. Comp. St. 1916, § 8661), "that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought" is construed, and held that, where a railway company has been sued under the federal statute by an employé to recover for injuries, it may not set off against the judgment the amount it owes such employé for insurance under a contract by which, in consideration of retaining each month a portion of his usual wages, it agrees to pay him half wages during certain periods that he is disabled by injuries in service; such contract containing no provision for releasing the company from its liability to such employé for injuries caused by its negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 118.]

Appeal from District Court, Wyandotte County.

Action by G. B. McAdow against the Kansas City Western Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Hutchings and McCabe Moore, both of Kansas City, Mo., for appellant. Emerson & Smith, of Kansas City, Kan., for appellee.

PORTER, J. G. B. McAdow was employed as a motorman, operating one of defendant's cars. On December 18, 1911, he was permanently injured in a collision between two cars, resulting from the negligence of other employés of defendant. In an action brought by him in Jackson county, Mo., under the act of Congress known as the federal Employers' Liability Act, he recovered a judgment against the defendant for \$7,500, which

was paid, and for which he gave his receipt "as full payment for all damages and injuries" sustained by reason of the accident. In July, 1913, he brought this action in the district court of Wyandotte county, alleging that when he entered defendant's employ the superintendent of defendant, J. W. Richardson, orally agreed that defendant was to pay him the usual and ordinary wages of motormen in its employ, less 50 cents a month, and "one-half of such usual ordinary wages during such time, not to exceed 52 weeks at one period, as the plaintiff was disabled from performing his usual and ordinary duties as motorman by reason of any injury that might be received by the plaintiff while in the performance of his regular duties." The petition then set forth the facts as to his injuries on December 18, 1911, that he was thereby disabled for more than 52 consecutive weeks, and alleged that by virtue of the oral contract defendant insured him for loss of time caused by such injuries, and was indebted to him in the sum of \$480.48, with interest, for which judgment was demanded.

The defendant's answer, besides a general denial, set up the judgment in the Missouri action, and alleged that the matters in controversy here should have been litigated there. It expressly denied that its superintendent was authorized to make the oral contract relied upon by plaintiff. As a further defense, it alleged that plaintiff is not entitled to maintain this action because of the provisions of the federal Employers' Liability Act upon which the action in Missouri was based. Section 5 of the federal Employers' Liability Act provides:

"That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought."

The answer alleged that in the Missouri action no sum of money which defendant paid to any insurance, relief benefit, or indemnity was set off or deducted from the amount of said judgment for \$7,500; that defendant had no knowledge or notice that plaintiff claimed or would claim defendant owed him any sum for insurance benefit or indemnity of any kind until after it had paid the judgment rendered against it in Missouri under the federal statute; that under the provisions of section 5 of the federal statute it was entitled to set off in that action all sums, if any, due plaintiff from defendant for insurance, relief benefit, or indemnity to which plaintiff was entitled on account of his injuries, and, the same not having been deducted therefrom, the plaintiff is not entitled to recover in the present action. The reply was a general denial.

The sole conflict in the evidence was over the questions: First, whether any contract such as plaintiff asserted was in fact made by the superintendent of defendant at the time plaintiff was employed; second, whether Richardson, the superintendent, was authorized to make such a contract. Upon these two issues the general verdict binds the defendant, unless one or more of the claims of error be sustained. At the first trial of the case the court directed a verdict for the defendant. That ruling was reversed and the cause remanded for a new trial. *McAdow v. Railway Co.*, 96 Kan. 423, 151 Pac. 1113.

[1] 1. The first question relates to the pleadings. The demurrer to the evidence was based in part upon the contention that there was no competent evidence that Richardson was "duly authorized" to make the contract sued upon. There was a verified denial of his authority. That he was superintendent, and was authorized to and did employ the plaintiff, is conceded; but in the state of the pleadings it is urged these admissions are not sufficient to prove his authority, or to justify an inference of his authority, to enter into a contract binding the defendant to insure the plaintiff. In the same connection it is claimed that it was error to admit evidence of facts tending to prove that defendant was estopped to deny his authority. It is said that plaintiff might have chosen to allege facts which, if proved, would estop defendant from denying such authority; but, having voluntarily chosen to allege that the superintendent was "duly authorized" to make the contract, it was incumbent upon him to prove the fact, even if an allegation to that effect was unnecessary, and that he cannot rely upon an implied authority. The cases of *Railway Co. v. Garrison*, 66 Kan. 625, 72 Pac. 225, and *Byland v. Powder Co.*, 93 Kan. 288, 144 Pac. 251, L. R. A. 1915F, 1000, are cited.

In the first of these cases the action was to recover against a railway company for fire damages and the petition alleged negligence in the operation of the engine by which the fire escaped. A motion to make more definite and certain having been overruled, the allegation was held insufficient to support a finding of negligence in the use of a defective spark arrester, and in view of such finding the overruling of the motion was held error. In the *Byland* Case it was held that plaintiff must prove the specific act of negligence, and cannot rely upon possible acts of negligence. In the case at bar there was no motion to require the petition made more definite. The expression "duly authorized" might mean expressly authorized, or authorized in any manner short of estoppel that would bind the defendant. In the absence, at least, of any motion to make more definite, we think the petition should be construed so as to permit evidence of implied as well as express authority, but not of estoppel to deny authority. The question of

the authority of an agent "is one of evidence, not of pleading." *Slevin et al. v. Reppy*, 46 Mo. 606. In that case it was said: "The material fact set forth in the petition is that defendant made the note, not how he made it—whether by his own hand or by that of his agent."

So in the case at bar plaintiff might have declared on the contract as made by defendant or by defendant through its agent. 16 *Encycl. Pl. & Pr.* 899. In *Childress v. Emory*, 8 Wheat. 642, 670, 5 L. Ed. 705, it was said in substance that the better form of allegation is that the contract was entered into by defendant through his agent duly authorized by him in that behalf. In *Seeber v. Commercial Nat. Bank (C. C.)* 77 Fed. 957, it was held that under an allegation that defendant in the name of "O. E. Hill, Cas.," entered into the contract any appropriate authorization may be given in evidence. The usual form of averment, that the contract was made by defendant's duly authorized agent, or words of like import, must be held sufficient to sustain evidence of any appropriate manner of authorization short, at least, of estoppel, which must generally be pleaded before evidence thereof is admissible.

[2] 2. The proof at both trials was substantially the same, and in the former opinion it was held that:

"A railroad company has incidental power to contract with its own employes to pay them half wages during disability resulting from service accidents." *McAdow v. Railway Co.*, supra, syl. 3.

This declaration must be held to be the law of the case, and it follows, too, that, if the corporation possesses such incidental power, it has also the same power to make such a contract in consideration of an arrangement as to monthly payments from the wages of its employes as the plaintiff testified to in this case. Some of the evidence will be referred to in connection with an instruction.

[3] 3. The court gave the following instruction, which is in substance the law as declared in *Townsend v. Railway Co.*, 88 Kan. 260, 128 Pac. 389, syl. 2:

"If you find from the evidence that, from the character of the duties that were intrusted to said Richardson as superintendent of the defendant, a reasonably prudent person, having knowledge of the nature and usages of the business in which defendant was engaged, would have been justified in supposing that said Richardson, as superintendent, was authorized to make the contract with the plaintiff, which the plaintiff alleges was made, then you should find that such contract if made as alleged by plaintiff, was made with the authority of the defendant."

It is claimed that this was error, because no evidence of any character tending to show any usages or customs of the business of defendant would have tended in the slightest degree to justify the plaintiff in supposing that Richardson was authorized to make the contract. There was evidence that Richardson was superintendent in charge at Leaven-

worth, that he employed and discharged all motormen, and that his duties were to operate the road. He testified that he posted over his own signature general orders governing the men, and that from 1905 he had been taking 50 cents out of the men's checks each month for one-half pay in case of injury, and that this practice continued "as long as we carried that insurance." It is the contention of the defendant, or it was claimed by Richardson, that the company carried an insurance policy for the benefit of the employes and that the 50 cents taken each month from their wages went to pay the premium. The policy was not introduced in evidence, a fact mentioned in the former opinion. We think there was sufficient evidence of the usage of the business of defendant in relation to its employes to justify the instruction.

[4] 4. Over defendant's objection plaintiff was permitted to testify that he had a conversation with Richardson, the superintendent, about three weeks after he had been injured; that Richardson came to see him, and said he would have come sooner, but was trying to get plaintiff's half time fixed up before calling; and that Richardson talked to him about a settlement for his lost time. If the evidence was introduced, as defendant insists, for the purpose of proving facts upon which to base an inference that defendant was estopped to claim the contract sued upon was never made, or to deny Richardson's authority to make such a contract, it was incompetent because, manifestly, if the superintendent had no authority in the first place to bind the defendant by making the contract, his statements made long afterward would not amount to a ratification. "An agent cannot as a general rule ratify an unauthorized act performed by himself so as to make his principal liable thereon." 31 Cyc. 1251. When the testimony was objected to, plaintiff's counsel stated that it was offered merely to prove that a demand was made on defendant. The court admitted it for that purpose only. The testimony contained no reference to a demand, and, moreover, the plaintiff proved a written demand upon defendant long afterward, on July 10, 1913. It is difficult to discover in what way the testimony was competent, and it is urged that its admission was prejudicial, because its effect was to lead the jury to believe that the alleged contract was made with defendant's authority. In view of the statement of the court that it was admitted solely for the purpose of showing a demand, we cannot say there was prejudicial error in overruling the objection.

[5] 5. Mr. Richardson was dead when the case was tried the second time, and his testimony taken at the former trial was read in evidence. He had testified that he had no authority to make the contract sued upon, and denied that he had made it. Mr. Her-

ron, who succeeded him, and who for several years had been his assistant, was a witness, and testified that he knew the authority possessed by Richardson as superintendent. He was asked whether his authority as superintendent was the same as Richardson's had been, to which the court sustained the objection that the question called for a comparison and conclusion of the witness. It is claimed this was error. From the abstract it appears there was no showing on the motion for a new trial what his answer would have been. Error cannot be predicated. Civil Code, § 307 (Gen. St. 1909, § 5901).

[6] 6. It is insisted there was no competent evidence to establish the authority of Richardson to make the contract. "Where general authority is established, and the act of the agent is not shown to be of an unusual or extraordinary character, the presumption is that the agent had authority to do such act." 31 Cyc. 1645. It was recognized in the former opinion that a railroad company has the incidental power to make contracts of this character with its employes. Richardson was shown to be the general superintendent in charge of the men, with power to employ and discharge them. The fact that he made the contract, which must be taken as established, notwithstanding the conflict in the evidence, and the fact that the company for several years retained out of plaintiff's wages the monthly payment, together with the fact that the company has not offered to return any part of it, were, we think, sufficient to justify a finding of implied authority in the superintendent to make the contract.

[7] 7. We come now to the principal contention of defendant. It is said that, prior to the enactment of the federal Employers' Liability Act, contracts were often entered into whereby, in consideration of insurance or indemnity benefits agreed to be paid by the railroad companies for loss of time occasioned by injuries in the service, the injured employe released the employer from all liability for damages resulting from such injuries; that in order to prevent the making of such contracts Congress enacted section 5 of the Employers' Liability Act, which is pleaded in the answer herein. Section 5 reads:

"That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

In view of "the old law, the mischief, and the remedy," it is claimed that while it was the intention of Congress to prevent the making of such contracts, or rather to prevent their interposition as a defense to an action under the Employers' Liability Act, it was also the purpose to permit the amount

of any damages recovered in such an action to be reduced to the extent of any sum paid or contributed by the railroad company for insurance, relief benefit, or indemnity. The action in Missouri was based upon the acts of Congress referred to. The defendant had no knowledge or notice, it is said, of the intention of plaintiff to look to it for payment of this indemnity or insurance in time to plead the amount as set-off in the former action; and, since it could not have been interposed as a defense, but only as a set-off, in that action, it is therefore available as a defense to the present action. If the defendant is correct as to the construction to be given to section 5 of the federal act and its application to the contract sued upon, the cases of *Boyd v. Huffaker*, 40 Kan. 634, 20 Pac. 459, and *Clifton v. Meuser*, 88 Kan. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124, are authorities which uphold defendant's contention of a right to interpose the set-off here, because the set-off is not barred by the former judgment, since it was not available as a defense, and could have been relied upon only to reduce the amount of the judgment in that action.

In *Atlantic Coast Line R. Co. v. Dunning*, 166 Fed. 850, 94 C. C. A. 128, it was held that, if an employé takes the benefit of a relief department, he thereby releases the railroad company from all liability for his personal injuries occasioned by the company's negligence. The case, however, was decided upon facts wholly dissimilar to those in the case at bar. By the terms of this contract Dunning agreed to release the railroad company from all liability for injuries sustained in the service. We have no way of determining that the contract sued on here contained any provision for releasing the defendant from liability for such loss of time. We know nothing concerning the provisions of the oral contract, save as testified to by the plaintiff. The defendant claims that all it ever agreed to do, and all that Richardson was authorized to do, or did, was to arrange to take out for the benefit of plaintiff and his fellow employes a policy of insurance covering any loss of time occasioned by injuries in the service and limited to the 52 weeks following the injury. But, as before observed, the defendant did not introduce the policy in evidence, and if it had done so the policy would not have disproved absolutely the plaintiff's claim of what the terms of his oral contract were. We cannot assume that the arrangement between Richardson and the plaintiff bound the plaintiff to release defendant from all liability for injuries caused by defendant's negligence. So, in the state of the record, we are unable to declare that section 5 of the act of Congress, upon which defendant bases this contention, has any application to the facts of this case, or could have been used as a ground for claiming the set-off in the Missouri action, even though defend-

ant had been aware of plaintiff's intention to assert the claim sued on here.

The defendant insists that:

"Regardless of whether a contract contains such a provision, a railroad is liable for damages under the federal statute, on the condition, however, that the railroad is entitled to set-off to the amount of the insurance, relief benefit, or indemnity, which such railroad has paid or is bound to pay."

The argument in support of this contention is ingenious, but not persuasive. We quote:

"It is true there was no such provision in said contract; but such a provision would have been illegal and void, after the passage of said federal act of 1908, so that, if the contract had contained such a provision, it would have been a provision which the courts would ignore; consequently it is entirely immaterial whether such contracts for insurance, etc., contain such provisions. Such a provision in contracts for insurance, etc., cannot be considered; therefore it is not material to the question of a set-off whether such a provision is or is not contained in contracts for insurance."

It is true the fact that a railroad company may not have intended to evade the federal statute does not affect the validity of the contract. This is the effect of the decisions declaring such contracts releasing railroads from liability void, whether made *before* or *after* the federal statute was enacted. If the contract operates so as to defeat the statutory liability, it is void, regardless of the intent of the parties. But it does not follow, we think, that the company is entitled to a set-off in cases where the contract contains no provision for releasing the company from liability. Nor do we think that this construction of the federal statute has the effect of offering to the company a reward or inducement for attempting to avoid its statutory liability, and denying the same reward to another company for not attempting to avoid its liability under the statute. The statute declares that all contracts for the payment of insurance, relief benefits, or indemnity, where the purpose is "to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void," coupled with the provision allowing a set-off for any sum paid or contributed by the carrier on account of the injury for which the action is brought. In *Phila., Balt. & Wash. R. R. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911, it was decided that it made no difference whether the contract for the insurance was made with the actual intent of the parties to circumvent the statute, if the effect of the contract would operate so as to defeat the liability created by the statute. If Congress had intended to give the set-off in all cases, regardless of the character of the contract, appropriate words would doubtless have been found to express that intent. As we construe the statute, the proviso applies only to contracts which enable the carrier to relieve itself of further liability.

Besides, the contract in this case was one of insurance pure and simple, by which

the company in consideration of the payment by plaintiff of a premium each month guaranteed to pay plaintiff for loss of time for a certain period upon certain conditions. It did not provide that plaintiff should accept his insurance in case of injury in lieu of his right to hold defendant for liability for the same injuries on the ground of defendant's negligence; and as said in the former opinion:

"The cause of action on the contract and that on the tort are entirely different and are independent of each other. The one is founded upon an agreement to pay a fixed amount (or an amount to be arrived at by a fixed standard) if disability is occasioned by an injury; the other is founded upon the obligation of a wrongdoer to make amends for the result of his misconduct. The circumstance that the same corporation happens to be charged both upon the contract and upon the tort does not affect the essential character of its liability in either aspect, or take the case out of the operation of the general rule." *McAdow v. Railway Co.*, supra, 96 Kan. page 426, 151 Pac. 1113.

For these reasons we conclude that defendant cannot urge the set-off, and that there was no error in refusing the instructions asked upon that branch of the case.

The judgment is affirmed. All the Justices concurring.

GARDNER et al. v. BOARD OF COM'RS OF CITY OF LEAVENWORTH et al.
(No. 20796.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — 538 — SPECIAL ASSESSMENTS—INJUNCTION—INQUIRY.

In an action to enjoin the collection of a special assessment for the cost of a sewer, on the ground that the amount is too large, the question whether by the adoption of a different plan the same benefits might have been obtained for the property in question, at a less cost, is not open to inquiry.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1194, 1253.]

2. MUNICIPAL CORPORATIONS — 536 — SEWER ASSESSMENT—INJUNCTION—GROUNDS.

The fact that the city has not supplied water for use in flushing is not a bar to the collection of special assessments for the cost of a sewer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253.]

3. MUNICIPAL CORPORATIONS — 538 — SEWER ASSESSMENT—RELIEF.

In an action to enjoin the collection of assessments against the property in a subdistrict for the cost of a lateral sewer, no relief can be had because of any inequalities in the apportionment of the cost of the main sewer, which has become final and unassailable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1194, 1253.]

Appeal from District Court, Leavenworth County.

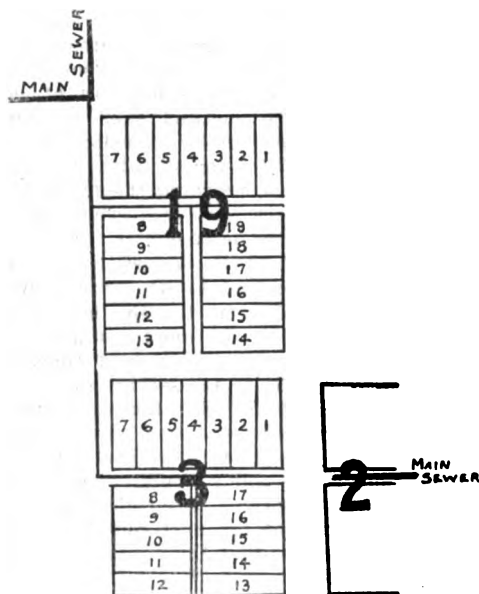
Action for injunction by R. E. Gardner and others against the Board of Commissioners of the City of Leavenworth and others. De-

murrer to plaintiffs' evidence sustained, and they appeal. Affirmed.

W. W. Hooper and J. A. Hall, both of Leavenworth, for appellants. C. P. Rutherford, of Leavenworth, for appellees.

MASON, J. The owners of a number of city lots in Leavenworth united in an action to enjoin the collection of special assessments levied to cover the cost of a lateral or tributary sewer. A demurrer to their evidence was sustained, and they appeal.

One of the appellants owns lot 12, lying in the southwest corner of block 3 in Rees, Doniphan & Thornton's addition. The others own various lots in block 19 of Day's addition, which lies just north of the block first described. The two blocks comprise a sewerage subdistrict. The main sewer, which was paid for by assessments levied upon all the lots within the sewer district, did not touch either of the blocks referred to, but one branch of it extended to a point across the street from the middle of the east side of block 3, and another to a point near the northwest corner of block 19. The lateral sewer for the subdistrict was constructed so as to discharge into the main sewer at the northwest corner of block 19, through a pipe laid in the street west of the two blocks. The situation is shown by the accompanying plat, the lines through the alleys and street showing the location of the lateral in question:



[1] 1. Testimony was given that it would have been practical and easy to connect the sewer in the east and west alley in block 3 with the main sewer which ended across the street from the middle of the east line of the block, as the ground sloped to the east, and

there was no obstruction in the street, and that this arrangement would have dispensed with the necessity for the lateral sewer running along the street west of the block. The plaintiffs argue that this evidence showed that at least a part of the sewer was unnecessary, and that their property should not be taxed with the cost of its construction. Whether the property in blocks 3 and 19 should have been connected with the main sewer lying east of block 3 or with that lying northwest of block 19 was a problem of engineering and administration, or perhaps of legislation, concerning which the decision of the municipal authorities, given in good faith, must be regarded as final, and not subject to review by the courts. 28 Cyc. 917; 4 Dillon's Municipal Corporations (5th Ed.) § 1739. Testimony that it would have been practicable and easy to connect the sewer in block 3 with the main sewer on the east has no tendency to show that the officials who were charged with the duty of adopting plans for the work acted in bad faith in deciding to have the connection made elsewhere.

[2] 2. There was also evidence that the city had not supplied water for use in the sewers in the blocks referred to, from which it is argued that they were of no benefit to the owners of the property in question. Even assuming that the practical value of the sewer depended largely upon the furnishing of city water for flushing purposes, the fact that the water had not yet been provided would not render the assessment of the tax illegal, for there would be a reasonable expectation that it would be supplied later. *Coates v. Nugent*, 76 Kan. 556, 563, 92 Pac. 597.

[3] 3. A further complaint of the appellants, as we understand it, is this: Each lot in blocks 3 and 19 was assessed in substantially the same amount (averaging about \$34) as the lots in block 2, which lies just east of block 3, to pay for the main sewer; the lots in blocks 3 and 19 are now charged with a further sum (said to be \$72, although we do not find the figures in the abstract) for a lateral sewer to connect them with the main sewer, while the lots in block 2, being adjacent to the main sewer, are subjected to no such additional charge; the owners of lots in blocks 3 and 19 are therefore required to pay \$106 for the same privileges acquired by the owners of lots in block 2 by the payment of \$34; this difference is too large to be accounted for as a mere error of judgment, and shows such unreasonable and arbitrary conduct on the part of the city officials as to invalidate the assessment. If any such inequality in fact exists it is obviously due to an unjust apportionment of the cost of the main sewer. These plaintiffs attacked the ordinance giving effect to that apportionment, but it was held that their action was begun too late to entitle them to relief. *Gardner v. City of Leavenworth*, 94 Kan. 509, 146 Pac.

1000. The assessments for the cost of the main sewer are no longer open to challenge. The assessments for the lateral are a distinct matter. *Coates v. Nugent*, supra. The evidence did not tend to show that they were unfairly made.

The judgment is affirmed. All the Justices concurring.

STATE v. COWAN et al. (No. 20906.)
(Supreme Court of Kansas. March 10, 1917.
Rehearing Denied April 13, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR — § 926(5) — TRIAL — § 48 — EVIDENCE — LIMITED APPLICATION — PRESUMPTION.

Evidence, admissible to establish one phase of a case and not of another, may be received and its application limited by the court in its instructions to the jury to the purpose for which it is competent; and, in the absence of the instructions, it may be assumed upon appeal that the court advised the jury that the evidence was confined to the purpose for which it was competent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3742; Trial, Cent. Dig. § 120.]

Appeal from District Court, Cherokee County.

Leck Cowan and Banty McCullough were jointly charged with being persistent violators of the prohibitory liquor law, and were convicted of an unlawful sale, and they appeal. Affirmed.

Al. F. Williams, of Columbus, for appellants. S. M. Brewster, Atty. Gen., and F. W. Boss, of Columbus, for the State.

JOHNSTON, C. J. In an information containing three counts Leck Cowan and Banty McCullough were jointly charged with being persistent violators of the prohibitory liquor law. One count was for an unlawful sale, and the other two charged the maintenance of nuisances at two places, but the defendants were convicted only of the sale.

Upon this appeal it is contended by the defendants that there was error in permitting the introduction in evidence of four search and seizure warrants issued against two places described in the nuisance counts. The objection is that the warrants tended to prove offenses other than those charged against the defendants. The warrants were evidently offered in support of the nuisance counts upon which no conviction was had. In connection with the introduction of the warrants the sheriff in whose hands they were placed testified that he went to the places named to serve the warrants, and found beer, whisky, and gin in considerable quantities, and these were found within the times named in the information during which the defendants were alleged to have maintained nuisances at these places. The returns on the warrants of the liquors found at the places would not have been proof of

the alleged nuisances, but the sheriff's testimony was that he found the liquors mentioned in the returns on the warrants, and his testimony was admissible as tending to establish the nuisance charges. In view of this testimony the statement in the returns on the warrants could hardly have been prejudicial to the defendants. The warrants which were introduced served to show the authority of the sheriff to make a search of the premises. It was within the province of the court to instruct the jury as to the application of the evidence to the several charges made against the defendants, and the defendants had the opportunity to ask the court to limit the application of the testimony; but in the absence of the instructions or any complaint of them, it may be assumed that the jury were advised that the warrants should only be considered in connection with the nuisance charges, and as to these the defendants have been acquitted.

The evidence not being preserved, it must also be assumed on this appeal that there was sufficient competent evidence of a first conviction and also of the sale of which the defendants were convicted.

Judgment affirmed. All the Justices concurring.

WALSH v. JOPLIN & PITTSBURG RY. CO.
(No. 20519.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1015(1)—**NEW TRIAL—SETTING ASIDE ORDER.**

Where a trial court grants a new trial for the reason that the verdict is not sustained by the evidence, but is contrary thereto, and for the further reason that the court erred in overruling a demurrer to the evidence, the order granting the new trial will not be set aside on the ground that the court did not err in overruling the demurrer to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3860-3866.]

2. APPEAL AND ERROR \S 1015(2) — **MOTION FOR NEW TRIAL—CONFLICTING EVIDENCE.**

Under the circumstances disclosed in the first section of this syllabus, an order of the trial court granting a new trial will not be set aside where the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3860-3866.]

Appeal from District Court, Crawford County.

Action by Mary T. Walsh, administratrix, etc., against the Joplin & Pittsburg Railway Company. Judgment for plaintiff, and from the granting of a new trial, she appeals. Affirmed.

W. P. Dillard, of Ft. Scott, L. H. Phillips, of Joplin, Mo., O. A. McNeill, of Columbus, and J. G. Sheppard, of Ft. Scott, for appellant. Ed C. Wright, of Kansas City, Mo., John P. Curran, of Pittsburg, A. H. Skidmore, of Columbus, and Charles L. Dort, of Kansas City, Mo., for appellee.

MARSHALL, J. The plaintiff appeals from an order granting a new trial. In this action, the plaintiff, as administratrix, seeks to recover damages, under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, \S 8657-8665]) for the death of her husband, Robert Henry Walsh. The cause was tried by a jury, and at the close of the plaintiff's evidence, a demurrer thereto, filed by the defendant, was overruled. A verdict was returned in favor of the plaintiff and special questions were answered. On the motion of the defendant, the court granted a new trial, on the ground that the verdict was not sustained by, but was contrary to, the evidence, and on the further ground that the court erred in overruling the demurrer to the plaintiff's evidence.

[1] 1. The plaintiff argues that the court did not commit any error in overruling the demurrer to her evidence. Even if the court was mistaken when it declared that the demurrer to the evidence should have been sustained, the plaintiff cannot complain of that mistake until judgment has been rendered against her.

[2] 2. The plaintiff insists that there was sufficient evidence to sustain the verdict, and that judgment should have been rendered in her favor. The question of whether there was or was not sufficient evidence to sustain the verdict will not be determined by this court under the order granting a new trial, for the reason that the evidence on the vital points in the case was very conflicting. Some of the evidence tended to sustain the plaintiff's petition, while much of it tended to show that the defendant was not liable. Under these circumstances, if, upon weighing the evidence presented, the trial court was dissatisfied with the verdict of the jury, it was his duty to set aside the verdict and grant a new trial. *K. C. W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108. Numerous other cases might be cited in support of this rule. One more is deemed sufficient. *White v. Railway Co.*, 91 Kan. 526, 138 Pac. 589.

The judgment is affirmed. All the Justices concurring.

DANIELSON et al. v. REICHERT et al.
(No. 20761.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES \S 117—**DESCRIPTION—CONSTRUCTION.**

A chattel mortgage on growing corn, described as "our undivided three-fourths interest in 100 acres of corn now growing on" a described quarter section of land, does not include the growing corn owned by the mortgagors on the remaining quarter sections of land in the same section, as against a subsequent attaching creditor, although there are but 10 acres of corn growing on the quarter section described,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

and there are 90 acres of corn owned by the mortgagor, growing on the other quarter sections in the same section.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 202.]

2. JUSTICES OF THE PEACE \Leftrightarrow 149(1)—RIGHT OF APPEAL.

In an action before a justice of the peace, third parties claiming attached property, who, on their application, are made parties defendant, have a right to appeal from a judgment rendered by the justice of the peace denying their claims to the property.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 504, 505.]

Appeal from District Court, Cheyenne County.

Action by Dero Danielson and others against Michael Reichert and others, E. D. Nixon and others, interpleading as parties defendant. Demurrer to the interpleaders' evidence sustained, and they appeal. Affirmed.

E. E. Kite, of St. Francis, for appellants.
J. L. Finley, of St. Francis, for appellees.

MARSHALL, J. In this case there are cross-appeals. The plaintiffs commenced an action before a justice of the peace, against Michael Reichert, on a promissory note, caused an attachment to be issued and levied on a crop of corn growing on the east half of section 34, township 2, south of range 40 west, in Cheyenne county. On the application of E. D. Nixon and B. L. Kreuscher, they were made parties defendant in the action. They filed a pleading in which they claimed a lien on the attached corn under a chattel mortgage given by Michael Reichert and his wife to secure the payment of a note for \$175. The chattel mortgage described the following property:

"Our undivided $\frac{3}{4}$ interest in 100 acres of fall wheat now growing on the S. E. 34—2—40, and our undivided $\frac{3}{4}$ interest in 100 acres of corn now growing on the S. W. of 34—2—40 owned entirely by us without any incumbrance except \$50.00 to Citizens' Bank."

The issue presented by the pleading of Nixon and Kreuscher was tried before the justice of the peace and determined against them. Within proper time they filed an appeal bond. The cause was transmitted to the district court, and there, under leave obtained, they filed an amended interplea, on which the issues between them on the one side, and the plaintiffs on the other, were tried and determined. Before the trial, the plaintiffs filed a motion asking the court to dismiss the appeal, for the reason that the law does not provide for an appeal in such a proceeding. This motion was denied. The evidence of Nixon and Kreuscher tended to show that it was their intention and the intention of Reichert and his wife that the chattel mortgage should cover Reichert's three-fourths interest in all the corn grown by him. There was only ten acres of corn grown on the southwest quarter of the sec-

tion. The court sustained a demurrer to Nixon and Kreuscher's evidence. From this they appeal.

[1] 1. Nixon and Kreuscher argue that the chattel mortgage covered all of Reichert's interest in the corn grown by him on all of section 34; that the description of the property contained in the chattel mortgage was erroneous; that by examining the ground cultivated by Reichert, it would be found that ten acres of the corn was on the southwest quarter, while the remainder of the corn was on other parts of the section. They contend that the plaintiffs, having acquired their interest in the corn subsequent to the filing of the chattel mortgage, were charged with notice of the mortgage lien on all the corn grown by Reichert.

The land described in the chattel mortgage was definite and certain. There was a mistake in the number of acres of corn growing on that land. The chattel mortgage did not attempt to describe corn situated on any other land. As between the parties thereto, the chattel mortgage might have been reformed. Reichert intended to mortgage all his interest in all the corn to Nixon and Kreuscher. The rule that an attaching creditor acquires a lien on the attachment debtor's right in the attached property, and on nothing more, is modified to some extent by section 6495 of the General Statutes of 1915, which provides that:

"Every mortgage * * * shall be absolutely void as against the creditors of the mortgagor, * * * unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated."

The mortgage deposited in the office of the register of deeds did not describe the corn growing on the east half of the section. Under the authorities, Nixon and Kreuscher's chattel mortgage did not cover that corn. Darr v. Kempe, 54 Ark. 91, 15 S. W. 14; Adams v. Commercial National Bank of Dubuque, 53 Iowa, 491, 5 N. W. 619; First National Bank v. Hendrickson, 61 Minn. 293, 63 N. W. 725; Redfield v. Montgomery, 71 Miss. 113, 14 South. 199; Com. State Bank v. Interstate Elevator Co., 14 S. D. 276, 85 N. W. 219, 86 Am. St. Rep. 760; Conley v. Nelin, 60 Tex. Civ. App. 395, 128 S. W. 424; Jones on Chattel Mortgages (5th Ed.) § 63; Hammon on Chattel Mortgages, p. 43; 6 Cyc. 1032. The rights of the plaintiffs, attaching creditors, were paramount to the rights of Nixon and Kreuscher, under their chattel mortgage. Geiser v. Murray, 84 Kan. 450, 114 Pac. 1046, and cases there cited.

[2] 2. The plaintiffs, in their appeal, argue that the proceeding instituted by Nixon and Kreuscher before the justice of the peace was under section 152a of the Justices' Code (Gen. St. 1909, § 6519). There is no appeal from a proceeding under this section. Dille v. M'Gregor, 24 Kan. 361; Graves v.

Butcher, 24 Kan. 291; James Clark & Co. v. Wiss & Ballard, 34 Kan. 553, 9 Pac. 281. The difficulty with the plaintiffs' argument is that the proceeding was not under that section. Nixon and Kreuscher were made parties defendant, and as defendants in the action, they set up their interest in the property attached. Judgment was rendered against them, and from that judgment they appeal. As defendants, they had an absolute right to appeal from any judgment that was rendered against them.

The judgment is affirmed. All the Justices concurring.

WHEELER v. WAYMIRE. (No. 20831.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

BROKERS—§52—COMMISSION—SERVICES.

An agent for the exchange of real estate has earned his commission, where, after finding a purchaser able and willing to trade, he brings the parties together, and they agree to an exchange on terms satisfactory to his principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73.]

Appeal from District Court, Greenwood County.

Action by J. A. Wheeler against W. O. Waymire. Judgment for plaintiff, and defendant appeals. Affirmed.

Wicker & Badger, of Eureka, for appellant. A. B. Miller, of Eureka, for appellee.

PORTER, J. The plaintiff sued for commission as an agent in procuring an exchange of property for defendant. He recovered judgment, and defendant appeals.

The defendant resided at Madison, Kan. Having become the owner of a half section of land in Missouri near the town where plaintiff was engaged in the real estate business, he arranged with plaintiff to procure for him an exchange for the land, or to lease it in case no exchange was made. On March 26, 1915, after some correspondence in reference to leasing the land to R. S. Handy, an adjoining landowner, the plaintiff wrote defendant a letter, which contained the following statement:

"Mr. R. S. Handy leaves here to-morrow night for your town. He is the party that is wanting to rent your land. He also has traded for the Doty Hotel in your town. It might be that you would make a deal with Mr. Handy and let him have the half section. It adjoins his home farm. I will have him call and see you."

On March 29th defendant replied that Mr. Handy was there that day and had renewed his offer to lease the half section; that Handy had made a trade for the hotel. The letter made no reference to a talk which Handy testified defendant had with him the same day in regard to trading the half section for the hotel. On March 29th the plaintiff wrote defendant about a possible trade with an-

other party, and asked whether defendant had been "able to do anything with Mr. Handy." To this inquiry defendant made no reply. May 25th plaintiff wrote, stating that he had just learned that an exchange between the defendant and Handy had been closed, and demanded his commission. Defendant immediately replied, "I owe you nothing."

Mr. Handy's testimony is, in substance, that at plaintiff's suggestion he went to Madison, talked with Doty, the owner of the hotel, about a trade; that he saw defendant and kept trying to induce him to agree to take the hotel in exchange for the Missouri land. Defendant "stood him off" and said, "When you get it closed up, we will talk it over." Subsequently, he made a trade for the hotel and took possession April 15th; and for two or three days talked trade with defendant, who did not care for the hotel, but was willing to exchange his Missouri land for a quarter section which Doty owned near Madison. An arrangement was then made with Doty to take back the hotel in exchange for the quarter section; and as soon as Handy received the deed to the latter, a trade was made with defendant by which he accepted the quarter section in exchange for the half section in Missouri.

It appears to be the contention that the exchange finally consummated with Handy was one not contemplated by the plaintiff when he wrote the letter which he claims resulted in bringing the parties together; that the trade for the hotel was never made, but, on the contrary, the parties made an independent exchange for themselves after all negotiations in reference to the original proposition had been abandoned. It is therefore claimed the court erred in not instructing that, if the jury found the original negotiations did not result in a trade and were abandoned, and the parties afterward opened new negotiations resulting in a trade independent of plaintiff, he could not recover. There was no request for an instruction based upon this theory of the defense. The court gave a concise and accurate general statement of the law covering the issues, and, after fully defining what is meant by "the procuring cause" in an exchange or sale of real estate, applied the law to the concrete case before the jury as follows:

"If the defendant in this action placed his farm in the hands of the plaintiff for the purpose of having it sold or exchanged for other property, and the plaintiff thereafter found one R. S. Handy, to whose attention he directed the desire of defendant to sell or exchange his farm, and thereafter introduced or sent the said R. S. Handy to the defendant for the purpose of buying or exchanging for said defendant's farm, and called defendant's attention thereto, and a sale or exchange was as a result thereof, thereafter made between the defendant and said Handy, then the defendant would be liable to the plaintiff for his commission upon such sale or exchange."

Had an instruction been requested to the effect that where the broker fails to bring a customer to terms, and then abandons the negotiations, he is not entitled to a commission upon a sale made subsequently by the owner to the customer, it would not have been proper because there was no evidence to show an abandonment of the negotiations by the plaintiff, though it is obvious the defendant was willing to abandon the first negotiations and proceed independently so far as the law would permit to him.

Plaintiff was not employed to find a customer who would agree to exchange a hotel or any particular kind of property for the Missouri land. It made no difference to him what terms the parties finally agreed upon. Having brought the parties together and notified his principal of what he had done in the matter, his commission was earned when the parties had agreed to exchange upon terms satisfactory to his principal. *Betz v. Land Co.*, 46 Kan. 45, 28 Pac. 458; *Green v. First*, 89 Kan. 536, 132 Pac. 179.

We find no error in the instructions, and the judgment is affirmed. All the Justices concurring.

PROUTY v. BURROUGHS.

(Supreme Court of Oregon. April 10, 1917.)

1. TRUSTS \Leftrightarrow 89(2)—RESULTING TRUST—DEGREE OF PROOF.

In an action to have defendant declared a trustee of an interest in land, bought with funds of both parties, there being no fraud, plaintiff must show by a preponderance of evidence that a part of the purchase money belonged to him if a full accounting were had.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 135.]

2. COSTS \Leftrightarrow 232—ON APPEAL—DISMISSAL.

Where a suit is dismissed on an appeal by defendant for failure of plaintiff to produce a preponderance of evidence, dismissal should be without costs or disbursements to either party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 877-883.]

In Banc. Appeal from Circuit Court, Lincoln County; J. W. Hamilton, Judge.

Suit by Reuben Prouty against Catherine Burroughs. Decree for plaintiff, and defendant appeals. Dismissed, without costs.

The substance of the complaint is that about June 21, 1911, the parties had \$1,500, one-half of which belonged to the plaintiff, that they agreed they should invest the same in a block in Newport, taking title to both plaintiff and defendant as tenants in common each of an undivided one-half thereof, and that the defendant fraudulently ignored the rights of the plaintiff, and caused a deed to be prepared, wherein she secretly had her name entered as the sole grantee. The answer denies all the allegations of the complaint. A further and separate answer, setting up that the plaintiff and defendant are brother and sister, narrating a long course of

business transactions between them, and demanding an account which the defendant claims would show that the money invested in the property was all hers, was stricken out, and the case was tried on the general issue. The trial court rendered a decree, to the effect that the plaintiff was owner of an undivided eighteen-sixtieths of the real property in question and the defendant of the remainder, and required her to convey his portion to him. The defendant appeals.

John H. Bower, of Eugene, for appellant.
Edward J. Clark, of Toledo, for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] The testimony shows that the money immediately invested in the property in controversy was all in the hands of the plaintiff; that he managed the transaction and the defendant knew nothing whatever about the contents of the deed until it was delivered to her and she had nothing to do with its preparation. As to the real source of the money and to whom it equitably belonged the parties are at total variance. There is utterly no testimony to support a charge of fraud. The plaintiff has failed, in our judgment, to produce a preponderance of evidence showing that any of the money really belonged to him if a full accounting was had, and consequently his case fails for want of a greater weight of testimony than that produced by the defendant. Under these circumstances the suit should be dismissed, without costs or disbursements to either party. It is so ordered.

SOMO v. SUPREME COURT I. O. F.

(Supreme Court of Oregon. April 8, 1917.)

1. INSURANCE \Leftrightarrow 693—BENEFIT INSURANCE—BY-LAWS.

By-laws of a fraternal benefit insurance society, providing that local officers shall be considered as agents of the members in accepting and transmitting payments for insurance, and that all acts of a local officer shall be construed as having been done for the members and applicants for membership, are valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833.]

2. INSURANCE \Leftrightarrow 793—BENEFIT INSURANCE—RIGHTS OF DIVORCED WIFE.

Where plaintiff was named as beneficiary in a policy of insurance on the life of her husband, a divorce did not deprive her of her right to recover the full value of the policy in event of the death of her husband prior to his withdrawal from the order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1967-1972, 1980.]

3. INSURANCE \Leftrightarrow 694(1)—BENEFIT INSURANCE—RIGHT OF MEMBER TO WITHDRAW.

As the duties incumbent upon a member of a voluntary association by reason of his membership are purely voluntary, unless the agreement between the members provides to the contrary, a member may withdraw at any time without the consent of the association or of the ben-

efficiary in a life policy issued to him by the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1834.]

4. INSURANCE ~~6~~743—BENEFIT INSURANCE—RIGHTS OF BENEFICIARY—WITHDRAWAL OF INSURED.

Where the beneficiary in a policy of fraternal insurance on the life of her husband assumed the payment of premiums at the time of a divorce under an agreement with the local financial secretary, who by the terms of the policy and by-laws was the agent of the members, and paid the premiums until the policy was canceled upon the rightful withdrawal of the husband from membership in the order, the moneys received by the order were earned premiums upon a valid contract of insurance, which the beneficiary had no right of action against it to recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1888.]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Mary Somo against the Supreme Court of the Independent Order of Foresters. Judgment for plaintiff, and defendant appeals. Reversed, and judgment entered for defendant.

This is an action for money had and received. The facts involved are substantially these: On the 8th day of March, 1893, W. J. Riley became a member of Court Pacific No. 1247, Independent Order of Foresters, located at Portland, Or., and received a certificate therefrom entitling the beneficiary named therein to receive upon his death the sum of \$3,000. The beneficiary named was this plaintiff, who was then Riley's wife. In 1905, domestic trouble arose, ending in a divorce, and subsequently plaintiff married another. In connection with the settlement of their property rights at that time it was agreed between them that Mrs. Riley should continue as the beneficiary named in the certificate, and should assume the payment of the dues and assessments thereafter accruing. She testifies that she at once interviewed F. X. Le Grand, financial secretary of the subordinate lodge, informed him of the arrangement, and asked him if it would be satisfactory to the order, and that he replied "that, being as I was the beneficiary, the order would protect me." She continued to pay the dues and assessments as they matured until November 30, 1912, when, Riley having formally withdrawn from the order, the "Supreme Court" of the order having its headquarters in Toronto, Canada, declined to receive any further payments from anybody on the certificate and treated the same as canceled. Plaintiff then brought this action to recover the sum of \$411.22, being the amount she had paid in dues and assessments. A trial was had, resulting in judgment for plaintiff in accordance with the prayer of her complaint, and defendant appeals.

Geo. L. Masten, of Portland, for appellant.
E. E. Heckbert, of Portland, for respondent.

BENSON, J. (after stating the facts as above). There are a number of assignments of error, but the conclusions we have reached render it unnecessary to consider any of them except the defendant's motion for a directed verdict.

[1] At the outset it may be observed that the beneficiary certificate contains the following clause:

"I hereby expressly agree that the constitution and laws of the Independent Order of Foresters, as well as any amendments thereof which may be adopted from time to time by the Supreme Court, shall be a part of this contract."

Subdivision 6 of section 73 of the laws of the order reads thus:

"As soon as a court is instituted, whether instituted under the authority of the head office of the order, or under the authority of a high court, such court shall forthwith become and be the agent of the members thereof and applicants for membership therein, and no act of such court or of any officer or member thereof shall be construed as having been done for the order, but shall be construed as having been done for such court and the members thereof and applicants for membership therein."

Subdivision 10 of section 104 reads as follows:

"As the financial secretary and other officers of a court are not officers of the corporation contracting with the beneficiary members of the order, the order itself, subject to the provisions of section ninety-seven, subsection seven, shall in no wise be held accountable for any dereliction of duty on the part of the financial secretary or of any other officer of a court, and all payments for whatsoever purpose made to any officer of a court by the members of such court shall be received by such officer as agent of the member making the payment."

There is no contention that the Supreme Court had any knowledge of the alleged agreement between plaintiff and the financial secretary of the subordinate lodge, but plaintiff's right of recovery is based entirely upon the theory that Le Grand, in promising to protect plaintiff's interest as beneficiary, was acting as the agent of the Supreme Court, and that it was therefore bound by his promise. This theory was adopted by the trial court in its instructions to the jury, and in support thereof our attention is called to the cases of Whigham v. Foresters, 44 Or. 543, 75 Pac. 1067, and Patton v. Women of Woodcraft, 65 Or. 40, 131 Pac. 521. The first of these cites as authority Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752, and Patterson v. United Artisans, 43 Or. 333, 72 Pac. 1095, both of which involve the question as to whose duty it was to supply the supreme lodge with the proofs of death. As to the question of agency both opinions were based upon specific by-laws requiring the subordinate lodge to secure and present such proofs, and it does not appear in any of these cases that the attention of this court was called to any provisions similar to those quoted. But if these can be construed to support plaintiff's contention, they have, to that extent, been prac-

tically overruled by the later case of *Hartman v. National Council*, 76 Or. 153, 147 Pac. 931, L. R. A. 1915E, 152. Plaintiff urges that this case is based upon the statute of 1911 (Laws of 1911, p. 354), and that the contrary doctrine prevailed until then. We have examined the statute with care, and are unable to find any provision therein relating to the subject of agency, nor do we discover in the opinion of Mr. Justice Burnett, in the *Hartman Case*, that his conclusion was influenced by any statutory provision. On the contrary his views are expressed thus:

"The question is: What is the legal conclusion to be drawn from those uncontroverted facts? Some courts have gone so far as to say that, notwithstanding the laws of the order and the stipulations of the parties to be bound by them, yet the local officers are the agents of the chief organization of the order, and not of the members or the local council. Such is the rule laid down in such cases as *Dromgold v. Royal Neighbors*, 261 Ill. 60, 103 N. E. 584, and *Dougherty v. Foresters*, 125 Minn. 142, 145 N. W. 813, and other precedents which might be noticed. The great weight of authority, however, is to the effect that it is competent for parties to enter into a contract such as is here set out and embodied in the certificate and laws of the order. There is nothing contrary to public policy or in violation of any public law in making such a stipulation. There is good reason for making the officer of the local council the agent of the member, for that official is elected by the vote of the members, and, being so chosen, it is competent for the parties to stipulate against a possible favoritism to be shown by the officer to the person who elects him as against the general membership of the order."

[2, ?] It is strenuously urged by plaintiff that this is a case wherein the defendant has received money which in good conscience it ought to refund. We cannot concur in this contention, since by the great weight of authority the divorce did not deprive her of her right to recover the full value of the policy in the event of the death of the assured prior to his withdrawal from the order. 14 M. A. L. 146; *Overhiser v. Overhiser et al.*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. Rep. 612; *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251. Neither could the defendant prevent Riley from severing his connection with the order. "Unless the compact between the members of a voluntary association provide to the contrary, a member may withdraw from it at any time. 'The entering into it, the remaining in it, the performance of duties incumbent upon the member, by reason of his membership, are purely voluntary.' Consequently the member may withdraw when he pleases without the consent of the association." 1 Bacon, *Benefit Societies*, section 111, and cases there cited.

[4] It follows that all of the moneys received by the defendant from the plaintiff were earned premiums upon a valid contract of insurance which was finally canceled through no fault of the defendant, and if she had any right of action it would be against her former husband, Riley, for a breach of

his agreement with her. It follows that the motion for a directed verdict should have been allowed. Since in no event could the plaintiff recover in this action, a judgment will be entered here in favor of the defendant.

McBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

ROSENWALD v. OREGON CITY TRANSP. CO.

(Supreme Court of Oregon. April 17, 1917.)

1. APPEAL AND ERROR \S 1106(3)—DETERMINATION—REMAND FOR AMENDMENT—FAILURE OF PROOF.

L. O. L. \S 97-99, relating to curing variances by amendment, but providing that failure of proof is not a variance, does not authorize remanding a case with permission to amend, where plaintiff entirely failed to prove his allegations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4389-4391.]

2. APPEAL AND ERROR \S 1152 — MODIFICATION OF JUDGMENT—FAILURE OF PROOF.

Where plaintiff's failure of proof merited a nonsuit below, a judgment for defendant will be modified to one of nonsuit, although plaintiff resisted a nonsuit motion in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4483-4496.]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

On rehearing.

For former opinion, see 163 Pac. 831.

Hall S. Lusk, of Portland (Carson & Brown, of Salem, and Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for appellant. Abraham Nelson, of Portland (Westbrook & Westbrook, of Portland, on the brief), for respondent.

BENSON, J. In an able argument the plaintiff urges that the opinion of the court in this case is erroneous because while it holds that the trial court gave to the jury an incorrect instruction, it further determines that this error is negligible for the reason that there was a fatal variance between plaintiff's pleadings and proof which would prevent a recovery in any event. It appears from the record that the complaint bases the right of recovery upon the common-law liability of the carrier while upon the trial, plaintiff, in his direct case, offered proof of a written agreement expressly limiting such liability. The evidence of this written agreement is nowhere contradicted. It has been repeatedly held by us that where a plaintiff pleads a common-law liability, and proves a written contract expressly limiting such liability, he cannot recover. *Normile v. Or. Nav. Co.*, 41 Or. 177, 69 Pac. 928; *Union St. Ry. Co. v. F. N. Bank*, 42 Or. 606, 72 Pac. 586, 73 Pac. 341; *McGregor v. O. R. & N. Co.*, 50 Or. 527, 93 Pac. 465, 14 L. R. A. (N. S.)

668; *Lacey v. O. R. & N. Co.*, 63 Or. 596, 128 Pac. 999. It follows that under the pleadings and proof the plaintiff was not entitled to recover in any event in this particular action. The defendant interposed a seasonable motion for a nonsuit, which, being resisted by plaintiff, was denied.

[1] It is now contended that this court should remand the cause to the lower court, with permission to plaintiff to amend his pleadings. This position is based upon the provisions of section 97, L. O. L., in regard to variance between a pleading and the proof. This section of our Code must be read in connection with sections 98 and 99, in regard to which it may be said that the phrase "fatal variance" is practically synonymous with the "failure of proof" described in section 99, supra, and such a variance is termed "fatal" for the reason that it cannot be cured by amendment. Mr. Pomeroy, in his work on Code Remedies (4th Ed.) at section 447, classifies disagreements between pleadings and proofs as being of three grades: (1) An immaterial variance; (2) a material variance; and (3) a complete failure of proof. As to the latter he says:

"Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defense is the only equitable result." Pomeroy's Code Remedies (4th Ed.) § 448.

[2] While it is true that a judgment of nonsuit was the best which plaintiff might have demanded in the trial court, and although he rejected that by resisting the motion therefor, it is equally true that we are unable to find authority for visiting such failure of proof with a more severe penalty than a judgment of nonsuit, and consequently a judgment of that character will be entered here.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

TOWN OF TREMONTON v. JOHNSTON et al. (No. 2938.)

(Supreme Court of Utah. March 9, 1917.)

1. EMINENT DOMAIN §255—APPEAL—PRESERVATION OF GROUNDS OF REVIEW—WAIVER OF DEFECT IN COMPLAINT.

In proceedings to condemn land, where no demurrer was interposed to the complaint, and no objection respecting its sufficiency made, either before or during trial, the defect that the complaint failed to state that the attempted condemnation proceedings were authorized as required by statute, being jurisdictional, was not waived.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666.]

2. EMINENT DOMAIN §167(4)—EXERCISE BY MUNICIPAL CORPORATION—FOLLOWING STATUTORY PROCEDURE.

The general rule is that, where the statute prescribes the procedure or steps to be taken by

a municipal corporation in exercising the right of eminent domain, the procedure prescribed becomes a matter of substance, and must be strictly followed by the condemnor as against the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 452, 453.]

3. EMINENT DOMAIN §169—EXERCISE BY MUNICIPALITY—PASSAGE OF RESOLUTION—JURISDICTIONAL CHARACTER OF REQUIREMENT—STATUTE.

Under Comp. Laws 1907, § 206x2, authorizing the condemnation of a water supply by a municipality, before a town was authorized to commence condemnation proceedings to condemn a spring and appropriate its waters, it was necessary that the board of trustees should first adopt an ordinance or resolution declaring it necessary that the spring be condemned and the waters appropriated for the use of the inhabitants of the town, thus giving the taxpayers the statutory opportunity to protest, and the passage of such a resolution was jurisdictional; section 300, providing for the calling of a special election to vote bonds, the proceeds of which are to be applied in paying for the water or the property condemned or purchased by the town, having nothing to do with the authority to institute condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461.]

4. EMINENT DOMAIN §202(1)—EVIDENCE—VALUE—REMOVEDNESS.

In a town's condemnation proceeding, under Comp. Laws 1907, § 206x2, to condemn the waters of a spring, testimony of the owner of the spring, on cross-examination, that 15 years before filing a declaration of homestead he had stated the value of the land and spring to be much less than he testified their value to be at the trial, was improperly elicited from him; the evidence being too remote.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

5. EMINENT DOMAIN §262(5)—APPEAL—HARMLESS ERROR—EVIDENCE.

Such error was harmless as to the owner's substantial rights.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686.]

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Proceeding by the Town of Tremonton, under the eminent domain statute, against William Johnston and others. From a judgment of condemnation, defendants appeal. Reversed, and case remanded, with directions.

Wade M. Johnson, of Ogden, for appellants. B. C. Call and Henry Seeger, both of Brigham City, for respondent.

FRICK, C. J. The town of Tremonton, in Box Elder county, Utah, commenced this proceeding under our eminent domain statute to condemn a certain spring and to appropriate the waters thereof for the use of the inhabitants of said town. At the hearing it was shown that the spring in question was the property of the defendant William Johnston, and hence the other defendants will not be further noticed.

The proceeding is based upon Comp. Laws 1907, § 206x2, which reads as follows:

"That it shall be lawful for the city council or board of trustees of any city or town in this state to purchase or lease all or any part of any water, waterworks system, water supply, bonds, stocks, or property connected therewith; or, whenever such city council or board of trustees shall deem it necessary for the public good, they shall have the right to bring condemnation proceedings to condemn water, water rights, and all rights and privileges of any person or corporation; provided, that in all condemnation proceedings, the value of all land must be considered in connection with said water or water rights used for the purpose of supplying any city or town, or the inhabitants thereof, with water; provided, that if, within thirty days after the passage and publication of a resolution or ordinance for the purchase, or lease, or condemnation herein provided, one-third of the resident taxpayers of any city or town, as shown by the assessment roll thereof, shall protest against the purchase, or lease, or condemnation proceedings contemplated, then said proposed purchase, lease, or condemnation shall be referred to a special election and if confirmed by a majority vote thereof, shall take effect; otherwise it shall be void."

The complaint is too long to be copied in this opinion. Nor is it necessary to do that, since the sole question to be determined hinges upon the sufficiency of the allegations in paragraph 15 of the complaint, which contains the only allegations respecting the acts or proceedings taken by the town trustees authorizing the condemnation proceedings. That paragraph reads as follows:

"Plaintiff further alleges that by virtue of a resolution passed by the town of Tremonton the board of trustees of the said town decided to submit the question of incurring a bonded indebtedness to the qualified electors who had paid a property tax in said town for the purpose of supplying the said town with water. Notice of said election was duly given, the purpose of the same was set forth, and the question was voted upon by a special election wherein a majority of the qualified electors voted in favor of the bond issue for the purpose of supplying water for the said town of Tremonton. That thereafter the said board of trustees provided by ordinance for the disposal of said bonds, and that said bonds were thereafter sold."

No demurrer was interposed to the complaint, and the defendants answered the same, admitting certain allegations and denying others. Johnston, however, denied that it was necessary to condemn the spring and to appropriate the waters thereof. The court, however, found that it was necessary to condemn the spring and to appropriate the waters thereof, and submitted the question of damages to a jury, who returned a verdict in favor of Johnston for the sum of \$4,000. The court entered the usual judgment of condemnation, and also entered judgment in favor of Johnston for said sum of \$4,000. Johnston appeals.

[1] The first error assigned is that the judgment of condemnation is without authority of law for the reason that the complaint fails to state that the attempted condemnation proceedings were authorized as required by section 206x2, supra. In view that no demurrer was interposed to the complaint, and no objection respecting its sufficiency

made either before or during the trial, counsel for the town insist that the defect, if there is any, in the complaint, was waived. The sole question therefore hinges upon the question whether the alleged defects or omissions in the complaint are merely formal or whether they are jurisdictional.

[2] In determining that question it should be remembered that the proceedings in question were instituted by a municipal corporation to take an owner's property against his consent. The general rule is that, where the statute prescribes the procedure or steps to be taken by a municipal corporation in exercising the right of eminent domain, the procedure prescribed by the statute becomes a matter of substance, and must be strictly followed by the condemnor as against the owner of the property sought to be condemned. It is further held that, where the statute prescribes certain steps to be taken before initiating condemnation proceedings, such steps are jurisdictional, and may not be disregarded.

In *Vreeland v. Jersey City*, 54 N. J. Law, 49, 22 Atl. 1052, the court states the rule in the following words:

"Statutes conferring the power of condemnation under the right of eminent domain are strictly construed. Every condition prescribed by the Legislature in the grant must be complied with, and the proceedings to condemn must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential."

In 8 Standard Ency. Pro. 280, it is said:

"Where an ordinance, resolution, or election must authorize condemnation before such proceedings may be instituted, the petition must allege that such authorization has been given in proper form, as a jurisdictional fact."

In 2 Lewis, Eminent Domain, § 596, the author states the rule thus:

"When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with."

Numerous cases are cited in support of the author's text, and a large number of concrete cases are given in the body of the section illustrating the doctrine. The text quoted from 8 Standard Ency. Pro. is also supported by a large number of cases.

In *Whitehead v. Denver*, 13 Colo. App. 134, 56 Pac. 913, it is held that, where a statute requires certain things to be done by a municipality before initiating condemnation proceedings, the things required to be done constitute a condition precedent to the right to institute the proceedings and must be alleged and proved. It is not necessary to pursue the authorities farther.

[3] It seems very clear to us that under section 206x2, supra, no condemnation proceedings can be instituted by a city or town

unless "the city council or board of trustees deem it necessary for the public good," and that the judgment of the city council or board of trustees to that effect must be expressed in the form of a "resolution or ordinance." After the passage of the resolution or ordinance one-third of the resident taxpayers may protest against the institution of condemnation proceedings, and, if that number do protest, the whole question must be submitted to the vote of the taxpayers, and it requires a majority to order the proceedings to be commenced. If no protest is made, no doubt the resolution or ordinance, if properly passed, is sufficient to authorize the institution of condemnation proceedings. We thus have a statute which prescribes the necessary steps to be taken before commencing such a proceeding. The owner whose property is sought to be appropriated against his consent certainly has the right to insist that the statute be followed. That is all Johnston is contending for on this appeal.

We are of the opinion that before the town of Tremonton was authorized to commence condemnation proceedings to condemn the spring and to appropriate the waters thereof it was necessary that the board of trustees should first adopt an ordinance or resolution in which they declared that it is necessary that the spring be condemned and the waters thereof appropriated for the use of the inhabitants of the town. Had that been done, the resident taxpayers would have been given the contemplated opportunity to protest as provided by the statute. It may be that a city or town may seek to condemn the property of one or more of the resident taxpayers, and if that be the case such taxpayers should be given an opportunity to protest. The right to protest is, however, given to all resident taxpayers, whether their property is sought to be taken or not, and the town or city must afford them the opportunity to protest as required by the statute. It follows, therefore, that the passage of a resolution or ordinance is required by the statute before instituting the condemnation proceedings in question is jurisdictional, and hence Johnston did not waive his right to assail the judgment at any time.

It is, however, contended by the town's attorneys that the proceedings were instituted under Comp. Laws 1907, § 309. That section provides for the calling of a special election to vote bonds the proceeds of which are to be applied in payment for the water or for the property condemned or purchased by the town, and has nothing to do with the authority to institute the condemnation proceedings. If counsel's contention should prevail in that regard, then we would in effect be required to repeal section 206x2, supra. Moreover, under that section one-third

of the taxpayers may compel an election regarding the question of whether the condemnation or purchase of the property sought to be acquired is necessary. When the bonds are voted for, the question, of necessity, is no longer an open question. There is no escape from the conclusion, therefore, that where property is about to be taken by a town or city through the exercise of eminent domain under section 206x2, the owner has the right to insist that the provisions of that section be complied with before he is bound to surrender his property. The assignment just discussed should therefore prevail.

[4] The next assignment relates to the admission of certain testimony as part of the cross-examination of Johnston, the owner of the spring in question, over his objection. Some 15 years before the trial Johnston had filed a declaration of homestead under our statute in which he stated the value of the land and spring to be much less than he testified their value to be at the trial. He was compelled to state on cross-examination what he stated the value of the land with the spring thereon was when he filed his homestead declaration. It is now urged by his counsel that the court permitted the town's counsel to transcend the legitimate bounds of cross-examination in that the statements made by the witness in the declaration of homestead were too remote to establish value or to contradict his present statements, or to affect his credibility. In view of the rapid development of the country and the great increase of values in a comparatively short period of time, the evidence was, no doubt, too remote to be of any help to the jury or to in any way affect the credibility of the witness. The court should therefore have sustained the objection.

[5] We remark, however, that if that were the only error assigned, we should not feel inclined to reverse the judgment for that reason alone. In view of the whole record we do not think the evidence, although erroneously admitted, resulted in prejudice to Johnston's substantial rights.

For the reasons stated, the judgment is reversed, and the case is remanded to the district court of Box Elder county, with directions to grant a new trial, to permit the plaintiff, if it is so advised, to amend its complaint in the particulars stated, and in case the complaint is amended so as to comply with the views herein expressed, to proceed with the case in the usual way, and in case the plaintiff refuses or neglects to amend its complaint within a reasonable time to be fixed by the court, then to enter judgment dismissing the complaint; appellant to recover costs.

MCCARTY and CORFMAN, JJ., concur.

McEVILLA v. PUGET SOUND TRACTION,
LIGHT & POWER CO.
(No. 13537.)

(Supreme Court of Washington. April 16,
1917.)

STREET RAILROADS \S 99(7)—COLLISION WITH
AUTO—CONTRIBUTORY NEGLIGENCE.

The driver of an auto, with which a street car collided when he attempted to drive in front of it, was guilty of contributory negligence as matter of law; he when 8 or 10 feet from the track, going at a speed of 6 or 7 miles an hour, having looked, as he testified, for a car, and it then being in sight about 30 feet away coming down grade at a speed of 20 miles an hour.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 214.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by E. McEvilla against the Puget Sound Traction, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Jas. B. Howe and H. S. Elliott, both of Seattle, for appellant. P. W. Willett and Willett & Oleson, all of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries, and also damages to property. The cause was tried to the court and a jury. The verdict was in favor of the plaintiff, in the sum of \$800. A motion for judgment notwithstanding the verdict having been made and overruled, judgment was entered upon the verdict. From this judgment the defendant appeals.

The facts out of which the action arose are substantially these: Some time during the afternoon of April 19, 1915, an automobile, driven by the respondent, collided with a street car, owned and operated by the appellant. The collision occurred at the intersection of Blanchard street and First avenue, in the city of Seattle. At this point, First avenue is 84 feet wide, from property line to property line, and runs approximately north and south. Blanchard street is 66 feet wide, and intersects First avenue at right angles. Lenora street is one block south of Blanchard street, and intersects First avenue. Virginia street is one block south of Lenora street, and two blocks south of Blanchard street, and is parallel to those streets. The blocks between Blanchard and Lenora streets, and Lenora and Virginia streets, are each 360 feet long. From Virginia street north to Blanchard street, there is a 3.6 per cent. downgrade. From Virginia street south, there is also a descending grade, the crest of the hill being at the intersection of that street with First avenue. Upon First avenue there is a double-track electric street railway. The distance

between the rails of the two tracks is approximately 5 feet, and the distance between the west rail of the east track, and the east rail of the west track, is approximately 5 feet. The south-bound street cars are operated over the west track, and those north-bound, over the east track. The overhang of the street car was not less than 2 feet. On the day mentioned, a street car was proceeding south on the west track, from some point north of Blanchard street. At the same time, the respondent was driving his automobile south on the west side of First avenue, and just in the rear of the street car. The distance between the west rail of the west street car track and the curb on the west side of First avenue was approximately 20 feet. At the northwest corner of the intersection of Blanchard street and First avenue, the street car stopped for the purpose of discharging and receiving passengers. After the street car again started, the respondent started his automobile, and, while attempting to turn up Blanchard street to the east, collided with a street car going north upon the east track. The front end of the automobile struck the left front of the street car. Each of the street cars mentioned was approximately 40 feet in length.

The respondent claims that the street car, with which he collided, was being operated at an excessive rate of speed, and that no gong was sounded, or other warning of its approach given.

Upon the question as to whether the appellant company was negligent in any particular, the evidence is conflicting, and, unless the respondent was guilty of contributory negligence, as a matter of law, the verdict of the jury cannot be disturbed.

The controlling question, then, is whether the evidence shows contributory negligence as a matter of law. Upon the manner of the happening of the accident, the respondent testified that, when the street car stopped at the northwest corner of Blanchard street and First avenue, he stopped the automobile at the same place, and to the rear of the street car; that, from where he stopped, he could see south to the top of the hill, or Virginia street and First avenue; that he looked, and there was no street car at that time approaching from the south; that, after the south-bound street car started up, then he started the automobile; that the automobile was started on a low gear, and ran not more than 4 miles an hour until it got to the intersection of Blanchard street and First avenue, when it was speeded up to 6 or 7 miles; that the turn was made around the center point of the intersection; that, when he got up to the point where he would make the turn, the south-bound car was about 70 feet from him; that, at this time, he looked for a north-bound car, but could not see any approaching; that the front of

the automobile was just turning when he looked again for the north-bound street car, and, at this time, the front of the automobile was on the south-bound track; that, at this time, from the place where he looked, he could see almost a block, and there was no north-bound car within his range of vision; that, subsequent to this time, he did not again look, but attempted to proceed up Blanchard street; that the street car struck the radiator, or the front end, of the automobile.

The speed of this north-bound car, between Lenora street and Blanchard street, was fixed by the respondent's witnesses at from 15 to 20 miles per hour, which would be in excess of the speed fixed by the city ordinance. If the street car was approaching Blanchard street at the rate of 20 miles per hour, the maximum fixed by any witness, then this car was approximately 30 feet, or less than a car length, from the point of collision when the respondent says that he last looked. Taking the respondent's testimony that, when he last looked, the front end of the automobile was upon the south-bound track, and going at the rate of 6 or 7 miles an hour, the front end of the car was then only 8 or 10 feet from the point where the collision occurred. If the street car was going 20 miles an hour, it would be traveling approximately three times as fast as the automobile, and would be not more than 30 feet from the point of collision.

The question, then, is reduced to whether it is contributory negligence, as a matter of law, for the driver of the automobile to attempt to cross the street in front of an approaching street car, when the automobile is 8 or 10 feet from the track, upon which the street car is approaching, at a speed of 20 miles per hour, down a 3.6 per cent. grade. If the respondent looked, as he claims, he could not have avoided seeing the approaching street car. Taking into consideration the speed of the automobile, and its distance from the north-bound track, and the speed of the street car, and its distance from the point where the collision occurred, at the time when the respondent last looked, the attempt to drive the automobile across the north-bound track, in front of the approaching street car, was almost certain to result in a collision.

In principle, this case does not materially differ from *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, and *Fluhart v. Seattle Electric Co.*, 65 Wash. 291, 118 Pac. 51, and, upon the authority of those cases, it must be held that the respondent was guilty of contributory negligence, as a matter of law, and therefore his action fails.

The judgment will be reversed, and the cause remanded, with direction to the superior court to dismiss the action.

ELLIS, C. J., and MOUNT and CHADWICK, JJ., concur.

BRADBURY v. NETHERCUTT et al.
(No. 13669.)

(Supreme Court of Washington. April 16, 1917.)

1. PLEADING \S 246(1)—**AMENDMENT—INCONSISTENCY.**

Allowing amendment of complaint is not error, although there are statements in amended complaint inconsistent with statements in original, where the object sought is the same.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 676-678, 681-683.]

2. APPEAL AND ERROR \S 1089(2)—**HARMLESS ERROR—PLEADING—SEPARATE STATEMENTS.**

In an action to quiet title, refusal to require plaintiff to separately state his causes of action on two instruments sought to be set aside is not reversible error, where the execution of the two instruments were made for a single and continuous purpose.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4075.]

3. LIMITATION OF ACTIONS \S 37(2)—**STATUTE APPLICABLE—FRAUD.**

An action to quiet title, although fraud is practiced in creating the cloud, does not fall within Rem. Code 1915, \S 159, limiting actions for relief on the ground of fraud to three years.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. \S 183.]

4. MORTGAGES \S 37(2)—**ABSOLUTE DEED—PAROL EVIDENCE.**

Parol evidence is always admissible to show that a deed absolute on its face is a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 98, 99, 101, 103-107.]

5. EVIDENCE \S 420—**PAROL EVIDENCE—ALTERATION OF INSTRUMENTS.**

That alterations in an absolute deed are forged may be proved by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 1969-1971, 1973, 1974.]

6. ALTERATION OF INSTRUMENTS \S 17—**MORTGAGES—RIGHTS OF PARTIES.**

A material alteration of a mortgage by mortgagee invalidates mortgage as to mortgagee or assignees, even though innocent parties.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. \S 122-139.]

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by M. Q. Bradbury, as administrator of the estate of Anis E. Hogan, deceased, against George M. Nethercutt individually and as administrator of the estate of Mary C. Nethercutt, deceased, W. G. Turnham, and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

O. C. Moore, of Spokane, and Jay A. Whitfield, of Ellensburg, for appellants. Roscoe Maddox, of Toppenish, John H. Bruff, of North Yakima, and L. J. Birdseye, of Spokane, for respondent.

HOLCOMB, J. In this action respondent Bradbury, as administrator of the estate of Anis E. Hogan, seeks to quiet title to certain real estate situated in Kittitas county, Wash., by removing two alleged clouds thereon created by a certain deed and mortgage. From

a judgment granting respondent the relief prayed, appellants Nethercutt and Turnham have appealed.

Respondent's version of the facts, which was adopted by the court as evidenced by its judgment and which is thoroughly substantiated by the record, is, in substance: Anis Hogan employed Nethercutt, an attorney, to represent her in probating the estate of her father, which comprised the lands in controversy. One Smith was appointed administrator, and from time to time paid Nethercutt sums of money as fees and expenses in administering the estate, and also for a contest suit in which the government contested the title of deceased to this land. Subsequently Nethercutt represented to Anis Hogan that he could secure a loan of \$2,000 on this property from Turnham, and that to secure the same she should execute a note and mortgage on the premises in question in Turnham's favor, which later she did on the representation of Nethercutt that he would hold these instruments and not deliver them until the payment to her by Turnham of the consideration mentioned. Some time later she was informed by Nethercutt that Turnham could raise only \$750, which he (Nethercutt) would accept as his fee, but that she must make a deed to Nethercutt and Turnham of one-half of the lands in question to be held in escrow and not delivered until the \$750 should be advanced. No money was ever so advanced to her by Turnham subsequent to the execution of these instruments, and it plainly appears that the name of Turnham, as payee and mortgagee of the note and mortgage, respectively, was erased, and the name of G. M. Nethercutt inserted in lieu thereof, and also that the name of Turnham was erased as one of the grantees in the deed, thus leaving Nethercutt the sole grantee. The ground upon which the relief was prayed in this action was that these transactions constituted a fraudulent scheme, and that the alterations constituted forgeries and rendered the instruments void.

[1] Many assignments of error are urged by appellants, the first one being that the court should not have allowed respondent to amend its complaint because the allegations of the original and the second amended complaint were diametrically opposed to each other. While there were some inconsistent statements in the two pleadings, the object sought in both complaints was the same, and this court has never held that inconsistent statements could not be made in successive pleadings of the same kind. *Hadevis v. Nutting*, 43 Wash. 40, 86 Pac. 197; 1 *Sutherland's Code Pleading, Practice & Forms*, 472.

[2] Complaint is also made that the court erred in refusing to require respondent to separately state the causes of action alleged in the second amended complaint. Granting that the complaint sought to set aside two

instruments for the purpose of quieting title to the premises in question and that the more orderly method of pleading would require that each be separately stated as a cause of action, yet the execution and alteration of these two instruments were made for a single and continuous purpose, which ran through the entire transaction, and it was therefore at least not reversible error, as appellants were not prejudiced thereby.

[3] Error is also assigned because appellants' demurrer to the second amended complaint was overruled, it being appellants' contention that the basis of this action was fraud, and that this case, therefore, falls within Rem. 1915, Code § 159, which limits actions for relief upon the ground of fraud to a period of three years. But the gravamen of this action is to quiet title and, even though fraud is practiced in creating the cloud, it is not subject to the three-year limitation in actions for relief on the ground of fraud, as shown by the following quotation from *Wagner v. Law*, 3 Wash. 500, 128 Pac. 1109, 15 L. R. A. 784, 28 Am. St. Rep. 56:

"It cannot be concluded that an action to remove a cloud falls within the statute of limitations for actions for relief upon the ground of fraud, for there may be clouds upon the title without the aid of fraud."

[4, 5] Because the deed in question was absolute on its face appellants contend that it was error to admit parol testimony to the effect that the deed was to be held by Nethercutt in escrow. While it is no doubt the rule that, where a deed absolute on its face is delivered to the grantee, it is not proper to show by parol that the parties did not contemplate a delivery till the happening of a certain contingency, yet in the case at bar it fairly appears from the record that this deed was intended as a mortgage, which fact can always be proven by parol. And it is equally positive that alterations can be shown by parol to have been forged, as otherwise a forged instrument would have the same status and validity as a genuine one.

[6] This conclusion also disposes of appellants' argument that, even though an alteration was made in the deed after the execution and after title thereby was vested in the grantee, its operation as an executed contract is not affected thereby. If, as we have decided, it was intended as a mortgage, no legal title was ever vested in the grantee and—

"although a mortgage is in form a conveyance of title, it is in reality but a security for the payment of money, and a material alteration of the mortgage by the mortgagee annuls the instrument as a lien upon the property, and likewise prevents proceedings for its foreclosure, even by an innocent assignee." 2 *C. J.* 1187.

The decree is just and right. Affirmed.

ELLIS, C. J., and MOUNT and PARKER, JJ., concur.

W. B. HUTCHINSON INV. CO. v. WOMAN'S EXCHANGE et al. (No. 13776.)

(Supreme Court of Washington. April 12, 1917.)

LANDLORD AND TENANT §291(2)—NOTICE TO SURRENDER—SERVICE ON CORPORATION TENANT.

Service by landlord on corporation tenant of notice to surrender possession being in strict compliance with Rem. & Bal. Code, § 814, is sufficient.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1223-1225; Appeal and Error, Cent. Dig. § 4768.]

Department 1. Appeal from Superior Court, King County; W. H. Jackson, Judge.

Action by the W. B. Hutchinson Investment Company against the Woman's Exchange and others. From an adverse judgment, the named defendant appeals. Affirmed.

G. C. Israel, of Seattle, for appellant. Arthur H. Hutchinson, of Seattle, for respondent.

WEBSTER, J. This is an action for an unlawful detainer brought by the W. B. Hutchinson Investment Company, a corporation, against Alfred W. Seymour and Fanny M. Seymour, his wife, and the Woman's Exchange, a corporation of which Fanny M. Seymour was president and business manager. The demised premises consisted of a flat on the third floor of the Estabrook building located at 211 Union street in the city of Seattle. The court dismissed the action as against Alfred W. Seymour and Fanny M. Seymour, but rendered judgment against appellant the Woman's Exchange.

The only question for consideration is the sufficiency of the service of the notice to surrender possession of the premises. The court made the following finding, which appellant concedes is correct:

"That Arthur H. Hutchinson tried to find some person at the residence of the said defendants at flat 1 on the third floor of the Estabrook building, corner of Second avenue and Union street, Seattle, King county, Wash., and, being unsuccessful, made service upon all of the occupants collectively and individually by affixing upon the separate doors two separate notices as above mentioned and by mailing a separate copy of the said notice directed to all these defendants, Alfred W. Seymour, Fanny M. Seymour, and the Woman's Exchange, a corporation, by placing three copies of the said notice in three separate envelopes, sealed and stamped with both a regular two-cent stamp, and also registered in three separate directed envelopes, one to Fanny M. Seymour and one to Alfred W. Seymour and one to the Woman's Exchange, a corporation, addressed to 211 Union street, Seattle, King county, Washington, and deposited the same in the post office of Seattle on February 5th, 1916."

Rem. & Bal. Code, § 814, provides:

"Service of any notice provided for in this act may be had upon a corporation by delivering a copy thereof to any officer, agent or person having charge of the business of such corporation, at the premises unlawfully held, and in case no

such officer, agent or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated."

The service in this case was in strict compliance with the provisions of the statute, and was clearly sufficient. *Smith v. Seattle Camp No. 69 W. O. W.*, 57 Wash. 557, 107 Pac. 372.

Affirmed.

ELLIS, C. J., and **CHADWICK** and **MAIN, JJ.**, concur.

VANASSE LAND CO., Inc., v. HEWITT et ux. (No. 13906.)

(Supreme Court of Washington. April 13, 1917.)

1. EXECUTION §290—PURCHASER FOR EXECUTION—PURCHASER—FAILURE OF TITLE.

Where a judgment creditor transferred sheriff's certificates of lands sold on execution to defendant in return for promise to pay certain amount if land was redeemed and another amount if sheriff's deeds were issued, which was subsequently done, but the execution and sale were later set aside, subject-matter of the contract ceased to exist, and the creditor could not recover thereon.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 827.]

2. COVENANTS §108(1)—CONSTRUCTION OF CONTRACT—RETURNING DEEDS TO VENDOR.

Where a vendor agreed to prosecute or defend any suit necessary to vest title in the purchaser, the purchaser, who had a substantial interest in the property, was not delinquent in not returning the evidences of title to the vendor so he could defend such a suit in his own name, where no request for such return was made.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179, 182-185.]

3. VENDOR AND PURCHASER §214(1)—CONVEYANCES TO THIRD PARTY—EFFECT.

Where the vendor consents in writing to the purchaser conveying to a third party, a subsequent assignee of the vendor cannot sue upon the contract of purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 437, 442.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the Vanasse Land Company, Incorporated, against Henry Hewitt, Jr., and Rocina L. Hewitt, his wife. Judgment for defendants, and plaintiff appeals. Affirmed.

W. F. Hays and C. E. Claypool, both of Seattle, for appellant. T. L. Stiles and E. R. York, both of Tacoma, for respondents.

PER CURIAM. On November 19, 1908, W. F. Hays, of Seattle, and Henry Hewitt, Jr., entered into the following contract:

"Tacoma, Wash., November 19, 1908.

"This memorandum witnesseth that: Whereas, W. F. Hays of Seattle, Washington, has this day assigned all his right, title, and interest to Henry Hewitt, Jr., in certificates of purchase of certain timber lands sold by the sheriff of Skagit county, and also by the sheriff of What-

com county, and also by the sheriff of King county, in pursuance of a judgment in favor of the said Hays in King county court of June 13, 1908, in Cause No. 54037. In consideration for which, the said Hewitt has this day paid said Hays the full sum of forty-seven thousand five hundred (\$47,500.00) dollars, and in the event that the lands conveyed by said certificates be redeemed thereunder said certificates, then the said Hewitt is to pay said Hays the further sum of forty-two thousand five hundred (\$42,500.00) dollars, but if said lands shall not be redeemed and the sheriff of said respective counties shall execute his deed for said lands, the said Hewitt hereby agrees to hold for the said Hays an undivided one-half interest thereto, and he shall then pay to said Hays, when title thereto shall have been perfected, the said sum of forty-two thousand five hundred (\$42,500.00) dollars. Said Hays is to prosecute any suit, action, or defense that may be necessary in the premises, to finally vest title to said lands in the said Hewitt or the payment to him of the full amount of said judgment with its interest and costs. Said Hewitt, in the event that he shall take title as aforesaid, to execute to said Hays or his assigns a good and sufficient deed to the undivided one-half interest in said lands. In the event title to said lands finally vests in said Hewitt said Hewitt is to deed to said Hays one-half thereof, and to pay the further sum of \$42,500.00, this to be in full."

Although the contract recites the payment of \$47,500 in money, only \$2,500 was paid. In June, 1908, Hays attached certain property as the property of M. N. Richardson et al., and took a default judgment, which, with interest and costs, aggregated about \$87,000. There can be no question that, at the time the contract between Hays and Hewitt was entered into, both parties assumed that the judgment was a valid lien upon the lands which had been attached and which Hays had bid in at execution sale. The legal effect of the contract was that Hays, who did not deal in timber lands, sold the lands, subject to redemption, to Hewitt, who did deal in such property. After the time for redemption had passed, the sheriff executed deeds to Hewitt who, with the consent of Hays, conveyed the land to the Sumpter Lumber Company, an Oregon corporation. It afterwards being made to appear that the execution had been improvidently issued because title to the land was not in the execution defendants, it was vacated by the superior court. Upon appeal, this court sustained the order vacating the judgment. *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889. Hays thereafter conveyed to appellant all his interest in the contract, and suit is brought against Hewitt to recover the amount alleged to be due under the contract which, with interest, is \$127,800.

After a trial upon issues joined, judgment was rendered in favor of defendants. Appellant seeks to sustain a right of recovery upon several grounds, but stripped of verbiage and detail, they all rest in the contentions that Hewitt got all he ever contracted for, that is, sheriff's deeds to the property, and that the vacation of the judgment upon which the sales rested is no defense in law to an action on the contract; that if he was not satisfied

with the "titles" evidenced by the sheriff's deeds, he should have made the certificates, or the sheriff's deeds, over to Hays, so as to enable him to "perfect" the title instead of placing them on record as he did, and thereafter conveying the land to a third party, thus putting it beyond the power of Hays to furnish a better title.

[1] We think the trial court arrived at a correct conclusion. The rights of the parties are to be measured by the contract. It is in writing, and its intent is manifest. The subject-matter of the contract was the sale and purchase of certain lands against which there appeared to be a lien of a valid judgment. That title would fail, other than by redemption, seems not to have occurred to either party. Now for causes entirely beyond the control of Hewitt, causes chargeable to Hays' omissions and oversights, if chargeable to any one, the title failed. The subject-matter of the contract ceased to exist, and Hewitt is not liable either to Hays or his assignee, unless it can be said that he is responsible for the failure of the title.

[2, 3] Hewitt made the contract, conveyed the land to the Sumpter Company, and defended the title with the full knowledge of Hays, if not with his consent and under his direction and advice. He cannot be held because he did not reconvey to Hays. He had paid \$2,500 in money, and had agreed to pay \$92,500 more if the title was perfected, and, under certain conditions, to convey an undivided one-half of the lands to Hays. His interest was as material as was that of Hays. He cannot be charged as a delinquent because he did not reconvey such evidences of title as he had, so that Hays could carry on the litigation attending this transaction in his own name. It does not appear that Hays ever demanded that the certificates be re-assigned to him, or that Hewitt's title be made over. Nor does it appear that he ever appeared, or offered to appear, in his own behalf in any of the proceedings where the rights of the parties under the contract were involved. Nor is it made to appear wherein the title would have been made good in his hands while held bad in the hands of his assignee. Moreover, the complaint alleges that the title was put, and, as between the parties, is now in a third party, all with the written consent of Hays, and for that reason, if for no other, the complaint does not state a cause of action.

Respondents did not buy caveat emptor. The subject-matter of the contract having failed, there is no object to which the doctrine of caveat emptor can apply. Hays sold nothing, and Hewitt bought nothing. The one financed a hope. The other discounted the issue of a possible lawsuit. As it transpired, and as it was held by this court, there was no title in Hays, either actually or in expectancy. The fund out of which the parties expected to reap a rich harvest having

been exhausted, we know of no rule of law that could be applied to the facts in this case that will permit them to prey upon each other. Appellant stands in the shoes of Hays, and will take nothing.

Affirmed.

STATE ex rel. FOSTER v. SUPERIOR COURT FOR CLARKE COUNTY
et al. (No. 14025.)

(Supreme Court of Washington. April 13, 1917.)

JUDGES & 51(2) — DISQUALIFICATION — TIME OF MAKING OBJECTION.

A divorced father's application for modification of a decree awarding custody of his child, made a year after the divorce decree, is not merely a continuance of the divorce action, but a separate "proceeding" within Rem. Code 1915, § 209-1, authorizing the disqualification of judges for bias before action is taken in the proceeding.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 226.]

Department 2. Application by the State on the relation of Carl W. Foster, for a writ of mandate against the superior court of the State of Washington for Clarke County, and R. H. Back, Judge thereof. Writ issued.

Edgar Swan, of Vancouver, for appellant.
L. M. Burnett, of Vancouver, for respondents.

PARKER, J. The relator, Carl W. Foster, seeks a writ of mandate in this court to compel the superior court for Clarke county and R. H. Back, judge thereof, to cause to be heard by another judge his application for a modification of the decree of divorce rendered by that court in the case of Marie E. Foster v. Carl W. Foster, in so far as the decree deprives him of the custody of his child. The application for change of judge was made under sections 209-1 and 209-2, Rem. Code.

The facts appearing in the record before us, which includes the answer and return of Judge Back to our alternative writ of mandate, may be summarized as follows: On November 6, 1915, in the superior court for Clarke county, Hon. R. H. Back presiding as judge thereof, there was rendered a decree of divorce upon relator's answer and cross-complaint in that certain action therein pending in which Marie E. Foster was plaintiff and Carl W. Foster, this relator, was defendant, which decree dissolved the bonds of matrimony theretofore existing between them and disposed of their minor child as follows:

"It is further by the court ordered that the minor child of plaintiff and defendant, to wit, Ellen Foster, be and she is hereby permanently ordered into the care, custody and control of F. E. Bathea and Mattie Bathea, his wife, of Clarke county, Wash."

The divorce was awarded to relator because of cruelty on the part of plaintiff; but, the court concluding that neither of the parties was a fit person to have the care and

custody of the child, it was disposed of as above noticed. The substance of the court's finding touching relator's fitness to have the custody of the child is:

"That the defendant, Carl W. Foster, is of weak and vacillating character, of slovenly and shiftless habits and tendencies, has never been able to provide a suitable home for the aforesaid minor child, Ellen Foster, and has not now any suitable place to care for or keep said child. * * *

There was no finding made that he was otherwise unfit to have the custody of his child. On December 13, 1916, which it will be noticed was more than one year after the rendering of the decree of divorce, relator filed in the superior court for Clarke county his petition, entitling it as in the divorce action, reading as follows:

"Comes now the petitioner, Carl W. Foster, defendant in the above-entitled action, and represents to the court as follows: (1) That he is now a resident of the county of Clarke and state of Washington. (2) That he is the father of the minor child, Ellen Foster, named in the decree entered herein on November 6, 1915. (3) That he is now employed at good wages and is able and willing to provide a good home for his said minor child and to give her proper care and maintenance. (4) That he is a fit and proper person to have the care and custody of said child, and that it is for the best interests of said child that she now be awarded to the care and custody of this petitioner. (5) That in said decree it was provided that said child be awarded to the care and custody of parties other than the parents of said child. Wherefore this petitioner prays that said decree be modified and that said child be now awarded to the care and custody of this petitioner."

Soon after the filing of this petition and before any order or ruling of any nature in connection therewith had been asked for or was made by the superior court or by Hon. R. H. Back, judge thereof, relator filed in the proceeding his motion asking for a change of judge, accompanied by his affidavit stating:

"That Judge R. H. Back of said court before whom said matter is pending is prejudiced against said defendant, and said defendant believes he cannot have a fair and impartial trial of said case before said judge."

Thereafter on March 6, 1917, Judge Back entered an order denying relator's application for change of judge, and thereupon relator commenced this proceeding seeking to compel such change by a writ of mandate.

No contention is made but that the motion and affidavit for change of judge filed by relator is sufficient both in form and substance to entitle him to have the question presented to the court by his petition tried by some judge other than Judge Back, if his motion and affidavit have been timely filed, and the question of the modification of the divorce decree in so far as it disposes of the custody of the child is a "proceeding" within the meaning of section 209-1, Rem. Code, which in so far as we need here notice its language reads:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause."

Counsel for respondent contends that relator's application for change of judge has not been timely made and invokes those decisions of this court holding in substance that to become available such an application must be made before the trial judge has had presented to him for his decision some question in the action or proceeding upon which question the applicant has been heard or had an opportunity to be heard, citing *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40; *Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304; *Nance v. Woods*, 79 Wash. 188, 140 Pac. 323; *State ex rel. Nixon v. Superior Court*, 87 Wash. 603, 152 Pac. 1. This contention proceeds upon the theory that relator's petition for modification of the decree of divorce touching the custody of the child is not the commencement of a "proceeding" within the meaning of section 209—1, Rem. Code, but merely calls for the exercise of the court's continuing jurisdiction in the divorce action, and that therefore relator's right to a change of judge has been abandoned by his failure to ask for such change at the beginning of the divorce action, before Judge Back was called upon to decide any question presented therein. It is true, as pointed out by counsel for respondent, that the jurisdiction of the trial court in a divorce action is generally held to continue after the rendering of a final decree therein in so far as the custody of children is concerned, and that the decree may be modified touching the custody of children as changed conditions may arise and be shown thereafter, and that such modification may be brought about upon the petition of any interested party and the giving of notice to other interested parties, giving them an opportunity to be heard upon the question so presented. We think it does not follow therefrom that the word "proceeding" as used in section 209—1 means only such a proceeding as is entirely apart from some other action, but that it includes a proceeding in a divorce action after the rendering of a final decree therein, which calls for the determination of the question presented, such as the custody of a child, upon a new and different state of facts arising after the rendering of the decree in the action. Such a proceeding, while in a sense in the original action and calling for the continued exercise of the court's jurisdiction in the action, calls for the trial of issues which were not and could not be tried in the divorce action or disposed of by the final decree rendered therein, because the issues presented by such a petition for modification and such answer as may be made thereto pertain to new rights resting upon

new facts occurring after the rendering of the final decree. The decree is no less final in its effect as to all rights existing at the time of its rendering. As said by this court in *Koontz v. Koontz*, 25 Wash. 336, 343, 65 Pac. 546, quoting with approval from *Dubois v. Johnson*, 96 Ind. 6:

"A decree of the superior court, which determines the custody of infant children, from which no appeal has been taken, is conclusive upon the court which rendered the decree and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child."

These observations, we think, render it plain that the new issue to be tried is connected with the original divorce action as a matter of form only, for the purpose of controlling the procedure by which the matter may be brought before the court for disposition. True, it does not require process in the nature of a formal summons as in the commencement of a civil action to bring the parties before the court, but manifestly notice of such nature as furnishes interested parties an opportunity to be heard must be given before the court can rightfully try the new issues so raised.

In *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594, where there was involved the question of the right of a party to a divorce proceeding to have the decree modified after its entry touching the custody of a minor child, Judge Gose, speaking for the court upon the question of the right to change of judge under this statute, said:

"It is next argued that an application for the modification of a decree in a divorce action is a continuation of the original case, and hence that the statute does not apply. We think the premise is sound, but that the conclusion does not follow. The statute in positive terms provides that no judge of a superior court 'shall sit to hear or try any action or proceeding' when his prejudice shall have been established in the manner therein provided. * * * This is a proceeding in the original action. The original decree was entered on the 8th day of May, 1911. The petition in this proceeding was filed in February, 1912. After the original case had gone to final judgment, the statute became applicable to any subsequent proceeding in the original case."

Counsel for respondent insists that these remarks were unnecessary to the decision in that case in view of the fact that the change of judge had actually been granted and it was the other party who was insisting that such change was granted without authority. However that may be, we are constrained to adopt this as the sound view of the law applicable to proceedings of this nature.

The reasoning of our decision in *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66, is in harmony with and lends some support to this view, though that case is distinguishable from this. Our decision in *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291, may be regarded as also lending some support to the conclusion we here reach, though not exactly in point. That was a

contempt proceeding wherein it was sought to punish a person for acts committed out of the presence of the court in violation of an order of the court made in an action. Change of judge was sought under the provisions of section 209—1, Rem. Code, and denied by the trial court. It was there held that the trial court was in error in denying the change of judge asked for, and it was compelled by writ of mandate to grant the change; this court proceeding upon the theory that the "proceeding" was one within the meaning of section 209—1. Our decision in *State ex rel. Gourley v. Smith*, 78 Wash. 292, 139 Pac. 60, may seem not in harmony with these views. That was also a contempt proceeding, but ancillary to the original action. It was prosecuted to enforce obedience to an order of the court, and not as an independent contempt proceeding for the purpose of punishing alone. As said by Chief Justice Crow in the opinion:

"It was in the nature of a civil process, issued by the court to enforce obedience to the mandate contained in its judgment and secure the delivery of the stock to the clerk of the superior court. In other words, it was in the nature of an execution issued in an action to which appellant was already a party."

This is no such proceeding.

We are of the opinion that since this is not a proceeding ancillary to the divorce action or in aid of the enforcement of the final decree rendered therein, but is a proceeding to try and determine new rights arising out of new facts occurring since the rendering of that decree, it is a "proceeding" within the meaning of section 209—1, Rem. Code, and that relator, having made his application for change of judge as prescribed by the statute, is entitled to such change as a matter of right.

Our attention is called to our denial of a writ of mandate to compel a superior judge to grant a change of judge to try a petition to modify a decree of divorce in the recent case of *State ex rel. Davis v. Superior Court*, being No. 13935 in this court, in which no opinion was written. That case can be differentiated from this, in that the record therein shows that the application for modification of the decree was filed only 28 days after entry of the decree and under such circumstances as to show that it was in substance an attempt to retry the issues settled by the decree.

Judge Back, after the filing of relator's application and affidavit for change of judge, entered an order permitting Frank Bethea and Mattie Bethea, the custodians of the child under the decree, to intervene in this proceeding and resist the petition of the relator for modification of the decree. Relator insists that we should set aside this order. We think relator's rights will be sufficiently protected in this regard by saving to him the right to challenge before the judge who will

hear this controversy the right of the Betheas to intervene. It is so ordered.

Let a writ of mandate issue commanding the superior court and Hon. R. H. Back, as judge thereof, to grant relator's application for change of judge as prayed for.

LALIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

SANDBERG v. CAVANAUGH TIMBER CO.
(No. 13382.)

(Supreme Court of Washington. April 12, 1917.)

1. NEGLIGENCE \S 139(2)—FIRES—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action for damages from the destruction of property by a fire which originated on defendant's premises, an instruction that it was defendant's duty to exercise that care and diligence which a person of ordinary prudence would exercise to extinguish and control any fire started by it upon its premises, and to protect plaintiff's property against loss thereof, in view of the nature and extent of the fire, the material on the ground, the weather conditions prevailing, the means at hand, and all the surrounding circumstances, and that defendant's failure to exercise such reasonable care would constitute negligence, was not erroneous, as requiring a higher degree of care on the part of defendant to prevent the spreading of the fire than that which the law imposes on an owner of premises on which a fire originates without his act or fault; the degree of care required of defendant being the same in respect to its duty to prevent the fire from spreading, whether the fire was started by defendant without negligence or by some one else.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 372.]

2. NEGLIGENCE \S 134(8)—FIRES—DILIGENCE QUESTION FOR JURY.

Evidence, in an action for damages from the destruction of property from fire originating on defendant's premises, held to authorize submitting to the jury the question whether defendant exercised due diligence to prevent the fire from spreading to plaintiff's property.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 263.]

3. APPEAL AND ERROR \S 1004(2)—EXCESSIVE AWARD—EVIDENCE.

Where, in an action for damages from fire, there was ample room for difference of opinion as to whether the damages were excessive, the award could not be disturbed on appeal as being excessive.

En Banc. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Carrie Sandberg against the Cavanaugh Timber Company. From judgment for plaintiff, defendant appeals. Affirmed.

W. P. Bell and Coleman & Fogarty, all of Everett, for appellant. Cooley, Horan & Mulvihill, of Everett, and A. M. Wendell of Arlington, for respondent.

PARKER, J. This is an action to recover damages for property destroyed by fire. Tried in the superior court sitting with a jury re-

sulted in verdict and judgment awarding plaintiff damages in the sum of \$2,000, from which the defendant has appealed to this court.

Appellant at the time in question was engaged in logging upon its own land in Snohomish county. Respondent at that time owned a farm about two miles from where appellant was logging. The fire in question destroyed respondent's barn, outbuildings, hay, feed, and implements, which, as alleged by her, were of the total value of \$2,550. The fire originated upon appellant's land, about 150 feet from one of its donkey engines, which was being used in its logging operations, and was discovered there by appellant's employes and its foreman very soon after it started, as to which facts there is no controversy. By the allegations of respondent's complaint appellant was charged with starting the fire and with negligently doing so, and also with negligence in failing to put the fire out and permitting it to spread to respondent's property. It is conceded that the evidence introduced upon the trial fails to show any negligence on the part of appellant in connection with the starting of the fire. It is a disputed question of fact as to whether or not appellant did start the fire, which question, however, we think it will appear, is of no moment in our present inquiry.

Counsel for appellant contend that certain testimony bearing upon the question of appellant starting the fire was erroneously received over their objection, and that the trial court erred in giving instructions bearing upon that question. Counsel for respondent contend that the ruling of the trial court touching the receiving of evidence and the giving of instructions upon the question of appellant starting the fire were in no event prejudicial to the rights of appellant, in view of the undisputed fact that the fire actually started upon its land, and was known by its employes and foreman to have started there very soon thereafter. The testimony claimed to have been erroneously admitted was that of a witness who stated, "I asked him [the foreman] how the fire got started, and he told me from the donkey," which statement of the foreman, as testified to by the witness, occurred on the day following the starting of the fire; and the instructions complained of, as interpreted by counsel for appellant, assumed in substance that the fire started from the donkey engine, and in that sense from the act of appellant, though without negligence upon its part. So there remained for the jury's consideration only the question of negligence of appellant in failing to subdue the fire and prevent it spreading to respondent's property. So far, therefore, as we are concerned with these rulings of the trial court, assuming for argument's sake that they were technically erroneous so far as the question of appellant's starting the fire is concerned, our problem is: Was appellant, having knowledge of the

starting of the fire upon its own premises, required by law to exercise due diligence looking to the prevention of the spreading of the fire to respondent's property; and would the failure on the part of appellant to exercise due diligence in that behalf render it liable to respondent as for negligence? If this obligation rested upon appellant, regardless of how the fire actually started, and the trial court by its instructions prescribed no higher degree of care than the law imposes upon the owner of land on which fire starts apart from his own act, but knows of the starting of the fire in time to prevent by due diligence its damaging his neighbor, then these rulings of the trial court would be without prejudice, because of their relation to a question which would not affect the measure of appellant's responsibility and diligence, however it might be decided. The authorities convince us that there may be negligence, such as to render the owner of premises liable to his neighbor in his failure to use due diligence in preventing the spread of a fire originating upon his own land, though it so originate without any act or fault of his own. The common law seems to have rendered an owner of premises on which fire starts, regardless of the manner of its starting, absolutely liable for damage which his neighbor suffers therefrom; but the harshness of this doctrine has been much modified in both England and this country in recent times. In the text in 11 R. C. L. 940, the learned editors state the present-day rule as follows:

"The general rule in this country, as in England, is now well settled that when a private owner of property sets out fire on his own premises for a lawful purpose, or when a fire accidentally starts thereon, he is not, in the absence of a statute to the contrary, liable for damage caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it."

In Bishop's Non-Contract Law, at section 833, that learned author says:

"Since fire, one of the most beneficent servants of man, does not from its own nature imperil surrounding persons and objects, the careful setting and keeping of it in one's dwelling house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for the damages."

In this text it will be observed that it is at least inferentially stated that there may be negligence rendering an owner of premises liable in such cases, regardless of how the fire starts upon his premises. The reports furnish but few instances of decisions being rendered wherein there is considered the question of the measure of the duty of a person, on whose premises a fire is started by some agency for which he is not responsible, to prevent its spread to his neighbor's property. The decisions touching this exact question, however, seem to be in harmony in hold-

ing that there is a measure of responsibility on the part of an owner, growing out of such a situation, which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence.

In *Baird v. Chambers*, 15 N. D. 618, 109 N. W. 61, 6 L. R. A. (N. S.) 882, 125 Am. St. Rep. 620, this exact question seems to have been under consideration. In that case the fire was started upon defendant's ranch without any act or fault of his own. He knew of it, and, as was claimed, failed to exercise due diligence in preventing its spread to his neighbor. It did spread beyond the limits of his own ranch, destroying property of his neighbor. The trial court instructed the jury in such language as to leave it to infer that he was liable to his neighbor for the damage thus caused "if it would have been possible for him to prevent the spread of the same." This instruction was held to be erroneous, and upon that ground alone a new trial was granted; the court being of the opinion that the instruction imposed too high a degree of care upon the owner of the premises where the fire started. Stating the law applicable to the case as a guide to the lower court upon new trial, Justice Engerud, speaking for the court, said:

"After he discovered the fire on his premises, he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect, after discovering the fire, would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors as a man of ordinary prudence would put forth who was actuated by a proper regard for his neighbors' rights and safety."

In *Farrell v. Minneapolis & R. R. Co.*, 121 Minn. 357, 141 N. W. 491, 45 L. R. A. (N. S.) 215, there was involved the spreading of a fire which had been started upon the company's right of way without any act or fault of the company. The fire spread to adjoining land and destroyed property thereon; the question being as to the negligence of the railway company in permitting the fire to so spread and damage neighboring property, its agents having knowledge of the starting of the fire upon its right of way. Disposing of the contention that the company was not liable because the fire did not start by any act of the company, Judge Bunn, speaking for the court, said:

"Was there a legal duty resting on defendant to use reasonable care to prevent the spread of this fire? We think there was. This is not holding that a railroad company must make its right of way a barrier to prevent the spread of fires for the starting of which it is not responsible, nor does a decision that such a duty rested on defendant establish any new doctrine. It is an application of the old rule of 'sic utere tuo.' If a fire is started on the right of way of a railroad, or on land of a private owner by the carelessness of boys, the matches of smokers,

or from any cause for which the landowner is not responsible, and the latter knows of the fire, and knows that, if not controlled, it will spread and destroy valuable property of his neighbor, there is a duty to use reasonable care to prevent this result. This may not always have been the law; but it is now generally recognized that each member of society owes a legal duty, as well as a moral obligation, to his fellows. He must so use his own property as not to injure that of others. The doctrine is nowhere better illustrated than in the case of *Depue v. Flatau*, 100 Minn. 299 [111 N. W. 1] 8 L. R. A. (N. S.) 485, and the following extract from the opinion in that case states the principle clearly: 'Whenever a person is placed in such a position with regard to another, that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, the duty at once arises to exercise care, commensurate with the situation in which he thus finds himself, to avoid such injury; and a negligent failure to perform that duty renders him liable' for the consequences of his neglect. "Many of the situations to which the principle is applicable are referred to in the opinion, as well as in the cases there cited, including the valuable note to *Union P. R. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513."

The following decisions lend support to this doctrine: *McCully v. Clarke & Thaw*, 40 Pa. 399, 80 Am. Dec. 584; *McNally v. Calwell*, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494; *Seckerson v. Sinclair*, 24 N. D. 326, 625, 140 N. W. 239.

Our own decision in *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43, lends some support to this view, though the fire there in question was actually started by the owner of the premises, from which it spread to and damaged his neighbor's premises. He was held liable because of negligence in his failure to prevent the fire spreading, though he was held not negligent in starting the fire upon his own land. That decision seems to be rested upon section 3138, Bal. Code, being section 5141, Rem. Code. Section 5143, Rem. Code, of the same act, preserves the common-law remedy, which is here invoked by respondent.

[1] Did the instructions of the trial court state a rule requiring a higher degree of care on the part of the appellant to prevent the spreading of the fire than that which the law imposes upon an owner of the premises on which a fire originates without his act or fault? Touching the degree of care to be exercised by appellant, the trial court instructed the jury as follows:

"It was the duty of the defendant to exercise that care and diligence which a person of ordinary prudence would exercise to extinguish or control any fire started by it upon its premises and to protect the property of plaintiff against loss on account thereof, in view of the nature and extent of the fire, the material on the ground, the weather conditions prevailing, the means at hand, and all the surrounding circumstances, and the failure of the defendant to exercise such reasonable care would be and constitute negligence upon its part."

It will be noticed that in this instruction the trial court measured the degree of care in a case where the owner starts a fire upon

his premises. That, however, would not render the instruction prejudicially erroneous, unless the degree of care therein stated is in law greater than that required of appellant, had the instruction assumed that the fire did not start by any act or fault of appellant. It seems to us, in any view that may be taken of this instruction, it did not impose upon appellant any higher degree of care than it was required to exercise touching the question of its negligence in allowing the fire to spread to respondent's property. The authorities above noticed, we think, show that the required degree of care would be the same, so far as its duty to prevent the fire spreading is concerned, whether the fire was started by appellant or by some one else, assuming, as is here conceded, that there was no negligence on the part of appellant attending the starting of the fire. If this instruction be construed as assuming that appellant started the fire, it in no event meant that there was any negligence on the part of appellant attending the starting of the fire. Another instruction plainly told the jury that there was no such negligence, as was conceded upon the close of the trial.

[2] Contention is made in appellant's behalf that the evidence introduced upon the trial does not support the judgment and verdict, in that it does not warrant a finding that appellant did not exercise due diligence looking to the prevention of the spreading of the fire to respondent's property. A careful reading of the evidence convinces us that this was a question for the jury. The fire was traced, by creditable evidence, directly from the place it started upon appellant's land to respondent's property. It occurred early in August, during a very dry season. It is true appellant used some effort to stop the fire a day or two following its starting, but very little effort thereafter. On the second or third day following, appellant's foreman was warned by a fire ranger that the fire was proceeding towards the east, threatening the property of others. This ranger also testified that in his opinion the fire could have been subdued, had proper efforts been used in that behalf. Respondent herself testified that about 1½ hours before the fire reached her place she warned appellant's foreman by telephone message of the approach of the fire to her place and asked for help. None was furnished by appellant, according to her testimony. Whether or not her place could then have been saved is somewhat problematical. We deem it unnecessary to pursue this inquiry further. We are quite clear that the question of appellant's negligence, so far as the question of its efforts to control the fire are concerned, was for the jury to decide.

[3] Some contention is made in appellant's behalf that the verdict is excessive. A reading of the evidence convinces us that there

is ample room for difference of opinion upon that question, and we are therefore constrained not to interfere with the jury's award of \$2,000 to respondent.

The judgment is affirmed.

ELLIS, C. J., and HOLCOMB, MAIN, MOUNT, FULLERTON, and WEBSTER, JJ., concur.

SLADJOE v. NATIONAL CASUALTY CO. (No. 18723.)

(Supreme Court of Washington. April 11, 1917.)

TRIAL \S 255(12)—INSTRUCTIONS—PRESERVATION OF EXCEPTIONS.

In action on accident policy having two clauses, one for total and one for partial disability, where defendant failed to request submission of instruction based on partial disability clause, and to except to the instructions based on the total disability clause, it could not on appeal complain of failure to instruct on partial disability clause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 638.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Gavro Sladjo against the National Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Van Dyke & Thomas, of Seattle, for appellant. Walter B. Allen, of Seattle, for respondent.

WEBSTER, J. This is an action to recover indemnity upon a policy of accident and health insurance issued by defendant on the 18th day of February, 1915. Plaintiff alleged that it had previously issued to him a similar policy which had been mutilated and destroyed, and that by express agreement of the parties the policy upon which this action is based was issued to take the place of the previous one; that thereafter plaintiff became ill and was subsequently operated upon for appendicitis, and by reason thereof he was confined to his place of abode and therein regularly visited and treated by a legally qualified physician. Defendant by its answer denied that the second policy had been issued in lieu of the first, and affirmatively pleaded that it was a new and distinct policy having no relation to or connection with the first; that by the terms and provisions of the new policy it did not cover sickness commencing within 60 days after its issuance; and that the illness for which plaintiff is seeking to recover began within 60 days from that time. There is abundant evidence in the record to support the allegation that the second policy was issued to take the place of the first, and this issue was fairly submitted to the jury and resolved in plaintiff's favor.

Defendant further alleged that plaintiff did not pay the monthly installment of premium

which was due on March 1, 1915, until the 6th day of March, 1915; that by the terms of the policy it is provided that, if default is made in the payment of the agreed premium when due, a subsequent acceptance of the premium by the company would reinstate the policy, but only to cover sickness beginning more than 10 days after the date of such acceptance; and that plaintiff's alleged illness began within that time. The evidence tended to show that on March 7, 1915, plaintiff became ill, but at that time was suffering from a bad cold or the grip, and no recovery for that sickness is sought in this action. The illness for which plaintiff is endeavoring to recover is that alleged to have been incident to an attack of appendicitis and a subsequent operation therefor, and there was ample evidence that this attack occurred more than 10 days after the acceptance of the March premium. This issue also was submitted to the jury and decided favorably to plaintiff.

Each of the policies contained two paragraphs, identical in form, relating to indemnity for sickness. Paragraph G provided indemnity at the rate of \$50 per month for the number of consecutive days after the first week, not exceeding six months, that the insured is necessarily continuously and actually confined in any house and therein regularly treated by a legally qualified physician. It is upon this paragraph that plaintiff bases his cause of action. Paragraph H provides for one-half of the rate provided in paragraph G, but not exceeding two months, when the insured is wholly and continuously disabled, though not confined within a house, but is actually attended by or calling upon a physician. Defendant complains of the failure of the court to instruct the jury relative to the provisions of paragraph H providing for partial indemnity. It did not except to the portion of the charge wherein the jury was instructed that plaintiff's recovery was to be measured by the provisions of paragraph G, other than to urge that the court did not accurately state those provisions. A careful examination of the instructions convinces us that this objection is without merit. Defendant did not request the court to submit to the jury an instruction based upon the provisions of paragraph H, and that paragraph was in no way called to the attention of the court. Not having excepted to the instructions given other than as herein pointed out, and not having prepared and requested an instruction embodying the provisions of paragraph H, defendant cannot now be heard to complain of the failure of the court to so instruct the jury. *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461, Ann. Cas. 1916E, 1044; *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903; *Howe v. West Seattle, etc., Co.*, 21 Wash. 594, 59 Pac. 495; *Allend v. Spokane Falls, etc., Ry. Co.*,

21 Wash. 324, 58 Pac. 244; *Cogswell v. West St., etc., Ry. Co.*, 5 Wash. 46, 31 Pac. 411. Affirmed.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

MCDONALL v. McDONALL (No. 13877.)
(Supreme Court of Washington. April 11, 1917.)

1. DIVORCE \Leftrightarrow 286—APPEAL—REVERSAL.

Where each spouse prayed for divorce, and though the husband alone was entitled to a divorce, the court granted a divorce to each, the decree will not be disturbed, each party being as effectually released by the decree as if it were granted to the husband alone.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770.]

2. DIVORCE \Leftrightarrow 252—ALIMONY—ALLOWANCE.

Where, on divorce, custody of the children was allowed to the defendant wife, who was also given a decree of divorce, to which she was not entitled, she was nevertheless entitled to share in the property, so that she could maintain the children, and hence a division was proper.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 713-715.]

3. DIVORCE \Leftrightarrow 308—ALIMONY—MAINTENANCE OF CHILDREN.

Where a father was ordered to pay for the maintenance of his children whose custody was on divorce awarded to the wife the same monthly sum that he had been voluntarily contributing, and it did not appear that it was excessive, no complaint can be made of the award.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 801, 802.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action for divorce by Patrick McDonall against Mary McDonall, who cross-complained. From the decree, plaintiff appeals. Affirmed.

Walter B. Allen, of Seattle, for appellant.
M. H. Ingersoll, of Seattle, for respondent.

ELLIS, C. J. Plaintiff brought this action seeking a decree of divorce from defendant on the grounds of cruelty and abandonment. Defendant, by cross-complaint, sought a decree in her favor on the ground of cruelty. The parties were married on August 18, 1893. They have two children, daughters, aged, respectively, 16 and 10 years. Shortly before the marriage, plaintiff purchased lots 6, 7, 8, and 9, in block 8, Fern addition to Seattle, for \$450, of which he paid \$300 at the time, giving a mortgage on the property for the balance of \$150. This mortgage was paid off subsequent to the marriage. These four lots are now, however, covered by a mortgage for \$500. There is a small five or six room house, some fruit trees, a barn, chicken house, and garden on these lots. In 1904 the parties purchased two lots in Sumas, Whatcom county. The family lived upon the Seattle premises until August, 1907, about which time plaintiff's mind became unsettled,

and he, without cause, conceived the idea that defendant was unfaithful. Plaintiff is and has always been a sober, industrious, laboring man, kind to the children, and there is no specific evidence of any act of cruelty on his part toward defendant, save that of entertaining and expressing this delusion and making vague threats touching it. About the middle of August, 1907, while plaintiff was absent at work, defendant went to Sumas, taking the two children with her. Upon complaint of his mother-in-law, plaintiff was committed by the superior court of King county to the hospital for the insane at Stillacoom, where he remained until May, 1908, receiving his final discharge in 1909. Defendant, claiming to be afraid of him, has ever since refused to return to his home or to live with him, and has remained in Whatcom county teaching school. Plaintiff has made no further threats nor evinced any sign of a recurrence of insanity or delusions. He has contributed as liberally as his means would permit to the support and education of the children. The trial court found that each of the parties had been guilty of acts of cruelty toward the other, and awarded to each a decree of divorce. The custody and control of the children was awarded to defendant, subject to the right of plaintiff to visit them at all reasonable times. Defendant was awarded the Sumas lots, and also lots 6 and 7 of the Seattle property, subject to the payment of one-half of the mortgage on the four Seattle lots. Plaintiff was awarded the other two Seattle lots (upon which it seems to be conceded are located the house and most of the improvements) subject to the payment of one-half of the mortgage debt. It was further ordered that plaintiff pay to defendant \$20 a month toward the support of the children. Plaintiff appeals.

[1] It is first contended that the court erred in granting respondent a decree of divorce, and that appellant alone was entitled to such decree. In this we are inclined to agree with appellant. There was little evidence of actual cruelty on either side. Respondent, however, did desert appellant; and, while she may have been justified in doing so through fear of him while his mind was temporarily unsettled, several years have intervened since that time, during which she has steadily refused to return to him, though he has been and is entirely sane, has made no threats of any kind, and has evinced a kindly feeling for her and a deep affection for the children. His charge of desertion was amply sustained. But it would be idle to modify the decree so as to give the divorce to appellant alone. Such a decree would release both parties as effectually as does the divorce given to both. *Schirmer v. Schirmer*, 84 Wash. 1, 145 Pac. 981; *Hilleware v. Hilleware*, 92 Wash. 99, 158 Pac. 999.

[2] Appellant's main contention is that the

division of the property was unjust. Respondent was awarded the custody of the children. It is not claimed that she is not a fit person to have their care and control. Her character is in no manner assailed. Having this care, she is certainly entitled to a share of the property. The record is silent as to the present value of any of the lots. If the division made by the court is unjust, we have no means of knowing it, nor are we possessed of any facts upon which to base a different division.

[3] Some complaint is made of the provision allowing respondent \$20 a month toward the support of the children. There is no claim that this is more than appellant can afford to pay. In fact, there is evidence tending to show that during much of the time since his release from the asylum he has been voluntarily contributing at least that amount.

The decree is affirmed.

CHADWICK, MAIN, and WEBSTER, JJ.,
concur.

In re MASON'S ESTATE.

MASON v. MASON. (No. 13461.)

(Supreme Court of Washington. April 12, 1917.)

1. TRUSTS \S 17, 18(3)—EXPRESS—ORAL PROMISE TO CONVEY.

An oral promise to convey realty to a brother, on payment of purchase price, did not create an enforceable express trust, since the agreement was not in writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 18.]

2. TRUSTS \S 63½—RESULTING ORAL PROMISE TO CONVEY.

An oral promise to convey realty to a brother, on payment of purchase price, did not create a resulting trust, since there was no payment or part payment of purchase price, nor other equitable circumstances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98, 99, 100.]

3. FRAUDS, STATUTE OF \S 56(1)—ORAL PROMISE TO CONVEY—VALIDITY.

An oral promise to convey realty to a brother, on payment of purchase price, held to create no interest enforceable either in law or in equity.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 84, 87, 89.]

4. HUSBAND AND WIFE \S 254—COMMUNITY PROPERTY—REALTY.

Where grantor orally promised to convey land to a brother upon payment of purchase price, which was not paid until after brother's marriage, although the brother did some work on the land before marriage, and to which payments the wife contributed, upon execution of deed, the land became community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897-899.]

5. HUSBAND AND WIFE \S 274(1)—COMMUNITY PROPERTY—LIABILITY OF HEIRS—FAMILY EXPENSES.

Where a son on mother's death took a half interest in community property, subject to community debts then existing, his interest

cannot be charged with family expenses incurred by father, the surviving member of the community, subsequent to mother's death, even to the extent that such expenses were increased by the son's membership in the family, since the burden of supporting him was voluntarily assumed by the father.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1028, 1029, 1030.]

6. HUSBAND AND WIFE ⇨274(1) — COMMUNITY PROPERTY—LIABILITY OF HEIRS—IMPROVEMENTS—STATUTE.

Where a son on mother's death took a half interest in community property, subject to community debts then existing, his interest cannot be charged with improvements placed upon his property, no such liability existing at common law, and Rem. Code 1915, § 797, providing that, in action to recover realty upon which improvements have been made by defendant "holding in good faith under color or claim of title adversely to the claim of plaintiff," the value thereof must be allowed as a counterclaim, not applying.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1028, 1029, 1030.]

7. HUSBAND AND WIFE ⇨274(3) — COMMUNITY PROPERTY—LIABILITY OF HEIRS—MONEY ADVANCED TO PAY DEBTS.

Where a son on mother's death took a half interest in community property, subject to community debts then existing, his interest is chargeable with money advanced to liquidate debts owing at mother's death, if claim is made within period of statute of limitations (Rem. Code 1915, § 1368) providing that real estate of a decedent shall not be liable for debts unless administration be granted within six years from date of death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1028.]

8. EXECUTORS AND ADMINISTRATORS ⇨437(2) — ALLOWANCE OF CLAIMS—STATUTE OF LIMITATIONS.

Rem. Code 1915, § 1368, providing that real estate of a decedent shall not be liable for debts unless letters testamentary or of administration be granted within six years from date of death, is a statute of limitations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1737-1743.]

Department 2. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Petition by Lillian B. Mason, administratrix, to sell real estate belonging to estate of Charles E. Mason, deceased, contested by Raymond Mason. Order granting petition, and contestant appeals. Order reversed, with instructions.

Miller & Wilkinson, of Vancouver, for appellant. G. M. Davison and Henry Crass, both of Vancouver, for respondent.

FULLERTON, J. On April 1, 1914, Charles E. Mason died intestate, being then seised of 80 acres of land situated in Clarke county. The respondent, his then wife, was afterwards appointed administratrix of his estate. In the course of the administration it was thought necessary to sell all, or some portion, of the real estate mentioned, and to that end the administratrix filed the usual petition applicable in such cases for such a sale. In the petition she did not set forth the nature of the title by which Mason held

the property at the time of his death, but evidently proceeded on the assumption that it was either Mason's separate property or property of the community composed of herself and Mason. In answer to the notice to show cause the appellant, Raymond Mason, appeared and filed written objections to the proposed sale. He set forth in effect that Mason had been married prior to his marriage with the respondent; that he was the sole issue of such marriage; that the land in question was acquired during the coverture of Mason and his mother, and was their community property; that his mother died while the coverture existed, and that he, as her sole heir, became vested on her death with an undivided one-half interest in the property. He further averred that, if the land or any part thereof should be sold, he would lose his interest in the same, and prayed that the sale be postponed until his rights in the property could be determined.

In reply to the objections the respondent, after certain admissions and denials, set up three affirmative defenses. In the first she averred that the property in question was acquired by Mason prior to his marriage with the appellant's mother, and was at all times his separate property. For a second defense she set up that the community composed of Mason and the appellant's mother was at the time of the mother's death indebted in the sum of approximately \$1,000, and that of the indebtedness existing at the time of her death some \$180 was for obligations incurred in liquidating such indebtedness, and that the remainder was largely incurred in purchasing provisions, supplies, and household necessities which went to the support of the family of which the appellant was a member. For a third defense, she set forth that her mother had during the time of the respondent's marriage with Mason loaned and advanced to the use of the community composed of herself and Mason sums of money aggregating \$700, which had never been returned to the mother, and that the mother had assigned all of her right to the indebtedness represented thereby to the respondent. She further averred that the principal part of the improvements now on the premises had been put thereon subsequent to her marriage with Mason; that at the time of such marriage only about 10 acres of the land had been cleared and made tillable, while at the time of his death the cleared area had been increased to 30 acres, of which 4 acres had been planted to fruit trees and was then a producing orchard; that at the time of her marriage the land was worth not to exceed \$2,000. Elsewhere it appeared that the land was valued by the appraisers of Mason's estate at \$4,000. The prayer of the reply was that the court determine the several interests of the parties to the estate; that the respondent be given credit for the

money advanced by her mother; and that the interest of the appellant, whatever the court should find it to be, be charged with its proportionate share of the debts of the estate. There was a prayer also for general equitable relief.

The trial court treated the proceeding as one to try title to the property, heard the evidence of the parties, and adjudged from the proofs that the property was the separate property of Charles E. Mason, and granted the petition to the extent of permitting a sale of 20 acres of the land.

The evidence disclosed the following facts: The land was formerly a part of a 100-acre tract which stood in the name of one Charles E. Whitney. On December 7, 1878, Whitney entered into a contract with Levi A. Mason by which he agreed to sell to Mason the entire tract for a consideration of \$600, a part to be paid on the execution of the contract, and the remainder within a named period thereafter. Mason paid the balance on November 27, 1880, and on that date received a warranty deed from Whitney conveying the title to him. At the time the contract was entered into Levi A. Mason orally promised his brother Charles to deed to him (Charles) 80 acres of the land on the payment of one-half of the purchase price of the entire tract. At the time of the promise Charles was a single man, and for a part of the time lived on the common premises with Levi and the members of his family. During this time he did a little work in the tract he was to receive in the way of slashing, and started the erection of a small log cabin thereon. He, however, paid no part of the purchase price prior to his marriage with the appellant's mother in August, 1881; his earnings prior to that time going, as his brother testified, to the payment of an obligation he had incurred in the state of his former home before he came to the territory of Washington. The father and mother of the appellant first took up their residence on the land some time in 1882, the year following their marriage. Between that time and the time the husband received a deed to the property on November 14, 1887, they paid the purchase price in small payments, both contributing thereto from their joint and individual earnings, the final payment being made some two months before the deed was executed. All of the substantial improvements also were placed on the premises subsequent to the marriage, the principal part of them subsequent to the entry thereon in 1882.

The trial court held that Levi A. Mason took the property as trustee for Charles E. Mason, and that the property was at all times thereafter the separate property of the latter; that the appellant had no interest therein other than as an heir of Charles E. Mason; that the whole of the property was subject to the debts of Charles E. Mason existing at the time of his death, and to the

payment of the costs and expenses of administering his estate. An order was entered directing that the administratrix sell in the manner prescribed a specifically described 20 acres of the tract for the purpose of paying such debts and expenses. From this order this appeal is prosecuted.

[1-3] It is our opinion that the conclusion of the court is not justified by the facts. It may be doubted, we think, whether the oral promise of the brother Levi to convey the property to Charles on the payment of the purchase price created any interest in the land in favor of Charles which was enforceable either in law or equity. There was no enforceable express trust, since the agreement was not in writing (*Gottstein v. Wist*, 22 Wash. 581, 61 Pac. 715; *Spaulding v. Collina*, 51 Wash. 488, 99 Pac. 306; *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340; *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 885), and no resulting trust, since there was no payment or part payment of the purchase price by the cestui que trust, nor other equitable circumstance bringing the transaction within the rule. Nor was the contract in any sense a mortgage; that is, it was not an advance or loan of money from Levi to Charles in which the title to the land was taken as security for the repayment of the money.

[4] Charles assumed with reference to the transaction no obligation whatsoever. His part of the transaction was purely optional, and if any obligation at all arose on either of the parties to the transaction, it arose after the completion of the payments of the purchase price. But these payments were not made by Charles. They were made by the community composed of Charles and his then wife, and clearly the land became on the execution of the deed the community property of Charles and his then wife.

The case of *Borrow v. Borrow*, 84 Wash. 684, 76 Pac. 305, principally relied upon by the respondent, is not contrary to this principle. That was a case of a loan of money with the title taken in the name of the person making the loan as security for its repayment; the lender, as we held, occupying the dual position of mortgagee and trustee of a resulting trust. Moreover, it was a controversy between the lender and the borrowers, not a controversy between the legal representatives of the borrowers as to the nature of the title taken by them. We cannot think it in any way bears upon a controversy like the one before us.

Our conclusion is that the property in controversy was the community property of Charles E. Mason and the mother of the appellant, and that the appellant on the death of his mother became entitled to an undivided half interest in the property subject to the community debts then existing.

[5] The foregoing conclusion renders it necessary to notice the other questions pre-

sented. The interests of the appellant cannot be charged with the expenses incurred in the support of the family of the surviving member of the community incurred subsequent to the dissolution of the community, even to the extent that such expenses were increased by the appellant's membership in the family. The burden of supporting him was voluntarily assumed by the surviving member, and his representatives cannot now charge back this cost thereby incurred to the appellant's property.

[6] Nor is the appellant liable for the improvements that have been placed upon his property. The liability where it exists at all is purely one of statutory creation; no such liability existing under the common law. Our statute (Rem. Code, § 797) is not sufficiently broad to create it in this character of case. Under our statute the improvements must have been made by one "holding in good faith under color or claim of title adversely to the claim of" the owner. These conditions do not exist in the case before us.

[7, 8] As to the claim for the money advanced by the respondent's mother, in so far as it was used to liquidate the debts owing at the time of the appellant's mother's death, it could have been properly charged against his estate had the claim been made within the period of the statute of limitations. But the mother's death occurred in 1893, more than 20 years prior to the assertion of the claim. The statute (Rem. Code, § 1368) provides that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within 6 years from the date of the death of such decedent. The statute is a statute of limitations, and fixes a time when the real property of which a person dies seised cannot be charged with his debts. It is applicable here, and since the limitation fixed has long since expired, the court has no power to charge the appellant's property with the obligations existing at the time of the death of his mother.

The order is reversed, with instructions to stay the proceedings until such time as the property is partitioned between the appellant and the owners of the interest with which Charles E. Mason died seised.

MOUNT, HOLCOMB, and PARKER, JJ.,
concur.

BOGDAN v. PAPPAS et al. (No. 13587.)

(Supreme Court of Washington. April 12, 1917.)

1. APPEAL AND ERROR ¶773(3) — BRIEFS — TIME FOR FILING.

Where the appellants' opening brief was served July 6th and was filed in the Supreme Court the next day, and respondent's brief was served on August 4th and filed in the Supreme Court on August 10th, and appellants' reply

brief was served on August 28th and filed in the Supreme Court on August 31st, a motion made on the hearing of the appeal on November 15th to dismiss the appeal because appellants' briefs were not served within the time required by law, should not be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108.]

2. PRINCIPAL AND SURETY ¶66(1)—LIABILITY OF SURETY.

Where a surety bond covered the operation of an automobile within the limits of a city, the surety was not liable for an accident occurring upon a county highway not within the corporate limits of such city.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108, 109, 112.]

3. HIGHWAYS ¶176—LAW OF ROAD—VIOLATION—NEGLIGENCE PER SE.

Laws 1914, p. 394, § 26, providing that any person operating a motor or other vehicle shall, at the intersection of public highways, keep to the right of the intersections of the centers of such highways when turning to the right, does not apply to a case where an automobile passenger received an injury from the driver's negligence in driving over an embankment, being intended to protect travelers and vehicles upon the highway, to avoid collisions, and failure to obey such statute is not negligence per se, unless the complaining party is one for whose benefit the statute or ordinance was enacted.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Joseph A. Bogdan against George Pappas and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

Geo. McKay and Henry S. Noon, both of Seattle, for appellants. Longfellow & Fitzpatrick, of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for injuries sustained by the plaintiff, due to the negligence of the defendant George Pappas in the operation of an automobile. Recovery is also sought against the defendant Pacific Coast Casualty Company, upon the bond upon which that company was surety and Pappas was principal. From a verdict and judgments in favor of the plaintiff the defendants appeal.

The facts sufficient to an understanding of the questions which are controlling upon this appeal are these: On the 19th day of July, 1915, Pappas undertook for hire to convey the respondent by automobile from the city of Seattle to the city of Everett. At one point upon the county highway between the two cities the road makes a right-angle turn. When about 300 feet from this bend in the road Pappas undertook to pass another automobile going in the same direction, and for this purpose turned to the left. When he reached the bend in the road he failed to make the turn, and the automobile went over the bank, and the respondent sustained the injuries for which he seeks recovery. The

bond upon which the Pacific Casualty Company was surety covered the operation of the automobile by Pappas in Everett, which is a city of the first class.

[1] The respondent opens his brief with a motion to dismiss the appeal because the briefs of the appellants were not served within the time required by law. The appellants' opening brief was served on the 6th day of July, 1916, and was filed in this court on the day following. The respondent's brief was served on the 4th day of August, 1916, and was filed in this court on the 10th day of the same month. The appellants' reply brief was served on August 28, 1916, and was filed in this court on the 31st day of the same month. The cause was heard here on the 15th day of November, 1916, at which time a motion to dismiss was first presented. Upon these facts we think the motion should not be granted.

[2] Upon the merits, as to the Pacific Coast Casualty Company there is no liability, because the accident did not occur in the city where the operation of the automobile was covered by the bond. This question is fully discussed in the recent case of *Bartlett v. Lanphier & Pacific Coast Casualty Co.*, 162 Pac. 532. Upon the authority of that case there is no liability upon the bond in the present case, because the accident happened upon a county highway, and not within the corporate limits of the city of Everett.

[3] The next question is whether the court erred in submitting the cause to the jury. In this connection complaint is made of an instruction to the effect that, if Pappas was propelling his automobile at the time of the accident along the highway towards a bend or intersection of such highway, and was turning to the right, and failed to keep to the right of the intersection of the highway, then the appellant Pappas was violating the law of the state, and, if such violation was the proximate cause of the accident, the respondent was entitled to recover unless he was guilty of contributory negligence. This instruction is based upon section 26 of chapter 142 of the Laws of 1915. It is there provided that any person operating a motor or other vehicle shall, at the intersection of public highways, keep to the right of the intersections of the centers of such highways when turning to the right. The object of this requirement of the statute was to protect travelers and vehicles upon the highway, and to avoid collisions. The failure to obey a traffic statute or ordinance of this kind is not negligence per se, unless the complaining party is one for whose benefit the statute or ordinance was enacted. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Rampon v. Washington Water Power Co.*, 162 Pac. 514. In the case last cited, it was said:

"The object of the traffic ordinance is to protect pedestrians and vehicles, and to avoid collisions."

sions. * * * We have held that similar ordinances had no application unless the one invoking the ordinance can say that the ordinance was enacted for his benefit. Wherefore it has been frequently held that it is not negligence per se for a person to drive at an unlawful rate of speed, or upon the wrong side of the street, if the nonobservance of the traffic ordinance did not result in injury to the one for whose benefit it had been enacted" (citing authorities).

The instruction was not applicable to the facts in this case. As to the Pacific Coast Casualty Company, the judgment will be reversed, and the cause remanded, with direction to the trial court to dismiss the action. As to Pappas, the judgment will be reversed, and the cause remanded for a new trial.

ELLIS, C. J., and MOUNT and CHADWICK, JJ., concur.

SNYDER v. SNYDER. (No. 13774.)

(Supreme Court of Washington. April 13, 1917.)

DIVORCE — 131 — GROUNDS — NEGLECT — EVIDENCE.

In an action for divorce, evidence held sufficient to entitle wife to divorce on ground of nonsupport.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 449.]

Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge. Action for divorce by Dorothy Snyder against John Snyder. Divorce denied, and plaintiff appeals. Reversed and remanded, with directions.

Howard O. Durk, of Seattle, for appellant.

CHADWICK, J. Action for divorce on the grounds of nonsupport and neglect. The parties were married at North Yakima in August, 1914. Respondent worked at "odd jobs" for three weeks in North Yakima, and then borrowed money with which to take himself and wife to the home of his parents in Seattle. One child was born as the fruit of their union.

The record shows that during the time intervening between November, 1914, and May, 1915, respondent had but two months of steady employment, and that during that time he contributed nothing to the support of his wife. In May, 1915, he went to Portland, Or., promising to send her money. From Portland he went to San Francisco, and thence to Ft. Rosecrans, where he joined the United States Army for a period of enlistment expiring in 1918. He was transferred from Ft. Rosecrans to Ft. Wordon, Wash., in March, 1916. During his absence, the extent of his contributions to the maintenance of his wife and baby seems to have consisted of two money orders of 50 cents each. Appellant, since her marriage, has had to rely on the charity and kindness of rela-

tives for that support which her husband has denied her.

It is unnecessary to further detail "the short and simple annals" of this unhappy pair. We find the charge of nonsupport to be unquestionably sustained.

"Divorces may be granted by the superior court on application of the party injured, for the following causes:

"6. * * * or the neglect or refusal of the husband to make suitable provisions for his family."

Rem. Code § 982.

Reversed and remanded, with directions to grant the prayer of appellant's complaint.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

GODFREY et al. v. CAMP et al. (No. 13433.)
(Supreme Court of Washington. April 16, 1917.)

1. APPEAL AND ERROR §1199—PROCEEDINGS IN LOWER COURT—JURISDICTION AFTER REMAND.

The superior court has no jurisdiction, after a judgment has been affirmed, to vacate it for fraud, where permission has not first been obtained from the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676.]

2. APPEAL AND ERROR §1199—ESTABLISHMENT OF WILL—CONCLUSIVENESS—ACTION TO VACATE JUDGMENT.

Where a will was contested as a forgery, but its validity established and affirmed upon appeal, contestants cannot maintain an action to vacate such judgment on ground that additional evidence relative to the alleged forgery was discovered after the case was remanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676.]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Suit by George H. Godfrey and others against Nellie Camp and others. From an order sustaining a demurrer to the complaint, and dismissing the action, plaintiffs appeal. Affirmed.

Scott & Campbell, of Spokane, for appellants. Ira Honefenger and Hamblen & Gilbert, all of Spokane, for respondents.

MOUNT, J. This action was brought to set aside a judgment in the matter of the estate of Sarah J. Brown, deceased. The trial court sustained a demurrer to the complaint, and dismissed the action. The plaintiffs have appealed from that order.

It appears upon the face of the complaint that these plaintiffs instituted on action to set aside the purported will of Sarah J. Brown, deceased. That action was tried in the superior court on June 19, 1912, and a judgment was entered declaring the will valid. That judgment was afterwards affirmed upon appeal to this court. In re Brown's Estate, 83 Wash. 528, 145 Pac. 591. After

the judgment was affirmed the plaintiffs petitioned this court for a rehearing. That petition was denied in April, 1915. Thereafter in June, 1915, these plaintiffs filed a petition in this court asking permission to attack the judgment upon the facts set out in this complaint. The petition was denied. Afterwards a petition for a rehearing thereon was also denied. Thereafter this action was brought in the court below alleging the foregoing facts, and also that the purported will which had been adjudicated to be valid was invalid because it was a forgery, and that since the original trial additional evidence had been discovered which would show the will to be a forgery; that it was afterwards discovered that the witnesses who testified in favor of the will had perjured themselves upon the trial; that these facts were unknown to the plaintiffs at the time of the original trial, and could not have been discovered with reasonable diligence. This, in short, is the substance of the complaint.

Upon the hearing of the demurrer the trial court was of the opinion that there was no jurisdiction in the superior court to reopen the case and retry it; and also that the complaint did not state facts sufficient to constitute a cause of action. We think the trial court was right upon both grounds.

[1] This court in a number of cases has held that after a judgment has been affirmed upon appeal, the superior court has no jurisdiction of an action to vacate it for fraud, where permission to do so has not been granted by this court. *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1064; *Kath v. Brown*, 69 Wash. 306, 124 Pac. 900; *Cochrane v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42; *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144; *State ex rel. Prentice v. Superior Court*, 86 Wash. 90, 149 Pac. 321. In *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1064, supra, we said, in a case very much like this:

"The trial judge had no jurisdiction to entertain the petition now before us. When the judgment of this court affirming the judgment of the judge pro tempore was remitted to the lower court, it became in legal effect conclusive upon all the parties to the action in that court, unless recalled or attacked by permission first obtained upon proper showing here. This was not done."

In *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144, supra, we held that the lower court was without jurisdiction to amend a judgment which had been affirmed by this court. In *State ex rel. Prentice v. Superior Court*, supra, after referring to a number of cases from this court, we said:

"An examination of these cases discloses the fact that, in every one of them, there was either an express affirmance of the judgment by this court, or an express entry of judgment on the merits by this court. They sustain the doctrine that, in such cases, no interference with such judgments by any proceeding in the same cause in the lower court will be tolerated, except by direction or leave of this court."

It is plain therefore that the lower court had no jurisdiction to vacate, modify, or set aside the decree ordered entered by this court, except by permission of this court, which was not had.

[2] This is decisive of the case, but, in view of the fact that no opinion was written when the application for permission to reopen the case was denied, we deem it proper to consider briefly the sufficiency of the complaint. It appears therefrom that the will of Sarah J. Brown, deceased, was attacked by these plaintiffs upon the ground that the will was forged and supported by perjured testimony. After a trial of that question the superior court found that the will was valid, and entered a judgment to that effect. The appellants now claim that since that trial they have discovered other evidence to the effect that the will was a forgery; that the witnesses who testified in that case testified falsely; and that these facts were discovered with due diligence after the trial.

In the case of *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5, L. R. A. 1916B, 883, this court had occasion to consider the questions presented here, and we said:

"* * * Assuming that the court's judgment was based upon perjured testimony, that fact was unavailing, for the reason that judgments or decrees of a court of justice cannot be set aside on a collateral attack as being fraudulently obtained upon the sole ground that they were obtained on perjured evidence, without some other extrinsic or collateral fact entering into and constituting fraud in the transaction."

And further on in the same opinion, defining what were "extrinsic or collateral facts," we quoted from *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, as follows:

"What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. *United States v. Throckmorton*, 98 U. S. 65, 66 [25 L. Ed. 93], and authorities cited. In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy."

No such extrinsic or collateral facts were alleged. The foundation for this rule, of course, is, that there must be an end of litigation. And when a case is once tried in a court of competent jurisdiction, it is finally

tried, and the findings therein are conclusive, unless reversed on review or upon appeal. That rule is clearly applicable in this case. The case was tried originally upon the question of fraud procured by forgery. If the will was forged, the testimony in support of it must necessarily have been perjured. When these plaintiffs sought to set aside that will, they entered the contest, assuming that they were prepared to show these facts. They made that issue in the case, tried it out, and were not successful. If they may now, after the case has been affirmed upon appeal, again raise the same issue, and retry it, and again fail, then upon further discovered testimony they may have another trial, and so on indefinitely. Our system of jurisprudence does not permit any such procedure. The only tenable theory is that a trial once had is conclusive upon the parties when no errors are found and when no fraudulent contrivance prevents a fair trial. New trials, of course, may be granted as provided by the Code, and not otherwise.

We are therefore satisfied that the trial court properly sustained the demurrer upon both grounds.

The judgment is affirmed.

MAIN, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting). After the opinion had been filed and become final in *Re Brown's Estate*, 83 Wash. 528, 145 Pac. 591, the contestants petitioned this court for leave to reopen the case in the court below, and to submit certain positive testimony tending to show not only that the will was a forgery, but actually fastening the crime of forgery upon Nellie Waterhouse, now Nellie Camp, and George McFarlane. The court denied the petition without opinion, although the petitioners had brought themselves strictly within the rule of *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1084, s. c., 69 Wash. 306, 124 Pac. 900, and *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 1104. The majority cites as sustaining authority *Cochrane v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42, *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144, and *State ex rel. Prentice v. Superior Court*, 86 Wash. 90, 149 Pac. 321; but these cases have no bearing, as I shall show.

Counsel asked a rehearing. This was refused—again without an opinion. Whereupon, no other course being open, they began this suit in equity, setting up the fraud and facts subsequently ascertained, and praying for a decree of the court declaring the fraud and forgery. The material allegation in the complaint is as follows:

"That since the decision of the Supreme Court sustaining the validity of the said will and affirming the said judgment herein mentioned, and since the filing of the remittitur from the Supreme Court in the clerk's office of the superior court of Spokane county, state of Washington,

the 21st day of April, 1915, this plaintiff has discovered and learned the following facts with reference to the preparation and execution of the said will and the manner of such preparation and execution, and alleges the facts to be with reference thereto: That the said will is fraudulent, forged, and fabricated, and was not in existence at the date of the death of Sarah J. Brown, to wit, January 16, 1911, and that the same did not come into existence until on or about the 14th day of December, 1911. That during the first part of the month of December, 1911, the defendant Nellie Camp herself prepared a draft of said will upon a typewriter. That she herself signed the signature of 'Sarah J. Brown' to such typewritten draft, which is now the instrument referred to as the will of Sarah J. Brown, deceased. That upon the 8th day of December, 1911, she first approached two people, namely, Linn J. Earhart and Mrs. Annie Lane, residents of Spokane, Wash., and requested them and each to become subscribing witnesses to the said will. That upon said date they and each refused to become witnesses, but at the urgent request of Nellie Camp they met her by appointment in the parlors of the Pacific Hotel in Spokane, Wash., at about 2 o'clock p. m. on the 9th day of December, 1911. That there was present at such time the two parties mentioned, together with Nellie Camp and George McFarlane, and that at that time and place and in the presence of said George McFarlane, Linn J. Earhart, and Mrs. Annie Lane, the said Nellie Camp produced the instrument which has since been admitted to probate as the last will and testament of Sarah J. Brown, deceased, upon which appeared at that time the signature of 'Sarah J. Brown,' but which did not contain the signature of the subscribing witnesses, to wit, George A. Griffith and M. C. Lavender. That the said Linn J. Earhart and Mrs. Annie Lane examined the said instrument so submitted to them by the said Nellie Camp at that time and became familiar with said will, and are now familiar with the contents of said instrument. That she at that time requested the said Linn J. Earhart and Mrs. Annie Lane to become subscribing witnesses thereto, and upon the refusal of the said Mrs. Annie Lane to do so, she turned to Earhart and offered him five hundred dollars (\$500.00) if he would sign his name as a witness to the signature 'Sarah J. Brown' as it appeared thereon, stating to him at that time that she knew where she could secure one person who would witness it, but did not know where she could get another. That at said date and time, the date line of said will contained the date the 14th day of January, 1910, and that the said Nellie Camp stated to them that she herself had written said date in said will. That it was as good a date as any. That said Earhart refused to sign the said will as requested, and thereupon he and the said Mrs. Annie Lane, together with Nellie Camp, proceeded to leave the said hotel, and after reaching the street said Nellie Camp informed them that she would call at their home at about 5 o'clock that evening. They, however, did not reach home at 5 o'clock that evening, but were proceeding on their way, and while so doing met Nellie Camp, who stated that she had called at their home, but did not find them there, and had left a note there with a name and telephone number for them to call, which note contained the following notation: 'J. E. Dealy, 417 Hyde Blk. A. 1244, Chas. Griffith,' and she again insisted that they and each sign the said will as subscribing witnesses, which the said Earhart and Lane positively refused to do; she thereupon requested them to say nothing about what had occurred between them. That they and each told her at that time that they would not say anything about what had occurred unless compelled so to do. That by reason thereof and of the unpleasant notoriety to which they knew they would be subjected if they did tell

what had occurred, as aforesaid, they refrained from divulging the facts herein set forth, and refused to divulge the same until on or about the date as above set forth. That the said note so written by the said Nellie Camp and left at the place of residence of the said Linn J. Earhart and Mrs. Annie Lane is attached to the original affidavit of Mrs. Annie Lane, which has been filed in the Supreme Court, in the said contest proceedings, in which the said judgment rendered as a part of the petition of the plaintiffs herein, asking permission to attack the said judgment in the lower court, and that the said note is hereby referred to and made a part hereof, the same as if fully set forth herein."

The error of this court in summarily dismissing the plea of the contestants to reopen the case is impliedly admitted. It is said in the opinion, after citing the cases to which I have referred:

"This is decisive of the case, but, in view of the fact that no opinion was written when the application for permission to reopen the case was denied, we deem it proper to consider briefly the sufficiency of the complaint. It appears therefrom that the will of Sarah J. Brown, deceased, was attacked by these plaintiffs upon the ground that the will was forged and supported by perjured testimony. After a trial of that question the superior court found that the will was valid, and entered a judgment to that effect. The appellants now claim that since that trial they have discovered other evidence to the effect that the will was a forgery; that the witnesses who testified in that case testified falsely; and that these facts were discovered with due diligence after the trial."

The court then proceeds, by what seems to me to be an inconclusive argument, to sustain itself. The opinion does not touch the principal question, but justifies the former delinquency of the court by urging and attempting to prove by authority that the present proceeding is a collateral attack upon the former judgment. That the opinion is unsound, and that the position of the court is indefensible, seems to me to be easily demonstrated. Let us see whether "this is decisive of the case." "This" is the conclusion drawn from the cases cited, that is:

"It is plain therefore that the lower court had no jurisdiction to vacate, modify, or set aside the decree ordered entered by this court, except by permission of this court, which was not had."

The legal effect of the court's holding—if, indeed, it is not so held by the positive words, "After a trial of that question [forgery] the superior court found that the will was valid, and entered a judgment to that effect"—is to make all judgments entered by a superior court and affirmed by this court final, and to assert the doctrine that this court will not, although its former opinion is shown to be wrong or so questionable as to warrant further inquiry upon the merit of the case, grant permission to reopen the case. If this is the test, then the rule that a litigant may so petition is entirely over-come, for we may safely assume that such petition can rarely, if ever, be filed until after a judgment has been entered. *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1084, was an appeal from an order

overruling a motion to vacate made in the court below. We held that jurisdiction to hear such motion was not in the lower court, but in this court, and the appellant, not having made his motion here, there was no controversy of which we could take cognizance. *Kath v. Brown*, 69 Wash. 306, 124 Pac. 900, admits as well as asserts the right to petition this court, notwithstanding a final judgment. The case went off upon the principal ground:

"It also appears that he has neglected for three years to avail himself of the remedy pointed out in *Kath v. Brown*, supra, and that in the meantime a restraining order has been issued against him, which order has become final and binding. In short, if we should grant the application now made, we would in effect set aside the restraining order without a hearing thereon. We are of the opinion, therefore, that, even if the plaintiff's showing, if made in time, would have been sufficient, he is now barred by laches and by the restraining order above mentioned which has become final. The application is therefore denied."

Cochrane v. Van de Vanter, supra, held only that an independent action in equity, to restrain an execution upon a judgment after an appeal had been dismissed, would not lie. It has no bearing upon the question before us. The *Hamilton Case* held simply that a court could not, by ex parte order, amend a judgment entered upon a remittitur sent down by this court. In the *Prentice Case* the court held:

"An examination of these cases discloses the fact that, in every one of them, there was either an express affirmance of the judgment by this court, or an express entry of judgment on the merits by this court. They sustain the doctrine that, in such cases, no interference with such judgments by any proceeding in the same cause in the lower court will be tolerated, except by direction or leave of this court."

The only cases in our reports bearing upon the question at bar are *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1084, and *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 1104. Each of these cases holds to the right of a defeated litigant to petition this court to further litigate after this court has decided the case. In the *Post Case* it is said (*italics my own*):

"Upon satisfactory showing being made in this court, leave has been granted in some instances to *attack judgments which have been affirmed here*. We are not, however, aware of any published decision which shows such leave to have been granted. It is manifest that this court must reserve to itself the right to determine each particular case from the showing made, and no general rule can be announced as applicable to all cases. *Certainly no permission can be granted to disturb the judgments affirmed or entered by this court unless it is made reasonably to appear that the ends of justice require it*. But the precedent of entertaining and considering such applications has already been established. Since our published reports contain nothing upon this subject, as far as we are now informed, we have thought it proper to make these observations in this connection, in order that the precedent established may be more generally understood."

It will thus be seen that the test is not whether the court below has passed upon the same question and has entered judgment, but

whether the subsequent showing is sufficient to invite the interposition of this court to serve the ends of justice. In other words, is the showing sufficient to make it appear, *prima facie*, that the judgment does not serve the ends of justice? The judgment is not a bar to the right to petition. It is the basis of the right. To cure the delinquency of the court in rejecting the original petition without assigning any reasons therefor, the court now assumes to pass upon the sufficiency of the petition, and passes it off by holding that petitioners have not raised any new issue; that the effect of the petition is only to assert newly discovered evidence—that is, to prove the perjury of the witnesses. This may be granted, but our cases require no more than this. Their logic is that if it may be shown by other and more convincing testimony that the judgment rests in fraud the court has discretion to interfere and grant the petition. We have never held that a petitioner in such cases must raise a new and independent issue. All he is required to do is to show that the judgment upon the tendered issue may be a fraud upon the court if facts theretofore undisclosed, and through no fault of the party, are heard by the court.

The rule of the *Post Case* is no more than a declaration of the old chancery rule which allowed the filing of a bill of review. It has been said that a petition to file such bill is, under the better practice, granted as a matter of right, unless there are special reasons to the contrary. *Seymour v. White County*, 92 Fed. 115, 34 C. C. A. 240.

If the petition is sufficient—within the rule that the new matter has come to the knowledge of the petitioner for the first time since the period at which he could have made use of it in the suit, and it could not, with reasonable diligence, have been discovered sooner, and is of such character that if it had been brought forward in the suit it probably would have altered the judgment or decree—the court will hear the merit of the petition. 3 *Enc. Plead. & Prac.* 587, 588; *Owens v. Adm'rs of Wm. Forbes*, 9 Fla. 825; *Finlayson v. Lipscomb*, 16 Fla. 751; 2 *Danell, Chancery Pleading and Practice* (6th Am. Ed.) p. 1578; *Story, Equity Pleadings* (10th Ed.) § 412 et seq.

The rule which should govern this case is best stated in *Ocean Ins. Co. v. Fields*, 2 *Story* (U. S.) 59, 75, 78, by Judge *Story*, who, after stating the rule of diligence, says:

"Now, the very reason, upon which the present bill is founded, is, that this, a perfect and valid defence at law, was, by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action; and the recovery was therefore inequitable and iniquitous. It would be against all the principles of a court of equity to allow one party to practice a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act, and then to be permitted to as-

sert this double iniquity as a bar to all equitable relief against the judgment. Upon this ground alone the objection would be unavailable. * * * Now, I agree that mere cumulative evidence to the fact of fraud, or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal. But I do not know that it has ever been decided that in an assignable case, where the defense has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly-discovered evidence has come out, full and direct and positive to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. A fortiori all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case, which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime. At all events, it would be an extraordinary course for a court of equity to pronounce such a judgment in such a case, upon a demurrer, rather than to retain it for a final adjudication upon a hearing of the merits, where the full pressure of the whole facts, and the weight of all the attendant circumstances known at the trial and discovered since, may be fully brought before it. While the court would not be disposed lightly to interfere with the verdict of the jury, upon the point of fraud, it might well deem itself at liberty to look deeper into the case upon new evidence which might justly, if known at the time, have changed the verdict of the jury."

It will be seen, by reference to the authorities, that the general rule is that a bill of review will not lie where the only object to be obtained is to cumulate testimony, but to this rule there is a well-defined and well-understood exception. It is not always clear in the opinions, and yet it may be safely said that it enters as a controlling feature in almost every case where the right to attack a judgment, after final judgment on appeal, has been permitted. The exception to the rule pertains where the testimony offered is such that if it had been received the court would have probably decided the other way. It is applied where an independent or, as is sometimes said, an extrinsic or collateral fact is made to appear or where circumstances are disclosed which, if they had been received, would have made the judgment improbable and there has been no lack of diligence or vigilance on the part of the petitioner.

Lord Kingsdown, in pronouncing the opinion of the privy council in *Hosking v. Terry*, 8 Jur. (N. S.) 975, is said to have given the

best résumé of the law on this subject that has been written:

"The party who applies for permission to file a bill of review on the ground of having discovered new evidence must show that the matter so discovered has come to the knowledge of himself, or of his agents, for the first time, since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and, secondly, that it is of such a character that if it had been brought forward in the suit it might probably have altered the judgment." *Traphagen v. Voorhees*, 45 N. J. Eq. 41, 46, 16 Atl. 198.

I might quote from the opinion of judges and text-writers without number, but I find no happier expression in the books than that employed by this court in *Post v. Spokane*, supra. All cases which rest upon right reason are consistent with the ordinance of Lord Bacon, who said:

"No bill of review shall be admitted on any new proof which might have been used, when the decree was made. Nevertheless, upon new proof that has come to light after decree made, which could not possibly have been used at the time when decree passed, a bill of review may be grounded."

Surely appellants have brought themselves within these rules. The error of the court lies in the fact that it has confused the rule. It has assumed that the production of other witnesses would only cumulate the testimony from which perjury could be inferred. But this is not so. The test is not whether witnesses will but add to the number theretofore sworn, and who have already testified upon certain material facts, but rather, does the proffered testimony tend to discredit the testimony by proof of facts not disclosed upon the trial, and which were within the knowledge of the successful party, and which no reasonable diligence could have uncovered? The understanding that fraud invariably hides in the shadows of silence is never lost sight of under the true doctrine.

While many cases lay down the broad statement that a judgment will not be reviewed where no more is shown than that some witness has perjured himself, or where the judgment rests in perjury, we think that no case can be found denying relief where the testimony subsequently discovered makes it most likely that the whole testimony, as well as the subject-matter of the suit, can be said to be perjured and false. In the *Standard Encyclopedia of Procedure*, vol. 4, p. 442, it is said:

"Perjury and fraud, when alleged as ground of review, must have had, to be available, a controlling interest in the decision upon the merits."

In *Taylor v. Nashville & C. R. Co.*, 86 Tenn. 235, 240, 6 S. W. 393-395, Judge Lurton said:

"This brings us to the question as to whether ignorance of the existence of a defense, and the absence of all circumstances of suspicion, will not, as against a plaintiff guilty of conscious mala fides in the obtaining of any judgment, excuse any effort to present a defense of which the defendant is totally unaware, by reason of

the artfulness with which the fraud of the plaintiff was concocted and concerted."

After a very able discussion, that learned judge draws the following conclusion:

"We are fully attentive to the necessity of maintaining the conclusiveness of a litigation terminated by a judgment at law, and of the wisdom of the rule which casts the responsibility for an unjust judgment upon the party whose negligence led to such a result. But that a court of equity, under the circumstances of this case, could not restrain the fraudulent plaintiff, Taylor, as between himself and the victim of his conscious dishonest conduct, would be an unendurable reproach upon the methods and machinery of that tribunal. The general rule which holds a party negligent who fails to develop every fact which would defeat a recovery upon an iniquitous demand is a reasonable rule, but it has its qualifications and reasonable limitations; and we hold that where a judgment was obtained through the mala fides of the plaintiff, who at the time knew that the judgment was contrary to the facts and the truth, and where it further appears that the defendant was at the time ignorant of the existence of the very facts which make the judgment unconscionable, and when there was nothing in the circumstances of the litigation or the trial calculated to arouse suspicion of a prudent man to the fact of a fraud being practiced, a court of equity will interpose and restrain proceedings upon such a fraudulent judgment; and the fact that the defense could have been made at law, and that the evidence was accessible, will not, in such a case, be such negligence as to restrain the exercise of the jurisdiction of this court."

This is but another way of saying that a court of equity will not tolerate a fraud where the fraud so taints the judgment that it ought not to stand. The court, in *Wonderly v. Lafayette County*, 150 Mo. 635, 51 S. W. 745, after reviewing many decisions of the Supreme Court of the United States, says:

"But when the defendant is prevented by the fraud of the plaintiff from making the defense, and when, as in this case, the defense rests in the peculiar knowledge of the plaintiff, and he conceals it from defendant, the fraud attaches to the judgment itself, and vitiates it."

A court has power to protect itself and its judgments from the fraudulent and iniquitous conduct of litigants. But the right should be exercised within the limits of a sound discretion. From the very nature of things, no hard and fast rule can be laid down. Each case must depend upon its own particular facts. If this be not so, it would be hard to conceive of a case where the result of a review, if successfully waged, would not tend, inferentially at least, to show perjury. As said by Chief Justice Marshall in *Marine Insurance Co. v. Hodgson*, 7 Cranch (U. S.) 332, 3 L. Ed. 362:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

An equitable suit for the review of a judgment at law is akin to a motion for a new trial upon the ground of undiscovered testimony, and should be heard if it appears *prima facie* that a fraud has been perpetrated on the court, and the petitioning party could not, by ordinary diligence, discover the fraud in time to submit evidence of it to the court in an original proceeding.

If a petition is to be dismissed with the broad statement that the court will not hear a petitioner who comes offering proof of the perjury of the prevailing party, the court would be powerless "to serve the ends of justice," although it were shown, by the confession of the prevailing party, that he imposed a fraud upon the court by his own false evidence, for the perjury would be the same whether proved by other witnesses or by the confession of the party. In other words, under the rule laid down by this court, we cannot take into account the nature of the proof, if the result of the proof, of whatever kind, went no further than to show that the judgment rested in perjury.

The Court of Appeals of Virginia found no such difficulty in the case of *Connolly v. Connolly*, 32 Grat. (Va.) 657. In that case a will had been admitted to probate. The issue in the original action was whether the will had been forged. A verdict of a jury had been taken, and upon it the will was admitted to probate as a valid will. An appeal had been taken, and a decree entered affirming the judgment of the lower court. Thereafter a certain person, being in fear of death, made confession to a priest that he had written the questioned document. The capacity of the petitioner to ask for a writ of review was challenged. This being granted, the court did not seriously question the sufficiency of the bill. It found that the petition had all the requisites of a proper bill:

"1. The evidence was discovered after the decree was rendered and affirmed.

"2. It could not have been discovered before by the exercise of reasonable diligence.

"3. It is material, and such as, if true, ought to produce, on another trial of the issue, a different result on the merits.

"4. It is not merely cumulative."

In the general discussion the court said:

"Since the sentence, she [the petitioner] has discovered the fact, which could not have been sooner discovered by the use of the most extraordinary diligence, that the paper established in that proceeding as the will of her uncle was forged after his death by a man whose name is given in the bill, and who makes a written confession of his crime under circumstances of great solemnity. The statements of her bill, on a motion for leave to file it, must be taken as true. Her prayer is, that the former proceedings may be opened, and that she may be allowed the opportunity, hitherto not afforded her, of being heard, and that she may be permitted to make good her allegations and have the spurious paper annulled. Is it possible that the law provides no remedy, can give no relief in such a case? Is the appellant, under the circumstances shown by her bill, to continue bound, and to be forever barred of her rights,

without being heard, or having an opportunity of being heard?"

But granting that the holding of the court is sound when applied to a proper state of facts, it should not be held to control the instant case. The fact litigated in the former trial was whether the signature of Sarah J. Brown was genuine, or false and forged. The fact submitted in the case at bar is independent and collateral. No testimony to sustain it was available, nor could it have been discovered except at the will of those who have been willing to speak after the controversy seemed to have been closed. It is, that Nellie Waterhouse, now Nellie Camp, did herself sign the purported will, and that a conspiracy existed to defeat the "ends of justice." The issue in the former case was: Did Sarah J. Brown subscribe her name with her own hand in her lifetime? The issue tendered by the bill in the present case is that Nellie Camp wrote the signature. The identity of the forger was not an issue in the former case. There was no testimony one way or the other.

This court has followed the general rule that relief by bill of review will be sparingly granted. It is stated in *Meeker v. Waddle*, 83 Wash. 628, 145 Pac. 967:

"If decrees were to be set aside upon the mere ground that they were based upon perjured testimony, decrees might never become final, for the decree which held that a former decree was founded upon perjured testimony might itself later be attacked upon the ground that it was procured by perjured testimony, and so on ad infinitum. We are convinced, therefore, that there were not sufficient facts either stated in the complaint or proven at the trial by respondent to entitle respondent to recover, and that the judgment of nonsuit moved for by appellant should have been granted."

This rule was followed in *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5, L. R. A. 1916B, 883. See, also, *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; *Freidman v. Manley*, 21 Wash. 675, 59 Pac. 490. But as I read the cases they do not deny that the relief will be granted in a proper case. In the *Meeker* Case it is said:

"Decrees in a court of justice cannot be set aside on collateral attack as being fraudulently obtained upon the sole ground that they were obtained upon perjured evidence, without some other extrinsic and collateral fact entering into and constituting fraud in the transaction. To hold otherwise would be to lead ultimately to bewildering and endless uncertainty and confusion."

The court then suggests, quoting from the *McDougall* Case:

"Perjury is not specified in our statute as a distinctive ground for vacating a judgment. There must, at any rate, be connected with it such circumstances as will relieve the opposite party from all implication of want of diligence, and deceive him completely in the nature of the testimony."

The same quotation is made in the *Robertson* Case, and it is said that our own decisions recognize that a showing of some extrinsic or collateral fraud which prevented a

fair trial is sufficient, although it is immediately followed by the same quotation from *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, which is used in this case, and which, if followed literally, would deny the right to a review entirely, and which is, in its very words as well as spirit, opposed by the reasoning and logic of the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, which was cited with approval in the *Meeker* Case.

We have held, as most all courts have held, that a decree of divorce will be set aside when it is shown that a fraud has been practiced upon the losing party or upon the court. *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999. It would seem that there should be no difference in principle between a divorce case and a civil action where "the ends of justice" have been defeated.

From the almost limitless number of authorities, I deduce the following principles: The right to attack a judgment by an independent proceeding rests in equity. It does not exist as a matter of right, but rests in the sound discretion of the court. It will not be tolerated simply to prove perjury, but if the perjury is such that the judgment, if allowed to stand, will operate as a fraud upon the court or defeat the ends of justice, sound discretion demands that it be allowed. Or, taking into consideration all the facts and circumstances, if the proof offered tends to prove fraud or perjury by some independent or collateral circumstance, the action will be allowed almost as a matter of right. These principles are amply sustained by our own decisions, more especially by the *Post* Case, the *Graham* Case, and *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088, where the distinction between the right to attack a judgment upon the ground of evidence discovered after the year, and upon the ground of a fraud upon the court or upon the adverse party, is clearly pointed out. In that case it is said:

"Courts of equity are always open for relief against fraud;" and "Equity will always relieve against fraud whenever discovered"—citing *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; and further, "Where the relief is on the ground of newly discovered evidence, it must appear that there was some fraudulent concealment of the facts on the part of the adverse party."

The *Denny* Case may be accepted as the alpha and omega of the law, and petitioners are well within its doctrines.

In this case the court was called upon to test the validity of a will purporting to have been executed by Sarah J. Brown on a day certain. The instrument had been admitted to probate and carried the legal presumptions of regularity and verity. The burden of proof was on the petitioners. If a showing that months after the purported date, the will was still unexecuted, and that Nellie Camp and George McFarlane were conspiring to defeat the ends of justice for the sake of

their own pecuniary gain does not make a case for the equitable interposition of the court, or is not a collateral or independent fact, then no case can be imagined where relief should be granted, and all that has ever been said about courts being zealous to guard their records from the taint of fraud had better have been left unsaid.

The burden of counsel's opposition to the shedding of further light upon this most questionable transaction is that it would open the case, and there would be no end to litigation. But this is necessarily so in every case where the relief is granted. If such contention ended inquiry, courts would be powerless to serve "the ends of justice," for a judgment resting in fraud or perjury would be as sound as one resting in truth.

The demurrer admits the truth of the allegations of the complaint. The court has assumed, in this hearing, to pass upon the insufficiency of the original petition. Having inherent power to do justice, we ought to hold that the present complaint—which charges fraudulent concealment, the test of which is whether due diligence and vigilance would have uncovered the fraud—is a sufficient petition within the rule that requires permission of the court to maintain the action instead of barring the right because permission, although applied for, had not been obtained. Or, we should hold, if upon no other authority than the Denny Case, that petitioners have the right to maintain an independent suit in equity to uncover the inequity and fraud which, upon the face of the complaint, inheres in the judgment.

The showing made by the petitioners, the truth of which is admitted by the demurrer, makes it possible to inquire further into the probable cause, which, after all, is the foundation of the right to petition in cases of this kind, and to say that when the proffered testimony is considered in connection with much that is in the record there is much to sustain the belief that the questioned signature of Sarah J. Brown, as well as the entire preparation of the will with the possible exception of the signature of Griffith, is the handiwork of Nellie Camp. The signature has none of the characteristics of Sarah J. Brown. It has all of the characteristics of the handwriting of Nellie Camp.

Aside from the character of the handwriting which, as I have said, bears inherent evidence of being the writing of Nellie Camp, the will itself bears the earmarks of Mrs. Camp. It speaks of Charlie McFarlane and of Clarence Godfrey. In such writings as we have available, Mrs. Camp uses Charley and Clarence habitually. Mrs. Brown, in all the writings which we have, says Charles, Master Charles, and Clarence. The will uses the words "with out." We find this form in the writing of Mrs. Camp. It was shown in the original petition that notwithstanding Mrs.

Camp's denial at the trial, she could in fact operate a typewriter, and that she had at the time used a typewriter.

These are but a few of the many suggestions that might be made from the record in aid of the complaint, and if the complaint needed any aid, and I believe it does not, these circumstances and others that might be mentioned ought to be sufficient to warrant the court in holding that petitioners should have a right to maintain a suit in equity to make further disclosure of what seems to me to be the most glaring fraud upon the courts and upon the parties interested that has ever come under my notice.

SANDERSON et al. v. CITY OF SEATTLE. (No. 13675.)

(Supreme Court of Washington. April 12, 1917.)

1. MUNICIPAL CORPORATIONS \S 516 — IMPROVEMENT ASSESSMENTS—COLLATERAL ATTACK.

Where abutting owners have not objected or protested at the time the assessment roll for an improvement assessment was made up and confirmed by the court and have paid the assessment, the court will not in a collateral proceeding inquire into any question going to procedure, since all informalities as well as all defenses going to the amount of the assessment are merged in the order of confirmation, and such order is not subject to collateral attack unless made void by some subsequent proceeding.

2. MUNICIPAL CORPORATIONS \S 516 — IMPROVEMENT ASSESSMENTS—COLLATERAL ATTACK.

Under Laws 1911, p. 455, \S 23, providing that assessment roll for local improvements shall be conclusive after confirmation by the council or other legislative body as provided, and the regularity, validity and correctness of the proceedings relating to such improvement, and to the assessment therefor, etc., shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding by any person not filing written objections to such roll as provided by law, and not appealing from the action of the council in confirming such assessment roll, as provided, etc., an improvement assessment cannot be attacked in a collateral proceeding by a showing of lack of benefit or that it was too high, or that proper credits have not been given, but it must be shown that there was a lack of original jurisdiction to make the improvement, especially where the thing complained of must be made to appear by resort to facts dehors the record of the original proceeding; as courts will not hear on collateral attack non-jurisdictional objections which should have been urged before the tribunal created to hear and determine.

3. MUNICIPAL CORPORATIONS \S 413(1)—IMPROVEMENT ASSESSMENTS—JURISDICTION.

The fact that the raising of streets was made necessary by a ship canal constructed by the United States government did not affect the jurisdiction of the city to order the improvement, or to assess proper amounts upon abutting property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1014, 1020.]

4. MUNICIPAL CORPORATIONS @516—ASSESSMENTS—COLLATERAL ATTACK.

Where United States condemned land for a canal and paid a judgment for damages to a city which thereafter raised grade of certain streets because of high water from the canal and assessed abutting property for the cost, the assessment after approval cannot be collaterally attacked because cost was not paid from such judgment.

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Proceeding to contest the validity of an improvement assessment by E. W. Sanderson and another against the City of Seattle. From a judgment sustaining a general demurrer to the complaint and dismissing the proceeding, the plaintiffs appeal. Affirmed.

S. S. Langland, of Seattle, for appellants. Hugh M. Caldwell and Howard A. Hanson, both of Seattle, for respondent.

CHADWICK, J. In the year 1898 King county brought a condemnation proceeding in aid of the United States government project to dig the Lake Washington canal. The then city of Ballard was made a party claimant. In consideration of a judgment for \$7,500 then entered and paid to the city as damages for flooding the streets of the city, the government was permitted to raise the waters of Salmon Bay nine feet above the city datum. The city did not use the award to raise the grade of its streets above the water level, but used the whole recovery in the construction of a city hall. Afterwards the city of Ballard was annexed to the city of Seattle and ceased its functions as a separate municipality.

On the 25th day of November, 1912, the city of Seattle passed Ordinance No. 30389, providing for the improvement of Shilshole avenue. A local improvement district was created, the object being to elevate the level of the streets which would be flooded by the raise of the waters nine feet above the city datum by filling with earth, etc., and to tax the cost thereof to the abutting property. An assessment roll was made up, and on October 28, 1914, the council passed Ordinance No. 33863, approving and confirming it. It is further made to appear by the complaint:

"That the grading and other improvement of said Shilshole avenue and other streets and avenues included in said Ordinance No. 30389 is rendered necessary solely by the raising of the waters of Salmon Bay by the United States government in its construction of a ship canal between Salmon Bay and Lake Union in said city of Seattle, and that such improvement is not a local or special improvement within the meaning of the Constitution and laws of the state of Washington, and the said plaintiffs' property and the other property within said local improvement, and none of said property is subject to special assessment therefor.

"That * * * the city of Ballard was annexed to the city of Seattle and the city of Seattle succeeded to all of the property of the city of Ballard, including said city hall and suc-

ceeded to all of its obligations and indebtedness; that by reason thereof the city of Ballard became obligated to restore and improve said streets when submerged by the waters of Salmon Bay by the raising thereof in the construction of said ship canal and said city of Ballard and its successor, city of Seattle, became and is estopped to assess any of its cost and expense of said improvement against the abutting property.

"That said city of Seattle had no power, authority, and jurisdiction to create a local improvement district and charge the cost and expense of making said improvement against plaintiffs' property and the other property located within said district No. 2601; that to do so would be pro tanto the taking of plaintiffs' property for a public use without compensation and against the Constitution of the state of Washington.

"That said assessment was absolutely void and without law to support it.

"That the aggregate amount attempted to be levied against plaintiffs' property heretofore described by said assessment roll above mentioned is the sum of \$1,774.80; that on the 23d day of November, 1914, said plaintiffs, in order to avoid future charges for interests, cost, and penalties, paid said amount to the city of Seattle under protest, demanding at said time that said amount so paid should be paid back to them in case it should be determined and adjudicated by the court that said assessment aforesaid be illegal and void."

[1] The court sustained a general demurrer to the complaint. The case is brought here upon an appeal from a judgment of dismissal. It is not made to appear that appellants appeared, objecting or protesting, at the time the assessment roll was made up and confirmed by the court. Under any theory of the law, whether under the statute or the general rules of procedure, appellants having failed to object and having paid the assessment, we cannot inquire into any question going to the procedure. All informalities as well as all defenses going to the amount of the assessment are merged in the order of confirmation. The order of confirmation is not subject to collateral attack unless made void by some subsequent proceeding. No general rule in special assessment cases is subject to as few exceptions as this. *Hamilton, Law of Special Assessments*, §§ 633, 634; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 137, 47 Pac. 237; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Martin v. Olympia*, 69 Wash. 29, 124 Pac. 214; *North American Lumber Co. v. Blaine*, 89 Wash. 366, 154 Pac. 446.

[2] The burden of appellants' plea is that it was the duty of the city, having succeeded to the former corporation of Ballard, to pay at least the \$7,500 recovered in the condemnation suit before coming on to the property of private owners. However appealing to the conscience this plea may be, it is without legal effect in a collateral suit. It is no more than a plea, a defense which, if permissible at all, might have been urged at the time the roll was made up and still open to objections. If then found to be meritorious, it could have been passed upon by

the council, subject, of course, to a right of appeal to the superior court if rejected by that body.

The city had jurisdiction of the subject-matter. To deny it the power to assess there must be more than a showing of a lack of benefit, or that the assessment is too high, or that proper credits have not been given. Page & Jones, *Taxation by Assessment*, § 933. There must be a lack of original jurisdiction to make the improvement. We understand this to be the meaning of section 23, Laws 1911, p. 455.

[3] Counsel cites many cases from this court holding to the principle that a court will interfere to prevent the collection of an assessment where the council had no jurisdiction of the subject-matter, or had so far departed from the forms of the statute as to oust itself of jurisdiction. Some of the cases cited have been seriously questioned, if not really overruled. But in none of them is it held that the rule relied on would apply to such a state of facts as is disclosed in the record before us.

The city had power to make the assessment. An erroneous exercise of that power, although operating as a denial of a positive right, will not void a proceeding so as to make it vulnerable to collateral attack. This is always so where the thing complained of must be made to appear by resort to facts dehors the record of the original proceeding, for it is fundamental that courts will not hear, on collateral attack, nonjurisdictional objections which should have been urged before the tribunal created to hear and determine.

We find no merit in the contention that, inasmuch as the assessment was made necessary solely by reason of the government project, this is not such an improvement as to warrant assessment of appellants' property as for a local improvement.

[4] The raising of the streets is no part of the government project. If by the raising of the waters certain streets are flooded, it is the province as well as the duty of the city authorities to grade the streets to a proper level. Neither the conditions nor the cause of the conditions calling for the improvement in any way deprive the city of jurisdiction to improve its streets. If in doing so it fails to properly credit a proportionate amount of money collected upon a general judgment to abutting property, or, which is the same thing, makes a greater assessment than should be laid upon the property, the remedy is in the proceeding, and under the statute. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1108, is not in point. In that case the amount of damage and benefit to the particular lot had been made the subject of a judicial inquiry. The judgment was held final as against a subsequent attempt of the city to satisfy its judgment by resort to the

local improvement statutes. The only time the question of benefits to the particular property involved in this case has ever been considered was under Ordinance No. 30389. The case falls more nearly within the reasoning of the court in *Grandin v. Tacoma*, 87 Wash. 98, 151 Pac. 254.

Having neglected to assert their present plea as a defense in the assessment proceeding, and having paid the assessment, appellants are without present remedy.

Affirmed.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

RAMAT et ux. v. CALIFORNIA INS. CO. OF SAN FRANCISCO. (No. 13586.)

(Supreme Court of Washington. April 12, 1917.)

1. INSURANCE — 288(1) — FIRE POLICY — BREACH OF CONDITION — OTHER INSURANCE NOT INDORSED ON POLICY.

Provision of a fire policy for it being void if there be other insurance on the property not indorsed on the policy is a condition, breach of which, though existing at the time of the loss, did not contribute thereto, and so, under 3 Rem. & Bal. Code, § 6059-34, does not avoid liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 660-669.]

2. INSURANCE — 555 — PROOFS OF LOSS — WAIVER—STATUTES.

Construed liberally, as expressly required thereby, 3 Rem. & Bal. Code, § 6059-34, providing that breach of a warranty or condition of a policy of insurance shall not avoid the policy or liability of the insurer, unless the breach exist at the time of and contribute to the loss, permits waiver, after loss, of condition of policy that sworn proofs of loss be furnished within 60 days, unless written extension of time is given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367-1373, 1382-1390.]

3. INSURANCE — 668(15)—WAIVER OF CONDITION—PROOFS OF LOSS.

Whether there has been a waiver of conditions of an insurance policy is not a question for the court, where the facts are not conceded and the testimony is conflicting and the proofs are capable of more than one construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1743, 1748, 1761, 1767, 1770.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by R. M. Ramat and wife against the California Insurance Company of San Francisco. Judgment for plaintiffs, and defendant appeals. Reversed and remanded for new trial.

H. T. Granger, of Seattle, for appellant. Cole & Dolby, of Seattle, for respondents.

FULLERTON, J. On August 3, 1914, the respondent, plaintiff below, applied to the resident agent of the appellant at the city of Seattle for a fire insurance policy covering his household effects then situate in a certain

dwelling house in the city named. Insurance was granted him to the amount of \$500, and later on a policy was made out and forwarded him, reaching him on the next day. He paid the required premium at the time of the application. The policy was in form that required by the statute, a form known as the New York Standard policy, and contained, among others, the following conditions:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The dwelling house, with its insured contents, was destroyed by fire on the evening of the day the respondent received the policy. The insured immediately notified the resident agent of the appellant of the happening of the fire, and furnished the adjuster to whom he was referred with a statement of his loss, but did not, within the 60 days prescribed by the conditions of the policy, render to the company the sworn statement therein required. It developed at the trial, also, that the respondent had insurance on the property in two other insurance companies, the one insuring it to the amount of \$350 and the other to the amount of \$250. The record does not make it very clear when this insurance was procured. It can be gathered, however, from the respondent's somewhat indefinite statements that it was applied for on the same day that the respondent applied for the policy in suit. The respondent further testified that, at the time he applied for the insurance in question, he told the agent to whom the application was made that he had other insurance on the property. This testimony, however, was emphatically denied by the agent. At the conclusion of the respondents' case in chief the appellant moved for a nonsuit, and at the conclusion of the testimony challenged its sufficiency to sustain a recovery against it, basing the motion and the challenge on the ground that the evidence showed affirmatively that there had been no compliance with the conditions of the policy before quoted. The motion and

challenge were overruled, and the cause submitted to the jury on the single question of the amount of the loss, the court ruling as a matter of law that there had been a waiver of the provisions of the policy making it void if the insured then had, or should thereafter acquire, any other contract of insurance on the property, and the condition that the insured should, within 60 days after a fire occurred, render to the company a sworn statement of the loss. The jury returned a verdict for the full amount of the policy. Judgment was entered in accordance with the verdict, and the insurance company appeals therefrom.

The appellant first assigns error upon the rulings of the court refusing to sustain its motion for nonsuit and its challenge to the sufficiency of the evidence. The claim of error is founded upon the provisions of the Insurance Code. That Code provides (Rem. § 6059-106) that:

"On and after January 1, 1912, no fire insurance company shall issue any fire insurance policy covering on property or interest therein in this state other than on form known as the New York Standard as now or may be hereafter constituted."

Another section (Rem. Code, § 6059-191) makes it a penal offense punishable by fine for any insurance company or any agent of any insurance company to knowingly and willfully violate such provision. The Standard Form policy of New York at the time this policy was issued, contained the provisions and conditions we have heretofore quoted, and there is no contention that the policy issued was not otherwise in strict accordance with the requirements of the statute. It is argued from this that the statute gives to these provisions of the policy the force of positive law, making them controlling as written, and hence there can be no oral waiver, or waiver by acts, of such provisions, and that there can be no recovery where it is made to appear that there is other insurance on the policy not provided by agreement indorsed on the policy or added thereto, or when it is made to appear that the insured did not, within the time limited in the policy, render to the company sworn proofs of the loss.

[1] But the Insurance Code contains the following section:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss; anything in the policy or contract of insurance to the contrary notwithstanding. In case a loss occurs while a breach of warranty exists, if it contribute to the loss, the insured shall only be entitled to recover the amount of insurance the premium paid would purchase at the rate that would be charged without the

warranty. This section shall be liberally construed." 3 Rem. & Bal. Code, § 6059-34.

The Code deals with fire, marine, and life insurance in its various forms. The section quoted is found among the general provisions applicable to the several kinds of insurance therein dealt with, and plainly constitutes a legislative rule of construction intended to be applicable to the several forms. The second sentence of the section, it will be observed, provides that the breach of a warranty or condition in any contract of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss. Manifestly the provision of the policy, to the effect that the policy should be void if the insured then had or should thereafter procure any other contract of insurance, if not indorsed on the policy, was a condition in the contract of insurance. While it existed at the time of the loss, it is plain that it did not contribute thereto. It would seem to require no argument, therefore, to demonstrate that it was the legislative intent that the breach of such a condition should not avoid the policy. Nor is there anything in the other provisions of the section that would lead to a different result. If the respondent is to be believed, there was no intent or attempt to deceive. He informed the agent of the appellant of the additional insurance, and the policy of insurance was issued to him with full knowledge of such insurance.

[2] It is our opinion, also, that the section is applicable to the other condition of the policy claimed to have been broken, namely, that sworn proofs of loss were not furnished within the 60 days. But here again there was evidence tending to show that the agent was misled by the acts of the appellant's agents. There was testimony tending to show that on the occurrence of the fire he immediately notified the agent who issued to him the policy of insurance. This agent referred him to the company's adjuster, who requested a statement of the loss. This was furnished, and the matter proceeded until after the expiration of the 60 days before any information was given the insured that his acts were not considered by the company as a compliance with the policy. The jury, we think, would have been warranted in finding that the acts of the agents misled the respondent; that he was led by them to believe that the appellant treated the return actually made as a compliance with the policy, and was thereby lulled into the belief that nothing further on his part was necessary to be done in order to have the insurance adjusted. Under the decisions of this court based on the prior statutes, this court has held that there could be a waiver on the part of the company of similar conditions of an insurance policy, and that they were waived by acts similar to those shown in the present record. *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185.

It seems to us the same rule must obtain

under the present statute. While the language of the section quoted may not meet the precise situation, it is especially provided that it shall be liberally construed, and the plain intent of the statute is that liability for losses shall not be avoided for a mere want of a literal compliance with the provisions of the policy, which do not contribute to the loss or operate to the injury of the insurer.

It may be well to remark that, since the present policy was issued and the loss thereunder incurred, the section of the statute quoted has been amended in material particulars (see Laws 1915, p. 703; Rem. Code, § 6059-34), and that we do not here determine the effect of the amendment on the question urged by the appellant as to policies issued subsequent to the amendment.

We conclude, therefore, that the court did not err in refusing to grant the motion for nonsuit, or err in refusing to sustain the challenge to the sufficiency of the evidence.

[3] The appellant next complains of the action of the court wherein it ruled that the question whether there had been a waiver of these conditions of the policy was one of law to be determined by the court. As we have said, the testimony of the respondent, to the effect that he had informed the agent of the appellant that he had other insurance on the property at the time he applied for the insurance in question, was denied by the agent. There is room for two opinions also on the question whether the failure of the appellant to return the sworn proofs of loss was due to the fact that he had been misled by the agents of the appellant. To rule as it did, the court had to conclude, either that the proofs were capable of but one construction, or that the facts were conceded. Neither of these conclusions was justified by the record. That the first was not we have sufficiently shown. The second is founded upon a colloquy occurring between the court and the appellant's counsel at the conclusion of the evidence. The court at that time inquired of counsel whether or not the question of waiver was a question of law for the court or a question of fact for the jury, and seems to have assumed that counsel answered that it was a question of law for the court. But the answer was not thus unqualified. When the question was submitted to him in its general form he answered that it was. After discussion, however, the court asked the further question:

"Assuming that it can be waived by the adjuster, is the question whether the facts constitute a waiver a matter of law or not?"

To this counsel answered:

"Oh, I doubt that. I doubt that when there is a conflict in the proof. When there is no conflict in the proof, I would say it was a matter of law, but if there is a conflict in the proof—"

Here he was interrupted by the court, and did not finish his sentence, but the context makes it clear that he meant no more than to concede that the court could properly in-

struct the jury as to the legal effect of the facts as they found them proven, and did not mean that the court could decide on conflicting evidence that there had been a waiver of the conditions of the policy and withdraw the question entirely from the jury. That he did not think he was conceding the proposition is further evidenced by the fact that he took exceptions to the instructions of the judge, wherein he told the jury that there was but one question for them to decide, namely, the amount of the loss suffered by the respondents by reason of the fire.

But if it were concluded that the appellant did concede that the question whether or not the facts constituted a waiver of the conditions of the policy was to be determined by the court, we would be constrained to hold that the court erroneously determined the facts. Whether the respondent informed the agent of the additional insurance at the time of the application for the present insurance seems to us not to be free from doubt, even were we to look alone to his own testimony and disregard everything else. But there is the positive, emphatic denial by the agent that the respondent gave any such information. The burden was on the respondent to prove the issue, and to our minds this burden was not met. This would require a reversal, with directions for a judgment in favor of appellant. But these were questions on which both sides are entitled to the verdict of the jury, and we prefer to hold there was a mistrial, requiring correction by a re-submission of the case to the jury than to determine it on a doubtful construction of the record.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, PARKER, and HOLCOMB, JJ., concur.

THOMPSON v. METROPOLITAN BLDG. CO. (No. 13815.)

(Supreme Court of Washington. April 11, 1917.)

1. PRINCIPAL AND SURETY §109—LIABILITY OF "SURETY"—RELEASE—CHANGE OF OBLIGATION.

Where a bondholder pledged bonds as security for a note of another person, he was a "surety," and, when the pledgee consented to accept in lieu of the note certain bonds constituting a change in the primary contract, the surety was released.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 219-222.]

For other definitions, see Words and Phrases, First and Second Series, Surety.]

2. PRINCIPAL AND SURETY §128(1) — RELEASE OF SURETY—CHANGE IN CONTRACT—ACQUIESCENCE.

Mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part, and it is not sufficient that he passively ac-

quiesces; he must actively consent to be bound by the terms of the new agreement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356-358, 363-365.]

3. PRINCIPAL AND SURETY §104(4) — RELEASE OF SURETY — PROTECTED SURETIES — CHANGE IN CONTRACT.

Plaintiff, who deposited bonds as security for the note of another and took back a note as indemnity, is not subject to the doctrine of secured or protected sureties, where the note was absolutely worthless.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 193.]

4. CORPORATIONS §123(15) — PLEDGE OF STOCK — "CONVERSION" — WHAT CONSTITUTES.

Where the pledgee of stock consented to accept bonds in lieu of the note for which the stock was pledged and received the bonds and thereafter refused to deliver the stock to the surety, its act constituted "conversion."

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1-194.]

For other definitions, see Words and Phrases, First and Second Series, Conversion.]

5. PRINCIPAL AND SURETY §109—LIABILITY OF SURETY — RELEASE—CHANGE OF OBLIGATION.

Where plaintiff deposited stock to secure another's note, and the pledgee thereafter consented to surrender the note and accept instead bonds issued under a composition agreement, it could not defend its refusal to return the stock on the ground that the composition agreement was void, where there was no substantial departure therefrom, and where it continued to hold the bonds and made no effort to rescind.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 219-222.]

6. TROVER AND CONVERSION §35, 50—DAMAGES—PRIMA FACIE VALUE.

In trover for the conversion of a chose in action such as a negotiable instrument, bond, or other evidence of indebtedness, plaintiff is entitled to recover as damages the value of the thing converted, and prima facie the face value is the true value.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 215, 216, 266.]

7. TROVER AND CONVERSION §35—DAMAGES —PRIMA FACIE VALUE—PROOF.

In trover for conversion of a bond, the burden is on the defendant to overcome the prima facie evidence of value consisting of the face value.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 215, 216.]

8. ESTOPPEL §18—BY BOND — DAMAGES — PRIMA FACIE VALUE—PROOF.

In trover for conversion of a bond against the maker or one primarily liable thereon, he cannot question face value of his own valid and subsisting obligation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 24.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Frank R. Thompson against the Metropolitan Building Company. Judgment for plaintiff, and defendant appeals, and plaintiff prosecutes a cross-appeal. Affirmed on the original appeal and modified on the cross-appeal, with directions.

Douglas, Lane & Douglas, of Seattle, for appellant. Bausman, Oldham & Goodale and Walter L. Nossaman, all of Seattle, for respondent.

WEBSTER, J. This is an action to recover damages for the conversion of two first mortgage bonds. The facts necessary to an understanding of this opinion are these: On June 15, 1911, the plaintiff, Fred R. Thompson, was the owner of three first mortgage bonds of the defendant corporation, by the terms of which it promised to pay to the holder of each the sum of \$1,000 with interest. On that date plaintiff pledged the bonds to defendant as collateral security for the payment of a note of the American Mortgage & Building Company in the sum of \$2,404.17. This indebtedness was subsequently reduced to \$1,304.17, at which time the defendant surrendered one of the bonds. Thereafter the mortgage company became indebted to defendant in the sum of \$580.30 for rent, but this was separate and distinct from the note for the payment of which plaintiff's bonds were pledged. On January 31, 1914, the mortgage company, being indebted in a large amount, made a common-law assignment to P. B. Truax for the benefit of its creditors. About one year later, it was mutually agreed between the creditors, including defendant, and the assignee, that it would be advisable to hold the property until business conditions should improve. To carry this policy into effect, it was agreed that bonds of the mortgage company should be issued payable on or before ten years from date of issuance, to be secured by mortgage upon all of the company's real estate equities and by assignment of all its interest in outstanding contracts, and these bonds were to be accepted by the creditors in settlement of their several claims against the company. Pursuant to this agreement, Truax in due time closed his trust as assignee and released the property to the mortgage company, which in turn executed to Truax, as trustee for the bondholders, an assignment and deed of trust conveying to him all the property, both real and personal, owned by the company. Subsequently the bonds were prepared, and on March 23, 1915, Truax wrote to the defendant the following letter:

"Metropolitan Building Company, Seattle, Wash.—Gentlemen: In accordance with your agreement to accept bonds of American Mortgage & Building Company for your claims against the company, you will find herewith inclosed bonds Nos. * * * aggregating \$2,057.05. This aggregate amount is arrived at as follows: [Itemized statement including both the indebtedness upon the note and for the rent.] Will you kindly sign and mail to me the receipt which is herewith inclosed?"

On April 2, 1915, defendant wrote Truax as follows:

"Inclosed please find receipt for bonds of the American Mortgage & Building Company as listed thereon."

The receipt referred to in this letter follows:

"Seattle, Wn., March 24, 1915. Received of American Mortgage & Building Company its bonds Nos. [being the same set forth in the letter of Truax], aggregating \$2,057.05. Metropolitan Building Company, per E. H. Sennott, Asst. Treasurer.

"The Metropolitan Building Company also holds, as security a/c claim for rent due this company from American Mortgage & Building Company, two (2) Metropolitan Building Co. bonds, property of Fred R. Thompson."

By letter of date April 3, 1915, Truax called the defendant's attention to the fact that the note of the mortgage company had not been inclosed in its letter of April 2d. On April 6th, defendant inclosed the note to Truax, explaining that it had neglected to send it when the receipt for the bonds was mailed. On the back of the note appeared the following:

"Paid April 2, 1915.

"Metropolitan Building Company,
"By N. E. Fell, Cashier."

On April 8th, plaintiff by letter made demand upon Truax for the return of the two bonds belonging to him. Truax communicated this demand to the defendant, but it refused to deliver the bonds, asserting the right to hold them as security for the indebtedness of the mortgage company to it. Prior to the negotiations resulting in the composition agreement, defendant notified Truax by letter that its claim against the mortgage company was secured by the bonds belonging to the plaintiff, and that it would surrender them only upon payment of the note due it by that company. There is other evidence in the record tending to support defendant's contention that the bonds were not intended to be accepted in payment of the note, but in our view of the case it will not be necessary to set it forth at length. The acts claimed by plaintiff to amount to a conversion of the bonds are: (1) The defendant's claiming the right to hold them as security for the amount due for rent for which they were not pledged; (2) the refusing upon demand to redeliver the bonds after the indebtedness which they had been pledged to secure had been paid; (3) in the event it should be held that the acceptance of the ten-year bonds did not amount to payment of the note, the refusing to deliver the bonds after the security pledge had been released by the acceptance of the ten-year bonds in lieu of the note without plaintiff's consent. The trial court found in favor of the plaintiff and assessed his damages in the sum of \$1,600, the amount admitted by the defendant to be the value of the bonds. From this disposition of the cause, defendant appeals. Plaintiff prosecutes a cross-appeal upon the ground that the damages should have been assessed in the sum of \$2,000, the face value of the bonds.

[1] The lower court found that the defendant accepted the ten-year mortgage bonds in payment and satisfaction of the balance due on the note of the mortgage company, and that its refusal thereafter to surrender

the bonds upon demand amounted to conversion. We are not disposed to disturb this finding as being contrary to the preponderance of the evidence. Admitting, however, for sake of argument, that the bonds were not accepted in payment, it is undisputed that the defendant voluntarily surrendered the note and accepted bonds in a corresponding amount and asserted the right to hold plaintiff's bonds as collateral security for their payment. Where the owner of property pledges it as security for the debt of another, he is to be treated as occupying the position of a surety, and any change in the primary contract, or the acceptance of a new obligation in different terms based upon a valid consideration moving from the principal debtor to his creditor without the consent of the surety, thereby releases his property from the lien of the pledge. *Reed v. Cramb*, 22 Ill. App. 34; *Westbrook v. Belton Ntl. Bank*, 97 Tex. 246, 77 S. W. 942; *Diehl v. Davis*, 75 Kan. 38, 88 Pac. 532, 12 Ann. Cas. 550; *Kracht v. Empire State Surety Co.*, 62 Wash. 339, 113 Pac. 773; 32 Cyc. 195.

[2] It is urged that plaintiff knew of the composition agreement and the acceptance by defendant of the mortgage company bonds and did not object thereto, but it is well settled that mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part. In order to bind him to the new undertaking it is not sufficient that he passively acquiesce; he must actively consent to be bound by the terms of the new agreement. *American Iron & Steel Mfg. Co. v. Beall*, 101 Md. 423, 61 Atl. 629, 4 Ann. Cas. 883; *Edwards v. Coleman*, 6 T. B. Mon. (Ky.) 567; *Brandt on Suretyship & Guaranty* (3d Ed.) § 379; 32 Cyc. 161.

[3] Plaintiff did not pledge his bonds as security for the payment of the ten-year bonds of the mortgage company. His property was deposited as collateral to secure the payment of the mortgage company's demand note which defendant surrendered when it took the bonds, and there is no evidence in the record that plaintiff agreed that his bonds might be held for ten years as security for the retirement of the bonds accepted by defendant. It is insisted that, at the time plaintiff pledged his bonds to defendant, he took from the mortgage company, as indemnity, a note of the Manhattan Building Company, and therefore he cannot claim to be released by the novation. It was shown that this note was worthless, and for this reason the doctrine of secured or protected sureties does not apply. *Fay v. Tower*, 58 Wis. 286, 16 N. W. 558.

[4] It is plain that when defendant surrendered the demand note, to secure which the bonds in question were pledged, and accepted instead the ten-year bonds of the mortgage

company without the consent of plaintiff, his bonds were thereby released, and the refusal of the company to surrender them upon demand was evidence of such an act of dominion and authority over them as to amount to a conversion.

[5] This conclusion renders it unnecessary to discuss the question whether the assertion of the right to hold the bonds as security for the payment of the claim for rent was likewise an act of conversion. Defendant urges that the composition agreement was not carried out by the trustee according to its terms and provisions, but that preferences were given to certain creditors, and therefore the agreement was void, and the acceptance of the bonds did not release plaintiff's property. This contention is without merit: (1) Because there was no substantial departure from the agreement; and (2) because defendant continued to hold the bonds and made no effort to rescind the agreement.

Consequently, whether the acceptance of the bonds was intended to be in satisfaction and discharge of the original indebtedness or is to be treated as the taking of a new and different obligation without the consent and agreement of plaintiff, the collateral bonds were released from the lien of the pledge, and plaintiff was entitled to their immediate return.

[6-8] Defendant in its answer denied that the bonds in question were of any greater value than \$800 each. There was no evidence as to the value of the bonds other than that their face value was \$1,000 each. The court rendered judgment in favor of plaintiff for \$1,600, the amount admitted by defendant to be the value of the bonds. Plaintiff insists by his cross-appeal that the judgment should have been for the sum of \$2,000. In trover for the conversion of a chose in action such as a negotiable instrument, bond, or other evidence of indebtedness, the plaintiff is entitled to recover as damages the value of the thing converted, and prima facie the face value is the true value. The burden is upon the defendant to overcome this prima facie evidence by showing in mitigation such facts as will legitimately affect and diminish the face value, such as insolvency or the like. But where the action is against the maker of the instrument or the one primarily liable thereon, it is held that the defendant is not permitted to question the face value of his own valid and subsisting obligation. Under this rule, the judgment should have been in an amount equal to the face value of the bonds. *Robbins v. Packard*, 31 Vt. 570, 76 Am. Dec. 134; *Hoyt v. Stuart*, 90 Conn. 41, 96 Atl. 166; *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130; *First Ntl. Bank of Decatur v. Henry*, 159 Ala. 367, 49 South. 97; *Kirkpatrick v. San Angelo Ntl. Bank* (Tex. Civ. App.) 148 S. W. 362; *Daniel, Negotiable Instruments*, § 329; *Jones, Collateral Securities* (3d Ed.) § 575; 38 Cyc. 2097. See,

also, *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363.

We conclude that the judgment should be affirmed on the original appeal, and modified on the cross-appeal, with direction to enter judgment in favor of plaintiff for the sum of \$2,000, with interest from March 24, 1915.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

FARNANDIS et al. v. CITY OF SEATTLE.
(No. 13713.)

(Supreme Court of Washington. April 12, 1917.)

1. JUDGMENT \Leftrightarrow 603—MERGER AND BAR—
DAMAGE FOR CONTINUING INJURIES.

An action against a city for removal of lateral support by a cut in regrading a street, in which plaintiffs were limited under the law to the recovery of such damages as they were able to prove they had suffered within the period of 30 days prior to the date of filing the claim upon which the action had been based up to and including the date of the trial, was not res judicata of a subsequent action for damages sustained by them after the time of the first trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1119.]

2. JUDGMENT \Leftrightarrow 954—PRESUMPTIONS—FOR—
MER RECOVERY—PROSPECTIVE DAMAGES.

In an action for damages caused by the removal of lateral support when regrading a street, in the absence of any showing to the contrary, it will be presumed that plaintiffs in a prior action for former damage were limited to recovery of damages sustained up to the time of that trial, and were not allowed to recover for future or prospective injuries to their property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1816-1818.]

3. MUNICIPAL CORPORATIONS \Leftrightarrow 404(3)—AC—
TIONS FOR DAMAGES TO PROPERTY—NOTICE
—SUFFICIENCY.

As a notice to the city under the statute of the damage caused by lessening the value of the property by regrading called the attention of the defendant city to the then condition of the property and from inspection they could have discovered that a slide was likely to occur from the property into another street, the court properly in the exercise of its discretion permitted a trial amendment to cover an item of damage caused by such slide, occurring after the giving of the notice, and did not err in receiving evidence relative to such slide.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 991.]

4. TRIAL \Leftrightarrow 296(11)—INSTRUCTIONS—ERROR—
CURE BY OTHER INSTRUCTIONS.

An instruction, that the jury might find for the plaintiffs in such sum as they believed they had been damaged since filing of claim by reason of any slides which took place within two years prior to the filing of the complaint, while perhaps misleading if taken alone, was not error when taken with instructions that plaintiffs could not recover for damages occurring more than 30 days before the filing of the claim, and that in determining the compensation they should find the difference between the market value 30 days before the filing of the claim and at the date of trial, and compare the two, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 715.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by S. C. Farnandis and others against the City of Seattle. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hugh M. Caldwell and Walter F. Meier, both of Seattle, for appellant. Jay C. Allen, of Seattle, for respondents.

WEBSTER, J. This is an action to recover damages alleged to have been caused by the removal of lateral support. During the years 1907, 1908, and 1909, the city of Seattle caused Main and Jackson streets to be regraded between Tenth and Twelfth avenues, in such manner as to necessitate a cut of approximately 86 feet, which reached daylight at Twelfth avenue and Jackson street; that is, the grades met at that point. The earth on the north side of Jackson street was of such character that, when the cut was made, it developed a tendency to slide into the street. The sliding continued until the property of respondents, consisting of two lots facing on Main street which was the street immediately north of Jackson street, was invaded. In September, 1912, respondents instituted an action against appellant in the superior court for King county in which they sought to recover damages caused by a slide resulting from the removal of the lateral support to their property. In that action respondents recovered judgment for \$2,000, which appellant thereafter paid. On the 13th day of March, 1915, respondents caused to be filed with the city clerk of the city of Seattle a claim for damages in which they set forth that, within 30 days prior to the filing of such claim, another slide had occurred by reason of the same regrading of Jackson and Main streets between Tenth and Twelfth avenues. In July, 1915, respondents commenced this, their second action, for damages against the city. For answer appellant interposed a general denial and affirmatively pleaded the institution of the first action, the trial thereof upon the merits, the recovery of judgment, and the payment of the same, claiming that thereby all matters and things sought to be litigated in this action had previously been adjudicated. Upon the issues thus joined, the cause was tried to the court sitting with a jury, resulting in a verdict and judgment in favor of respondents.

The numerous assignments of error resolve themselves into three distinct classes and present the following questions for determination: (1) Was the judgment in the first action res adjudicata of the matters sought to be litigated in the present suit? (2) Did the court err in receiving evidence relative to the obstruction of ingress and egress to and from respondents' property caused by the sliding out of Main street? (3) Did the court err in instructing the jury?

[1, 2] I. In the first action respondents were limited under the law to the recovery of such damages as they were able to prove they had suffered within the period of 30 days prior to the date of filing the claim upon which that action had been based up to and including the date of the trial. Clearly they could not have recovered in that action for future or prospective injuries to their property. In *Jorguson v. Seattle*, 80 Wash. 126, 141 Pac. 334, a case involving damages due to a continuing or progressive slide, this court said:

"Construing the charter provision as applicable to all claims for damages and the statute as making the filing of the claim mandatory, as we do, it is manifest that the plaintiffs were only entitled to recover such damages as they were able to show they had suffered from the 16th day of January, 1913, up to, and including, the date of trial."

We must assume, in the absence of any showing to the contrary, that respondents were not permitted in the first action to recover future or prospective damages, but were limited to the recovery of such damages only as they had sustained up to and including the time of the trial. While the evidence in that case may have taken a broad scope, there is nothing in the record before us to indicate that the cause was submitted to the jury upon an improper theory, or that respondents were permitted to recover damages for injuries to their property which might or might not thereafter occur. In the absence of a countervailing showing, we must indulge the presumption that the cause was tried within the issues, and that the court by appropriate instructions limited respondents' right of recovery to such damages as had already been sustained. In *Doran v. Seattle*, 24 Wash. 182, 64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948, this court went at some length into the question of the right to bring successive actions to recover damages for continuing and progressive slides, and, after reviewing numerous authorities, holds that the better reasoning is with the cases which sustain the right to maintain such actions, declaring that any other rule would be not only illogical but would be fraught with doubt and uncertainty. This court is committed to that doctrine. The ruling therefore of the court below, that the judgment in the first action was not res adjudicata of the matters sought to be litigated in the present suit, was clearly right.

[3] II. The second question for consideration relates to the reception of evidence as to the obstruction of ingress and egress to and from respondents' property by reason of the slide occurring in Main street. Appellant objected to this testimony upon the ground that the claim filed by respondents set forth interference with ingress and egress as a damage resulting from the regrading of Jackson street, and not from the sliding out of Main street. The evidence in the case was to the effect that the sliding of Main street occur-

red subsequent to both the filing of respondents' claim and the commencement of this action in pursuance thereof. The claim upon which the present action is predicated was for injuries to respondents' property alleged to have been caused by the regrading of Main and Jackson streets between Tenth and Twelfth avenues and, after specifying the alleged wrongful acts on the part of appellant in making such regrade, continues with this statement:

"That by reason of said work hereinbefore stated, the said real property and the said buildings were greatly damaged, which said damage was and is a continuing one, and within 30 days last past claimants have been greatly damaged by reason of the lessened value of the real property, * * * which said damage is a continuing damage and will continue to increase and enlarge."

The object of requiring claims of this character to be filed is to give timely notice to the city of the matter complained of, and thus enable it to make prompt investigation and, if possible, take action to arrest the progress of the injury and minimize the damages. The evidence shows that the claim in this case fully accomplished that purpose. As has been aptly said, the purpose of notice is notice. Pursuant to the filing of the claim, appellant took timely steps for the purpose of preventing a slide into Main street after having sought and obtained the consent of respondents to go upon their property for that purpose. The condition in Main street concerning which the testimony complained of was offered and received was due solely to the acts set forth in the claim filed. It is not contended that the city was in any manner misled or lulled to sleep, or that it could have taken any other or different action than it did, even though the condition in Main street had been specifically called to its attention. Indeed, respondents could not specify as an item of damage the physical obstruction in Main street until after it had occurred, and obviously the city could not then have prevented it. Its attention was specifically called to physical conditions which probably would, and in fact did, subsequently result in a slide in Main street, and that the city appreciated that fact is made manifest by its action in attempting to prevent it. The slide into Main street was incidental to the condition of which the city had ample notice. *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478.

The evidence disclosed that this slide occurred only a short time prior to the trial, and the court did not abuse its discretion in permitting a trial amendment of the complaint to be made in order to cover that item of damage. The amount of the claim was greatly in excess of the amount recovered. When the amendment was allowed by the court, appellant did not claim surprise

nor did it move for a continuance, but proceeded with the trial of the case. We are of the opinion that the court did not err in receiving the evidence relative to the slide in Main street.

[4] III. The assignment that the court erred in instructing the jury is based upon an isolated portion of the charge wherein the jury was told that it might find for respondents in such sum as it believed they had been damaged since February 13, 1915, by reason of any slides which took place within two years prior to the filing of the complaint. If this were the only instruction upon that question, it may well be said that the jury might have been misled by it. Clearer language to express the idea could no doubt have been employed, but it was the evident intention of the trial court to limit respondents' recovery to such damages as they had sustained since February 13, 1915, and also to charge the jury that by reason of the statute of limitations the action must have been commenced within two years after the happening of the injury of which respondents complained. The instruction at most was ambiguous and was directly followed by this language:

"You are instructed that, in connection with the law requiring the filing of claim, if you find from the facts in this case that the damage to plaintiffs' property occurred from slides more than 30 days prior to the filing of plaintiffs' claim, that is, prior to the 13th day of February, 1915, plaintiffs cannot recover from the city for any damage so sustained. If you find that a part or portion of said damage resulted to plaintiffs' property from slides prior to said 13th day of February, 1915, then you are instructed that under the law plaintiffs cannot recover in this action for such damages or partial damages as resulted to plaintiffs and their property through said prior slides."

And later in the charge the court instructed the jury as follows:

"You are instructed that, in the event you find the plaintiff is entitled to recover, the rule to be used by you in determining the compensation is fixed by the laws of this state, and so far as it applies to this action is as follows: Take the fair cash market value of the property with all its physical surroundings and circumstances on a date 30 full days prior to the 13th day of March, 1915, to wit, on February 13, 1915, and ascertain the fair cash market value upon said date. Then find the fair cash market value of the property with all its surroundings and circumstances on the date of the trial of this cause, and compare the two. If you find from a fair preponderance of the evidence that the fair cash market value of the plaintiffs' property is today less than it was on the previous date mentioned, that is, on the 13th day of February, 1915, and if you further find from a preponderance of the evidence that the depreciation, if any, of said market value between said dates has resulted wholly and exclusively through and because of the acts alleged in the complaint subsequent to said 13th day of February, 1915, then I instruct you that under the law plaintiffs are entitled to recover herein, and that the measure of plaintiffs' compensation is the difference in fair cash market value between said dates."

Taking the whole charge together, instead of separating and isolating a part thereof

for the purpose of criticism, it seems perfectly plain that the jury could not have been misled or confused. It would be difficult to employ more apt and appropriate language than that used by the trial court in the portions of the charge last above referred to for the purpose of explaining to the jury that respondents were confined to a recovery of such damages only as they had suffered by means of slides occurring subsequently to February 13, 1915, and the jury must have so understood. It is well settled by the decisions of this court that, although a portion of the instructions if standing alone may be technically erroneous and have a tendency to confuse or mislead the jury, yet it will not constitute prejudicial error if, when taken in connection with the instructions as a whole, the jury could not have been misled as to the principles of law applicable to the issues. *Olmstead v. Olympia*, 59 Wash. 147, 109 Pac. 602; *Sudden & Christenson v. Morse*, 55 Wash. 372, 104 Pac. 645; *St. John v. Cascade Lumber, etc., Co.*, 53 Wash. 193, 101 Pac. 833; *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330; *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206.

Upon the whole record, we are convinced that the cause was fairly tried, and that there is no error warranting a reversal.

Affirmed.

ELLIS, C. J., and MAIN and CHADWICK, JJ., concur.

STATE v. BARTOW. (No. 13843.)

(Supreme Court of Washington. April 3, 1917.)

1. INTOXICATING LIQUORS ⇨132—OFFENSES—ESSENTIAL ELEMENTS.

Under Initiative Measure No. 3 (Laws 1915, p. 3) § 4, making it unlawful for any person to sell intoxicating liquors, and section 7, excepting sales by registered druggists for certain purposes from the provisions of the act, section 7 does not in itself define a crime.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 141.]

2. INTOXICATING LIQUORS ⇨215—INFORMATION—SUFFICIENCY.

An information, charging accused with being a registered druggist and selling alcohol for prohibited purposes, is drawn under Initiative Measure No. 3, § 4, prohibiting sale of intoxicating liquors by any person, and not under section 7 allowing registered druggists to sell for certain purposes, since section 7 creates no crime.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 258-260.]

3. INTOXICATING LIQUORS ⇨221—INFORMATION—MATTERS OF DEFENSE.

Under Initiative Measure No. 3, prohibiting sales of intoxicating liquors by any person, and section 7, allowing registered druggists to sell for certain purposes, an information need not negative such exception for it is a matter of defense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 240-248.]

4. INDICTMENT AND INFORMATION \Leftrightarrow 111(2)
—STATUTORY OFFENSES—NEGATING EX-
CEPTIONS.

Exceptions and provisos found, not in the enacting clause of a criminal statute, but in subsequent clauses, are regarded as matters of defense, and need not be negated in the information nor proven by the state.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 296.]

5. INDICTMENT AND INFORMATION \Leftrightarrow 111(2)
—STATUTORY OFFENSES—ENACTING CLAUSE.

Initiative Measure No. 3, § 7, allowing registered druggists to sell intoxicating liquors for certain purposes, is not an enacting clause, since it creates no offense, but simply contains exceptions to the crime created and defined in section 4.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 296.]

6. INDICTMENT AND INFORMATION \Leftrightarrow 119—
SURPLUSAGE.

Under Initiative Measure No. 3, § 4, prohibiting sales of intoxicating liquors, and section 7, allowing registered druggists to sell for certain purposes, allegations in an information charging accused with being a registered druggist and selling for a prohibited purpose may be rejected as surplusage, since they do not identify the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314.]

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

H. G. Bartow was convicted of selling intoxicating liquors, and appeals. Affirmed.

Norvell & Norvell, of Anacortes, for appellant. A. R. Hilten and R. V. Welts, both of Mt. Vernon, for the State.

MORRIS, J. Appellant was convicted under an information charging:

"That at Anacortes, in said Skagit county, Wash., on or about the 18th day of April, 1913, said defendant then and there being a registered druggist and pharmacist, did then and there willfully and unlawfully sell unto another, to wit: One Miller and one — Ellis, intoxicating liquor, to wit: Two one-quart bottles of grain alcohol, and at said time said grain alcohol was not sold for mechanical or chemical purposes, and that defendant well knew that said grain alcohol was not to be used for chemical or mechanical purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington."

[1-4] Appellant now complains that the state failed to prove that he was "a registered druggist and pharmacist" at the time of the alleged sale as charged in the information. Under such a contention the decisive question is whether or not the words "then and there being a registered druggist and pharmacist" are an essential element of the crime charged. Clearly they are not. Section 4 of Initiative measure No. 3 (Laws 1915, p. 2) makes it unlawful for any person to sell intoxicating liquor "except as in this act provided." Section 7 provides:

"Nothing in this act shall be construed to prohibit a registered druggist or pharmacist from selling * * * alcohol for mechanical or chemical purposes only."

The basis of appellant's claim of error is that the information is drawn under section 7. This contention cannot be sustained, as section 7 defines no crime, nor contains no provision making any sale of liquor unlawful. It simply enumerates certain sales of liquor that may be lawfully made by a registered druggist or pharmacist, as for medicinal purposes upon the prescription of a licensed physician, for sacramental purposes, and alcohol for mechanical or chemical purposes. These enumerated sales are among those excepted from the provisions of section 4 by the clause "except as in this act provided," and fall within the well-recognized general rule of criminal pleading that exceptions and provisos, found not in the enacting clause of a criminal statute, but only in subsequent clauses or provisions, need neither be negated in the information nor proven by the state, but are regarded as matters of defense. *State v. Davis*, 43 Wash. 116, 86 Pac. 201.

[5] Since that part of section 7 under consideration neither creates nor defines a defense, but simply contains exceptions to the crime created and defined in section 4, it can in no sense be construed as an enacting clause. *State v. Seifert*, 65 Wash. 596, 118 Pac. 746. This rule has found special application in prohibitory liquor statutes containing exceptions in favor of druggists. *McAdams v. State*, 9 Ga. App. 166, 70 S. E. 893; *State v. Moore*, 166 N. C. 284, 81 S. E. 294; *Walker v. State*, 68 Tex. Cr. R. 318, 151 S. W. 318; *People v. Shuler*, 136 Mich. 161, 98 N. W. 986; *State v. Beneke*, 9 Iowa, 203; *Baume v. State*, 26 Fla. 71, 7 South. 371; *State v. Duggan*, 15 R. I. 403, 6 Atl. 787; 23 Cyc. 239.

[6] It being unnecessary for the state to charge that the alleged sale did not fall within any excepted class, it was unnecessary to prove it. Appellant relies upon certain Missouri cases of which *State v. Marchand*, 25 Mo. App. 637, is a type. In these cases defendants were indicted for violations of a statute relating to druggists, and not for unlawful sales of liquor. The court reasons that, inasmuch as the statute under which the indictments were drawn had reference only to "druggists" as that term is defined in other state statutes, the defendants could only be indicted and convicted as druggists; the statute covering no other class of persons. No such limitation is found in our law. It is not a law applying to druggists only, and hence one which druggists alone can violate. It is an offense for any person to sell, except as in the act provided. It was therefore unnecessary to either allege or prove that appellant was a druggist, and no error can be predicated upon the state's failure to so prove. Neither does the insertion of this immaterial matter, as appellant further contends, fall within the rule as stated

in Joyce on Indictments, § 267, that, while immaterial averments may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge, including those allegations which operate by way of description of that which is material. The thing legally essential in this information was the unlawful sale by appellant of intoxicating liquor to the persons named and in the manner and form charged. The character or description of the person making such sale was immaterial, since "any person" selling intoxicating liquor contrary to the provisions of the initiative act, whatever his trade, calling, or profession, would be guilty of an offense. That appellant is a druggist was in no sense descriptive of or a part of the act charged. It added neither to its certainty nor uncertainty. The rule contended for by appellant has been recognized by this court and given its due weight in *State v. Wilson*, 91 Wash. 136, 157 Pac. 474, where it was said:

"This rule is based upon the idea that the particular description is essential to the identity of the thing taken."

In other words, to be material the descriptive words in the information must be an essential part of the thing charged as the criminal act. The description here complained of cannot be so regarded or in any other light than as mere surplusage.

Other exceptions are presented in the record. They have, however, not been urged upon us, and upon examination we find them without merit. The judgment is affirmed.

ELLIS, C. J., and CHADWICK, MAIN, and WEBSTER, JJ., concur.

NOLLMMEYER v. TACOMA RY. & POWER CO. (No. 13764.)

(Supreme Court of Washington. April 12, 1917.)

1. CARRIERS — 321(14)—INJURIES TO PASSENGER—INSTRUCTION.

In an action against a street railroad for injuries to plaintiff when attempting to alight from defendant's car, charge to the jury held to contain a fair, clear, and concise statement of the issues involved, and to define the rules of law applicable with accuracy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332.]

2. CARRIERS — 321(21)—INJURY TO PASSENGERS—INSTRUCTION.

In an action against a street railroad for injuries to a passenger while attempting to alight, where the court instructed that the burden was on plaintiff to establish that he was thrown from the car substantially as charged in the complaint—i. e., by reason of the conductor's negligence in starting the car while plaintiff was in the act of alighting, but before he had completely alighted—the charge was as favorable to defendant as it had any reason to expect, carrying the plain implication that if plaintiff's injuries were caused by an attempt on his part to alight or jump from the car af-

ter it had been stopped and again put in motion, as alleged by defendant, plaintiff could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1334.]

3. TRIAL — 260(8) — INSTRUCTIONS — DEFENDANT'S RIGHT.

Defendant street railroad was not required to rest its defense upon mere inference or implication, however plain, arising from the instructions given, but was entitled to have its version of the accident definitely and specifically submitted to the jury, if there was any substantial evidence tending to prove the allegations of the affirmative defense, and if defendant presented a proper instruction embodying the law applicable with the request to so instruct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657.]

4. CARRIERS — 333(5)—INJURIES IN ALIGHTING FROM MOVING CAR—NEGLIGENCE.

It is not negligence per se for a passenger to attempt to alight from a moving street car in the absence of circumstances making the attempt so dangerous that it might not be made by a person of ordinary care and prudence, having regard for his own safety; if, under all the circumstances, an ordinarily prudent person would reasonably have been warranted in attempting to alight from a moving car, negligence as a matter of law will not be imputed to a passenger who pursues that course.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1391.]

5. TRIAL — 261—INSTRUCTIONS—PARTIAL INCORRECTNESS OF REQUEST.

To entitle a party to predicate error on the court's refusal to give a requested instruction, such an instruction must be substantially correct, and such as the court might give without modification or omission; and an instruction which is in part correct, and in other particulars incorrect, may be refused as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675.]

6. TRIAL — 260(1) — INSTRUCTIONS — REPE-TITION.

When requested instructions were amply covered by the instructions given it was not error to refuse to give the requests in the exact language asked, if being sufficient if the substance of the requests was correctly covered in suitable language.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

7. TRIAL — 255(5)—DIRECTION TO DISREGARD EVIDENCE—SUFFICIENCY.

In an action against a street railroad for personal injuries to a passenger, where plaintiff testified that he had not the money to have an operation, advised by a physician, performed, and defendant's counsel objected to the testimony as incompetent, irrelevant, and immaterial, and asked the court to disregard the answer, and the court ruled that it was immaterial, in the absence of request for a more specific direction to the jury to ignore the question and the answer, the statement of the court that the evidence was immaterial was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 633.]

8. EVIDENCE — 103—IMMATERIALITY.

In an action against a street railroad for personal injuries, the question to plaintiff whether he had got the money to have an operation advised by a physician performed was improper, and should not have been asked.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 157-159, 161, 162, 165-168.]

9. APPEAL AND ERROR —1053(2)—HARMLESS ERROR—EVIDENCE.

The effect of such question and plaintiff's negative answer was not such that it could not be cured by an instruction to disregard it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179; Trial, Cent. Dig. § 977.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Rudolph Nollmeyer against the Tacoma Railway & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. D. Oakley, of Tacoma, for appellant. A. O. Burmeister and J. H. Gordon, both of Tacoma, for respondent.

WEBSTER, J. This action was instituted by plaintiff to recover damages alleged by him to have been sustained on the 26th day of July, 1915, while attempting to alight from one of defendant's street cars at Klee's Station in Pierce county. It is alleged in the complaint that the car upon which plaintiff was a passenger stopped at the above station for the purpose of discharging passengers, and while plaintiff was in the act of alighting, the defendant, through its agents and servants in charge of the car, caused the same to suddenly start and jerk, throwing plaintiff to the ground and causing the injuries of which he complained. For answer defendant admitted that plaintiff was a passenger upon its car at the time and place alleged, denied the allegations of negligence set forth in the complaint, and affirmatively pleaded that, if plaintiff sustained any injuries upon the occasion in question, the same were caused by his own carelessness and negligence in that, after the car had stopped at its regular stopping place and had again been started and put in motion, he recklessly and heedlessly undertook to alight or jump therefrom. The allegations of the affirmative defense were denied by plaintiff, and, upon the issues thus joined, the cause was tried to the court and a jury, resulting in a verdict and judgment in favor of plaintiff. From this judgment defendant appeals and assigns for error: (1) The refusal of the court to give to the jury certain instructions requested by it; and (2) the refusal of the court to charge the jury to disregard and ignore certain incompetent evidence introduced in behalf of the plaintiff. Of these assignments in the order stated:

I. In support of the allegations of his complaint plaintiff testified that, as the car upon which he was a passenger approached Klee's Station, he notified the conductor of his desire to get off at that point; that he was standing on the rear platform, and, when the car stopped at the usual and regular stopping place, one Klee preceded him and alighted safely; that the plaintiff immediately followed, holding to the handhold with

one hand, and in the other carrying a basket; that as he was in the act of stepping down, the conductor caused the car to start, throwing him to the ground; that when the car was put in motion he could not hold or balance himself and "had to kind of jump." This testimony was amply sustained and corroborated by other witnesses to the accident. The court instructed the jury in part as follows:

"The plaintiff claims in his complaint that he started to alight from the car, and while one foot was on the step of the car and the other swung outward in the act of alighting, the car was caused to suddenly start and jerk, throwing the plaintiff to the ground with great force and violence, injuring and wrenching plaintiff's back and groin, promoting an inguinal hernia, from which injuries he became weak, sore, and sick, and disabled to work and perform his usual vocation as a farmer; that he is still suffering from such injuries; and that he will continue to suffer from said hernia for the rest of his life. He charges further that he was compelled to employ a physician at an expense of \$50; that he believes an operation will be necessary, at a cost of \$300, and on account of the injuries which he thus alleges he received he asks damages in the sum of \$2,800. The defendant in answer denies the statement of the plaintiff as to the manner of the car being started and injuring him, and denies that the plaintiff was injured in the manner or to the extent, or at all, as alleged by him; and denies all negligence on its part which in any way contributed to any injury which he may have sustained. And for a further and affirmative defense the defendant alleges: That if the plaintiff sustained any injuries at the time, place, and in the manner alleged in his complaint, that such injuries were caused by reason of his own carelessness and negligence in recklessly and heedlessly undertaking to alight from the car in an improper manner and while the car was in motion, and in failing to exercise his faculties in a way to observe, escape, and avoid the risk and danger of his position in attempting to alight from the car while the same was in motion, which was open and apparent to him and which could have been easily avoided had he taken proper care for his personal safety. The plaintiff, replying to this answer of the defendant, denies all negligence on his part which contributed to his injury. It is the duty of a street car company operating cars within the city or on interurban lines to use a high degree of care in operating their cars and in stopping at stations, in order that persons getting on or off the car, who are themselves in the exercise of a reasonable degree of care, can do so with safety. And it is the duty of one who is getting on or off a car to use ordinary care for his own safety.

"A street car company is not an insurer of the safety of its passengers, but it is under obligations to use a high degree of care for their safety; and for any injury which a passenger sustains because of the failure of the company operating the car to use this high degree of care, the person so injured has a right of recovery for the injuries he may have received on account of the want of care on the part of the street car company. In the case at bar, if you find from the preponderance of the evidence in the case that the plaintiff received some or all of the injuries of which he complains by reason of the negligence of the conductor in charge of the car in starting the car before the plaintiff had completely alighted therefrom, at the time and place charged in his complaint, and you further find that he sustained the injuries of

which he complains, or some of them, as the result of that negligence, and you also find from the evidence that the plaintiff himself was guilty of no negligence on his part that contributed to his injury, then I instruct you that your verdict in this case should be for the plaintiff, for such an amount as you think he is entitled to to compensate him for the injury or injuries so sustained. If, on the other hand, you find from the evidence that the street car company was not guilty of any negligence whatever, which was the proximate cause of such injuries as plaintiff may have sustained at the time in question, if you find that he sustained any injury, or if you find that although the street car company was negligent in some degree the plaintiff himself was also negligent in his manner of alighting from the car, and that his negligence was such that it contributed to his injury, then I instruct you that the plaintiff cannot recover, and your verdict should be for the defendant, because in order that a plaintiff may recover damages in such a case he must have himself been free from any negligent act on his part that contributed to his injuries.

"It was the duty of the street car company in the case now on trial to have stopped its car at 'Joe Klee's Station' a reasonably sufficient length of time to enable all passengers on said car who desired to alight from the car at that place to do so with safety, if they used reasonable care on their part to do so, and if you find that the street car company failed on its part to give the plaintiff a reasonable time to alight from the car before starting the same, then that would be negligence on its part in that regard. If you find from the evidence in this case that the plaintiff was standing on the car platform ready to alight therefrom, or was in the act of alighting from the car when the defendant suddenly started the car and threw the plaintiff off in the manner substantially as alleged in his complaint, then the defendant would be liable for the injuries he may have sustained by reason of their having so started the car.

"The burden is upon the plaintiff, not only to show by a fair preponderance of the evidence that he was thrown from the car, substantially as charged in his complaint, but that the injuries he claims to be suffering from, and for which he seeks to recover damages in this case, were due to his fall at the time of his getting off the car, and if he fails to satisfy your minds that the injuries of which he complains are the result of this accident, then your verdict should be for the defendant, for he can recover only for the injuries which are the proximate result of his fall from the car, if you find that he did fall and receive injuries. * * * In the trial of this case the burden is upon the plaintiff to satisfy you, ladies and gentlemen of the jury, by a fair preponderance of all the evidence in the case, that he received the injuries of which he complains, and that such injuries were due to the negligence of the persons in charge of the car at the time, and in the manner alleged in his complaint. However, while you are considering the affirmative defense of the company, that the plaintiff was himself negligent in alighting from the car, and that such injuries as he sustained were due to that negligence contributing to his injuries, the burden as to that question, that is, whether or not the plaintiff was guilty of contributory negligence, is upon the defendant to show such contributory negligence."

[1, 2] The foregoing charge to the jury contains a fair, clear, and concise statement of the issues involved, and the rules of law applicable thereto are plainly defined with commendable accuracy and brevity. Appellant does not contend that there is any error in

the instructions given, but complains of the refusal of the court to give its requested instructions, submitting to the jury its theory of the case. The court instructed the jury that the burden was upon the plaintiff to establish by a preponderance of the evidence that he was thrown from the car substantially in the manner charged in the complaint; that is, by reason of the negligence of the conductor in starting the car while plaintiff was in the act of alighting, but before he had completely alighted therefrom. This charge carried with it the plain implication that, if plaintiff's injuries were caused by an attempt on his part to alight or jump from the car after it had stopped at the station and had again been put in motion, as alleged by the defendant, the plaintiff could not recover. As we understand the law this certainly was as favorable to the defendant's contention as it had any reason to expect.

[3] Defendant argues, however, that it was not required to rest its defense upon mere inference or implication, however plain, arising from the instructions given by the court, but was entitled to have its version of the accident definitely and specifically submitted to the jury. In our opinion this contention has merit, provided there was any substantial evidence in the case tending to prove the allegations of the affirmative defense, and provided further the defendant presented to the court a proper instruction embodying the law applicable thereto, with the request that the court so instruct the jury. A careful examination of the record fails to convince us that there was any such evidence. The defendant offered no testimony in its own behalf tending to prove that the plaintiff attempted to alight from the car after it had been put in motion, and, if there is any evidence in the record to that effect, it is found in the testimony of Clyde Boyles, a witness called in behalf of the plaintiff, and we have grave doubt as to whether his testimony tends to prove that after the car had stopped at the platform and was again started plaintiff then attempted to jump or alight therefrom. The theory of the defense was that, after the car had stopped and had again been put in motion, the plaintiff undertook to alight; while the theory of the plaintiff was that the car had stopped at the station, and, while he was in the act of alighting, but before he had completed doing so, the conductor negligently caused the car to start, throwing him to the ground. With this thought in mind it may seriously be questioned whether the testimony of Boyles tended to support the defendant's version of the accident or was in any manner inconsistent with plaintiff's theory thereof. But, granting for the sake of argument that his testimony was sufficient upon which to predicate an instruction in line with the allegations of the affirmative defense, it seems to us that the requested instructions did not contain a cor-

rect statement of the applicable principles of law.

Of the several requested instructions the one most favorable to the defendant as being the one more nearly correct is as follows:

"I instruct you that a passenger has no right to alight from a car while it is in motion too great for him to do so in safety, because of the fact that he wishes to alight from the car. This fact would not excuse the passenger taking the risk and danger of alighting from a moving car. It is the passenger's duty to remain on the car until it has come to a standstill, or has slowed down sufficiently to enable him to alight in safety. If you find from the evidence that the plaintiff in this case desired to alight from the same, and did undertake to alight from the said car while it was moving, the defendant company is not responsible, and your verdict must be for the defendant. The defendant company cannot be held liable for mistakes of judgment made by passengers in alighting from moving cars."

[4] By this request the court is asked to charge the jury that it is the duty of the passenger to remain on the car until it has come to a standstill, or has slowed down sufficiently to enable him to alight in safety. It is not claimed by the defendant that plaintiff attempted to alight from the car before it had come to a full stop, and this portion of the instruction clearly is not applicable to either the pleadings or the proof. It also requests the court to instruct that, if the plaintiff undertook to alight from the car while the same was in motion, its verdict must be for the defendant. This is not the law. To so charge would be in effect to instruct the jury that it is negligence per se for one to attempt to alight from a moving street car, while the overwhelming weight of authority sustains the rule that this is not negligence per se in the absence of circumstances making the attempt so dangerous that it might not be made by a person of ordinary care and prudence having regard for his own safety. The criterion is that if, under all the circumstances as disclosed by the evidence in the particular case, an ordinarily prudent and careful person would reasonably have been warranted in attempting to alight from a moving car, negligence as a matter of law will not be imputed to a passenger who pursues that course. As was said by this court in *Brown v. Seattle R. Co.*, 16 Wash. 465, 470, 47 Pac. 890, 892:

"* * * We cannot announce as a legal proposition that a passenger upon a street railway car may not get off the car when in motion. It would depend entirely, in our judgment, upon the circumstances, that is, the rate of speed, place at which the passenger might attempt to alight, and other things, which would make each case depend upon the particular facts and necessarily, ordinarily, be a question of fact for the jury to determine whether the act of the passenger was negligent."

[5] It is also well settled that, in order to entitle a party to predicate error upon the refusal of the court to give a requested instruction, such instruction must be substantially correct, and such as the court might give to the jury without modification or omis-

sion. A party cannot complain that the court did not pause in the midst of a trial and, of its own motion, modify and correct a requested instruction, and then give it as corrected. No such duty rests upon the court. An instruction which is in part correct, and in other particulars incorrect, may be refused as a whole. *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 36 Am. St. Rep. 182; *Howe v. West Seattle Land & Imp. Co.*, 21 Wash. 594, 59 Pac. 405; *State v. Johnson*, 47 Wash. 227, 91 Pac. 949; *Ramm v. Hewitt-Lea Lumber Co.*, 49 Wash. 263, 94 Pac. 1081; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

[8] We have carefully examined all of the other requested instructions, and are satisfied that, so far as they contain correct principles of applicable law, they were amply covered by the instructions given by the court, and when such is the case it is not error to refuse to give an instruction in the exact language requested. It is sufficient if the substance of the request is correctly covered in suitable language. *Smith v. Seattle*, supra; *State v. Anderson*, 30 Wash. 14, 70 Pac. 104; *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652.

[7, 8] II. The assignment that the court erred in failing to instruct the jury to disregard an improper question and answer when requested so to do by defendant we find to be without merit. The record discloses that, after plaintiff had testified that he had been advised by a physician that an operation for hernia would be necessary as a result of his injuries, he was asked:

"Q. Have you got the money to have that operation performed? A. No, sir.

"Mr. Oakley: That is objected to as incompetent, irrelevant, and immaterial, and I ask the court to disregard the answer.

"The Court: That is immaterial."

Thus it will be seen that plaintiff did not request the court to charge the jury to disregard and ignore the question and answer, and the objection which was interposed was promptly sustained by the court. In the absence of a request for a more specific direction to ignore the question and answer, the statement of the court in the presence of the jury that the evidence was immaterial was sufficient.

[9] While the question was improper, and should not have been asked, it was not such misconduct as could not have been cured by an instruction to disregard it. The defendant seemed to be content with the action taken by the court upon its objection, and cannot now be heard to complain of a matter which could have been met and corrected if called to the attention of the trial court.

Upon the whole case we are convinced that there are no errors justifying a reversal of the judgment.

Affirmed.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

LEVITCH v. LINK et al (No. 13908.)

(Supreme Court of Washington. April 13, 1917.)

CHattel Mortgages §138(1)—PRIORITIES—LIVERY STABLE KEEPERS' LIENS.

Under Rem. Code 1915, §§ 1197, 1199, relating to livery stable keepers' liens, a chattel mortgage prior in time is not outranked by a livery stable keeper's lien subsequently acquired.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231-236.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Meyer Levitch against Robert Link and others. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

F. A. McMaster, of Spokane, for appellant. Harry M. Morey, of Spokane, for respondents.

CHADWICK, J. The question in this case is whether a chattel mortgage prior in time outranks a livery stable keeper's lien subsequently acquired. Respondents admit the general rule, but claim the benefit of the exceptions noted in 25 Cyc. 1509 and 1510:

"By the weight of authority the lien of the livery stable keeper on a horse kept by him is, in the absence of legislative intent to the contrary, subordinate to the lien of a prior recorded mortgage, unless the horse be delivered to the livery stable keeper with the consent of the owner, express or implied."

It is first insisted that the statute (Rem. Code, tit. 8, c. 11, §§ 1197, 1199) indicates a legislative intent to make a livery stable keeper's lien superior to an existing chattel mortgage, in that the statute creates the lien and authorizes a retention of possession until the lien has been paid, and summary satisfaction of the charge by notice and sale without the formality of a proceeding in court.

It is further insisted that this court has, by implication at least, held that a lien of the character here asserted is a superior lien. *National City Bank v. Henderson*, 59 Wash. 354, 109 Pac. 1038, is relied on. The question there decided was whether an agister who claimed under a statute passed after the lien of a chattel mortgage had attached could assert the priority of his lien. The court held that, inasmuch as his right to a lien at all was statutory, the statute under which it was asserted would not be held to be retroactive so as to destroy the lien of a prior chattel mortgage. The court did not assume to pass upon the rights of lienholders who claim under statutes of equal standing, or to say that, notwithstanding one was later in time, he should be the first in right because of implied notice, or because of some equity in favor of the stable keeper.

The trial judge rested his decision upon his conception of the court's holding in the *National City Bank Case*. By quoting from

the case of *Case v. Allen*, 21 Kan. *217, 30 Am. Rep. 425, the court may have inadvertently given ground for the inference that, if it were not for the difference in time which would make the statute sustaining the lien retroactive, the agister's lien would have been given preference. But we think the court had no such intention. It was possible to affirm the case upon substantial reason without going into the question of priorities. The *Kansas case* is explained by the writer of the opinion. At any rate his idea of the meaning of the quotation from the *Kansas case* (see *National City Bank v. Henderson*, supra, 59 Wash. 357, 109 Pac. 1038) may be gathered from the following words:

"It evidently meant that he consented to the priority of the lien which was already provided for by statute, and that there was no intention on the part of the court to announce the doctrine that an act of the Legislature subsequent to the execution of a contract could have force and effect to change the terms of the contract, to the injury of either of the contracting parties."

Whether the distinction made by the Supreme Court of Kansas between a lien founded in contract and one created by statute is sound may be doubted, but we are not called upon to solve the doubt. Our chattel mortgage act (Rem. Code, § 3660) by its terms makes a chattel mortgage "void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, etc., unless it is accompanied by the statutory affidavit and is acknowledged. The effect of this statute is to make such instruments valid as against any subsequently asserted lien. The language employed to effectuate this purpose is as apt as if it were provided that such instruments should be preferred over any subsequent lien of whatever character. The *Kansas statute* at the time the decision in *Case v. Allen*, supra, was announced did not provide a way for making a chattel mortgage secure and valid against one claiming "a lien upon such property." It took account only of "creditors," "subsequent purchasers," and "mortgagees." *Dassler's Statutes of Kansas 1876*, p. 542.

While the *National City Bank Case* does not discuss the question at bar, it does say that the lien of an agister or livery stable keeper is "purely statutory." When this is said this case is disposed of. The statute (Rem. Code, tit. 8, c. 11, §§ 1197-1200) makes no exception in favor of the liens therein created, although the Legislature might have so provided, as indeed it did so provide in the chapter giving a lien upon farm products for labor performed in the rearing or saving of crops. Such liens are made "prior to all other liens." Rem. Code, § 1188.

To hold that respondents' lien is superior to the appellant's chattel mortgage would be to go further than to merely hold that such

priority is implied in the lien statute. We must, to accomplish the desired result, hold that the entirely independent statute which defines the character of the chattel mortgage lien is repealed, in so far as agisters' and livery stable keepers' liens are concerned, by implication.

The principle governing this case was considered by us in the case of *Rothweiler v. Winton Motorcar Co.*, 92 Wash. 215, 158 Pac. 737. In that case the lienor asserted a right under Rem. Code, tit. 8, c. 5, §§ 1154-1158, giving a lien for labor and materials expended upon chattel property at the request of the owner. No priority was given over other liens. We held that the priority of the mortgage lien was not overcome, and that, having the opportunity to declare priorities, the Legislature intended no such consequence, "otherwise it would have made a reservation in favor of subsequent liens of the character now asserted."

Reversed and remanded, with instructions to enter a decree protecting the liens of the parties in their order; the first in time being the first in right.

ELLIS, C. J., and MAIN and WEBSTER, J.J., concur.

CITY OF SEATTLE v. HEWETSON. (No. 13769.)

(Supreme Court of Washington. April 13, 1917.)

1. INTOXICATING LIQUORS — 238(1) — ILLEGAL ISSUANCE OF PRESCRIPTION — QUESTION FOR JURY.

In a prosecution for having issued prescription for whisky without good reason to believe that person to whom it was issued was sick, or that the liquor was required as medicine, the question whether defendant had ground to believe that the person was actually sick, or the liquor was required as medicine, *held* for the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324, 325, 327.]

2. INTOXICATING LIQUORS — 15 — ORDINANCE — PROHIBITORY CHARACTER.

An ordinance of the city of Seattle forbidding a physician to issue a prescription for whisky without having good reason to believe that the person to whom it is issued is actually sick, or that the liquor is required as medicine, is not void as prohibitory and not regulative; Rem. Code, 1915, § 7507, subd. 32, giving a city of the first class power to regulate sale or gift of intoxicants, so that the city had authority to pass it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 17, 18.]

3. MUNICIPAL CORPORATIONS — 111(4) — ORDINANCE — PARTIAL INVALIDITY.

Even though some sections of a city ordinance regulating the sale of intoxicants are void, the efficacy of others is not destroyed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 248-251.]

4. INTOXICATING LIQUORS — 11 — REGULATION BY STATE — EXCLUSIVE CHARACTER — STATUTE.

Initiative Measure, No. 3 (Rem. Code 1915, § 6262-1 et seq., Laws 1915, p. 2), regulating

the sale of intoxicants, was not intended to be exclusive, and does not deny to municipalities of the state power to enact ordinances relating to the same subject-matter, so long as they are not in conflict with the provisions of the statute; legislation relating to the sale of intoxicants being an exercise of the police power, and the fact that there is state legislation on the subject not depriving a city of the power to legislate thereon.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 13.]

5. CRIMINAL LAW — 371(10) — EVIDENCE — OTHER OFFENSES.

In prosecution of a physician for violation of a city ordinance by having issued a prescription for whisky without having reason to believe that the person to whom it was issued was sick, or that the liquor was required as medicine, testimony relating to prescriptions other than that on which the charge was laid was admissible as material on defendant's good faith.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830, 831.]

6. INTOXICATING LIQUORS — 233(1) — PROSECUTION — EVIDENCE.

Evidence as to the number of prescriptions for intoxicants written by defendant on the particular day and a day or two previous to the time the prescription on which the charge was based was written was competent.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 293, 294, 296, 297.]

7. CRIMINAL LAW — 1036(4) — APPEAL — RESERVATION OF GROUNDS OF REVIEW — OBJECTION TO EVIDENCE.

The objection, against oral testimony as to the contents of a drug store's record book and prescription file, that it was incompetent, irrelevant, and immaterial, was insufficient to preserve the objection that the evidence offered was not the best evidence; if the claim was that the evidence was inadmissible because secondary, and because no proper foundation had been laid, the objections should have been pointed out.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1636.]

8. CRIMINAL LAW — 402(1) — EVIDENCE — SECONDARY EVIDENCE.

Where every reasonable effort by means of a subpoena duces tecum had been made to have the record book of a drug store and its prescription file brought into court in a prosecution for having issued a prescription without having reason to believe that the person to whom it was issued was sick, etc., oral testimony as to the contents of the record and file was admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 887, 1211.]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

J. W. Hewetson was convicted of having issued a prescription for whisky without having good reason to believe that the person to whom it was issued was actually sick, etc., and he appeals. Affirmed.

John F. Dore and Robert Welch, both of Seattle, for appellant. Hugh M. Caldwell and Thomas J. L. Kennedy, both of Seattle, for respondent.

MAIN, J. The defendant in this case was charged, in the police court of the city of Seattle, with having issued a prescription for whisky, without having any good reason to believe that the person to whom it was is-

sued was actually sick, or that the liquor was required as medicine. The trial in the police court resulted in a judgment of guilt, and a fine of \$100. From this judgment, an appeal was taken to the superior court. There the trial resulted in a verdict of guilt. From the judgment entered upon the verdict, the appeal is prosecuted.

The first assignment of error is that there was not sufficient evidence to justify the submission of the question of the guilt of the appellant to a jury. The evidence shows: That the Brendel Drug Company was conducting a drug store at 117 Yesler Way, in the city of Seattle. That the appellant, a licensed physician, had an office in the back part of the room occupied by the drug store. That the office could be entered by a door from the portion of the building used for the drug store. That on the evening of February 19, 1916, the complaining witness went to the appellant for the purpose of getting a prescription for liquor. That he entered through the drug store, found seven or eight persons standing in line, waiting for similar prescriptions, and, when his turn came, said to the appellant that he had a cold, or a bad cold. That thereupon the appellant inquired of him if he would like a little stimulant, and the complaining witness said "Yes." That before receiving the prescription the complaining witness was required to sign a statement as follows:

"I, the undersigned, do declare that the prescription written for me by Dr. J. W. Hewetson for intoxicating liquor, on this date is for medical purposes; that I am sick and in need of medicine, and will take the same according to directions. Dated this 19th day of February, 1916. M. W. Palmer, 135 N. 75th St."

That there was no examination of the complaining witness as to his physical condition. The evidence further shows that the record book and the prescription file at the Brendel Drug Store disclosed that on February 19th, 164 prescriptions for liquor had been filled; on February 18th, 108; on February 17th, 105; and on February 16th, 83—and that most of these prescriptions had been written by the appellant. It was admitted, upon the trial, that any one "could get a prescription for intoxicating liquor unless he refused to sign one of these statements," and that the appellant had "for the past two years written prescriptions free of charge."

[1] There was some evidence as to the number of persons standing in line, waiting to have prescriptions written, on other occasions than the one above referred to. Under this evidence, and other details that appear in the testimony, the question whether the appellant had ground to believe that the person to whom he issued the prescription was actually sick, or that liquor was required as medicine, was for the determination of the jury. It could not be held, as a matter of law, on such evidence, that the respondent had failed to prove that the appellant, when he issued the prescription for which he was

being tried, did not have good reason to believe that the person to whom it was issued was actually sick, and that the liquor was required as medicine.

[2] The next point is that the ordinance, under which the charge was laid, was void, for two reasons: First, because the city had no authority to pass it at the time of its enactment; and, second, that even if the city then had such power, at the time the offense was alleged to have been committed, the city ordinance had been superseded by chapter 2, p. 2, Laws 1915 (Rem. Code, § 6262—1 et seq.), generally referred to as initiative measure No. 3. The ordinance was enacted on December 1, 1915. By section 10 of article 11 of the Constitution, any city of the first class has power to frame a charter for its own government, consistent with and subject to the Constitution and laws of the state. By section 11, a city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Section 7507, Rem. Code, enumerates powers of a city of the first class. By subdivision 32 thereof, such city has power to regulate the sale or giving away of intoxicating liquors; by subdivision 33, to grant licenses for lawful purposes; by subdivision 34, to regulate the carrying on within its corporate limits of occupations which are of such a nature as to affect the health or the good order of the city. The objection urged against the ordinance in this connection is that it is a prohibitory, and not a regulative, ordinance, and therefore it was beyond the power of the city to pass it, because the city had power only to regulate, and not to prohibit. Whether the sections of the ordinance, other than those which refer to the issuance of prescriptions for intoxicating liquor are prohibitory, or not, is a matter in which we are not now concerned.

[3] The provisions of the ordinance, under which the appellant is charged, cannot be said to be prohibitory, and, even though some sections of the ordinance might be void, it would not destroy the efficacy of those under which the charge is laid. *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093. Even though the ordinance did imply some degree of restraint and prohibition, it was yet a regulative, and not a prohibitory ordinance. *Tacoma v. Kelsel*, 68 Wash. 685, 124 Pac. 137, 40 L. R. A. (N. S.) 757.

It is not to be understood, from what has been said, that we hold that the city, at the time the ordinance was passed, did not have power to pass a prohibitory ordinance. Upon this question, no opinion is expressed. The sections of the ordinance which the appellant was charged with violating are regulative in their nature, and, in passing such an ordinance, the city acted within its power.

[4] The second reason urged against the ordinance is that the state, by the passage of initiative measure No. 3 (Rem. Code, § 6262—

1 et seq.), expressed an intention of removing the subject of intoxicating liquors from the control of municipalities. It will certainly be admitted that legislation relating to the sale of intoxicating liquors is an exercise of the police power. The fact that there is state legislation relating to the sale of intoxicating liquor does not deprive the city of the power to legislate upon the same subject, so long as the city ordinance does not conflict with the general law of the state, unless the state act should show, upon its face, that it was intended to be exclusive. *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324; *Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49; *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855; *Spokane v. Spokane & Inland Empire R. Co.*, 75 Wash. 651, 135 Pac. 636; *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892.

From an examination of initiative measure No. 3, we do not find any provision therein with which the ordinance in question conflicts. Neither do we think that the act was intended to be exclusive, and deny to the municipalities of the state power to enact ordinances relating to the same subject-matter, so long as such ordinances were not in conflict with the provisions of the state act. In other words, there is nothing in the act to indicate that municipalities shall not have power to pass ordinances relating to the sale of intoxicating liquors so long as such ordinances are not out of harmony with the state statute.

[5] The next contention is that the court erred in admitting testimony relating to prescriptions other than the issuance of the Palmer prescription, upon which the charge, of which the appellant was convicted, was laid. The rule is that, in cases of this character, such evidence is competent. The real issue in such a case is whether the prescription was given in good faith, and, as bearing upon this question, the number of prescriptions given by the accused, within a specified time, for intoxicating liquor, to various persons, as found on the file of the druggist, in whose store the appellant kept his office, is competent. *Lee v. State*, 8 Ga. App. 413, 69 S. E. 310; *Stanley v. State*, 9 Ga. App. 141, 70 S. E. 894; *Weatherford v. State*, 51 Tex. Cr. R. 430, 103 S. W. 633; *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693. In the case last cited on this question it was said:

"The fifth, tenth, and eleventh grounds impute error to the circuit judge in allowing witnesses to be asked as to the number of prescriptions given by defendant within a specified time, for intoxicating liquors, to various persons, as found on the files of the druggist in whose store the defendant kept his office. It seems to us that such testimony was clearly competent where the real issue was, as in this case, whether the defendant had bona fide given the prescription upon which the indictment was based to the person therein named, as a patient upon whom he was actually attending as a physician, or whether the whole thing was not pretensive, and a mere device to evade the law."

In the case here for determination, an essential element of the charge was that the appellant issued the prescription without good reason to believe that the person to whom it was issued was actually sick, or that the liquor was required as a medicine. The good faith or intention of the appellant, in writing the prescription, was directly in issue. Under the authorities cited, and many others, that might be assembled, the evidence was competent.

[6, 7] Finally, it is contended that there was error in the admission of the evidence as to the number of prescriptions for intoxicating liquor which had been written by the appellant upon the day, and a day or two previous to the time, the prescription upon which the charge was based was written. Under the authorities already cited, the evidence was competent. No error can be predicated upon the fact that the testimony upon this question was by witnesses who had examined the record book and the prescription file in the drug store prior to the trial, for two reasons: First, the only objection urged against the oral testimony as to the contents of the book, and the number and contents of the prescriptions, was that it was incompetent, irrelevant, and immaterial. This was not a sufficient objection to preserve the question that the evidence offered was not the best evidence. If the claim was that the evidence was inadmissible because it was secondary, and that no proper foundation had been laid, these objections should have been pointed out to the trial court. *Liebenthal v. Price*, 8 Wash. 206, 35 Pac. 1078; *State v. Spangler*, 92 Wash. 636, 159 Pac. 810.

[8] The other reason why the objection to the testimony is not well taken is because every reasonable effort, by means of a subpoena duces tecum, had been made to have the record book and the prescriptions brought into court.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK and WEBSTER, JJ., concur.

ROSENOFF et al. v. CROSS, County Auditor.
(No. 13755.)

(Supreme Court of Washington. April 11, 1917.)

1. INTOXICATING LIQUORS. § 74—RIGHT TO DRUGGISTS' PERMIT—FORMER CONVICTION.

Rem. Code 1915, § 6262—19, provides that no county auditor shall issue a permit to any druggist who has been convicted of violating "any of the liquor laws" of the state. Section 6262—7 provides that a druggist who has been convicted of selling intoxicating liquor in violation of this section shall not, within two years thereafter, sell intoxicating liquor for any purpose. Section 6262—17 requires a druggist, in the application for a permit, to state that he has not heretofore been convicted of any violation of the laws of the state relating to intoxi-

cating liquors. In June, 1914, two druggists were convicted of violating the local option law in force before sections cited were passed. *Held*, that as section 6262-19 is in terms mandatory, and does not limit denial of permits to druggists who have violated the present law or who have not violated any law within two years, the words "any of the liquor laws," used in the section, include the local option law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75.]

2. CONSTITUTIONAL LAW §197—REGULATION—VALIDITY OF STATUTE—RETROACTIVE AND EX POST FACTO STATUTES—LIQUOR PERMIT.

Rem. Code 1915, § 6262-19, providing that a county auditor shall not issue a permit to any druggist who has been convicted of violating any of the liquor laws of the state, and section 6262-17, requiring applicant to state in his application that he has not been convicted of violating any of the liquor laws, although applied so as to prohibit issuing of permits to druggists who have violated prior laws, are not *ex post facto* in their nature; the disqualification not being an additional punishment for past offenses.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 560.]

3. INTOXICATING LIQUORS §15—DRUGGISTS' PERMIT—CONTRADICTIONARY STATUTES.

Rem. Code 1915, § 6262-7, providing that a druggist who has been convicted of a violation of any liquor law shall not within two years thereafter, sell, etc., is not in conflict with section 6262-19, providing that county auditor shall not issue a permit to a druggist who has been convicted of any of the liquor laws of the state, although the latter section prescribes no time limit, and a county auditor may refuse to issue a liquor permit to a druggist convicted under local option law, a prior enactment, more than two years previous.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 17, 18.]

4. STATUTES §207—CONSTRUCTION.

The courts will not so construe different provision of the law as to create a conflict where any other course is reasonably possible.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 284.]

Department 2. Appeal from Superior Court, Adams County; Bert Linn, Judge.

Mandamus by Fred Rosenoff and another against J. L. Cross, as county auditor. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

W. O. Miller, of Ritzville, for appellant. G. E. Lovell, of Ritzville, for respondents.

ELLIS, C. J. Action in mandamus to require the county auditor of Adams county to issue to plaintiffs, who are druggists, a permit to ship into the state of Washington intoxicating liquors consigned to themselves. They claim the right under section 6262-17, 2 Rem. Code. There is no dispute as to the facts. Plaintiffs are, and have for some years been, engaged in the drug business in Ritzville, Adams county, Wash. On June 6, 1914, they were both convicted in the superior court of Adams county and fined for a violation of the local option law, section 6302, Rem. & Bal. Code, prohibiting the sale of intoxicating liquors within a dry unit. On

the same day, in the same court, plaintiff H. K. Rosenoff was convicted and fined for a violation of section 6308, Rem. & Bal. Code, requiring druggists to keep a record of their sales of intoxicating liquors. Thereafter the premises then and now occupied by plaintiffs as druggists were declared by the court to be a nuisance, and plaintiffs were permitted to continue their business therein on giving a bond in the sum of \$1,000, as provided in section 6304, Rem. & Bal. Code. In June, 1916, prior to the commencement of this action, plaintiffs presented to defendant, and filed in defendant's office, an affidavit, which, omitting caption, signature, and jurat, reads as follows:

"H. K. Rosenoff, being first duly sworn on oath deposes and says: that he (is) a druggist and pharmacist, and a member of the firm of Rosenoff Drug Company, which is a copartnership. That the said copartnership consists of affiant and Fred Rosenoff, and affiant is one of the co-owners of the said partnership. That the location of said firm is in the city of Ritzville, Adams county, Washington, and the said firm is legally engaged in business as druggists and pharmacists at said point. That it is necessary from time to time to make shipment of intoxicating liquors. That said liquor is not to be sold in violation of the laws of the state of Washington, but is obtained for use for purposes permitted by this law only. That the applicant for this 'permit' or any of the members of the said partnership, as a partnership, have not been heretofore convicted of any violation of the laws relating to intoxicating liquor of the state of Washington, which will prevent the said partnership from having on hand and selling intoxicating liquors at this time."

Defendant refused to issue the permit, and plaintiffs brought this action. The trial court, after finding in detail the foregoing facts, entered a judgment ordering defendant, as auditor of Adams county, forthwith to issue to plaintiffs a permit to ship from Missoula, Washington (Montana) to Ritzville, Wash., 50 gallons of whisky, and awarding to plaintiffs their costs. Defendant appeals.

As justifying his refusal to issue the permit, appellant relies upon certain provisions of the state-wide prohibition law of 1915, as found in Rem. Code. Section 6262-19 declares:

"No county auditor shall issue a permit to any person or druggist or pharmacist who has been convicted of the violation of any of the liquor laws of the state, or to any person other than a druggist or a pharmacist, who is the holder of an internal revenue special tax stamp or receipt, issued by the United States government, permitting or relating to the sale of intoxicating liquor, or to any person not a registered druggist or pharmacist who has, within twenty days immediately preceding, obtained a permit for the shipment of intoxicating liquor."

Section 6262-17, relating to applications for shipment by druggists, declares that the application, among other things, shall state—" * * * that the applicant for such permit or any of the members of the said partnership, as a partnership, or of the officers, agents or servants in the employ of said corporation and in charge of its business at such location, have not been theretofore convicted of any violation of the

laws relating to intoxicating liquor of the state of Washington. * * *

Section 6262—31 declares:

"All persons convicted of any violation of this act where the punishment therefor is not herein specifically provided shall be punished by a fine of not less than fifty dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not less than ten days nor more than three months, or by both such fine and imprisonment."

Appellant knew of respondents' prior convictions. They were matters of record. Presumably they were then, as now, admitted by respondents. In view of the specific inhibition of section 6262—19, and the penalty imposed for any violation of the act by section 6262—31, appellant, possessing such knowledge, might well hesitate to issue the permit.

[1] Appellant first suggests—though respondents expressly disclaim any such contention—that it may be argued that the words "any of the liquor laws of this state," found in section 6262—19, and substantially the same words found in 6262—17, do not refer to nor include the local option law, nor any law in effect prior to January 1, 1916. The plain purpose was to prescribe as a qualification for those persons who might be permitted to bring intoxicating liquor into this state a prior observance of the laws relating to such liquors as earnest that such persons will not violate the prohibition law in the future. Obviously the applicant's attitude manifested toward prior laws on this subject augurs as much for his future conduct as his attitude manifested toward the existing law. Section 6262—17 requires that the applicant shall file a statement in writing under oath that he has not been "theretofore" convicted of "any" violation of the laws of this state relating to intoxicating liquor. The words "theretofore" and "any" are broad and inclusive as to time and subject-matter. They negative any intention to make only the violation of existing law a disqualification. That the sections in question were intended to include convictions for a violation of prior laws as a disqualification we entertain no doubt.

[2] It is next suggested—though again respondents disclaim any such view—that if these sections are construed as referring to violations of prior laws, it may be argued that they are ex post facto in their nature, or viciously retroactive. We find no merit in the suggested contention. The disqualification is not, either in purpose or nature, an additional punishment for past offenses. It, therefore, does not fall within the inhibition against ex post facto laws. Nor are the provisions under discussion retroactive in any objectionable sense. They merely prescribe past conduct as a standard applicable to all druggists by which shall be measured their probable fitness to deal, as druggists are permitted to deal, in intoxicating liquors. They merely exclude from the privilege accorded by the law persons whose past con-

duct shows they are unfit to receive it. Granting, as must be granted, the power of the state to regulate and even prohibit the liquor traffic, the following authorities clearly sustain in principle the view here expressed: *Foster v. Board of Police Com'rs*, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; *Washington v. State*, 75 Ala. 582, 51 Am. Rep. 479; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002; *Fox v. Territory*, 2 Wash. T. 297, 5 Pac. 603.

[3] But section 6262—7, Rem. Code, declares:

"* * * A druggist or pharmacist who has been convicted of selling intoxicating liquor or of any other act in violation of this section, shall not, within two years thereafter, either personally or by agent, sell intoxicating liquor for any purpose whatsoever. * * *"

A provision substantially the same was contained in the local option law. See section 6308, Rem. & Bal. Code. Respondents contend—and it is their sole contention here—that this provision is in direct conflict with section 6262—19, Rem. Code, hereinbefore quoted; that the provisions of the latter section are general; that those of section 6262—7, last above quoted, are definite and specific, and that, therefore, they must control as the clearer and more definite expressions of the legislative will. This position is untenable for two reasons:

In the first place the provisions of section 6262—7 are neither so specific nor so definite as those of section 6262—19. The subject-matters of the two sections are different. The one relates to sales of intoxicating liquors by convicted druggists, the other to the duty of the auditor touching permits requested by convicted druggists to ship such liquors into this state. Section 6262—7 does not expressly authorize an offending druggist to sell liquor after two years from his conviction. It merely implies a permission. Section 6262—19 distinctly prohibits the auditor from issuing a permit to any druggist who has been convicted. Its terms are mandatory. Even assuming an irreconcilable conflict between the two sections, the provisions of section 6262—19 must control, because it is the more specific, because it is the later in numerical order, and especially because the act of 1915 itself imposes its own rule of construction, declaring in the first section:

"This entire act shall be deemed an exercise of the police power of the state, for the protection of the economic welfare, health, peace and morals of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of that purpose." Section 6262—1, Rem. Code.

[4] In the second place, the two sections in question are not in necessary conflict. As before stated, they relate to different subjects. Section 6262—7 suspends the right of a convicted druggist for two years after con-

viction to sell intoxicating liquors. He may have a supply on hand at the time of his conviction. He cannot sell it within two years thereafter for any purpose whatsoever. But that section does not, either expressly or by necessary implication, authorize him to replenish his stock by further shipments at any time. On the other hand, section 6262-19 does expressly and unequivocally prohibit the county auditor from issuing a permit "to any person or druggist or pharmacist who has been convicted of the violation of any of the liquor laws of this state," and contains no limit on the time or duration of that prohibition, either expressly or impliedly. It is thus manifest that the two sections have ample fields for independent operation, each to its full extent, without any necessary conflict. In such a case it is elementary that both must be permitted so to operate. The courts will not so construe different provisions of the law as to create a conflict when any other course is reasonably possible.

The judgment is reversed, and the cause is remanded, with direction to deny the writ.

MOUNT, FULLERTON, and PARKER,
JJ., concur.

SHORTS v. CITY OF SEATTLE. (No. 13942.)

(Supreme Court of Washington. April 11,
1917.)

1. MUNICIPAL CORPORATIONS § 279, 918(1)— CHARTER POWERS — EXTENSION OF WATER SYSTEM—STATUTE.

Rem. Code 1915, § 8006, requires submission to voters of ordinance for construction of any public utility mentioned in section 8005 except: (1) When work proposed is an addition to, betterment of, or extension to existing waterworks; (2) where in any charter of any city or town adopted by a vote of the people an article or provision has been adopted authorizing city council or other corporate authorities to provide by ordinance for acquiring, opening, or operating any of said public utilities "for which no general indebtedness is to be incurred." Seattle City Charter, art. 4, § 18, gives city council power to provide for erecting, purchasing, etc., of waterworks, to supply the city with water and fix, alter, regulate, and control use and price of water so supplied. *Held*, that city council has power to provide by ordinance for making additions, extensions, and betterments of city's water system, and issue and sell bonds payable solely from income from system without submission of either proposition to popular vote for ratification, although city charter does not contain words "for which no general indebtedness is to be incurred."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 739, 1919.]

2. STATUTES § 181(1)—STRICT CONSTRUCTION —LEGISLATIVE INTENT.

Under any rule of construction of a statute, whether strict or liberal, the legislative intent, when clearly apparent, must prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259.]

3. MUNICIPAL CORPORATIONS § 925 — BONDS —DATE OF MATURITY.

Under a city charter containing no provision as to date for maturity of bonds for waterworks, city council may provide that bonds shall mature serially, a specified amount six years after date and a like amount annually thereafter, in view of Rem. Code 1915, § 8008, providing that such bonds shall be payable at such time as council shall determine.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1938.]

4. CONSTITUTIONAL LAW § 70(3)—JUDICIAL POWER—PUBLIC POLICY—DETERMINATION.

Where the Legislature, acting within its constitutional powers, has authorized issuance of bonds by cities for certain purposes, the question of public policy is not for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Bruce Shorts against the City of Seattle. A demurrer to the complaint was sustained, the action dismissed, and plaintiff appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Hugh M. Caldwell and Robert H. Evans, both of Seattle, for respondent.

ELLIS, C. J. The plaintiff, a resident voter and taxpayer of the city of Seattle, and a consumer of water furnished by the city through its municipal water plant, brought this action to enjoin the issuance, sale, and delivery by the city of "Special Fund Water bonds" totaling \$60,000. Plaintiff sets forth at length the acquisition in 1890 of the city's original water supply system, traces its development through many additions and extensions to 1895, when it was changed from a steam pumping plant to a gravity system, known thereafter as the "Cedar River Water Supply System," details the making of further additions prior to 1916, and points out that the original acquisition and subsequent additions and extensions and the issuance of securities, whether general or special fund bonds, to pay for the same were all submitted to and authorized by the qualified voters of the city. It is then alleged, in substance, that in November, 1916, the city council determined to make further additions to and betterments and extensions of its water supply system, and to that end passed Ordinance No. 36630. This ordinance, after setting forth the proposed additions, betterments, and extensions, provides that to pay the costs thereof the city will issue bonds in the sum of \$60,000, maturing serially, \$12,000 six years after date, and a like amount annually thereafter, all bearing interest at the rate of 5 per cent. per annum, payable semiannually, both principal and interest being payable solely from a special fund created by ordinance, to be known as "Cedar River Water Supply Fund of Seattle, Series No. 4;" that thereafter the city by resolu-

tion of its council called for bids on the bonds; that Morris Bros., Inc., made the best offer for the bonds; and that its bid was accepted by the city. It is further alleged that Ordinance No. 36630 does not authorize or provide that the system or plan specified and adopted in the ordinance shall be submitted to the qualified voters of the city, nor does it provide for the submission to the voters of the proposition of the issuance of the bonds; that neither of these propositions has ever been, in whole or in part, submitted to the qualified voters of the city, and that the city claims the right and authority to issue the bonds for the purposes mentioned without submitting the matter to such voters for their ratification or rejection. A demurrer to the complaint was sustained. Plaintiff abiding by his pleading, the action was dismissed. He appeals.

[1] Appellant's dominant contention is that the issuance of these bonds is ultra vires of the city, in that neither the plan of the proposed additions to the water system nor the proposition to issue the bonds was ever submitted to the qualified voters for ratification or rejection, as required by the Public Utilities Act of 1909, which, as amended in particulars here immaterial, is embodied in sections 8005 to 8010, inclusive, Rem. Code. No question of constitutional power is presented. It is conceded that, these bonds being payable, both principal and interest, solely from the earnings of the public utility, would not constitute an "indebtedness" of the city within the meaning of the state Constitution touching the debt limit. *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998. The sole question is one of statutory power. The material provisions of the governing statute are found in Rem. Code, § 8006, as follows:

"Whenever the city council or other corporate authorities of any such city or town shall deem it advisable that the city or town of which they are officers shall purchase, acquire or construct any public utility mentioned in section 8005 hereof or make any additions and betterments thereto or extensions thereof, the common council or other corporate authorities shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof as near as may be, and the same shall be submitted for ratification or rejection to the qualified voters of said city at the general or special election, except in the following cases where no submission shall be necessary:

"(1) When the work proposed is an addition to, or betterment of, or extension of, or an increased water supply for, existing waterworks, or an addition, betterment or extension of an existing system or plant of any other public utility mentioned in section 8005 hereof, for which no general indebtedness is to be incurred by such city or town: Provided, such undertaking shall have been authorized by the common council of such city or town prior to July 1, 1910: or

"(2) Where in any charter of any city or town in the state of Washington heretofore or hereafter adopted by a vote of the people, an article or provision has been adopted authorizing the city council or other corporate authorities of such city to provide by ordinance for acquiring, opening or operating any of said public utilities,

for which no general indebtedness is to be incurred by such city or town. * * *

Then follow certain general provisions which, as pointed out by the codifier, should be set off in a separate paragraph. They cannot be construed as a part of or as affecting subdivision 2 as above quoted without making the section as a whole self-contradictory, a course which no court can soundly pursue where any other reasonable construction is possible. *Rosenoff v. Cross*, 164 Pac. 236. The general provisions following those above quoted are plainly intended to apply to cities and towns lacking the charter powers mentioned in subdivision 2. This seems to be admitted, since appellant concedes that the crux of the issue lies in the question whether or not the charter of the city of Seattle contains any provisions such as contemplated by that subdivision.

The fourteenth subdivision of section 18, art. 4, of the charter of Seattle, as adopted by the people and subsequently amended by a vote of the people in 1906, so far as here pertinent, reads as follows:

"The city council shall have power by ordinance: * * *

"Fourteenth. Acquisition, Erection and Operation of Waterworks; Sale of Water, Free Water: To provide for erecting, purchasing or otherwise acquiring, as the sale and exclusive property of the city, waterworks, within or without the corporate limits of the city, to supply said city and its inhabitants with water for any and all purposes, and to fix, alter, regulate and control the use and price of the water so supplied. * * *

[2] Appellant's position seems to be that, inasmuch as the Public Utility Act must receive a strict construction, the city charter must not only confer upon the city council the authority by ordinance to acquire and operate waterworks, but must confer that authority in the terms of the statute. It must be conceded that the Public Utility Act should receive a strict construction. Our own decisions amply sustain that principle. But even a strict construction must be a reasonable construction. Under any rule of construction, whether strict or liberal, the legislative intention, when clearly apparent, must prevail. We think it may be soundly postulated that the legislators were concerned with the fact of the charter authority to the council to act by ordinance rather than the mere formula by which that authority might be expressed. Subdivision 2 of section 8006, above quoted, expressly applies to charter provisions "heretofore" as well as "hereafter" adopted. There is nothing to indicate that the legislators had in mind any specific then existing charter provision of any particular city or town, and adopted its exact verbiage as the only form of expression intended to be validated. Yet if such is not the case, appellant's rule of strict construction would convict the Legislature of intending to make the power of cities theretofore possessing charter authority to proceed by ordinance dependent upon a mere

fortuitous coincidence. We decline to assume an intention so capricious. The above-quoted provision of the Seattle charter clearly authorizes the city council by ordinance "to provide for erecting, purchasing or otherwise acquiring, as the sole and exclusive property of the city, waterworks, * * * to supply said city and its inhabitants with water," etc. Under no reasonable rule of construction, whether strict or liberal, can it be said that the authority so conferred is of a different nature or is less comprehensive than that prescribed in the statute.

Some stress is laid upon the fact that the charter provision does not contain the words "for which no general indebtedness is to be incurred by such city or town," as found in the statute. As to this last provision it seems plain that it is the fact that no general indebtedness is to be incurred which invokes the power conferred by both charter and statute, not the mere recital of that fact in the charter. This provision is obviously intended as a limitation upon any charter power to acquire, own, and operate, not as an essential recital in the charter itself to confer that power. We are convinced that since the city charter specifically authorizes the city council by ordinance to acquire, own, and operate a water system such as the city long has had, the city has power, under the plain terms of the statute, to provide by ordinance for making additions, extensions, and betterments to that system, and to issue and sell bonds payable solely from the income to be derived from the system to pay for the same without submitting either proposition to popular vote for ratification.

[3] It is next argued that the bonds here involved do not conform in their dates of maturity to the requirements of subdivision 15, § 18, art. 4, of the city charter, which, among other things, provides that public utility bonds issued to pay for the utilities in that subdivision enumerated shall be payable "at such times as may be agreed upon between the tenth and fortieth years after their date of issuance." It is a sufficient answer to say that subdivision 15 relates only to municipal light, power, and heating plants, street railways, telephones, ferries, docks, and water power sites, and has no application to waterworks, while subdivision 14, § 18, art. 4, relates only to municipal waterworks. The latter subdivision under which the city is proceeding contains no provision as to the maturity of any bonds to be issued in payment for such waterworks. The section of the Public Utility Act (Rem. Code, § 8008), specifically relating to special fund bonds payable solely from the earnings of public utilities, provides that such bonds shall be "executed in such manner and payable at such times and places as the common council or other corporate authorities of such city or town shall determine. "The dates

of maturity of such bonds are thus distinctly left to the discretion of the common council or other corporate authorities of the city. The dates fixed by the council in this instance, therefore, impinge no provision either of charter or statute.

[4] Finally it is urged that the issuance of these bonds should be enjoined on grounds of public policy. We shall not pursue in detail the arguments advanced in this connection. It should suffice to say that we know of no better criterion by which to determine any given question of public policy than the utterances of the state Legislature upon that question. As we have seen, the Legislature, acting within its constitutional powers, has authorized the issuance of bonds of this character in the manner in which and for the purpose for which these bonds are to be issued. The question of policy involved is a legislative question pure and simple.

The judgment is affirmed.

MOUNT, PARKER, and FULLERTON, JJ., concur.

SHORTS v. CITY OF SEATTLE. (No. 13941.)

(Supreme Court of Washington. April 11, 1917.)

1. MUNICIPAL CORPORATIONS § 279, 918(1)— CHARTER POWERS—EXTENSION OF ELECTRIC LIGHT PLANT—STATUTE.

Rem. Code 1915, § 8005, authorizes incorporated cities and towns to purchase, acquire, add to, maintain, and operate municipal light and power plants. Section 8006 provides that the plan proposed shall be submitted to qualified voters except where, in any charter adopted by a vote of people, an article or provision has been adopted authorizing city council to provide by ordinance for acquiring, opening, or operating any of said public utilities, "for which no general indebtedness is to be incurred." Seattle City Charter, art. 4, § 18, subd. 15, gives city council power by ordinance to purchase, acquire, add to, maintain, and operate, among other things, a municipal light plant, omitting the above-quoted words of section 8006. Held, that the city council has power to provide by ordinance for making extensions and additions to city electric lighting plant and issue and sell bonds payable solely from a special fund created by ordinance without submission of plan for proposed extension nor proposal to issue and sell bonds to vote of electors, although the authority conferred by charter is not couched in same terms as section 8006, subd. 2.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 739, 1919.]

2. MUNICIPAL CORPORATIONS § 925—STATU- TORY POWERS OF COUNCIL—LIMITATION BY CHARTER.

Rem. Code 1915, § 8008, provides that whenever a city council shall be authorized to exercise any of the powers conferred by section 8005 without submission to voters the common council shall have power to create a special fund for sole purpose of defraying cost of public utilities or addition, betterment, or extension thereto, and to issue and sell bonds payable at such times as the common council shall determine. Seattle City Charter, art. 4, § 18, subd. 15, provides that the principal of such bonds shall be

payable serially in such amounts and at such times as may be agreed upon between the tenth and fortieth years after date of issuance. *Held*, that provision in ordinance of city council that bonds issued for extension of electric light plant should be paid in equal annual amounts beginning 6 years and ending 20 years after their date from a fund provided is valid under rule that discretion vested in council by general statute cannot be controlled or circumscribed by any charter provision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1938.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Bruce Shorts against the City of Seattle. A demurrer to complaint was sustained, the action dismissed, and plaintiff appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Hugh M. Caldwell and Robert H. Evans, both of Seattle, for respondent.

ELLIS, C. J. Plaintiff, a resident voter and taxpayer of the city of Seattle and a consumer of electric energy furnished by the city from its municipal light and power plant, in this action seeks to enjoin the issuance, sale, and delivery of \$390,000 special fund light bonds which the city proposes to issue. Plaintiff sets forth at length the original acquisition of the city's light and power plant, details the making of various additions thereto prior to 1916, and the issuance of general bonds to pay therefor, and points out that the original acquisition and subsequent additions and extensions and the issuance of such bonds were all submitted to and authorized by the qualified voters of the city. It is then alleged that in November, 1916, the city deeming it advisable to make further additions to and betterments and extensions of such plant, passed Ordinance No. 36760, which, after setting forth the proposed additions, betterments, and extensions, describing the plan and estimating the cost thereof, provides that to pay for the same the city shall issue and sell its negotiable 5 per cent. bonds in amount not exceeding \$390,000, payable in equal annual amounts beginning 6 years and ending 20 years after their date, and provides that both principal and interest shall be payable solely from a special fund created by the ordinance, to be called "Municipal Light Extension Fund of Seattle, Series J." It is further alleged that neither the plan for making such additions, betterments, and extensions, nor the proposal to issue the bonds in payment therefor, has ever been submitted to the qualified voters of the city by any other ordinance, and that no provision for such submission is made in this ordinance, and that the city is proceeding to issue and sell these bonds without any authorization by vote of such qualified electors, and will do so unless enjoined. A demurrer to the complaint was sustained. Plaintiff

electing to stand upon his pleading, the action was dismissed. He appeals.

[1] It is first contended that the city is proceeding without power, in that neither the plan of the proposed additions nor the proposal to issue and sell the bonds has ever been authorized by a vote of the qualified electors. The incurring of no general indebtedness being proposed, no question of constitutional power is involved. The sole question is one of statutory power.

The first section of the Public Utilities Act of 1909, as amended in 1913 (section 8006, Rem. Code), authorizes incorporated cities and towns to construct, purchase, acquire, add to, maintain, and operate, among other public utilities, municipal light and power plants, such as that here involved. Section 2 of the same act, section 8006, Rem. Code, provides that the system or plan proposed and the estimated cost of any such utility shall be provided for by ordinance, and submitted for ratification or rejection to the qualified voters, except in two cases "where no submission shall be necessary." With the first of those cases we are not concerned. The second, as found in subdivision 2 of section 8006, is as follows:

"Where in any charter of any city or town in the state of Washington heretofore or hereafter adopted by a vote of the people, an article or provision has been adopted authorizing the city council or other corporate authorities of such city to provide by ordinance for acquiring, opening or operating any of said public utilities, for which no general indebtedness is to be incurred by such city or town. * * *

Then follow certain provisions applicable to cities lacking the charter authority above mentioned. The section closes with a provision obviously intended to cover all cases whether the given proposition has been adopted by vote under the general provisions, or by the city council or other corporate authorities solely by ordinance as provided in subdivision 2 above quoted. It is as follows:

"Whenever a proposition has been adopted as aforesaid or in the cases mentioned in subdivisions first and second of this section where no submission shall be necessary the common council or other corporate authorities of such city or town shall have power to proceed forthwith to purchase, construct and acquire the public utility contemplated or to make additions, betterments and extensions thereto and to make payment therefor as hereinafter provided in section 8007 and section 8008."

Section 8008, which has not been amended since its enactment in 1909, among other things provides:

"* * * Whenever the common council or other corporate authorities of any such city or town shall be authorized to exercise any of the powers conferred by section 8006 hereof without submitting any proposition as provided in subdivisions first and second of section 8006 hereof, the common council * * * shall have power to create a special fund or funds for the sole purpose of defraying the cost of such public utility or addition, betterment or extension thereto. * * * and to issue and sell bonds or warrants bearing interest not exceeding six per centum per annum, payable semiannually, executed in such manner and payable at such times and

places as the common council or other corporate authorities of such city or town shall determine, but such bonds or warrants and the interest thereon shall be payable only out of such special fund or funds."

The fifteenth subdivision of section 18, art. 4, of the city charter of Seattle was adopted by a vote of the people in March, 1912. It contains provisions as follows:

"The city council shall have power by ordinance and not otherwise: * * *

"To construct, condemn and purchase, purchase, acquire, add to, maintain and operate, within or without the limits of the city, works, plants and facilities for the purpose of furnishing the city and the inhabitants thereof, and any other person, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes, public and private, with full authority to regulate and control the use, distribution and price thereof, together with the right to handle and sell, or lease, any meters, lamps, motors, transformers, and equipment for accessories of any and every kind, necessary and convenient for the use, distribution and sale thereof; to authorize the construction of such plant or plants by others for the same purpose, and to purchase such gas, electricity or power from others, either within or without the city, for its own use, and for the purpose of selling to its inhabitants and other persons doing business within the city, and to regulate and control the use and price thereof; * * * to acquire by purchase or condemnation an adequate water power supply and site and to construct, operate and maintain an electric power and light plant and system for furnishing power and light for industrial, individual and municipal uses; and to provide and secure payment therefor in whole or in part by net earnings therefrom; or by general bonds of the city of Seattle bearing interest not to exceed five per cent. per annum, sold to the highest bidder and for not less than par, the principal of which shall be payable serially in such amounts and at such times as may be agreed upon between the tenth and fortieth years after their date of issuance, or by any ways and means now or hereafter allowable by law, and to do anything necessary or proper in order to carry out the foregoing purpose; provided, however, that no public utility shall be purchased, acquired or constructed, nor any additions or betterments thereto or extensions thereof be made, for which a general indebtedness is to be incurred by the city, unless the council shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be, nor shall any public utility or plant be sold unless the council shall provide therefor by ordinance, which ordinance shall specify the terms and conditions of any such sale, and neither such purchase nor such sale shall be made unless the same shall be submitted for ratification or rejection to the qualified voters of the city at a general or special election, and unless such proposition shall be adopted and assented to by three-fifths of the qualified voters of the city, voting thereon at said election."

Appellant contends that, because the authority conferred upon the city council by this provision is not couched in the same

terms as found in the statute above quoted (subdivision 2 of section 8006) it is insufficient to invoke the power granted by the statute without submitting the plan of the proposed additions, the estimated cost thereof, and the question of issuing the bonds in payment therefor to the qualified voters. We find no merit in this contention. Under no reasonable construction, however strict, which can be given to both the statute and the charter provisions can it be said that the latter do not meet the requirements of the former. See the companion case touching proposed additions to Seattle's water system. *Shorts v. Seattle*, 164 Pac. 239.

[2] But it is urged that the bonds are invalid because they do not conform to the above-quoted charter provision in their periods of maturity. It will be noted that the ordinance providing for the issuance of the bonds makes them mature in annual installments running from 6 to 20 years after their date, while the quoted subdivision of the charter relating to bonds issued for the purpose here involved provides that:

"* * * The principal * * * shall be payable serially in such amounts and at such times as may be agreed upon between the tenth and fortieth years after the date of issuance. * * *"

This particular provision of the charter is, however, in conflict with the general law of the state touching the same subject. Section 8008 of the public utilities statute above quoted specifically relates to special fund bonds such as these, payable solely from the earnings of the public utility. It provides that such bonds shall be "executed in such manner and payable at such times and places as the common council or other corporate authorities of such city or town shall determine." The fixing of the maturity of the bonds is thus distinctly left to the discretion of the common council or other corporate authorities of the city. That discretion, being vested in the council by general state law, cannot be controlled or circumscribed by any charter provision. This, as a governing principle in such cases, is now too thoroughly established by the decisions of this court to be open to question. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *Benton v. Seattle Electric Co.*, 50 Wash. 156, 96 Pac. 1033; *Dolan v. Puget Sound T. L. & P. Co.*, 72 Wash. 343, 130 Pac. 353.

The demurrer to the complaint was properly sustained. The judgment is affirmed.

MOUNT, FULLERTON, and PARKER, JJ., concur.

SKINNER v. HUNTER et al. (No. 13854.)
(Supreme Court of Washington. April 12, 1917.)

1. LIS PENDENS \Leftrightarrow 26(1)—**EFFECT OF NOTICE—RIGHT TO HOMESTEAD—RIGHTS OF STRANGER.**

Under Rem. Code 1915, § 243, as to effect of filing notice of lis pendens, the filing of such notice in mortgage foreclosure suit bars a stranger to the title from asserting a homestead in the property.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 58, 62.]

2. LIS PENDENS \Leftrightarrow 26(1)—**RIGHT TO HOMESTEAD—RIGHTS OF STRANGER.**

Under Rem. Code 1915, § 602, as to procedure on mortgage foreclosure, right to claim a homestead is a right reserved to the judgment debtor to retain possession of the mortgaged premises during the period of redemption, and therefore, where tenants of the property purchased it from the mortgagors at the time a lis pendens was filed and before judgment of foreclosure, they had no right to declare a homestead.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 58, 62.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Anna F. Skinner against F. Hill Hunter and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. O. Colburn, of Spokane, for appellants. J. Webster Hancox, of Spokane, for respondent.

CHADWICK, J. Respondent began an action to foreclose a mortgage upon certain property in Spokane. A lis pendens was filed at the time the action was commenced. The property was occupied by appellants Bedford as tenants from month to month. They were not made parties to the foreclosure proceedings. Before judgment was entered, the Bedfords, whom I shall refer to as appellants, purchased the property of the mortgagors, and on the same day filed a declaration of homestead. After decree and sale appellants refused to give possession, and respondent applied for and was granted a writ of assistance. Counsel contends that a writ of assistance is not a proper remedy, but, as the record is not sufficient to raise that issue, we will consider his main reliance, that is, that his clients are entitled to remain in possession of the mortgaged premises under their claim of homestead.

[1] The filing of a lis pendens bars a stranger to the title from asserting a homestead in the property. Rem. 1915 Code, § 243; Jones on Mortgages (7th Ed.) § 1664. See, also, Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429; Portland & Seattle R. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573.

[2] Under our statute the right to claim a homestead in property can hardly be said to be a matter of traffic. It is a right reserved to a "judgment debtor" to "retain" possession

of the mortgaged premises during the period of redemption. Rem. 1915 Code, § 602.

Since appellants' grantors had neither possession nor right of homestead at the time the lis pendens was filed, it follows that the judgment must be affirmed.

ELLIS, O. J., and MAIN and WEBSTER, JJ., concur.

HAEFELE v. BRACKETT. (No. 13822.)

(Supreme Court of Washington. April 13, 1917.)

1. MASTER AND SERVANT \Leftrightarrow 80(8)—**ACTION FOR WAGES—EVIDENCE—VALUE OF SERVICES.**

In action on express contract for labor performed, evidence regarding reasonable value of such labor is admissible, where the contract is admitted but the amount to be paid disputed, as circumstantial evidence of the amount agreed upon.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 117.]

2. ESTOPPEL \Leftrightarrow 119—**DISPUTED FACTS—EFFECT.**

Estoppel will not be declared as a matter of law upon disputed facts.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 306, 308.]

3. MASTER AND SERVANT \Leftrightarrow 80(13)—**ACTION FOR WAGES—JURY QUESTION—PAYMENT IN FULL.**

In an action for balance due for wages, whether the payments made were in full held a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 121, 122.]

4. NEW TRIAL \Leftrightarrow 52—**VERDICT—MODE OF REACHING.**

A verdict will not be set aside because its amount could not be reached under either party's theory without mistake or compromise, unless passion, prejudice, or willful disregard of the testimony, clearly appears.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 101.]

5. NEW TRIAL \Leftrightarrow 52—**VERDICT—COMPROMISE.**

A verdict for labor performed in an amount less than plaintiff demanded will not be set aside as a compromise verdict at defendant's request because evidently a compromise, where plaintiff's claims were contested and certain of his items might will be rejected.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 101.]

Department 1. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Ferdinand Haefelee against George Brackett. Judgment for plaintiff, and defendant appeals. Affirmed.

S. A. Bostwick and W. H. Mason, both of Everett, for appellant. Geo. W. Louttit, of Everett, for respondent.

CHADWICK, J. Plaintiff was employed by defendant to work a small farm near Edmonds. He alleges that defendant agreed to pay him \$40 a month and board. Defendant denies that he agreed to pay \$40 ex-

cept for a limited time. He alleges that he has paid plaintiff all that is due; that payments were made from time to time and accepted without protest, which is, in itself, sufficient evidence to sustain defendant's version of the contract.

Plaintiff claims wages for 54 months
at \$40, or..... \$2,160
Board at \$3 per week..... 702

\$2,862
Less wages paid..... 1,057
\$1,805

[1] The jury returned a verdict for \$950, and defendant has appealed. The first error assigned is that the court permitted certain witnesses to testify as to the reasonable value of the services rendered by respondent. It is contended that, inasmuch as respondent relies upon an express contract to work for a certain sum, testimony of the reasonable value of his services was highly prejudicial to appellant. Such testimony is received under a well-understood exception to the rule that a person may not bring an action upon an express contract and recover upon a quantum meruit. It applies where the contract is admitted but the amount to be paid for goods, work, or services is disputed. It is received, "not for the purpose of establishing a contract, but for the purpose of furnishing circumstantial evidence as to which contention of the parties is correct." *Pettet v. Johnston*, 83 Wash. 663, 145 Pac. 985.

[2] It is next contended that the court should have directed a verdict because the testimony shows that plaintiff received and accepted, without protest, such sums as were paid by appellant and without making further demand prior to the time of bringing this action. Appellant discusses this assignment as within the rule of estoppel. No estoppel is pleaded, and it may well be questioned whether, upon a plea of payment in full, such a defense is competent. Estoppel will not be declared as a matter of law upon disputed facts. 16 Cyc. 813.

[3] Several witnesses testify to facts which, being believed by the jury, are enough to sustain the contention of the respondent. Certain witnesses testify that appellant said to them, during the time the payments were being made, that he was paying respondent forty dollars a month. To one of them he said he was laying a part of respondent's wages by for him, and to another that he was holding back a part of his wages. This testimony cannot be rejected when it is considered that respondent is a Swiss farm hand, of moderate needs, and, although industrious, somewhat given to going on periodical sprees. It is for the jury to say whether such payments as were made were payments in full.

Other exceptions go to instructions given and refused. Without discussing them in de-

tail, we find that the issues were fairly covered by the trial judge, and that appellant was not prejudiced by his refusal to give the instructions requested.

It is finally contended that \$950, the verdict returned, is an impossible sum under the issues. Counsel cites *Frost v. Ainslie Lumber Co.*, 8 Wash. 241, 28 Pac. 354, 915; *Tilden v. Gordon & Co.*, 25 Wash. 593, 86 Pac. 50; *Gage v. Gage*, 78 Wash. 262, 138 Pac. 586; 38 Cyc. 1846.

[4] But we do not understand that a verdict will be set aside as within the rule of mistake or compromise, or that it is impossible under the theory of either party, unless it shows upon its face that the jury has given way to passion or prejudice or has acted in willful disregard of its duty to consider the testimony and a true verdict render.

[5] In the case at bar, it was well within the province—the duty as we believe—of the jury to reject the claim for board, and in addition thereto make due allowance for certain time which was lost by respondent. The answer, as well as the testimony offered by appellant, tendered these issues, and the jury was privileged to consider or reject them in whole or in part without tainting the verdict with the vice complained of.

"There was no ground for saying that the verdict was a compromise verdict other than the fact that the plaintiff was allowed less than he sought and more than the defendant claimed he should receive." *Hart v. Denise*, 75 N. J. Law, 82, 66 Atl. 1085.

Affirmed.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

AUSTIN v. UNION LUMBER CO. (No. 13744.)

(Supreme Court of Washington. April 13, 1917.)

1. ACCOUNT STATED \Leftrightarrow 6(2)—WHAT CONSTITUTES.

Whether an account has been stated is largely a question of intent, and if it was intended to state the account and the balance was actually struck, and one paid and the other accepted without protest or objection of any kind, it is viewed as an account stated.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 31-34, 36-38.]

2. ACCOUNT STATED \Leftrightarrow 6(2)—WHAT CONSTITUTES.

Where seller of logs, knowing what his scale showed, went to office of buyer and was given a statement of accounts showing what their scale showed, together with a check for the amount due, which he accepted without protest other than that they scaled the logs pretty close, there was an account stated.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 31-34, 36-38.]

3. ACCOUNT STATED \Leftrightarrow 19(3) — RECOVERY OF GREATER AMOUNT.

Evidence held insufficient to sustain recovery for price of logs in excess of account as stated,

on theory that the seller's scaling, and not the buyer's, was correct.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 93.]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by John Austin, as receiver, against the Union Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Troy & Sturdevant, of Olympia, for appellant. Bigelow & Manier, of Olympia, for respondent.

FULLERTON, J. In this action the respondent seeks to recover from the appellant a balance claimed to be due on the purchase price of a quantity of sawlogs, sold and delivered to the appellant by one W. H. Davis, the predecessor in interest of the respondent. Prior to the sale of the logs an oral contract was entered into between the appellant and Davis concerning the terms of the sale, not made very clear by the record. Both parties agree, however, that the logs were to be merchantable logs, and that the price was to be \$5 per thousand feet board measure, to be ascertained by a scale of the logs made in the usual manner. Among the logs delivered under the contract were three rafts, which were delivered at separate times, such deliveries being treated by the parties as separate transactions. There is no controversy in this court as to the first raft, although it was a subject of controversy in the court below, both parties accepting the court's conclusions thereon. The logs in the second raft were scaled by Davis shortly after they were put in the water at the place of delivery, and were scaled by the appellant after being brought to its mill and hauled onto the log deck just before they were cut into lumber. Davis' testimony was to the effect that his scale showed the raft to contain 71,384 feet of merchantable logs, while the appellant's scale showed the raft to contain but 39,878 feet of such logs. For the quantity it admitted having received the appellant paid Davis, and the controversy is over the difference between the two scales. As to the third raft there is no controversy as to the quantity or quality of the logs delivered, but in making payment for the rafts the appellant deducted \$25 as damages for injuries it claims Davis had done to its logging trucks which it had loaned to him in order to facilitate his logging operations, and the respondent denies the appellant's right to this sum. The respondent sues as receiver of the property of Davis. The court allowed a recovery in favor of the receiver for the amount claimed as due on the sale of the second raft, and for the amount unpaid on the third, refusing to recognize the claim of damages as valid.

It is the appellant's contention that there was an accord and satisfaction, or perhaps,

more strictly speaking, a compromise and settlement with reference to the sale of the second raft. The evidence concerning the transaction was not in dispute. After the raft had been taken to the mill by the appellant and the logs scaled, Davis went to the office of the company to receive pay therefor. The agent of the appellant then representing it gave him a statement of the account between the appellant and himself as it then stood on the appellant's books. This statement credited Davis with the value of the logs as shown by the appellant's scale at the agreed price, and debited him with an account for merchandise, leaving a balance in his favor. Davis, after examining the statement, remarked that the company had scaled the logs pretty close, but made no other objection thereto. He did not then inform the agent, nor did he inform any representative of the appellant prior thereto that he had also scaled the logs, and that his scale differed from the scale made by the appellant, nor did he claim that there was due him a larger sum than the statement indicated. A check was then drawn in his favor by the agent for the amount of the balance, which, after receipting the statement, he carried away and cashed, applying the proceeds to his own use.

[1] There is much learning in the books as to what acts will and what acts will not amount to a settlement of an account, and no general rule can be laid down that will satisfy all of the cases. The consensus of opinion seems to be that it is largely a question of intent, to be gathered from the facts of the particular case. If it can be gathered from the transaction of the parties that a settlement and satisfaction was intended, that a balance is actually struck, and that the one pays and the other accepts without protest or objection of any kind, it is viewed in law as a closed account, notwithstanding one of the parties may secretly intend to, and thereafter does, treat the account as still an open one, unless, of course, the complaining party can show some legal or equitable reason for reopening it, such, for example, as that there was a mutual mistake, or some form of fraud or overreaching practiced upon him by the other party.

[2] It seems to us that the facts here shown constitute a settlement within the rule. The transaction giving rise to the account was, at the time of the settlement and payment, a closed incident, nothing further remained to be done concerning it. The appellant from whom the balance was owing desired no extension of time or other favor for making payment, but was ready and willing to satisfy it in full. Davis, the other party to the transaction, went to the office of the appellant for the purpose of settling the matter and receiving payment in full for such balance as might be due him. He knew then what his own scale of the logs showed and the price he was to receive for them. When.

therefore, he received the appellant's statement of the account without protest or claim that it did not represent the true balance, receipted the statement and accepted, carried away and cashed the check given him as payment for the balance, no conclusion can be drawn from his acts other than that he understood the matter as the appellant understood it; that is, as a settlement and satisfaction of the transaction in full.

[3] What we have said is on the assumption that the evidence preponderated in favor of the conclusion of the trial court. A reading of the evidence, however, convinces us that the court could well have found the other way. Davis himself testifies that there were logs in the raft not merchantable, and that he omitted a number when they were scaling them because of that fact. It appears, also, that he scaled them when in the water where they were visible in part only, while the appellant scaled them when they were in a favorable situation to discover their defects. It would not be strange, even conceding to Davis the utmost good faith, that he included many as merchantable which were not so. We are constrained to the conclusion, therefore, that the court erred in allowing a recovery for the second raft.

As to the third raft, we think the judgment of the trial court should be sustained. On that issue the evidence was in decided conflict, and the trial court was in a much better situation to determine the truth of the matter than is this court.

The judgment is reversed, and the cause remanded, with instructions to so modify the judgment as to eliminate from the recovery the amount allowed for the second raft. Neither party will recover costs in this court.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

HEIDELBACH et al. v. CAMPBELL et al.
(No. 13589.)

(Supreme Court of Washington. April 16, 1917.)

1. TRUSTS § 95—CONVERSION BY INSOLVENT—LIEN.

That an insolvent company wrongfully converts to its own use the proceeds of a sale of goods consigned to it in trust with the privilege of sale for the consignor's account, and the sum so converted becomes part of the assets, does not create a trust *ex maleficio* by virtue of which the consignor had a lien on all of the insolvent's assets.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147.]

2. TRUSTS § 349—RIGHTS OF BENEFICIARY—PURSUIT OF FUND.

The right of the beneficiary of a trust to pursue a fund and impose on it the character of a trust is based on the principle that it is the beneficiary's property, and not upon any right of lien against the wrongdoer's general estate, whether the property sought to be recovered is

in the form in which the beneficiary parted with it or is in a substituted form.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 514.]

3. STIPULATIONS § 18(6) — CONVERSION OF TRUST FUNDS—PRESUMPTION.

Where in an action against the assignees of an insolvent corporation to recover trust funds it was stipulated that the moneys received by the insolvent as trustee from the sale of the trust property was used "in payment of its employees, in paying expenses, in paying other creditors, and in the general operation of its business," recovery could not be had on the presumption, contrary to such stipulation, that the insolvent intended to use only that which it had a right to use, and that whatever it withdrew was from its own part of the common fund in which the trust fund was commingled, and that the balance remaining and turned over to the assignees was the trust fund.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 48-50.]

4. EVIDENCE § 53—"PRESUMPTION."

A "presumption" is an inference, affirmative or disaffirmative, of the truth of a proposition of fact which is drawn by a process of reasoning from some one or more matters of known facts; it is in the nature of evidence, and if it be known whether the given proposition is true or false, there can be no presumption because the fact is established which the presumption tends to prove or disprove.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 73.]

For other definitions, see Words and Phrases, First and Second Series, Presumption.]

5. TRUSTS § 340 — CONVERSION OF TRUST PROPERTY OR FUNDS—LIEN.

The trust relation does not create a lien on property of like kind, whether that property be money or property of a different nature.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 501.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Alfred S. Heidelberg and another against J. B. Campbell and another, as assignees of the estate of the S. E. Carr Company. From judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions.

Skuse & Morrill and J. B. Campbell, all of Spokane, for appellants. Samuel R. Stern, of Spokane, for respondents.

FULLERTON, J. This is an action brought by Alfred S. Heidelberg and his co-plaintiffs against the assignees of the S. E. Carr Company, an insolvent corporation, to recover trust funds belonging to them which they alleged passed to the assignees at the date of the assignment. From a judgment in favor of the plaintiffs, the assignees appeal.

The facts out of which the controversy arises are stipulated, and, in so far as they are material to the question presented in this court, are in substance these:

On and prior to February 7, 1914, the S. E. Carr Company, a corporation, was conducting an extensive department store in the

city of Spokane, dealing in general merchandise. On the date given it assigned its property to a trustee, of whom the appellants are the successors in interest, for the benefit of all of its creditors. Prior to the assignment, and on August 18, 1913, the respondents, through and under the name of one John C. Uhrlaub, consigned to the S. E. Carr Company 189 oriental rugs, identified by numbers, names, dimensions, and prices shown on a written statement accompanying the consignment, of the total value of \$20,140. The terms of the consignment were written, and provided in effect that the S. E. Carr Company should hold the property in trust with the privilege of sale for the consignor's account, and that the property and the proceeds received from any sale should be and remain at all times the property of the consignor; that the consignee should account for the property at the listed prices, should make returns from sales every week, and should pay freight and other expenses incurred in shipping the rugs.

Between the date of the consignment of the property to the S. E. Carr Company and the date the company made the assignment for the benefit of its creditors, the consignee returned to the consignor one rug of the value of \$124.25, and sold others of the aggregate value of \$1,991. The remaining rugs were in stock at the time of the assignment, and were delivered by the assignees to the respondents on their demand. The rugs sold were not accounted for, and (to quote from the stipulation)—

the "said S. E. Carr Company failed to keep the funds realized from the sale of the consigned rugs separate and apart from other funds, but mixed and commingled the same with the money of the said S. E. Carr Company, and the said S. E. Carr Company, prior to said 7th day of February, 1914, used said funds in payment of its employes and other running expenses, in paying other creditors and in the general operation of its business."

Nor did the company pay the freight charges and other costs incurred in shipping the rugs; these costs and charges amounting to the sum of \$338.66.

The S. E. Carr Company had in cash on the date of the assignment, \$78.23 on deposit with a bank at Spokane, \$16.43 on deposit with a bank at St. Louis, Mo., and \$959.03 on deposit with a bank in New York City, N. Y. The first of these sums was turned over to the assignee, of the second the stipulation does not disclose what disposition was made, and the third was applied by the bank which held it on a note of \$25,000, which the S. E. Carr Company owed to it, and which had become due prior to the date of the assignment. The company had on hand at the time of the assignment another fund created under the following circumstances (quoting again from the stipulation):

"The books of the S. E. Carr Company on said 7th day of February, 1914, showed an unextended balance of \$2,600 in the account entitled 'office funds,' carried as cash in the office

safe, and was composed of cash, cash items, memoranda, debit slips, and sundry expense items that was not put through the books until the end of a customary period, such as a week or two weeks, or when the fund became nearly depleted. This fund was also used in connection with cash taken in after banking hours to distribute each morning to the cashiers throughout the different departments for change to commence the business of the day. The exact amount of cash in said fund on the 7th day of February, 1914, is not now ascertainable, but it is believed to have been somewhere between \$1,200 and \$1,500."

Prior to the commencement of this action the assignees treated the account as a general account and paid dividends thereon aggregating the sum of \$786.86.

On these facts the court concluded that the respondents were entitled to recover the sum of \$1,254.33, with interest thereon from August 18, 1913, the date the rugs were consigned to the S. E. Carr Company, and entered judgment accordingly.

The record does not disclose the precise ground upon which the trial judge rested his decision, but the respondents argue that the judgment is sustainable upon any one of three grounds: First, that since the insolvent wrongfully converted the proceeds of the sales of the rugs to its own use, the sum so converted entered into and became a part of the assets which subsequently passed to the assignees, and that a trust *ex maleficio* was thereby created by virtue of which the claimant has a lien on all of the assets of the insolvent, whether money or property; second, that since the rugs and the money received from their sales were held in trust by the insolvent, and were blended with the insolvent's own funds, the money coming into the possession of the assignees from the insolvent's estate is chargeable with the trust, on the presumption that the insolvent intended to use that which he had a right to use and whatever he withdrew from the account was from its own part of the common fund, and that the balance remaining is the trust fund; or, third, that equity will charge property of like kind and character passing from the insolvent to the assignees with the trust, even though it be shown that no property of the beneficiary was intermingled therewith.

[1, 2] The first proposition, while sustained in certain jurisdictions, is contrary to our own cases and contrary to the principles on which the right of recovery rests. The right of the beneficiary to pursue a fund and impose upon it the character of a trust is based on the principle that it is the property of the beneficiary, not upon any right of lien against the wrongdoer's general estate; and this whether the property sought to be recovered is in the form in which the beneficiary parted with its possession or in a substituted form. *Rugger v. Hammond*, 163 Pac. 408; *Chase & Baker Co. v. Olmsted*, 160 Pac. 932; *In re Blattner's Estate*, 92 Wash. 48, 158 Pac. 1015; *Carlson v. Kies*, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317.

In the first of these cases the plaintiff sought to recover from the receiver of an insolvent bank moneys received by the bank from the sale of certain local improvement bonds which the plaintiff had caused to be placed in the possession of the bank to be sold on his account. He claimed the money as a trust fund, and sought to charge the money coming into the hands of the receiver from the insolvent with the trust. Stating the grounds on which recoveries were permitted under such circumstances, this language was used:

"Now, in so far as we are concerned with the trust theory upon which Rugger seeks recovery here, we are confronted with a question of title, and not a question of debt. Manifestly, in so far as Rugger seeks recovery upon that theory, this is nothing more nor less than an action to recover property, and the fact that he seeks recovery of his property in a changed or substituted form such as in the eyes of the law might make it still his property does not in the least change the nature of the ground of recovery which he here invokes. Such change of form in the property has to do only with the description and identity thereof. As said by Justice Peckham, speaking for the New York Court of Appeals in *Holmes v. Gilman*, 138 N. Y. 369 [34 N. E. 206] 20 L. R. A. 566 [34 Am. St. Rep. 463]: 'The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title'—and as even more tersely stated by Chief Justice Alvey, speaking for the Court of Appeals of Maryland in *Englar v. Offutt*, 70 Md. 78 [16 Atl. 497, 14 Am. St. Rep. 332]: 'The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him.'

"Justice Shelby, speaking for the Fifth federal Circuit Court of Appeals in *Butler v. Western German Bank*, 159 Fed. 116 [86 C. C. A. 306], recognized this underlying principle in observing that: 'The equity, springing as it does from the right to trace the funds or property, does not extend to a right to take other funds or property by way of damages or interest.'

"In 1 *Bolles*, *Modern Law of Banking*, p. 190, that learned author pointedly reminds us of that which becomes apparent to any one upon an examination of the numerous decisions touching this question that: 'Many a beneficiary has been unable to recover, not through his failure to prove the existence of a trust, but of a fund that he could rightfully claim as his own.'

"These observations it may be thought are unnecessary here because of their elementary character and the well-understood theory of a claimant's right of recovery of the nature here sought by Rugger. We deem it appropriate, however, to emphasize this principle to the end that the ingenious argument of counsel may not lead us astray in the determination of the real question here involved, which in its final analysis is little else than a question of fact, though the case is submitted to us upon detail facts which are not in dispute; that is, the question of whether or not there came into the hands of the receiver Rugger's money or its substitute."

In the second case the fund in controversy was the proceeds of certain fire insurance, which remained on deposit with a bank, commingled with the funds of the insolvent

depositor. Again stating the prevailing rule allowing a recovery of trust property which comes into the possession of the representative of the insolvent, the court said:

"The right of a beneficiary to reclaim a trust fund is based upon his right of property, not upon any right as a preferred creditor of the trustee. Hence it was formerly held that the blending of trust money with that of the trustee defeated the owner's title, and reduced his status to that of an unsecured creditor of the trustee. This on the theory that, having lost its identity, the trust money could not be followed and recovered in specie. The inequitable results of this doctrine finally led a great majority of the courts to adopt the rule that, where money held by one person as trustee for another has been commingled with money of the trustee and deposited in a bank to the trustee's individual credit, the balance in the bank may be charged with the trust. This on the reasonable presumption that the trustee intends to use only what he has the right to use, and that whatever the trustee withdraws from the account is from his own part of the common fund, and that the balance remaining includes the trust fund. *Crawford County v. Strawn*, 157 Fed. 49 [34 C. C. A. 553] 15 L. R. A. (N. S.) 1100; *Waddell v. Waddell*, 36 Utah, 435, 104 Pac. 743; *Wildman v. Kellogg*, 22 N. D. 398, 133 N. W. 1020 [39 L. R. A. (N. S.) 563]; *Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214, Ann. Cas. 1913D, 387 [L. R. A. 1916C, 61]; *Brennan v. Tillinghast*, 201 Fed. 609 [120 C. C. A. 37]; *Southern Cotton Oil Co. v. Elliott*, 218 Fed. 567 [134 C. C. A. 295]; *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; *Spokane County v. First Nat. Bank*, 68 Fed. 979 [16 C. C. A. 81]."

In the other cases cited the question was not specifically discussed. The rule was recognized, however, and the decisions rested upon the principle involved.

[3, 4] The principle announced by the cases cited not only precludes recovery in any case on the first ground stated, but it precludes recovery in the case before us on the second. It is stipulated that the moneys received by the trustee from the sale of the rugs was used "in payment of its employees, in paying expenses, in paying other creditors, and in the general operation of its business." A presumption is an inference, affirmative or disaffirmative, of the truth of a proposition of fact which is drawn by a process of reasoning from some one or more matters of known fact. The presumption arises from a want of knowledge of the truth of the proposition. It is in the nature of evidence, and if it be known whether the given proposition is true or false, there can be no presumption because the fact is established which the presumption tends to prove or disprove. Hence in the present case there can be no presumption that the money received from the sale of the rugs came into the possession of the assignees, and hence no recovery on the theory that the money is the property or the proceeds of the property of the beneficiary of the trust.

[5] The third ground is likewise in contravention of the principle on which the right of recovery rests. If the trust relation does not create a general lien on all of the prop-

erty of the trustee, there is no reason for saying that it creates a lien on property of like kind, whether that property be money or property of a different nature. This seems so self-evident as not to require argument in its support. The proposition was answered moreover by the case of *Chase & Baker Co. v. Olmsted*, before cited. There the fund which the plaintiff sought to impress with the trust had been depleted between the time his money was deposited in the fund and the time the action was instituted to a sum less than the amount of trust money deposited, although sufficient money was in the deposit at the latter time to pay the entire claim, and it was held there could be a recovery only to the amount shown to have continuously remained in the account. The court, after the paragraph heretofore quoted, used this language:

"But as a resulting corollary it is still held that, if at any time during the currency of the blended account the withdrawals leave a balance less than the trust fund, that fund must be regarded as dissipated, except as to such balance. Some subsequently added to the account from other sources cannot be attributed to the trust fund. *Crawford County v. Strawn*, supra; *Hewitt v. Hayes*, supra. Some courts have refused to recognize this corollary, but they are few, and at least one of these has, in more recent decisions, receded from its former position. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96. For a full statement of the foregoing principles substantially in the language of the leading cases, see 3 R. C. L. § 180. As between other creditors and the cestui que trust the burden of proving his title still rests upon the latter. *Schuyler v. Littlefield*, 232 U. S. 707 [34 Sup. Ct. 466, 58 L. Ed. 806]. Aided by every presumption, he can only recover the lowest balance to which the blended account had been reduced pending its currency as shown by the bank's books. *Powell v. Missouri & A. Land & Min. Co.*, 99 Ark. 553, 139 S. W. 299."

Counsel have in their briefs cited numerous authorities from other jurisdictions. These present a decided conflict of opinion. We have not felt called upon to notice them specifically, as we believe our own cases are determinative of the questions involved.

Our conclusion is that the court erred in the judgment entered. It is therefore reversed, and the cause is remanded, with instructions to enter a judgment to the effect that the plaintiffs take nothing by their action, with costs to the defendants.

MOUNT, WEBSTER, and HOLCOMB, JJ., concur.

STATE v. RICHTER. (No. 13811.)

(Supreme Court of Washington. April 11, 1917.)

1. ASSAULT AND BATTERY ⇨78—INFORMATION—SUFFICIENCY.

An information charging that in a certain county on or about a certain day the defendant unlawfully and willfully assaulted another

person with a weapon, instrument, and thing likely to produce harm, and inflicted grievous bodily harm upon him with such weapon, against the peace and dignity of the state, is sufficient under Rem. Code 1915, § 2414, defining assault in the second degree.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 116-122.]

2. INDICTMENT AND INFORMATION ⇨110(3) —STATUTORY OFFENSE—SUFFICIENCY.

An information charging a crime defined by statute is sufficient when drawn in the language of the statute.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 291-294.]

Department 1. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Fred Richter was convicted of an offense, and his motion in arrest of judgment was sustained, and the State appeals. Reversed and remanded, with directions.

O. T. Webb and Clifford Newton, both of Everett, for the State.

MAIN, J. The defendant was charged by information with the crime of assault in the second degree. The trial resulted in a verdict finding the defendant guilty of the crime charged. After the return of the verdict, a motion was made in arrest of judgment, for the alleged reason that the information failed to state facts sufficient to charge a crime. This motion was sustained, by the trial court, and the state appeals.

[1, 2] The information, aside from the formal parts—

"charges and accuses the above-named defendant, Fred Richter, with the crime of assault in the second degree, in that, in the county of Snohomish, state of Washington, on or about the 15th day of January, 1916, then and there being, the said defendant, Fred Richter, did unlawfully and willfully assault one George Walters with a weapon, instrument, and thing likely to produce harm, then and there held in the hands of him, the said Fred Richter, and did then and there unlawfully and willfully inflict grievous bodily harm upon him, the said George Walters, with said weapon and instrument aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The statute under which the charge is laid (Rem. Code, § 2414) defines assault in the second degree as follows:

"Every person who, under circumstances not amounting to assault in the first degree—

* * *

"(3) Shall willfully inflict grievous bodily harm upon another with or without a weapon; or

"(4) (Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm * * *

"Shall be guilty of assault in the second degree. * * *

By comparison it will be seen that the information embodies both these subdivisions, and is drawn in the language of the statute. The statute defines the crime. The information was good under either subdivision 3 or

4. The rule is that an information which charges a crime defined by the statute is sufficient when drawn in the language of the statute. *Watts v. Washington Territory*, 1 Wash. T. 409; *State v. Day*, 4 Wash. 104, 29 Pac. 984; *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Williams*, 73 Wash. 678, 132 Pac. 415; *State v. Jakubowski*, 77 Wash. 78, 137 Pac. 448.

The judgment will be reversed, and the cause remanded, with directions to the superior court to enter a judgment upon the verdict, and impose a sentence upon the respondent.

ELLIS, C. J., and CHADWICK and WEBSTER, JJ., concur.

DIETRICH et al. v. CITY OF SEATTLE.
(No. 13509.)

(Supreme Court of Washington. April 14, 1917.)

MUNICIPAL CORPORATIONS § 362(2) — CONTRACTS—CONSTRUCTION.

A provision in a contract with a city for the improvement of streets that if the contractor should be unable to complete the contract by reason of court proceedings enjoining the construction or completion of the work or any portion thereof, and in the discretion of the city engineer it be impracticable to construct any other portion, the contractor shall waive any and all claim for damages by reason of such inability to construct, and the city engineer shall report the improvement and file his final estimate, and the contractor shall agree to accept in full payment of such improvement and as a cancellation of his contract a sum for the labor performed in accordance with his bid, and should the proceedings allow the work to be resumed prior to the issuance of the notice of completion by the city engineer, the contractor may be required to proceed with the work, etc., was broad enough to preclude recovery by the contractor for damage sustained where the work was enjoined because of fault of the city in failing to procure the necessary right of way for the performance of the work in the absence of a showing of some form of overreaching or fraud.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 895.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by George C. Dietrich and another, copartners doing business under the firm name of George C. Dietrich & Co., against the City of Seattle. Judgment for defendant, and plaintiffs appeal. Affirmed.

Ballanger, Battle, Hulbert & Shorts, of Seattle, for appellants. Hugh M. Caldwell and Walter F. Meier, both of Seattle, for respondent.

FULLERTON, J. The appellants contracted with the city of Seattle to improve certain of its streets. The contract was in writing and, by reference, adopted as part of the contract the general standard plans and specifications theretofore prepared by the city in so far as they were applicable to

the particular work. Among the provisions of the standard plans is the following:

"24. *Injunctions*. It is agreed that if the contractor for this improvement, or the city of Seattle, shall be unable to complete any portion or portions thereof by reason of court proceedings enjoining the construction or completion of any portion or portions thereof and it shall, in the discretion of the city engineer, be impracticable to construct or complete any other portion or portions thereof, then, and in any such case, the contractor shall waive any and all claim or claims for damages by reason of such inability to construct such portion or portions of said improvement, and the city engineer shall have the right to report such improvement, as completed, file his final estimate thereon as provided for in the full completion of other local improvements in the city of Seattle, and such contractor shall agree to accept in full payment of such improvement, and as a cancellation of his contract therefor a sum of money for his labor performed, and materials furnished in strict accordance with his bid for such contract, on the basis of the work actually performed or materials and labor actually furnished in said work to the date of stopping thereof. Should the court proceedings allow the work to be resumed prior to the issuance of the notice of completion on said work by the city engineer, then the contractor on being ordered by the city engineer shall proceed with the work immediately, carrying out the contract in full according to all original intents or modifications of the court, as the case may be, at the prices as specified in the original contract, and no extra payment will be allowed said contractor for change in price of material or labor or for any other reason whatsoever. Whatever time elapses after the contractor has been ordered to stop on the work and his being ordered to proceed again will not be considered as a part of the time allowed on the contract."

The appellants shortly after the execution of the contract assembled their equipment at the place of the work and entered upon its prosecution. The plans and specifications for the work required certain cuts and fills in the street which could not be made without trespassing upon and damaging private property abutting thereon. Based on the ground that the city had not acquired by condemnation or otherwise the right to trespass or damage their property, certain of the property holders sued for and obtained an injunction against the city and the appellants, enjoining them from further proceeding with the work until their damages were ascertained and paid. The injunction continued in force for some four months before it was finally dissolved through the efforts of the city authorities, during which time the appellant's operations were largely suspended and their equipment idle. After the dissolution of the injunction the work was resumed by the appellants and completed in accordance with the contract. This action was instituted by the appellants to recover against the city for the damages sustained by them by reason of the enforced suspension of the work. The case was tried to the court sitting without a jury. At the conclusion of the case the court decided that the provision of the contract before quoted preclud-

ed a recovery, and entered judgment accordingly. This appeal followed.

It is the contention of the appellants that the clause of the contract on which the court based its conclusions is not sufficiently broad to include losses occasioned by an injunction issued because of the fault of the city in failing to procure the necessary right of way for the performance of the work. But the clause deals with injunction proceedings, and seems to have been provided to meet the very contingency which here happened. It provides: First, a method of adjustment if by reason of the injunction proceeding the improvement cannot be completed, and for a waiver of damages on the part of the contractor should such a contingency happen; and, second, for a resumption of the work should the court proceedings allow it, providing that in the case of the happening of the latter event "no extra payment will be allowed the contractor for change in price or material or for any other reason whatsoever." This language is broad enough to preclude a recovery of damages caused by injunction proceedings, even though the proceedings be the direct result of the fault of the city. The contract seems to be, as the trial court remarked, a harsh one when applied to a condition like one shown in the present record, but parties are at liberty to make their own contracts, and there must be some form of overreaching or fraud before the courts can relieve from them. Nothing of this character is here shown.

The judgment is affirmed.

MOUNT, PARKER, and HOLCOMB, JJ.,
concur.

WASHINGTON SHOE MFG. CO. v. DODWELL DOCK & WAREHOUSE CO.,
Inc. (No. 13788.)

(Supreme Court of Washington. April 13, 1917.)

WAREHOUSEMEN ~~33~~34(7)—Loss of Goods by Fire — SPECIAL LIABILITY BY CONTRACT — EVIDENCE.

In an action against a warehouseman to recover for merchandise destroyed by fire, evidence held not to show that warehouseman, by signing a regular bill of lading as a receipt for goods, agreed to become insurer according to provisions on back thereof applicable only to carriers.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 79.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the Washington Shoe Manufacturing Company against the Dodwell Dock and Warehouse Company, Incorporated. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Huffer & Hayden, of Tacoma, for appellant. Clise & Poe, of Seattle, for respondent.

WEBSTER, J. This is an action to recover the reasonable value of merchandise destroyed by fire in the burning of appellant's warehouse in the city of Seattle. Respondent was engaged in manufacturing and selling shoes in the domestic and foreign markets. Appellant was engaged in the business of operating a warehouse and dock on the Seattle water front. It was in no sense a common carrier, and had never engaged in that business. When goods intended for shipment were delivered at its warehouse, appellant would issue to the owner receipt for same. When they were subsequently placed on board vessel, the mate would issue a similar receipt. Upon the surrender of these receipts to the steamship company its agent would deliver a bill of lading in regular form to the shipper. Respondent had shipped merchandise through appellant's warehouse on previous occasions, and was thoroughly familiar with the customary method of issuing receipts and bills of lading. On October 28, 1915, it delivered at the warehouse a number of cases of shoes to be thereafter placed on board ship for transportation to the Philippine Islands. Respondent had on hand a supply of blank railroad bills of lading, and it was its custom to use these forms when shipping merchandise either by rail or water, whether the goods were to be delivered directly to the carrier or to an independent warehouseman or wharfinger. Upon the occasion in question the shoes were listed on these forms, which were delivered to respondent's drayman who hauled the goods to the warehouse. The lists were presented to appellant's checker at the dock, who, after comparing the marks on the merchandise with the description of the goods on the bills of lading, signed the same and returned them to the drayman. Within the following 24 hours the warehouse and its contents, including the shoes, were destroyed by fire.

On the back of the bills of lading are printed in small type the 10 conditions comprising the standard form of bill of lading approved by the Interstate Commerce Commission, all of which have reference to the relative rights and obligations of carrier and shipper. Among these provisions is the following:

"The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For a loss, damage, or delay caused by fire occurring after forty-eight hours [exclusive of legal holidays] after notice of the arrival of the property at destination or at port of export [if intended for export] has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negli-

gence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner or party entitled to make such request or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom on account of the nature of the property, or when at the request of the shipper, the property is transported in open cars, the carrier or party in possession [except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars] shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

Respondent did not allege that the destruction of the goods was due to appellant's negligence, but based its right of action upon breach of contract, claiming that, by virtue of the printed matter on the reverse side of the forms heretofore quoted, appellant became an insurer of the property. The relationship existing between appellant and respondent was that of warehouseman and depositor, and, in the absence of special contract, appellant's liability was that of an ordinary bailee for mutual benefit. The printed matter on the bills of lading is applicable only to the relationship of carrier and shipper, and the provisions upon which appellant relies were clearly intended for the purpose of changing and limiting the liability of the carrier to that of a warehouseman 48 hours after goods had reached their destination and notice of their arrival had been duly given. They are wholly foreign to and inconsistent with the relationship of warehouseman and depositor. A mere reading of the conditions clearly demonstrates this fact. An examination of the record leads irresistibly to the conclusion that the papers signed by appellant's checker were understood and intended by the parties to be nothing more than a receipt, evidencing the fact that the merchandise described upon the face of the forms had been deposited in appellant's warehouse. There is no substantial evidence in the record tending to prove that the minds of the parties met upon the provisions quoted, as the terms of a special contract, imposing upon appellant the extraordinary liability of an insurer of the goods against fire.

But detailed discussion of the evidence would serve no useful purpose. The provisions relied upon by respondent as evidencing the terms of the agreement are so inapplicable and inappropriate to the relationship actually existing between the parties as to completely negative the thought that they were assented to for the purpose claimed by respondent. To attempt to confure them into an agreement whereby appellant became an insurer of the merchandise would be to make a contract for the parties which they neither made nor undertook to make for themselves.

The judgment is reversed, with direction to dismiss the action.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

STATE v. WILLIAMS. (No. 2939.)

(Supreme Court of Utah. March 21, 1917.)

1. CRIMINAL LAW §941(1)—NEW TRIAL—ABUSE OF DISCRETION.

Where the evidence barely sustained a conviction for larceny of horses, the trial court abused its discretion in denying a new trial motion, largely based on cumulative affidavits, showing there was nothing suspicious in accused's connection with the horses, and that the man from whom he had innocently secured them really existed, which the sheriff had testified was not a fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2830.]

2. CRIMINAL LAW §939(1)—NEW TRIAL—DILIGENCE IN PREPARING FOR TRIAL.

Evidence held to establish that accused was reasonably diligent in preparing for trial after his release on bail after seven months' confinement, where he was without funds, and important witnesses lived several hundred miles distant, and subpoenas were given the sheriff to serve them, but they did not appear.¹

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 2821-2823.]

Appeal from District Court, Millard County; Joshua Greenwood, Judge.

L. A. Williams was convicted of grand larceny, and appeals. Reversed and remanded, with directions.

Wm. B. Higgins and J. S. Giles, both of Fillmore, and S. A. King, of Salt Lake City, for appellant. Dan Shields, Atty. Gen., and Jas. H. Wolfe and O. C. Dalby, Asst. Attys. Gen., for the State.

McCARTY, J. The defendant was tried and convicted in the district court of Millard county, Utah, for the crime of grand larceny. The larceny alleged consisted of the theft of two horses, the property of one John Terry. The evidence shows that the animals described in the information were stolen from the Terry ranch situated near the town of Hinckley, in Millard county, on or about the 25th day of March, 1915. The defendant does not question the sufficiency of the evidence to establish the larceny, but contends that it is insufficient to support the finding of the jury that he is the guilty party. The grounds relied on for a reversal of the judgment are: (1) The insufficiency of the evidence to support the verdict; and (2) the overruling of defendant's motion for a new trial.

[1, 2] The facts, in substance, are as follows: The defendant, a resident of Saw Mill Canyon, White Pine county, Nev., was sent from Ely, Nev., by a man by the name of W. R. James, to Fillmore, Millard county, Utah, to get three horses and a saddle belonging to James, and which were in the custody of

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ State v. Potello, 40 Utah, 56, 119 Pac. 1023.

Sheriff D. S. Dorrity at Fillmore. Defendant came by rail via Salt Lake City to Millard county. He received the horses and saddle from Sheriff Dorrity at Fillmore, and started on his return trip to Ely, Nev. From Fillmore he went to the Terry ranch, situate near the town of Hinckley, in Millard county. He stayed over night, and the following day at the ranch with two acquaintances of his, James Campbell and James Carter. From Campbell he obtained a small grey, unbroke pony. He had never traveled overland between Hinckley, Utah, and Ely, Nev., and was unacquainted with the country between these places. The nearest point from Hinckley on the road or public highway between Hinckley and Ely, Nev., where forage for horses could be obtained is the Meechem ranch, a distance of 85 miles. This necessitated an 85-mile ride after leaving the Terry ranch, before he could obtain hay for his horses. Because of this the defendant, so he testified, decided to leave the Terry ranch in the evening and travel the first half of the distance from Hinckley to the Meechem ranch at night. On this point, in response to interrogatories on cross-examination by the district attorney, he testified as follows:

"Q. Did you have any particular object in leaving there at night and not in the daytime? A. It was 85 miles from Hinckley to the Meechem ranch. I didn't know the country, but I could see into the Antelope Pass. * * * I rode away in the night because if I lost the road I could find the way to Antelope Pass. I could see where the pass was and could see it at night, and I wanted daylight for the after part of the ride."

No effort was made by the state to dispute or to weaken defendant's testimony regarding the topography and the physical condition of the country through which the road extends from Hinckley to the Meechem ranch. In fact, there does not seem to be any controversy regarding defendant's movements and the conditions under which he traveled from Fillmore with the horses he received from Sheriff Dorrity to his home in Nevada.

Defendant's version of the circumstances under which he came into possession of the horses described in the information and the disposition he made of them on reaching Nevada is about as follows: At about 2 o'clock on the day after he came to the Terry ranch with the James horses he was in front of a store in the town of Hinckley, and a man rode up on horseback and inquired of him if he "was the fellow that was going to Ely horseback," and that he answered in the affirmative. The man, who gave his name as Bidwell, stated that he had a couple of gentle horses that he desired to send "over to the Ely country"; that he could not take them himself because he "was going to Salt Lake two or three days on business." The defendant, in consideration that he would be permitted to ride one horse and use the other for a pack animal on the trip, agreed to take

the horses and leave them at Water Canyon, which is between Ely and Saw Mill Canyon, and where Bidwell claimed the horses were raised. The defendant informed Bidwell that owing to the fact that he had an 85-mile ride to make before coming to the next ranch or stopping place he intended to leave at night, and suggested to Bidwell that he bring the horses to the Terry ranch. Bidwell stated that he was in the horse business, and was then camping a few miles west from the Terry ranch and near the main traveled road along which defendant would travel to Ely; that he would have the horses ready for defendant when he arrived opposite the camp, provided he (Bidwell) should be unable to take them to the Terry ranch before defendant left for Ely. Pursuant to this understanding defendant received the horses from Bidwell on the road near the camp at 10 o'clock p. m. that night, and proceeded on his journey. He took approximately a direct course for Antelope Pass following the main traveled road for 12 or 15 miles of the distance. In the afternoon of the following day he arrived with the horses, six in number, at what is known as Antelope Springs. There he met and conversed with several men with a sheep camp outfit who were camped near the springs. That same evening, "between sundown and dusk," he arrived at the Meechem ranch. E. W. Meechem, the owner of the ranch, furnished him lodging, stabled and fed his six horses overnight. While he was at the ranch the defendant and Meechem briefly discussed the James horses, and casually mentioned the other three horses defendant had with him. From the Meechem ranch defendant traveled along the public road or highway to Ely, where he remained overnight, putting up the horses at a public corral or feed yard. The next morning he resumed his journey homeward, traveling along the public traveled road. When he arrived at Water Canyon he turned the horses which he claimed to have received from Bidwell loose on the public domain.

The foregoing is, in substance, defendant's evidence respecting his movements and what he did from the time he came to the Terry ranch with the James horses until he turned the stolen horses loose on the public domain at Water Canyon. About three days after he arrived home he was arrested on a telegram from the sheriff of Millard county and was taken by the officer, a deputy sheriff of White Pine county, in an automobile to Ely. Defendant and his wife, the latter being present when the arrest was made, testified that defendant was not advised by the officer making the arrest of the nature of the charge against him. The deputy sheriff making the arrest, however, testified that he handed defendant the telegram when the arrest was made, and informed him that the charge was grand larceny. The significance of this conflict in the evidence on an apparently im-

material matter will appear farther along in this opinion.

Defendant, as he passed Water Canyon in custody of the officer, directed the officer's attention to two horses that were grazing on the public domain some distance from the road that resembled, and probably were, the stolen horses in question. The deputy sheriff testified that Water Canyon is a place "where they generally have drives"; that he has "always understood they have a trap there, and it is a place where they hold horses—where different horse gatherers trap and hold their horses." On being questioned by the officer the following day regarding the horses he was accused of stealing, the defendant stated that they were turned over to him at Hinckley, Utah, by a man by the name of Bidwell, who instructed him to take them to Water Canyon, White Pine county, Nev., and there turn them loose on the public domain. His statement to the officer in that regard was substantially the same as that made later by him at the trial. A few days after the arrest the horses were found at Water Canyon in the vicinity of where the defendant claimed he had left them.

C. W. Meechem was called by the state and testified that when the defendant stopped at his ranch with the horses he had a conversation with him in which defendant, after speaking of the James horses, "turned to these three and said, 'Those three belong to me;' that is, these two horses [the Terry horses] and a little white pony that he had." On cross-examination the witness qualified this remark by saying, "As near as I can recall it that is the statement that he made." This is the only direct incriminating evidence against defendant in the record.

The theory on which the case was prosecuted in the trial court was that the stolen horses were not delivered to defendant by Bidwell, or by any other person, at or near the Terry ranch, or elsewhere. And that is the theory advanced by the state in this court. Mizzie Williams, the defendant's wife, testified that she had recently heard of a man in White Pine county, Nev., known as Jack Bidwell; that she heard a Mrs. Gregor who "kept boarders in Ely" speak of him; that this lady is known in Ely as "Mrs. Gregor of Ely." D. Blanchard, defendant's father-in-law, also testified that he knew of, but had never met, a man in White Pine county, Nev., by the name of J. P. Bidwell, giving the names of several parties whom he claimed he had heard speak of Bidwell. One of those parties was a Mr. Lowe, whose affidavit defendant later filed in support of the motion for a new trial. This affidavit, and similar affidavits made by other parties that were filed by the defendant in support of his motion for a new trial, will be referred to later.

The deputy sheriff of White Pine county, who arrested the defendant on the telegram

referred to, testified that he did not know and had never heard of a man in White Pine county by the name of Bidwell.

The defendant's course of conduct, what he did and what he said from the time he claims to have received the stolen horses from Bidwell until he was returned to Utah in custody of the officer to stand trial for the larceny is, with the exception of his alleged statement to Meechem herein referred to, as consistent with the theory of innocence as it is with the theory of his guilt. In fact, much of it is somewhat inconsistent with the theory of guilt. The fact that he proceeded along the public highway without any attempt at concealment or to avoid meeting with people residing near, and those traveling along, the road, and finally turned the stolen horses loose on the public domain at a place used as a rendezvous by "horse gatherers" and where horses are "trapped" and corralled, is more consistent with his innocence than it is with the theory of guilt.

Comp. Laws 1907, § 4355, provides that "possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." The jury evidently did not regard defendant's explanation of how he came into possession of the property as satisfactory. In view that the deputy sheriff testified that he had never seen or heard of a man by the name of Bidwell in White Pine county, Nev., or elsewhere, the jury no doubt regarded the evidence of Mrs. Williams, defendant's wife, and that given by Blanchard, his father-in-law, respecting the existence and whereabouts of Bidwell, as weak and unsatisfactory. Moreover, the evidence of the defendant and his wife, wherein they stated that the deputy sheriff, when he arrested defendant, did not inform him of the nature of the crime with which he was charged, was flatly contradicted by the deputy sheriff. This, as a legal proposition, was unimportant, except that it tended to, and no doubt did, affect the veracity of defendant and his wife before the jury.

Referring to the affidavits filed by the defendant in support of his motion for a new trial, counsel for the state, in their printed brief, say:

"Some 17 affidavits were filed on behalf of appellant, chiefly directed to the point of establishing the identity of the man named Bidwell from whom the appellant testified he received the horses near Hinckley, Millard county, Utah. The affidavits are cumulative, and the record does not show sufficient diligence on the part of appellant to warrant the court to grant the motion."

The record shows that the defendant was, immediately after he was arrested (April 1, 1915), taken to Millard county, Utah, and, being unable to furnish bail, he was confined in jail until after he was tried and convicted. On November 10, 1915, more than seven months after he was arrested, he secured and was released on bail. He was without

means and unable to employ counsel to defend him. He was, during the time he was in jail awaiting trial, more than 200 miles by wagon road from his home, relatives, friends, and acquaintances, all of whom resided in the state of Nevada, and out of the jurisdiction of the court. Under such circumstances the defendant should not be held to the same degree of promptness in preparing for trial, and to the same standard of diligence in procuring the attendance of witnesses, as is ordinarily required of defendants in criminal cases. Furthermore, the parties making the affidavits resided in another state out of the jurisdiction of the court, and more than 200 miles by wagon road from the place of trial. Defendant, in his affidavit filed in support of his motion for a new trial, recites that, immediately after he was released from jail on November 10, 1915, he went to White Pine county, Nev., and met and conversed with each of the parties who subscribed to the affidavits mentioned, and that they, and each of them, expressed a willingness to either permit their depositions to be taken or come to this state in response to a subpoena and testify for and on behalf of defendant with reference to their knowledge of the existence of Bidwell and as to when and where they last saw him, and the business he was engaged in, and that they can and will fully describe him.

Counsel who represented defendant in the trial court made and subscribed to an affidavit, wherein he says that prior to the time of the trial he talked with defendant and defendant's wife about the witnesses necessary for defendant's defense as far as they knew, and that he had subpoenas issued for five witnesses, naming them. Two of these witnesses were James Campbell and James Carter, presumably the two men with whom defendant stayed over night and one day at the Terry ranch while on his return trip to Nevada with the James horses; that said subpoenas were placed in the hands of D. S. Dorrity, sheriff of Millard county, for service; that he does not know whether said witnesses were served or not; that none of the witnesses appeared at the trial, and defendant was compelled to go to trial without them.

While it is true that neither the affidavit of the defendant nor that made by his counsel recites the facts which defendant expects to establish with the evidence of Campbell and Carter, we think the only inference deducible from the record is that those parties are important witnesses. The evidence shows that at the time the larceny was committed those men were staying at the Terry ranch, the place where it is conceded the crime was committed. The defendant testified that when he was on his way to Fillmore to get the James horses he stopped with those men two days at the ranch, and he recites in his affidavit that Campbell accompanied him to Fillmore on that occasion and

returned with him to the ranch. The evidence is also undisputed that Campbell and Carter were at the ranch when he left there for Ely, and that they furnished him with provisions and bedding with which to make the journey. It also clearly appears from the affidavits of defendant and his wife, and the testimony given by them at the trial, that neither of them had any information whatever before the trial that the parties making the affidavits, except three of the five persons for whom subpoenas were issued, and who did not appear at the trial, knew or claimed to know of a man by the name of Bidwell in White Pine county, Nev., or elsewhere. No attempt was made by the state to deny or refute the contents of the affidavits of the defendant and his wife respecting the diligence used by defendant in procuring the attendance of his witnesses and in preparing for trial.

We are of the opinion that defendant, under the circumstances, exercised all the diligence to procure the attendance of his witnesses and to prepare for trial that the law exacts.

The matters set forth in the numerous affidavits are mainly cumulative, and tend to show that there was nothing clandestine in the way defendant traveled with the stolen horses from the Terry ranch to Water Canyon; that he, on several occasions, stated that the horses belonged to a man by the name of Bidwell; that several of the parties making the affidavits claimed to be acquainted with Bidwell; that Bidwell, from the fall of 1906 to and including April, 1915, had, on numerous occasions, been in White Pine county, Nev. The description given of Bidwell in the affidavits corresponds substantially with the description given of him by defendant at the trial.

C. S. Crain, sheriff of White Pine county, Nev., subscribed to an affidavit in which he says that the deputy sheriff arrested defendant and took him to Ely on a telegram received at his office from Sheriff Dorrity of Millard county, Utah; that the telegram did not mention the crime for which the defendant was wanted by Millard county officers, and that neither he nor the deputy sheriff who arrested defendant was advised of the nature of the charge until after the defendant was taken to Ely; that after the defendant arrived at the sheriff's office he inquired of the sheriff the nature of the charge against him, and the sheriff answered that he did not know. On first impression it would seem that the affidavit of the sheriff on this point is wholly irrelevant, but in view that the deputy sheriff testified at the trial that he informed the defendant in the presence of his wife at the time he arrested him of the nature of the charge against him, thereby flatly contradicting the testimony of the defendant and his wife on that point, the sheriff's affidavit is significant. At the trial the testimony of the existence of Bidwell was given only by the defendant, his wife

and the defendant's father-in-law, and the jury may have given, and probably did give, considerable weight to the fact that the defendant was impeached by the deputy sheriff on what it, the jury, may have considered an important point in the case; and may have viewed with suspicion the circumstance of the defendant pointing out what appeared to be the stolen horses grazing on the public domain, as he and the sheriff passed Water Canyon, as a self-serving declaration on the part of the defendant.

One counter affidavit only was produced by the state, and it was filed for the purpose of impeachment. It affected only the weight of an affidavit made by a Mr. Young who claimed to have known a man in White Pine county, Nev., by the name of Bidwell. The Attorney General, in his printed brief, says: "The record does not present as strong a case as could be desired where a person is condemned to imprisonment." Where, as here, the record made in the trial court presents a case where in the evidence of guilt is admittedly weak and barely sufficient to support the verdict, the fact that the newly discovered evidence is largely cumulative ought not to control the discretion of the trial court in passing on a motion for a new trial, especially where, as in the case at bar, the newly discovered evidence, because of obstacles over which the defendant had no control, was not obtainable at the time of trial and much of which was then unknown to defendant and his counsel and which, if produced, might, and probably would, change the result if a new trial were had.

The facts of this case are, in some respects, somewhat similar to the facts of *State v. Potello*, 40 Utah, 56, 119 Pac. 1023, to which case we invite attention. We are of the opinion that the trial court, in view of the peculiar facts and circumstances of this case, abused its discretion in overruling defendant's motion for a new trial.

The case is therefore reversed, and the cause is remanded to the district court of Millard county, with directions to that court to set aside the judgment of conviction, and to grant a new trial.

FRICK, C. J., and CORFMAN, J., concur.

OKLAHOMA STATE BANK v. HICKLIN,
Marshal. (No. 20769.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. REPLEVIN §8(5)—RIGHT TO POSSESSION—HOLDER OF DRAFT WITH BILL OF LADING ATTACHED.

The plaintiff acquired the title to a car of wheat by the payment of a draft with the bill of lading attached, and shortly afterwards transferred the same to another bank. Payment of the draft being refused by the purchaser of the grain the draft and bill of lading were re-

assigned to the plaintiff. Before that time the wheat had been attached by a third party. Upon the retransfer of the bill of lading to the plaintiff, which in the meantime had gained possession of the wheat, plaintiff sold and transferred it to another party, and under that transfer the wheat was delivered. After the latter transfer the plaintiff brought an action of replevin against the officer who had levied the attachment upon the wheat. Held that, the plaintiff having transferred its interest in the wheat before its action was commenced, it was not entitled to recover possession of it.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 58-68.]

2. CARRIERS §58—HOLDER OF BILL OF LADING—TRANSFER OF INTEREST.

The fact that an attachment had been levied on the wheat did not prevent an effectual transfer of whatever interest the plaintiff had in the grain by the transfer of the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190.]

3. JUDGMENT §313—REPLEVIN §103(4)—ALTERNATIVE JUDGMENT—CORRECTION—TERM.

When the plaintiff which had obtained possession of the property replevied fails to show a right to its possession, the defendant is entitled to judgment in the alternative for the return of the property, or the value thereof if a return cannot be had; and where through inadvertence a general judgment in favor of the defendant is rendered at the end of the trial instead of in the alternative, it may be corrected, and proper judgment entered on the motion of the defendant after the term at which it was first rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 607-609, 627; Replevin, Cent. Dig. §§ 410, 411.]

Appeal from District Court, Sedgwick County.

Replevin by the Oklahoma State Bank against O. P. Hicklin, Marshal of the Wichita City Court. Judgment for defendant on sustaining a demurrer to plaintiff's evidence, corrected by a nunc pro tunc judgment, and plaintiff appeals. Affirmed.

T. A. Nofztger, George Gardner, and G. W. Cox, all of Wichita, for appellant. Campbell & Campbell, of Wichita, for appellee.

JOHNSTON, C. J. The Oklahoma State Bank of Sentinel, Okl., brought a replevin action in the district court against O. P. Hicklin, marshal of the Wichita city court, to recover possession of a car of wheat held by the marshal under a writ of attachment in another action. No redelivery bond was given by defendant. The trial court sustained a demurrer to the plaintiff's evidence, and rendered judgment in defendant's favor on December 21, 1915, for costs. Upon motion of defendant filed March 7th, a nunc pro tunc judgment was entered on April 8th, correcting the former judgment so as to decree a return of the property to the defendant, or its value. Plaintiff appeals.

Plaintiff alleged that it was the absolute owner of the property, but the following

facts were disclosed by its evidence. W. H. Titus, of Sentinel, who did business as the Orient Coal & Grain Company, shipped the car of wheat from Sentinel to the Hacker Grain Company of Wichita. A draft on the grain company for the value of the wheat, about \$1,500, with the bill of lading attached was turned over to the plaintiff bank which credited Titus' account with the amount. Plaintiff forwarded the draft and bill of lading to a bank in Kansas City, and on September 2, 1915, that bank credited the plaintiff's account there with the amount of the draft. The Kansas City bank then sent the draft to a Wichita bank, where it was presented to the Hacker Grain Company which refused payment. The draft was returned to the Kansas City bank which, upon instructions from the plaintiff, returned it to Wichita, with instructions to reduce it to the extent of \$75. Payment being again refused, the draft was returned to the Kansas City bank on September 8th, and it was returned to the plaintiff bank about September 10th, and its account was debited with the amount of the draft. On September 10th the plaintiff sold the car of wheat to the Higgins Grain Company at Lone Wolf, Okl., where the bill of lading with a new draft attached was sent and plaintiff received credit therefor. The date of the attachment by the marshal was September 7th. This action was commenced September 13th; and it appears that the only demand made prior to the commencement of the action was made by the bank's attorney in the name of the First National Bank of Clinton, Okl.

[1, 2] The marshal who took possession of the wheat under the order of attachment was entitled to recovery in the action unless the ownership and right of possession was in the plaintiff when its action was begun. The only demand upon the marshal for the possession of the wheat was made in behalf of the First National Bank of Clinton, Okl., and that bank is making no claim to the possession of the wheat. The ownership of the wheat was transferred in each instance by the transfer of the bill of lading. Plaintiff acquired the wheat in the first instance by such a transfer, and when the bill of lading was reassigned and returned to plaintiff it transferred that bill of lading and all the interest that it had in the wheat to the Higgins Grain Company, who in turn sold it to the Kemper Grain Company, and the wheat was actually delivered to that company on September 18th. It is conceded that ordinarily the transfer of a bill of lading operates as a transfer of the property mentioned in it, but it is claimed that, the transfer having been made without knowledge of the seizure of the wheat, the ownership did not pass. The transfers were made in the customary way, and physical control of the wheat

was not necessary to a valid transfer of it. The interruption of the shipment or the seizure of the wheat by a third party did not prevent the transfer of whatever interest the plaintiff had by the transfer of the bill of lading. It acquired the ownership of the wheat by the transfer of the bill of lading, and it parted with it by the same process. In this action the question was whether the plaintiff was the owner and entitled to the possession of the wheat when the action was begun. It had no right to the possession of the wheat on September 7th, when it was attached by the defendant, because the bill of lading had not then been transferred back to it, and when the replevin action was brought on September 13th it had already sold its interest in the wheat and had no right to its possession. That sale was sufficient to effectually pass its interest to the transferees, and no claim is made by them that the transfer is invalid, and the plaintiff is in no position to contest the validity of the sale it made. It is not important to inquire as to the rights acquired by the defendant under the attachment. It is enough if it appears from the evidence that the plaintiff was not entitled to the possession of the property when its action was begun. *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93; *Manufacturing Co. v. Godding*, 89 Kan. 396, 131 Pac. 572.

[3] The judgment, which it appears was first rendered for costs only, was modified so as to require the return of the wheat or its value, and of this complaint is made. The correction was made after the term at which the judgment was rendered. This is permissible under the third subdivision of section 596 of the Civil Code of Procedure (Gen. St. 1915, § 7500). *Martin v. Miller*, 97 Kan. 723, 156 Pac. 709; *Stone v. Pugh*, 99 Kan. 38, 160 Pac. 988. As no redelivery bond has been given and the plaintiff had failed to show a right to the possession of the wheat obtained under the writ of replevin, the defendant was entitled under the statute to a judgment in the alternative for a return of the wheat or the value thereof in case a return of the property could not be had. Gen. Stat. 1915, §§ 7077, 7080 (Code Civ. Proc. §§ 185, 188); *National Bank v. Thompson*, 54 Kan. 307, 38 Pac. 274. There is a contention that the judgment could not be modified after the term of court at which it was rendered, but it has been held that if the judgment in replevin is not rendered in the alternative as the statute requires, the court may modify and correct it after the term at which it was rendered. *Bank v. Stevenson*, 65 Kan. 816, 70 Pac. 875.

There are other criticisms of the rulings of the court, but we find nothing substantial in them. The judgment is affirmed. All the justices concurring.

BENNETT v. ST. MARYS GRAIN CO.
(No. 20757.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. SALES ¶404—**REMEDIES OF BUYER—**
SHORTAGE.

The provisions of section 8510 of the General Statutes of 1915 relating to bills of lading and the liability thereunder of railway companies do not preclude the buyer of grain from recovering against the seller for a shortage in the amount paid for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1146.]

2. GARNISHMENT ¶88—**AFFIDAVIT—WAIVER**
OF DEFECT.

An affidavit for garnishment instead of stating that the defendant had no property liable to execution sufficient to satisfy the plaintiff's demand, as required by section 7121 of the General Statutes of 1915 (Code Civ. Proc. § 229), stated that it had "no property liable to execution sufficient to satisfy the plaintiff's demand in this [Shawnee] county." Held that, as the defendant voluntarily appeared and without objection gave bond releasing the property attached, it cannot now be heard to question the validity of the garnishment affidavit.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 160-166.]

Appeal from District Court, Shawnee County.

Action by A. S. Bennett, doing business as the Bennett Commission Company, against the St. Marys Grain Company, with cross-petition by defendant. Judgment for plaintiff and for defendant on its cross-petition, and plaintiff appeals. Remanded, with directions to modify the judgment.

Eugene S. Quinton, of Topeka, for appellant. Maurice Murphy, of St. Marys, for appellee.

WEST, J. The plaintiff sued to recover on a written contract by the terms of which the defendant was to furnish five cars of wheat to be delivered and weighed at Kansas City. It was alleged that the defendant drew a draft on the plaintiff for \$60.90 more than the wheat came to, which plaintiff paid believing that the draft represented the actual amount of wheat so delivered and weighed. The jury found in accordance with these allegations and awarded \$60.90 on account thereof, which the court subtracted from the amount of the verdict, from which order of subtraction the plaintiff appeals.

The defendant by way of cross-petition claimed damages for garnishing the railway company and stopping two cars of wheat, which the defendant gave bond to release. The jury found in favor of the defendant on this matter and allowed \$59 therefor. This was approved by the trial court and is assigned as error by the plaintiff.

[1] The disallowance of the first item is sought to be justified under section 8510 of

the General Statutes of 1915, providing that each railway company shall be required to give to any one delivering grain for transportation a bill of lading in duplicate, stating the exact number of bushels or pounds of grain by whom delivered and to whom consigned, that thereafter the railway company shall be responsible to the consignee named in the bill of lading for the full amount of such grain until it shall show that it has delivered the whole amount thereof, and that:

"In any action hereafter brought against any railway company for or on account of any failure or neglect to deliver any such grain * * * to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain * * * so received by such railway company."

Weber v. Railway Co., 69 Kan. 611, 77 Pac. 533, holding that the right to recover from a railway company for loss of grain delivered to it for transportation is expressly restricted to the consignee, his heirs or assigns, is cited. The expression in the opinion that the only persons authorized to maintain the action were the consignees is called to our attention, but both the decision and the expression had reference to an action brought against the railway company, and not against the consignor. **Harold v. Railway Co.**, 93 Kan. 456, 144 Pac. 823, relied on as final and plenary authority, was also a case brought against the carrier and not against the shipper.

Doubtless the buyer could have sued the railway company in this case, but no reason is apparent why he might not with equal propriety sue the seller as he did. The statute in question adds to, but does not detract from, the rights of the buyer in respect to an action for shortage.

[2] The alleged wrongfulness of the garnishment is founded on the fact that in the affidavit it was stated not as the statute provides, that the defendant had no property liable to execution sufficient to satisfy the plaintiff's demand, while it had sufficient property in Shawnee county. It is plausibly and forcibly argued that, if the defendant had sufficient property in an adjoining county subject to execution, it should not be subject to garnishment in this county.

This interesting point need not be passed upon for the reason that, instead of making this contention at the right time and in the right court, the defendant appeared voluntarily and gave bond which released the wheat. Having therefore treated the affidavit as sufficient instead of assailing it for non-compliance with the statute, it is too late for the defendant to attack it now. 6 C. J. 338.

The plaintiff was entitled to his \$60.90. The defendant is not entitled to the \$59.

There were other items involved in the case of which no complaint is made.

The cause is remanded, with directions to modify the judgment allowing the plaintiff's

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

claim for \$80.90 and disallowing the defendant's claim for \$59. All the Justices concurring.

WILLIAMS v. ATCHISON, T. & S. F. RY. CO. (No. 20785).*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE §142 — VERDICT — SPECIAL FINDINGS—EFFECT.

"Where a recovery is sought by reason of several negligent acts of the defendant, and the jury in answer to a special question finds that the negligence upon which they base their verdict is a certain single act of the defendant, the finding in effect acquits the defendant of every charge of negligence alleged in the petition or mentioned in the evidence except the one specifically designated in the finding." *Roberts v. Railway Co.*, 98 Kan. 705, 161 Pac. 590, Syl.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 400-403.]

2. RAILROADS §337(5)—CROSSING ACCIDENT — NEGLIGENCE—PROXIMATE CAUSE.

In an action to recover for the death of a person killed at a railway crossing where the negligence relied upon is the failure of the defendant to sound the whistle 80 rods from the crossing, the rule is applied as in *A. T. & S. F. R. Co. v. Walz*, 40 Kan. 433, 19 Pac. 787, and in *Railway Co. v. Judah*, 65 Kan. 474, 70 Pac. 346, that, as deceased knew the train was approaching, she needed no notice of the fact, and the omission to sound the whistle will not create a liability against the railway company when such omission or neglect of duty was not the proximate cause of the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1094.]

Appeal from District Court, Gray County.

Action by Maud Williams against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and cause remanded, with directions to enter judgment on the special findings in defendant's favor.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, and William Osmond, of Great Bend, for appellant. Relihan & Relihan, of Smith Center, for appellee.

PORTER, J. On December 22, 1914, Jewell Nelson, a girl of 17, while driving to school was killed at a grade crossing by a passenger train of the defendant. Her mother brought this action to recover damages for the loss of her daughter's services. There was a general verdict in plaintiff's favor for \$2,500 damages. The court overruled defendant's motion for judgment on the special findings, and gave judgment on the verdict. The defendant appeals.

The deceased lived with her mother and stepfather, Hugh Williams, on a farm in Gray county. She attended school at Ingalls, three miles distant, driving each morning in a one-horse buggy. The petition alleged that the horse was "a gentle family horse" not afraid of trains. About 7:45 a. m., deceased

started for school. The morning was cold and cloudy, and a heavy, low fog hung over the ground which was covered with snow. Defendant's track is south of the house, and to reach the crossing deceased had to travel 150 feet west, then 50 feet south to the public road, then southeast 125 feet. After leaving the house, her view of the track until she arrived at the public road was more or less obscured by a number of cottonwood trees. The petition alleged that after deceased had reached the public road, and when about 25 feet from the crossing, she stopped her horse and observed the approach of the train from the west; that, after her horse had stopped, the engineer, without any necessity therefor, willfully, wantonly, and negligently blew the whistle in short, sharp blasts in an unusual manner, at a point about 150 feet west of the crossing, negligently frightening the horse and causing it to leap forward upon the track in front of the train; and that, before she could urge the horse over the track, the train running at a high and reckless speed struck and killed her. It alleged that the engineer failed to blow the whistle or sound any signal at the whistling post 80 rods west of the crossing as required by law, and that by reason thereof deceased was unable to hear the train until it was almost upon her. There was a further charge of negligence in having the engine in bad repair so that leaking steam escaped in large quantities, obscuring the engineer's view of the deceased while she was approaching the track. In addition to the actual damages sustained punitive damages were asked on account of the willful and wanton acts of the defendant.

The opening statement of the plaintiff followed the allegations of the petition. The stepfather of Jewell Nelson testified: That he was looking from the house just before she was struck; he saw the train when it was about 80 rods west of the crossing; he knew it was the train, although it was enveloped in steam; it was moving fast; he looked and saw the girl stop near the track. Mrs. Abbott, a sister of deceased, testified that, after Jewell left the house, the stepfather said the train was coming and had not whistled, and he rushed out of the house. The witness was near a window, and looking out saw Jewell.

"She was driving on a walk; she looked at the train, and then she stopped; she brought the horse to a complete stop, and it was standing there. They didn't whistle at the whistling post, but after they were about 200 or 250 feet from the crossing they began whistling sharp blasts, and this frightened the horse, and he lunged forward. I saw it jump. He started right south on the road and ran right on the track. At the time they started blowing the whistle she was standing still, the horse's head was probably 20 or 25 feet from the crossing."

On cross-examination this witness testified as follows:

"After she stopped, the horse went about 20 or 25 feet, and it just got across the track. At first, Jewell seemed to kind of pull back, and then she began just kind of whipping the horse. The horse was on the jump, going just as tight as it could, and she was whipping it to make it go a little faster. * * * The horse jumped at the first blast of the whistle. * * * I should judge the engine was 250 feet away when it first blew the whistle."

These witnesses had testified before the coroner's jury and had made statements to a claim adjuster of the defendant shortly after the accident, and the defense offered in evidence the testimony taken at the inquest and testimony of the company's claim adjuster as to statements made to him by the step-father, for the purpose of contradicting the account of the accident as given at the trial. The engine crew in charge of defendant's train testified that the crossing whistle was blown at the post 80 rods west of the crossing. The engineer testified that from his position in the cab he did not see the buggy until after the accident; that there was nothing to prevent a person from seeing the train on that morning for a distance of a mile or more from the crossing; that he gave the warning signals when the fireman spoke to him of the danger.

The jury returned the following special findings:

"(1) If you find for the plaintiff, then state wherein the defendant was negligent. Failed to whistle at the signal post.

"(2) Was not the track of the defendant for a mile or more west of the crossing straight and on ground nearly level? Yes.

"(3) Could not a person as soon as he entered upon the right of way have an unobstructed view of the track for a mile or more? No, because of fog.

"(4) How far west could a person located 24 feet north of the right of way line, on the highway crossing the railroad, see the tracks, or a train on the same? Six hundred feet.

"(5) Did the deceased stop on the road before going across the track? Yes.

"(6) When and where did the deceased first become aware of the approach of the train? Just before she stopped about 20 or 25 feet north of the track.

"(7) What, if anything, prevented her from seeing the train, when she was 20 or more feet north of the right of way? Obstructed by tree and also by fog.

"(8) Did the deceased look and listen for an approaching train, as soon as she reached a position where she might have known of its approach. Yes.

"(9) What, if anything, prevented her from doing so? Nothing.

"(10) Did the engineer, as soon as he was aware of the approach of the deceased, blow an alarm and apply the air to his train? He blew the alarm and applied the air as soon as he became aware of danger.

"(11) Did the engineer give the crossing signal as he passed the signal post? No."

[1] 1. The jury found that the deceased became aware of the approach of the train just before she stopped; that she stopped her horse at the distance of 20 or 25 feet north of the crossing. They found that the defendant's negligence was its failure to blow the whistle at the signal post 80 rods west of the crossing, and under repeated decisions of this

court the specific finding excludes all other claims of negligence except the failure to sound the crossing whistle. *Railway Co. v. Roth*, 80 Kan. 752, 756, 104 Pac. 849; *Tecza v. Sulzberger & Sons' Co.*, 92 Kan. 97, 98, 140 Pac. 105; *Adams v. Railway Co.*, 93 Kan. 475, 481, 144 Pac. 999; *Land v. Railroad Co.*, 95 Kan. 441, 445, 148 Pac. 612; *Spinden v. Railway Co.*, 95 Kan. 474, 479, 148 Pac. 747; *Pullin v. Railway Co.*, 96 Kan. 165, 173, 150 Pac. 604; *Case v. Yoakum*, 99 Kan. 253, 256, 161 Pac. 642.

The most recent case directly in point is *Roberts v. Railway Co.*, 98 Kan. 705, 161 Pac. 590, the syllabus of which reads:

"Where a recovery is sought by reason of several negligent acts of the defendant, and the jury in answer to a special question finds that the negligence upon which they base their verdict is a certain single act of the defendant, the finding in effect acquits the defendant of every charge of negligence alleged in the petition or mentioned in the evidence except the one specifically designated in the finding."

In *Adams v. Railway Co.*, 93 Kan. 481, 144 Pac. 1001, *supra*, it was said:

"The defendant had the right to know from the jury itself the fault or faults attributed to it, if it were found to be at fault. *Cole v. Railway Co.*, 92 Kan. 132, 135, 139 Pac. 1177, and cases cited in the opinion."

To the same effect, see *Broadhead v. Railway Co.*, 97 Kan. 222, 155 Pac. 20.

[2] 2. The plaintiff can recover, if at all, only on the ground that defendant was negligent in its failure to sound the signal at the whistling post 80 rods west of the crossing, and because that negligence could not, under the admitted facts, have been the proximate cause of the injury, the defendant was entitled to judgment on the special findings. Inasmuch as the purpose of requiring a signal in such cases is to give warning of the approach of trains, it has been held that, when a traveler about to cross a railroad track knows a train is approaching the crossing and is in a place of safety, he has all the notice of that danger which the required signal by whistle or bell would give him; and that the giving of the warning signal is as to him unnecessary. *Railway Co. v. Judah*, 85 Kan. 474, 70 Pac. 346, and cases cited in the opinion. See, also, *A., T. & S. F. R. Co. v. Walz*, 40 Kan. 433, 440, 19 Pac. 787, 790, where it was said:

"Of course, if the plaintiff knew that the train was coming, he needed no warning of that fact; and the omission to sound the whistle will not create a liability when such omission or neglect of duty did not in any way contribute to the injury"—citing *A., T. & S. F. R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298.

We deem it wholly unnecessary in this case to elaborate upon the doctrine of proximate cause. The finding is that the deceased saw the approaching train when she was at a safe distance from the crossing. She was driving an old and gentle horse. Whether because of contradictions between the testimony given at the trial by some of plaintiff's witnesses and that given at the inquest, or

for some other reason, the jury appear to have discredited the claim that the deplorable accident was caused by the horse becoming frightened at the signal given at the crossing. They found that, as soon as the engineer was aware of the danger, he blew the alarm and applied the air brakes. The jury were unwilling to find that the engineer was negligent in this respect; and, of course, he was doing no more than his duty and a regard for human life required him to do.

It follows that the judgment must be reversed, and the cause remanded, with directions to enter judgment on the special findings in defendant's favor. All the Justices concurring.

BLAIR v. McQUARY et al. (No. 20663).
(Supreme Court of Kansas. Feb. 10, 1917.)

(Syllabus by the Court.)

1. PLEADING \S 195—SET-OFF.

Pursuant to the petition for a rehearing in the above-entitled cause, section 3 of the syllabus is modified to read as follows:

"3. In an answer to an action on a promissory note, the defendant indorsers pleaded that they had furnished materials used in the property of their codefendant, who was the maker of the note; that the plaintiff holder of the note and the defendant maker thereof conspired to induce indorsers to forego their right to a lien; that the plaintiff and their codefendant represented to the indorsers that the maker of the note was prosperous and financially responsible, and that plaintiff would give them the cash for the note in lieu of their claim and right to a lien; that, relying thereon, they waived their right to a lien and indorsed the note to plaintiff, and he paid them the cash therefor; that the representations as to the financial responsibility of the maker were false. *Held* that, as against a demurrer, the answer sufficiently pleaded a set-off based upon the alleged fraud practiced upon the indorsers by the plaintiff holder and defendant maker of the note, and sufficiently pleaded the consequent damage sustained by the indorsers by the sacrifice of their right to a lien."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 447, 448.]

(Additional Syllabus by Editorial Staff.)

2. JUSTICES OF THE PEACE \S 90—PLEADING—VERIFICATION.

In an action originating in the court of a justice of the peace no written pleadings of any sort are necessary.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 306.]

3. APPEAL AND ERROR \S 832(4)—REHEARING—VERIFICATION OF ANSWER.

On a petition for rehearing in the appellate court, it is too late to first raise the question that defendants' answer was not verified, when it was not disclosed by the arguments nor in the brief when the case was presented, and where the record does not show that it was raised in the justice or district court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3221.]

On rehearing. Syllabus 3 of former opinion modified, and petition for rehearing denied.

For former opinion, see 162 Pac. 1173.

DAWSON, J. The petition for a rehearing has been carefully considered. Our view as to the merits of the set-off pleaded by Junkins & Son is not shaken thereby, and it needs no further discussion.

[2] It is now suggested for the first time that the answer of Junkins & Son was not verified under section 110 of the Civil Code (Gen. St. 1909, \S 5703). To this there are two answers, either of which is sufficient. The action originated in the court of a justice of the peace, where no written pleadings of any sort were necessary. *German v. Ritchie*, 9 Kan. 106; *Wagstaff v. Challiss*, 29 Kan. 505; *Baughman v. Hale*, 45 Kan. 453, syl. par. 2, 25 Pac. 856; *Coal Co. v. Brick Co.*, 52 Kan. 747, 35 Pac. 810. See, also, *Hart v. Haynes*, 96 Kan. 262, 264, 150 Pac. 530.

[3] The other equally obvious answer to this contention is that it is too late to raise the question for the first time on a petition for a rehearing in the appellate court when it was not disclosed by the arguments nor in the brief when the case was presented, and when the record does not show that it was raised in the justice court or in the district court. If this question had been raised in either of the lower courts, it would have been the duty of the court, in furtherance of justice (*Stanley v. Farmers' Bank*, 17 Kan. 592), to permit the pleading to be verified at the time (*Emery v. Bennett*, 97 Kan. 490, 492, 155 Pac. 1075).

[1] One criticism of our decision is meritorious. Section 3 of the syllabus recites the facts pleaded as if they were the facts proved. This section will be modified to show that they are only assumed to be true for the purpose of testing the propriety of the demurrer.

JOHNSTON, C. J., and BURCH, MASON, PORTER, WEST, and MARSHALL, JJ., concurring.

DAWSON, J. (concurring specially). The provisions of the Civil Code require that a demurrer shall specify distinctly the grounds of objection to a pleading. It seems impossible for some lawyers and some courts to treat these provisions in good faith—a lingering tendency of the time when a lawsuit was merely a game of skill and gave little concern to the paramount consideration of administering justice. A blind objection to a pleading that the facts recited therein do not constitute a cause of action or defense does not apprise the gulleless and unskillful that the only thing wrong with their pleading is the want of a verification. The demurrer should specifically point out the defect, so that it may be supplied if the defense is bona fide, and so that the case may be summarily concluded if it is not. The penalties for perjury will be likely to restrain the positive verification of a pleading which

recites a mere tissue of falsehoods. This was the purpose of the Revised Code (section 110), and it was never designed as a mere trap to catch the unwary.

MACKIE et al. v. GRAND LODGE A. O. U. W. OF KANSAS. (No. 20791.)

(Supreme Court of Kansas. April 7, 1917.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR \S 1056(1)—**HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Where a demurrer to evidence is sustained, error in excluding material and competent evidence will compel a reversal of the judgment if the evidence excluded, together with that admitted, is sufficient to make a *prima facie* case as against the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4187, 4191, 4207.]

(*Additional Syllabus by Editorial Staff.*)

2. DEATH \S 2(1)—**UNEXPLAINED ABSENCE—EFFECT.**

The unexplained absence of an insured without any showing that nothing had been heard from him since his disappearance, and without any showing that any effort had been made to ascertain his whereabouts was not sufficient to prove his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 1, 2.]

Appeal from District Court, Lyon County.

Action by Frank J. Mackie and others against the Grand Lodge of Ancient Order of United Workmen of Kansas. Judgment for defendant, and plaintiffs appeal. Reversed, and new trial ordered.

Dennis Madden, of Emporia, for appellants. Edgar Bennett, of Washington, Kan., for appellee.

MARSHALL, J. In this case, the plaintiffs seek to recover on a beneficiary certificate issued by the defendant to William Mackie. The petition alleged that William Mackie was a member of the defendant order; that the order had issued to him a beneficiary certificate payable at his death to the plaintiffs as beneficiaries; that on the 23d day of August, 1904, William Mackie disappeared from his home and family, and since that time has been unheard of, and his whereabouts have been unknown, although diligent search and inquiry have been made by the plaintiffs and the defendant; that William Mackie died on or about the 23d day of August, 1911; that proof of his death was made to the defendant and payment of the certificate refused; that the dues and assessments on the certificate were paid by the plaintiffs to the — day of —, 1905; that the defendant then refused to accept any further payments from the plaintiffs; and that the plaintiffs have been ready and willing to pay all dues and assessments.

Judgment was rendered in favor of the defendants on a demurrer to the plaintiffs' evidence. From this judgment the plaintiffs Frank J. Mackie and May Lewis appeal. The

cause was tried on October 13, 1913, before S. S. Spencer, judge pro tem. The plaintiffs' evidence tended to show the following facts: That William Mackie was a member of the defendant organization, and that a beneficiary certificate had been issued to him payable to the plaintiffs; that William Mackie disappeared from his home on August 23, 1904; that thereafter the dues and assessments were paid by the plaintiffs until July, 1905, and by the local lodge until August, 1905; that an arrangement was then made with the officers of the local lodge by which it would pay the dues and assessments until some time later; that an assessment became due on September 28, 1905, but that, prior to that time, and after the arrangement with the officers of the local lodge had been had, the grand master of the defendant wrote the officers of the local lodge telling them not to accept any more dues or assessments on this certificate from any one except William Mackie or some one authorized by him to pay them; and that, thereafter, the officers of the local lodge refused to receive any further dues or assessments, although payment thereof was tendered.

A further trial of the cause was then postponed. It was resumed on the 2d day of November, 1915, when the plaintiffs requested leave to file an amended petition. This leave was refused on the following grounds, as stated by the trial court:

"The trial of this cause began October 10, 1913—two years ago. The plaintiffs introduced all their evidence, then asked the court to adjourn the hearing and give them a little more time to bring in some additional evidence, which request was granted. Nothing more has been done in the case until leave to file amended pleading was asked a short time ago. This is not an application to amend to conform to the facts proven, but an attempt, after the close of plaintiffs' evidence on trial to frame new issues. There has been no diligence exercised, and no showing of any kind to excuse the laches."

After leave to file the amended petition had been refused, the plaintiffs offered to introduce evidence to prove that William Mackie had not been heard from since his disappearance; that his whereabouts had not been ascertained; that letters of inquiry had been sent to all his known relatives and acquaintances; and that they had answered that they had not heard of, and did not know, his whereabouts. The plaintiffs also offered evidence to prove that:

"William Mackie left a note in writing at the time of his departure on the center table in the sitting room of his residence, directed to his wife, on the said 23d day of August, 1904, stating that it was better for her to be without him, and that by the time she received the note he would be where the trials and sorrows of this life would be no more, and expressed the hope that God would forgive him for what he had done; to tell Mr. Gibson to pay his note, and the note in the Americus Bank, and give the surplus to his wife, and not to give anything to his bad boy, as he was the cause of his bad life; expressing good-bye to his wife, with a hope that they would meet in heaven."

[1, 2] Offers of other material and competent evidence were made, all of which was excluded. Of this complaint is made. The court sustained a demurrer to the plaintiffs' evidence. As to the evidence that had been admitted, the demurrer was probably rightly sustained, because that evidence did not tend to show that William Mackie had not been heard from since his disappearance, and did not tend to show that any inquiry had been made to ascertain, or that the plaintiffs did not know, his whereabouts. The unexplained absence of William Mackie, without any showing that nothing had been heard from him since his disappearance, and without any showing that any effort had been made to ascertain his whereabouts, was not sufficient to prove his death. *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797; *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, 7 Ann. Cas. 570; *Renard v. Bennett*, 78 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240; *Caldwell v. Modern Woodmen*, 89 Kan. 11, 130 Pac. 642; 13 Cyc. 297-301.

The evidence offered was material, and should have been received. It was error to exclude it. If it had been admitted, a prima facie case on behalf of the plaintiffs would have been proved.

For the error in excluding the evidence offered, the judgment is reversed, and a new trial is ordered. All the Justices concurring.

CORBETT v. COHEN et al. (No. 20794.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

PUBLIC LANDS §54(2) — ISLAND SCHOOL LANDS—PROPRIETORSHIP—THEORY OF CASE.

The proceedings examined, and held to disclose no misconception of law on the part of the court in stating findings of fact. Held further, the findings were sustained by the evidence.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 153.]

Appeal from District Court, Kearny County.

Action by Jacob Corbett against Edwin S. Cohen, executor of the estate of Jacob H. Cohen, deceased, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Edgar Foster, of Dodge City, for appellant. Bertram L. Hart and E. R. Thorpe, both of Lakin, and Wm. H. Thompson, Fred Robertson, and T. H. Enderlin, all of Kansas City, for appellees.

BURCH, J. The controversy relates to proprietorship of a tract of land lying south of what was the north bank of the Arkansas river, as located by the government survey made in 1873. The plaintiff, by virtue of survey and settlement, undertook to acquire title to the tract, a portion of which is island school land, and the remainder of which he claims as accretions to the islands. The de-

fendants own land which was formerly bounded on the south by the north bank of the river as originally surveyed. They protested the plaintiff's settlement and asserted ownership of the tract in controversy, except the islands, by virtue of the processes of accretion to and reliction from their shore. The state intervened, for the protection of whatever rights it might have; the validity or invalidity of the plaintiff's settlement being a matter for future determination should the defendants' claim of ownership fail. The court stated findings of fact and conclusions of law. Judgment was rendered that the plaintiff take nothing, and that the defendants recover their costs. The contention here is that the court misapplied the law in formulating its findings of fact.

A jury was called to answer special questions submitted to them by the court. To assist the jury in answering the questions, the court properly defined the terms "island," "accretion," "reliction," and "alluvium," and gave general directions to enable the jury to make intelligent use of the terms. The jury heard the evidence, viewed the premises, and returned findings of fact. The court set aside the findings of the jury, viewed the premises, and made the following findings:

"First. That at the time the United States government survey of section 15, in township 24 south of range 35 was made in 1873 there were within the banks of the Arkansas river south of the meandered north bank of the said river along section 15-24-35 as it passed through said section several small islands, some of which have since disappeared by being washed away by the waters of the said river, two of which islands still remain.

"Second. That there were on June 28, 1915, two small tracts of land in the Arkansas river south of the north bank of said river as it passes through said section 15-24-35, which were entirely separated from the north bank of said river by a distinct channel of said river, and which at one time had been islands.

"Third. That such small islands were south of that part of section 15-24-35 lying north of the north bank of said river, that such islands were included within the boundaries of the plat filed herein by the plaintiff, and that such islands were entirely separated from the other lands included in such plat by a distinct channel of said river.

"Fourth. That no part of the land embraced in the survey and plat or claimed by the plaintiff herein lying west of the east line of said section 15-24-35, and lying south of the north bank of said river, except the two small islands above mentioned, were ever islands in the Arkansas river as defined in section 9, c. 295, Laws of 1913 of Kansas.

"Fifth. That no settlement or improvement has been made by the plaintiff herein upon any land which was ever an island in the Arkansas river adjoining or lying south of said section 15-24-35.

"Sixth. That the improvements made and settlement claimed by the plaintiff upon the lands embraced within the boundaries of the plat and survey filed herein were made upon the land belonging to the estate of Jacob H. Cohen, deceased, and were made upon the lands which were never an island in the Arkansas river.

"Seventh. That the lands now lying between the north bank of such small islands hereinbe-

fore referred to and the north bank of the Arkansas river, through section 15-24-35, as meandered by the United States government survey thereof, has been added by accretion and reliction to that part of section 15-24-35 lying north of said river."

The definition of the word "island" contained in the statute referred to in the fourth finding was given to the jury, and reads as follows:

"The word 'island,' as used in this act, means and shall be held to be a tract of land which is entirely surrounded by the current of the stream in which it is situated when at its ordinary low stage." Laws 1913, c. 295, § 9.

Following this definition of the word "island," the statute undertook to make islands which had been attached to the mainland 20 years or more accretions to the mainland by this provision:

"And any islands which have been formed and attached to the land or banks along such streams, and which have not been islands as herein defined during the twenty years last past, are hereby declared to be accretions to and belonging to, and parts of the lots and lands to which they have become attached." Laws 1913, c. 295, § 9.

In the case of *Winters v. Myers*, 92 Kan. 414, 140 Pac. 1033, the court held this part of the statute to be void. The argument in the present case is that the court applied the void portion of the statute in making its findings.

The portion of the statute held to be void is no part of the definition of an island. After having defined the term "island," the Legislature proceeded to make an arbitrary extension of the ordinary meaning of the term "accretion" to include certain islands. The finding refers to the definition of the term "island," and not to the arbitrary definition of the term "accretion." Neither in the instructions to the jury nor in its findings of fact did the court refer to the statutory definition of "accretion." The court had before it the decision in *Winters v. Myers*, supra, and understood that 20 years' connection between islands and the mainland did not convert the islands into accretions. This understanding was clearly disclosed by the instructions to the jury, and there is nothing whatever to indicate that the court deliberately accomplished an about face, and applied to the evidence the void statutory extension of the term "accretion." That the court had in mind processes of nature, and not of the Legislature, is clearly indicated by the expression "has been added by accretion and reliction," found in the seventh finding, which is determinative of the case.

It is argued that, if the court did not apply the void portion of the statute in making its findings of fact, the findings are without support in the evidence. What the evidence establishes is not very clear, and, conceding that it might be difficult for this court to deduce from the abstract and exhibits the precise findings stated by the district court, it

possessed advantages which this court does not enjoy. It viewed the premises, and judged of the operation of the forces acting to produce this land by the topography of the tract, its soil, its vegetation, its trees, and other visible facts. The knowledge thus acquired enabled the district court to weigh the testimony of the witnesses and to apply such of their observations and descriptions as were credited, with an intelligence which this court cannot command.

It is said that the right to a jury trial was denied. No denial of any request for a jury trial or overruling of any objection to the method of trial adopted is pointed out.

The judgment of the district court is affirmed. All the Justices concurring.

FENNIMORE et al. v. PITTSBURG-SCAMMON COAL CO. (No. 20824.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT §405(5)—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY—EVIDENCE.

In an action under the Workmen's Compensation Act (Gen. St. 1915, §§ 5903, 5905) by the father and mother of a deceased workman for compensation for his death, a finding of partial dependency is sustained by evidence that the parents did in fact depend in part on the son's earnings, so that they suffered injury by being deprived of what they had relied on; and this is true although the father owns a home for which he paid \$1,450, owns land from which he derives an income of \$400 or \$500 a year, owns shares of stock in a corporation on which he has paid \$5,000, and is employed at a salary of \$125 a month.

Appeal from District Court, Crawford County.

Action by James Fennimore and Myrtle Fennimore, as father and mother and next of kin of Rue Fennimore, deceased, against the Pittsburg-Scammon Coal Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. M. Sheppard, of Joplin, Mo., and J. P. McCammon, of St. Louis, Mo., for appellant. John P. Curran, of Pittsburg, for appellees.

BURCH, J. The action was one by the parents of a deceased workman for compensation for his death. The plaintiffs recovered, and the defendant appeals, the contention being that the plaintiffs were not dependents within the meaning of the Workmen's Compensation Act.

The statute involved contains the following provisions:

" 'Dependents' means such members of the workman's family as were wholly or in part dependent upon the workman at the time of the accident. And 'members of a family' for the purpose of this act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then parents. * * * The amount of compensation under

this act shall be: (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars. * * * (2) If the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings, such proportion of the amount payable under the foregoing provisions of this section, as may be agreed upon or determined to be proportionate to the injury to the said dependents. * * * Gen. Stat. 1915, §§ 5903, 5905.

The court made the following findings of fact:

"(a) That on the 12th day of February, 1915, the said Rue Fennimore was killed by an accident arising out of and in the course of his employment with the said defendant coal company; and

"(b) That the said Rue Fennimore, deceased, was 19 years of age at the time of his death; and

"(c) That the said plaintiffs, James Fennimore and Myrtle Fennimore, are the father and mother of the said Rue Fennimore, deceased, and that he was the only child of said plaintiffs; and

"(d) That the said Rue Fennimore, deceased, was unmarried at the time of his death, and that he had never been married, and that he died without issue, and left said plaintiffs as his sole and only surviving heirs at law; and

"(e) That the said Rue Fennimore, deceased, had always lived at home with his father and mother; and

"(f) That the earnings of the said Rue Fennimore, deceased, for the year next preceding his death were \$600; and

"(g) That the said Rue Fennimore, deceased contributed to the support and maintenance of his said parents the sum of \$25 per month out of his earnings; and

"(h) That the said plaintiffs were in part dependent upon the earnings of the said deceased at the time of his death; and

"(i) That the said plaintiffs were dependent upon the earnings of the deceased to the amount and extent of \$25 per month at the time of his death; that the said plaintiffs were dependent upon the earnings of the said deceased to the extent of five tenths ($\frac{5}{10}$) of such earnings; and

"(j) That by reason and in consequence of the death of the said Rue Fennimore, deceased, the said plaintiffs were damaged in the sum of \$900."

There was evidence that the family lived in a home which cost \$1,450 and was owned by the father. He owned 240 acres of land in Missouri, which was rented, and from which he received \$400 or \$500 in the year 1915. The net income from the farm was not inquired about. The father owned an automobile which he traded for, and which the son took care of and used to make money with when he was not working. The father owned one-fourth of the capital stock of the defendant company. The company was capitalized for \$30,000, and the father had paid about \$5,000 on his stock subscription. Income from this source and the value of the stock were not inquired about. The father also worked for the company for wages, receiving \$125 a month. His liabilities were not inquired about, but he had no money in the bank and no money loaned out. The mother had no money or property. She

did her own housework and washing, with the aid of her son, who washed dishes, helped on wash days, and the like. He turned his money over to his mother to the extent of perhaps \$35 per month. It is argued that the parents were not dependent on the son because the father had too much property and too large an income.

The question whether or not the plaintiffs were partially dependent on the earnings of their son was a question of fact, and a finding of the fact of partial dependency is conclusive on appeal if there be any evidence to support it. The statute is a blind guide to the determination of the question of fact. Dependents are said to be members of the workman's family who were dependent on him. The definition includes the term to be defined. Earnings of the workman come in as a factor of dependency in the provision relating to the amount of compensation to those who were wholly dependent. Injury comes in in the provision relating to the amount of compensation to partial dependents. But there is no definite standard of dependency, either total or partial. Perhaps the Legislature used the word "dependent" in the dictionary sense of relying on the workman's earnings for support. Support for what? The bare necessities of life, without which existence would be impossible, or support according to some standard? If according to some standard, what standard? One to which the dependent was accustomed, or one which the court might think reasonable under all the circumstances?

Cases interpreting Workmen's Compensation Acts may be found in an exhaustive annotation in L. R. A. 1916A, 23, and in the Corpus Juris treatise, "Workmen's Compensation Acts," published by the American Law Book Company as an advance article of the Cyc-Corpus Juris system. In many of these cases the courts undertake to define the word "dependents" and to state tests of dependency. As the Supreme Court of Michigan remarked in the case of *Miller v. Riverside Storage & Cartage Co.* (Mich.) 155 N. W. 462, these definitions and tests, suggested by the facts of particular cases, do not supply a rule, because universal standards of independence cannot be set up.

Accepting the statute just as it came from the Legislature, the court is of the opinion that the question before the district court was not one of how the domestic economies of the Fennimore family might have been arranged, or ought to have been arranged, but how they were arranged; and if the father and mother did in fact depend in part on the son's earnings, so that they suffered injury by being deprived of what they had relied on, they were entitled to recover. This being true, the finding of partial dependency is abundantly sustained.

The judgment of the district court is affirmed. All the Justices concurring.

KIRSCH v. POSTAL TELEGRAPH CABLE CO. (No. 20572.)

(Supreme Court of Kansas. April 7, 1917.)

*(Syllabus by the Court.)*1. TELEGRAPHS AND TELEPHONES \S 54(5)—NONDELIVERY OF UNREPEATED MESSAGE—INTERSTATE MESSAGE—LIMITATION OF LIABILITY.

Under the Carmack amendment (Act Cong. June 18, 1910, c. 309, 36 Stat. 539), an interstate telegraph company may by contract limit its liability for nondelivery of an unrepeat message to the amount paid for its transmission, even in case of gross negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. \S 43, 46.]

2. CARRIERS \S 177(3)—NONDELIVERY—LIABILITY—INITIAL CARRIER.

The initial carrier is liable for the negligence of any of its connecting carriers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 779-789.]

Appeal from District Court, Saline County.

Action by William J. Kirsch against the Postal Telegraph Cable Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Ritchie & Spencer, of Salina, for appellant. Knittle & Knittle and Thomas L. Bond, all of Salina, for appellee.

WEST, J. The petition alleged, among other things: That the plaintiff entered into a contract by which for 55 cents paid the defendant the latter agreed to transmit a certain message without unnecessary delay. That the defendant "recklessly, maliciously, carelessly, wantonly, and with total and entire disregard of the rights of the plaintiff, failed, neglected, and refused to deliver said message, * * * or to make any effort to do so, and failed, neglected, and refused to transmit said message, * * * and never at any time attempted to comply with its agreement to transmit and deliver said message as aforesaid." The answer averred, among other things: That the message was written on a blank, a copy of which was attached, containing a provision on its face as follows: "Send the following message, without repeating, subject to the terms and conditions printed on the back hereof which are hereby agreed to." That this provision was signed by the plaintiff and made a valid contract. That on the back was a statement that it was agreed that the company should not be liable for "mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeat telegram, beyond the amount received for sending the same." That the message in question was an unrepeat one, and no toll was charged except for such a message. Also, that the blank contained a provision that the company "is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its

destination," and that the message in question was correctly transmitted to the Postal Telegraph Cable Company of Missouri, and if any negligence occurred it was not on the lines or in the office of the defendant. To these defenses the plaintiff demurred. The court sustained the demurrers, and the defendant appeals.

[1, 2] The Carmack amendment of June 18, 1910. (Part 1, 36 U. S. Stat. at Large, c. 309, pp. 539 and 544), is invoked. In *Bailey v. Telegraph Co.*, 97 Kan. 619, 156 Pac. 716, it was said:

"By this act interstate commerce in telegraph messages is placed under the control of the interstate commerce commission. Under this act, common carriers of interstate commerce may limit the amount of the recovery on account of damage inflicted to the property of a shipper by the carrier's negligence, and these limitations have been held valid and binding. *Kirby v. Railroad Co.*, 94 Kan. 485, 146 Pac. 1183 [L. R. A. 1916E, 528], and cases there cited; *Horse & Mule Co. v. Railway Co.*, 95 Kan. 681, 683, 149 Pac. 436; *Ray v. Railway Co.*, 96 Kan. 8, 149 Pac. 397 [L. R. A. 1916D, 1046]. The rules that justify common carriers of interstate commerce in limiting their liability for their negligence also justify interstate carriers of telegraph messages in limiting their liability for their negligence."

See opinion denying rehearing, 99 Kan. 7, 160 Pac. 985.

In the *Bailey Case*, the petition alleged gross negligence and prayed for exemplary damages. The decision therein together with the authorities cited, settled the rule in this state that under the Carmack amendment a contract limiting the liability of the carrying company is to be upheld whether the negligence be ordinary or gross.

That the initial carrier is responsible for the nondelivery appears from the language of the Carmack amendment itself and has been repeatedly announced by the federal Supreme Court. In *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, it was said:

"Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence." 219 U. S. 205, 31 Sup. Ct. 169 (55 L. Ed. 167, 31 L. R. A. [N. S.] 7).

In *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 648, 33 Sup. Ct. 391, 393 (57 L. Ed. 683), in speaking of the Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 584), it was said:

"The express terms of the act make the carrier liable for any loss caused by it, and provides that no contract shall exempt it from the liability imposed."

In *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 33 Sup. Ct. 609, 57 L. Ed.

980, it was held that stipulations in a bill of lading for interstate shipment that no carrier shall be liable for damages not occurring on its portion of the through route are void, and that the initial carrier is liable whether the through route connections are designated by it or by the shipper.

It is contended by the plaintiff's counsel that, while a carrier may limit its liability for ordinary negligence, it cannot thus stipulate in respect to its gross or wanton negligence. Realizing the force of this suggestion, we can and must reply that Congress has taken this matter into its own hands in cases of interstate shipment, and having, according to the decisions already referred to, permitted carriers to make such stipulations, the matter is beyond our power. It appears therefore that the demurrer to the second and third subdivisions of the answer was erroneously sustained.

A few observations not essential to the decision herein may be permitted, the writer speaking for himself only. In the Croninger Case, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, it was said that a carrier could, at common law, by a "fair, open, just, and reasonable agreement" limit the amount recoverable by a shipper in case of loss or damage, to an agreed value, and that a stipulation covering such limitation is not forbidden by the Carmack amendment. In numerous cases receipts or bills of lading in railroad shipments have been before us. In this case the contract pleaded is the ordinary telegraph blank. On the face, in white letters upon a blue background so arranged as naturally to attract no attention whatever are these words:

"The Postal Telegraph Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank."

Underneath this in dark blue type on white background are the following words:

"Send the following telegram, subject to the terms on back hereof, which are hereby agreed to."

On the back in blue type on white background is the name of the company with a map of what is called the greatest telegraph and cable system in the world, and a statement in large type that the Postal Telegraph Cable Company "transmits and delivers the within telegram subject to the following terms and conditions." These terms and conditions are printed mostly in small type, and underneath them is a line in large type as follows: "The fastest telegraph service in the world."

No quarrel is to be had with the proposition that Congress has the power to permit interstate carriers to limit their liability by a "fair, open, and just contract"; but everybody knows that the great majority of folks who patronize public service corporations

never have the remotest idea that in sending a telegram they are entering into a formal contract with the carrier. The former who occasionally ships a little live stock, or the working man who gets a job in another town and has to ship a few household goods and sends or goes to the depot to find the cost of the shipment, is handed a yellow sheet of paper ostensibly for the purpose of showing that he had paid the freight. Afterwards, in case of loss and an attempt to collect, he is informed and made to understand for the first time that by accepting such paper he became a party to a contract printed on the back thereof.

The average person, who once in a great while has need to send a telegram, usually in case of excitement or grief, goes or sends to the telegraph office and writes a message on a blank furnished him, and in case of its nondelivery and an attempt to collect damages is advised and made to understand for the first time that by signing the message he entered into the contract printed mostly in very fine type on the back of a blank, not one word of which was called to his attention or was ever a matter of consciousness on his part. Everybody knows that under such circumstances no contract is in fact entered into. The minds of the parties cannot meet because nothing whatever has caused them to comprehend or act upon a thing utterly unobserved and unrecognized by the shipper or sender. To understand the contract on the back of the blank in this case, the average citizen would need the help of at least one microscope and one lawyer. To say that he ever entered into such a contract is to express as absurd a notion as could be imagined.

If common carriers who hold themselves out to serve the public are to be permitted to assert under such circumstances that their patrons have entered into contracts, they ought to be required to couch such contracts in plain terms and have them fairly and honestly called to the attention of the shippers before their patronage is accepted.

The judgment is reversed, and the cause remanded for further proceedings.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and MARSHALL, JJ., concurring.

DAWSON, J. (concurring). The decision is all right, but some observations in the opinion prompt me to add that the fine print in the contract is the public service corporation's only protection against the perjury of witnesses and against the credulity, the prejudice, and the downright insincerity of juries. The latter are the real hindrances to the correct administration of justice, although reformers have yet to make this discovery.

ABELL v. ATCHISON, T. & S. F. RY. CO.
(No. 20554.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

CARRIERS §32(2)—INTERSTATE SHIPMENT OF
LIVE STOCK—NOTICE OF INJURY—WAIVER.

Where parties stipulate in a contract for an interstate shipment of live stock that, before there can be a recovery against the carrier for loss or injury to the stock occurring during transportation or previous to the loading thereof, the shipper or his agent in charge of the cattle must give written notice of his claim to an officer of the company or the station agent before the stock are removed from the place of destination or before they are slaughtered or intermingled with other stock, the carrier may not, under the federal law, waive the requirement of written notice of such claim by the shipper, nor dispense with notice of a claim from one shipper and require it from another, and without such written notice there can be no recovery, although the carrier may have had actual and complete notice of the claim of the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84.]

Johnston, C. J., and West and Marshall, JJ., dissenting.

Appeal from District Court, Clark County.

Action by F. M. Abell against the Atchison, Topeka & Santa Fé Railway Company. Demurrer to plaintiff's evidence overruled as to the first cause of action, and sustained as to the second cause of action, and judgment for plaintiff on the first cause of action, and defendant appeals, and, from the order sustaining the demurrer to the evidence on the second cause of action, plaintiff appeals. Rulings sustaining the demurrer as to one cause of action affirmed, and judgment for plaintiff on the other cause of action reversed. Cause remanded, with directions to enter judgment in favor of defendant.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, and F. C. Price, of Ashland, for appellant. Robert O. Mayse, of Ashland, for appellee.

JOHNSTON, C. J. This was an action by F. M. Abell against the Atchison, Topeka & Santa Fé Railway Company to recover damages for injuries to his cattle shipped by the defendant from Magdalena, N. M., to Ashland, Kan.

Two causes of action were alleged; one for injuries caused when the cattle stampeded and broke out of the defendant's defective stock pen at Magdalena before they were loaded upon the defendant's cars, the other cause of action for injuries caused by delay in transportation. The principal defense of the railway company was that the plaintiff had failed to comply with a provision of the written shipping contract (which the evidence shows the plaintiff signed after the cattle were loaded on the cars) to the effect that no recovery could be had for any loss or injury

to stock sustained during shipment or previous to loading for shipment, unless the shipper should give written notice of his claim to the proper officer or agent of the company before the stock was removed from the place of delivery or was mingled with other stock. Such a written notice was not given, but the evidence showed that, not only agents of the defendant at some of the points where delays occurred were notified of the injuries being done to the cattle, but that the agent at Ashland, the only representative of the defendant at that point, was present while the cattle were being unloaded, had his attention directed to the condition of the cattle, and was notified orally that claim for damages would be made. At the trial a demurrer interposed to plaintiff's evidence was overruled as to the first cause of action but sustained as to the second cause of action on the ground that there was no proof of the written notice required by the shipping contract. On the issues submitted to the jury, special findings were returned to the effect that the cattle in the stock pen were frightened by an engine or train passing near the pen, causing them to stampede, and that their injuries were received before the plaintiff signed the shipping contract; that the defendant was negligent in failing to keep the pen in proper repair; and that the cattle would not have escaped if the pens had been in a reasonably safe and suitable condition. Upon this cause of action plaintiff secured judgment for \$750, and defendant appeals. An appeal was taken by plaintiff from the order sustaining the demurrer to the evidence on the second cause of action.

First, as to plaintiff's appeal: He complains of the ruling excluding evidence of waiver and the holding that the contract requirement of written notice as to loss and injury of his stock by reason of delay during transportation could not be waived. There is some testimony that the trip took 70 hours, when a reasonable running time from Magdalena to Ashland was 40 hours. The only agent of the company at Ashland, the destination of the cattle, examined and counted them while they were being unloaded, and his attention was called to their condition and to the fact that damages were claimed by plaintiff for the injuries sustained by the cattle during transportation. The plaintiff concedes that the written notice required by the contract was not given, but he contends that the defendant had actual notice of the injuries and of plaintiff's claim, and, having acted upon the notice and made an examination, it has had the benefit and protection that the written notice was designed to furnish, and that the company cannot make the absence of such notice a defense. It was an interstate shipment and is governed by federal laws and regulations. While a carrier may not by contract protect itself from dam-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied May 18, 1917.

ages resulting from its own negligence, it may stipulate with the shipper that reasonable notice of loss or damage shall be given within a fixed time so that there may be an inspection of the cattle before they are moved from the place of delivery, slaughtered, or mingled with other cattle. Provisions requiring notice of losses and injuries occurring during transportation, and like restrictions, have been held to be reasonable and enforceable. *Kalina v. Railroad Co.*, 69 Kan. 172, 76 Pac. 438; *Railway Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Railway Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Giles v. Railway Co.*, 92 Kan. 322, 140 Pac. 875; *Mo., Kan. & Tex. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

Written notice of the claim of injuries and damages is expressly required by the contract. Doubtless, the purpose was that the nature of the injury and the extent of the claim may be made definite so that the carrier may examine the cattle as to the claimed injury while the evidence of loss and injury is available. It is the view of the court that the specific requirement that the notice shall be in writing is one which cannot be waived. The provisions regulating interstate commerce as between carrier and shipper are intended to be of uniform application. If a carrier should exact a written notice from one shipper and waive it as to another, it might lead to unjust discriminations and the abuses which the commerce acts were designed to prevent. In contracts providing that damages of the kind in question shall not be recoverable unless the claim is made within fixed times, it has been held that the limitation cannot be extended or waived by the carrier.

In *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 667, 35 Sup. Ct. 444, 446 (59 L. Ed. 774), it was said:

"To have one period of limitation where the complaint is filed before the commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished."

See, also, *Georgia, Fla. & Ala. Ry. v. Blish Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *Banaka v. Mo. Pac. Ry. Co.*, 193 Mo. App. 345, 186 S. W. 7; *Wall v. Northern Pac. Ry. Co.* (Mont. 1916) 161 Pac. 518.

While under state regulations formal written notice is not held to be essential where the carrier has actual notice and has all the benefits which the written notice would give, it is the view of the court that to enforce the stipulation requiring written notice of the claims made by some interstate shippers and to dispense with it as to others would be a violation of the equality of treatment provided for interstate shippers under

the federal laws, and that the trial court ruled correctly in holding that the plaintiff was not entitled to recover on the first count.

The defendant contends that the same rule should have been applied to plaintiff's second cause of action. As we have seen, that was an injury and loss which occurred after the cattle had been received and placed in the stockyards of the defendant but before the shipping contract had been signed by the plaintiff. The cattle were frightened while in the pens by an engine passing over the tracks adjacent to the pen, and the jury found that they escaped and were injured through the negligence of the defendant in failing to keep the pens in repair and in a safe and suitable condition. The court held that written notice was not essential to recovery for this injury and loss because it occurred before the execution of the shipping contract. The cattle were delivered to the defendant for immediate shipment, and it was holding them as a common carrier at the time they broke out of the pens which it had provided for their safe-keeping. The responsibility of a carrier for live stock delivered to it for shipment differs from that which it assumes when it undertakes the carriage of goods. It is an insurer of goods received for immediate shipment, while, as to animals which may suffer injury by reason of their propensities and habits or of their own lack of vitality, it is not deemed to be liable if it provides suitable facilities for the care and handling of the cattle and exercises reasonable vigilance and care for their safety while they are in its possession. The nature of the animals transported has a controlling effect in determining the kind of care required. 1 *Hutchinson on Carriers* (3d Ed.) § 335. It has been held that if the stockyards provided by a railway company for receiving and holding cattle for shipment are defective and unsuitable for the purpose, and if cattle received for shipment are injured by reason of the defective and unsafe yards, the company will be held liable for the damages sustained. *Railroad Co. v. Reets*, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571. If the owner of cattle is permitted to use the pens for a time and the cattle placed therein are not received for immediate shipment, the relation of carrier and shipper would not arise. Case note, 10 L. R. A. (N. S.) 571. But, where cattle are received for immediate shipment and placed in pens which the carrier has provided for that purpose, the obligation of a carrier attaches, although the shipping contract was not signed until after the cattle were injured. *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, 74 N. W. 301; *Lackland v. C. & A. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505; *G. C. & S. F. Ry. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Galveston, H. & S. A. Ry. Co. v. Jackson et al.* (Tex. Civ. App. 1890) 37 S. W. 255; *Thompson on Negligence*, § 6579.

It is contended, however, that the provisions of the shipping contract required a written notice of a loss occurring before the cattle were loaded or transportation had actually begun, and that in the absence of such notice no recovery could be had. The part of the contract applicable reads:

"In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stockyards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for cannot and shall not be waived by any person except a general officer of the company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the company within ninety-one days after the same may have occurred."

Under this provision, a written notice of a claim for loss and injury which results from the negligence of the company before the cattle are loaded for shipment is just as essential to recovery as it is in case of a claim for loss or injury sustained during transportation. Counsel refer to *Railroad Co. v. Beets*, supra, wherein it was said that a provision with reference to notice in a shipping contract did not apply to damages sustained before transportation begins or after it has ended, and only covered such injuries as occur while the stock is in transit. The contract which was under consideration in that case was not so broad in its terms as the one in question and contained no provision as to claims for losses or injuries sustained previous to the loading of stock for shipment. No reason is seen why notice of a claim for such loss may not be the subject of a contract between the parties the same as it is for a claim for injuries occurring between the place of shipment and the place of destination. The same rule must therefore be applied to a claim for loss or injury sustained by the plaintiff before shipment was made. The required notice not having been given and being one which the carrier cannot waive or the defendant omit to require, the demurrer to plaintiff's evidence upon this cause of action should have been sustained.

The ruling of the district court sustaining the demurrer to plaintiff's evidence on one count in favor of the defendant is affirmed, and the judgment in favor of the plaintiff on the other cause of action is reversed, and the cause remanded, with directions to enter judgment in favor of the defendant.

BURCH, MASON, PORTER, and DAWSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). The provisions relating to the kind of notice that shall be given of a claim of damages does not in my opinion enter into the rate that shall be charged, nor does a holding that there is no necessity of giving notice of a loss where a party already has full notice and knowledge of the same open the way to discrimination or violation of the terms of the commerce acts. The purpose of the notice is to afford the carrier an opportunity to inquire into the validity and justice of a claim of loss, and not to defeat a recovery for a loss actually sustained and of which the carrier has all the knowledge which a written notice would give. How can a written notice be essential where the defendant admits knowledge of the loss for which a claim is made? If the cattle died during transportation and the defendant assisted in loading and unloading them and in that way had learned of their condition and that a claim was made for injuries sustained, what purpose can be subserved by a formal notice of these facts? Stipulations providing that no recovery can be had for the negligence of the carrier unless notice is given are sustained on the theory that it is only reasonable that the carrier should have an opportunity to inspect the injured animals before they are removed from its custody or mingled with other animals. Unless given such an opportunity, the carrier would have difficulty in ascertaining the nature and extent of the injuries; but, if the carrier has had this opportunity and has learned the condition of the injured animals, the purpose of the notice has been fully accomplished. Under such circumstances, the formality of a written notice is not regarded to be a reasonable requirement or to be necessary to a recovery of damages in intrastate shipments. *Railway Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Railway Co. v. Fry*, 74 Kan. 546, 87 Pac. 754; *Cornelius v. Railway Co.*, 74 Kan. 599, 87 Pac. 751; *Railway Co. v. Frogley*, 75 Kan. 440, 89 Pac. 903; *Ray v. Railway Co.*, 90 Kan. 244, 133 Pac. 847. I am unable to see why the rule applicable to intrastate shipments should not apply to those made under the federal law, nor how such an interpretation of the contract and law can operate as a discrimination or defeat the purpose of the federal law.

WEST, J., joins in this dissent. MARSHALL, J., dissenting.

GARCIA et al. v. ATCHISON, T. & S. F. RY. CO. (No. 20607.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. RAILROADS \S 276(1) — DUTY TO TRESPASSER.

Rule followed that a railway company's duty to a trespasser is merely to refrain from willfully injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 878.]

2. RAILROADS \S 280—INJURY TO TRESPASSER—LIABILITY.

Where a boy climbs into a switch engine and his presence is known to the fireman, but not to the engineer, and the switch engine is struck by a freight train and the boy is caught and killed in the wreck, though the engineer and fireman saved their lives by jumping from the engine before the collision, the fact that the fireman who had no authority to do so permitted the boy to remain on the engine does not establish wanton or willful negligence on the part of the railway company so as to render it liable for damages in an action brought by the boy's parents.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S\S$ 902-909.]

Appeal from District Court, Reno County.

Action by Luis Garcia and Leogadia Garcia against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellants. J. R. Beeching, of Hutchinson, for appellees.

DAWSON, J. The plaintiff's son, a boy of 14, was killed while riding in the defendant's switch engine in the railroad yards at Hutchinson. A switch had been left open, whereby a freight train collided with the switch engine. The engineer and fireman saved themselves by jumping, but the boy was caught in the wreck and died from his injuries. The boy's parents recovered judgment, and the jury made special findings:

"(2) Did he ride out to the place near where he was killed on the steps or ladder of a box car? Ans. Yes. * * *

"(4) Was he in the gangway between the engine and tender at the time of the collision? Ans. Yes. * * *

"(6) Was there a door between the end of the engineer's cab and the gangway and a door between the end of the fireman's cab and the gangway? Ans. Yes. * * *

"(12) When did the fireman and engineer of the switching crew discover that an accident was likely to occur? Ans. When the train approached switch.

"(13) After they discovered that an accident was likely to occur, did they do what they reasonably could to prevent the accident? Ans. Yes.

"(14) Had either the fireman or the engineer authority under the rules of the defendant to permit the boy Garcia to ride on the engine? Ans. No.

"(15) Did either the engineer or the fireman of the switching crew know of Pedro Garcia being on the engine prior to the time they started to jump off, and, if so, which one of them? Ans. Yes, fireman. * * *

"(18) If you find for the plaintiff on the ground that the defendant was wantonly and willfully negligent, then state what employé of the defendant was so negligent and of what his negligence consisted? Ans. Fireman permitting boy to ride."

The defendant filed a motion for judgment on the special findings. This was overruled, and defendant appeals.

We have not been favored with a brief or argument by plaintiffs.

[1, 2] The engine was of the "full boiler type," having separate cabs for the engineer and fireman, and apparently the engineer did not know the boy was on the engine. The fireman, who did know of the boy's presence on the engine, had no authority to permit him to ride. *Kemp v. Railway Co.*, 91 Kan. 477, 138 Pac. 621. The finding merely is that the fireman knew he was on the engine. In this situation the boy was a trespasser. Gen. Stat. 1915, \S 3760. As such the defendant's only duty toward him was not to do him a willful injury. The trial court recognized this principle, and the only willful negligence found by the jury is that the fireman permitted him to ride. While a railroad engine is probably not a proper place for a youngster, it cannot be declared that it was wanton and willful negligence to permit him to ride on the engine. It is a place where enginemen must ride, and is not inherently a dangerous place. The fact that the fireman did not put the boy off, or notify the engineer of his presence so that the latter might put him off, was not willful negligence, nor was the collision with the freight train the natural and probable consequence of the fireman's permitting the boy to ride. Wantonness or willfulness was not shown simply because it did not exist. The case does not differ in principle from those already decided by this court. *Handley v. Railway Co.*, 61 Kan. 237, 59 Pac. 271; *Wilson v. Railway Co.*, 66 Kan. 183, 71 Pac. 282; *Mendenhall v. Railway Co.*, 66 Kan. 438, 71 Pac. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380; *Railway Co. v. Lacy*, 78 Kan. 622, 97 Pac. 1025; *Gamble v. Uncle Sam Oil Co.*, No. 20,646, decided March 10, 1917, 100 Kan. 74, 163 Pac. 627.

In view of the jury's special findings and the failure to establish willful negligence on the part of the defendant, the latter was entitled to judgment.

Reversed. All the Justices concurring.

CITY OF EMPORIA v. ATCHISON, T. & S. F. RY. CO. (No. 20210.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

MANDAMUS \S 164(4) — PLEADING — JUDGMENT.

The facts alleged in an answer and return to an alternative writ of mandamus examined.

and held to require that plaintiff's motion for judgment on the pleadings be overruled.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 355.]

Original mandamus by the City of Emporia, Kansas, against the Atchison, Topeka & Santa Fé Railway Company. Plaintiff's motion for judgment on the pleadings denied.

See, also, 88 Kan. 611, 129 Pac. 161; 94 Kan. 718, 147 Pac. 1095.

Gilbert H. Frith, of Emporia, for plaintiff. W. R. Smith, O. J. Wood and A. A. Scott, all of Topeka, and William Osmond, of Great Bend, for defendant.

DAWSON, J. The city of Emporia applies for a writ of mandamus directing the Santa Fé Railway Company to proceed forthwith to comply with a resolution of the city government which reads:

"Resolved, that the Atchison, Topeka & Santa Fé Railway Company open State street at Third avenue for public travel."

The defendant's answer and return to the alternative writ recites that in April, 1912, the city established the grade of State street about 17½ feet below the defendant's railway embankment; that the city's purpose in so doing was to accommodate a subway or undergrade crossing on State street; that in order to construct a surface or grade crossing at the intersection of State street and Third avenue it would require the defendant to change the grades established by the city's ordinances which defendant has no lawful right to do, and would subject it to damage suits by the adjacent property owners. The answer also invokes the protection of the Bill of Rights and the Fourteenth Amendment, and concludes thus:

"Defendant further avers that there is no necessity for a surface crossing over defendant's railway at the intersection of Third avenue and State street, and that said resolution of the board of commissioners of the city of Emporia, dated May 18, 1915, was not passed in good faith, but for the sole and only purpose of requiring the defendant railway to construct at a large expense an undergrade crossing at State street, which this court has heretofore decided it was not bound to do."

The plaintiff moves for judgment on the pleadings.

In 1912, the plaintiff applied to this court for a writ of mandamus requiring the defendant to build a subway at the intersection of Third avenue and Congress street, one block east of the place where the crossing is now demanded. The defendant at that time contended that the logical place where the subway should be constructed was at the intersection of State street and Third avenue and avowed its willingness to participate in the construction of a subway thereat. This was conceded by the city in its motion for judgment in that case, but this court issued a peremptory writ on January 11, 1918, directing the Santa Fé to construct the subway

on Congress street as demanded by the plaintiff. City of Emporia v. Railway Co., 88 Kan. 611, 129 Pac. 161. Some two years later, the plaintiff applied to us for a writ of mandamus to compel the Santa Fé to construct a subway at the intersection of State street and Third avenue, where the railway company contended it should have been located in the first instance. The writ was denied. City of Emporia v. Railway Co., 94 Kan. 718, 147 Pac. 1095.

Now the matter is renewed by this application for a writ requiring the defendant to construct some kind of a crossing. Scarcely two years ago, we held that the requirement of a subway crossing at this place, only one block distant from the subway put in by our order in 1913, was unreasonable. Nothing is shown to indicate that there is any material change in the situation, or that there is such an increase in population or congestion of business in the vicinity since the matter was last considered as to warrant the court in subjecting the railway to the expense of a subway crossing at this time. We again recognize the city's naked legal right to some sort of a crossing at this intersection, and that is conceded by the defendant. But it is not shown thus far, however, what sort of a crossing would be feasible without a re-establishment of the street grades. It was intimated at the argument that there is some prospect that the litigants will be able to devise some practical method of settling this question. This is the sensible thing to do. For the present, however, it needs no profound disquisition on the powers of a city and the duties of a railway company to show that on the facts pleaded by defendant, and conceded by plaintiff for the purpose of procuring our opinion thereon, the motion for judgment on the pleadings must be denied. See Drainage District v. Railway Co., 99 Kan. 188, 204, 206, and citations, 161 Pac. 937. All the Justices concurring.

KANSAS FLOUR MILLS CO. v. DIRKS.* (No. 20826.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. SALES §150(8)—CONSTRUCTION OF CONTRACT—TIME OF DELIVERY.

In a contract for the sale of wheat, the parties stipulated that it was to be delivered on or before December 30, 1914, and that in case the seller failed to make delivery on that day the buyer had the option to extend the time of delivery, cancel the contract, or buy wheat on the account of the seller. Held, that the seller had all of December 30th in which to deliver the wheat, and, as it was not delivered within that time, the buyer had a right on December 31st to extend the time of delivery until January 15, 1915.

[Ed. Note.—For other cases, see Sales, Cent. Cent. Dig. § 356.]

2. SALES §—418(2)—BREACH OF CONTRACT—DELIVERY DAMAGES.

The wheat not being delivered within the time originally fixed or within the extended time and the market price of wheat having advanced, the buyer was entitled to recover as damages the difference between the contract price and the market price at the place of delivery on January 15, 1915, the time to which the delivery was extended.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1175-1179.]

Appeal from District Court, Rush County.

Action by the Kansas Flour Mills Company against E. L. Dirks. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded, with directions to render judgment for plaintiff, etc.

T. A. Noftzger, of Wichita, and W. H. Russell and Frank U. Russell, both of La Crosse, for appellant. S. I. Hale and Harry W. Hanson, both of La Crosse, for appellee.

JOHNSTON, C. J. The Kansas Flour Mills Company brought this action against E. L. Dirks to recover damages for breach of a contract to deliver wheat. The contract for the wheat was as follows:

"Shaffer, Kansas, Dec. 3, 1914. To the Kansas Flour Mills Company: I hereby offer to sell you 1000 bushels of wheat to be delivered to your elevator at Shaffer, Kansas, on or before Dec. 30th, 1914, for \$1.00 per bushel, off grades to be settled for at market difference on day of delivery. If I fail to make delivery as above specified, you may extend time of delivery, cancel contract, or buy in for my account, at your option. E. L. Dirks.

"The above offer is accepted this 3d day of December 1914. The Kansas Flour Mills Company, by Geo. W. Vanhorn."

The defendant without any valid or legal excuse failed to deliver but 78 bushels. On December 31, 1914, plaintiff, for the purpose of extending the contract, wrote the following letter, which the defendant received in due course of mail:

"On Dec. 3d you contracted with our agent at Shaffer 1,000 bu. wheat for delivery on or before Dec. 30th and up to the present writing have delivered only 78 bu.

"We are extending this contract until Jan. 15th and must ask that you deliver the wheat by that time. If you do not deliver the wheat we will have to buy it in for your account, and charge you with our loss."

On December 30, 1914, the market price of wheat at Shaffer was \$1.12 per bushel, and on January 15, 1915, it was \$1.29. The defendant contended that the contract was breached on December 30th and that plaintiff could not exercise the option after that time, and the trial court decided that plaintiff's letter of December 31st did not extend the contract as it had already expired; that its breach occurred on December 30th. Judgment was rendered in favor of plaintiff for \$32.64, the difference between the market price on December 30th and the contract price, less \$78, the value of the wheat defendant had delivered to plaintiff.

[1] On this appeal it is insisted that the defendant had all of December 30th in which to make delivery, that the earliest possible day for plaintiff to make its election to extend the contract was December 31st, that the contract was duly extended to January 15th, that the market price on that date should govern in determining the damages to which it was entitled, and that it should have been awarded judgment against the defendant for \$189.38 with interest thereon from January 15, 1915. Did the contract end on December 30th, or was it continued by the action taken by the plaintiff on the following day? Defendant was entitled to all of December 30th in which to make delivery of the wheat just the same as he was to the 29th day of that month. Delivery under the contract was to be made on or before the 30th day of December, and defendant would not have been in default if delivery had been made at any business hour of that day. In the absence of notice to the contrary, the plaintiff had a right to assume that the defendant would deliver the wheat before the lapse of the day fixed in the contract, and, if it had been tendered during that day, the plaintiff could not have declared a cancellation of the contract. The option reserved to the plaintiff had to be promptly exercised after the default, and the extension could only be made for a reasonable time. The exercise of the option on the day following the expiration of the time fixed in the contract was in good time, and the notice given to the defendant in the letter of December 30th extending the time of delivery until January 15, 1915, must be regarded as having fixed a reasonable time and to be a proper exercise of the option named in the contract. The court was therefore in error in holding that plaintiff could not exercise the option under the contract after the 30th day of December.

[2] A proper measure of damages, where the seller fails to deliver grain or other chattels at the time stipulated in the contract of sale, is the difference between the contract price and the market price at the time and place of delivery. *Stewart v. Power*, 12 Kan. 596; *Gray v. Hall*, 29 Kan. 704. While holding that the contract was not extended, the court awarded the plaintiff the difference between the contract price of \$1 per bushel and \$1.12 which was the market value of wheat on December 30th. It appears that before that date defendant did deliver 78 bushels, and reckoning the value of the balance of the wheat, 922 bushels, at 12 cents per bushel, the difference between the contract and market prices, it would amount to \$110.64; but it appears that the plaintiff had not paid for the 78 bushels that had been delivered, and subtracting the value of that quantity from the increased value

of that not delivered we have \$32.64, the amount for which judgment was given.

The plaintiff insists that it was entitled to an award based on the price of wheat on January 15, 1915, the time of delivery fixed by the extension of the contract. This contention must be sustained. The option to extend the time of delivery was a part of the contract. It was supported by the same consideration as the stipulation fixing December 30th as the time of delivery, and, when the option was exercised and a reasonable time named by plaintiff for delivery, it was just as binding upon the defendant as if it had been the original time fixed by the contract. The court found that defendant was in the wrong and had no valid excuse for his failure to deliver the balance of the wheat. He had stipulated that settlement should be made as of the agreed time of delivery, and also that the time of delivery might be extended by the plaintiff. Market prices fluctuate, and if prices had declined between December 30, 1914, and January 15, 1915, defendant would have had a right to settle by the ruling price on January 15th, which had become the agreed date for delivery by the action taken in accordance with the provisions of the contract. He breached the contract, and he should not be permitted to say that it ended on December 30th, when it was expressly agreed that it might be kept alive for a longer time regardless of whether it should be for the benefit of one or both of the parties and where the stipulated steps had been taken to keep it alive. It does not appear that there was a rescission of the contract by plaintiff on December 30th, or at any time before January 15th, the date when the contract actually expired. The plaintiff was entitled to recover as damages 29 cents a bushel on the 922 bushels not delivered, or \$267.38, less \$78, the value of the wheat which was delivered.

The judgment is reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff for \$189.28, with interest thereon at the rate of 6 per cent. per annum from January 15, 1915. All the Justices concurring.

WALLINGFORD et al. v. BUSHTON GRAIN & SUPPLY CO. (No. 20679.)

(Supreme Court of Kansas. Feb. 10, 1917. On Motion for Modification of Judgment. April 7, 1917.)

(Syllabus by the Court.)

1. CONTRACTS \S 245(2)—CONFIRMATION—EFFECT.

Where a contract is made by telephone for the purchase and shipment of grain, followed by a letter of confirmation from the purchaser to the seller setting forth the terms of the contract, the written confirmation controls, unless the seller makes known to the purchaser any objection he may have to the terms as stated there-

in. *Strong v. Ringle*, 96 Kan. 573, 152 Pac. 631.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1130.]

2. SALES \S 101, 421—BREACH—WAIVER.

In an action to recover damages for defendant's failure to ship wheat according to contract, the defense was that defendant had rescinded because plaintiffs refused to pay a draft for the first car shipped. The court properly instructed that, if anything was said or done by defendant to induce plaintiffs to believe it had waived the failure to pay the draft, it would be estopped afterwards to claim a breach by reason of non-payment; but in another instruction the court charged in substance that defendant would be relieved from the consequences of such waiver if afterwards, and without fault on its part, it breached the contract on some other ground. *Held*, upon the facts stated in the opinion, that the giving of the latter instruction was error, and that it misled the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 267, 268, 1203.]

3. SALES \S 422—ACTION FOR BREACH—FINDINGS—JUDGMENT.

Upon the special findings, it is *held*, that plaintiff is entitled to judgment.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1204.]

(Additional Syllabus by Editorial Staff.)

On Motion for Modification of Judgment.

4. SALES \S 418(2)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where wheat was bought for shipment during the month of August and the seller breached the contract on August 6th or 7th, the measure of damages was the difference between the contract price and the market price at the place of delivery when the wheat would have been delivered if shipped up to the close of August 31st.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1175-1179.]

Appeal from District Court, Rice County.

Action by E. R. Wallingford, C. A. Wallingford, and S. P. Wallingford, partners, doing business under the firm name and style of Wallingford Brothers, against the Bushton Grain & Supply Company. Judgment for defendant, and plaintiffs appeal. Reversed, and cause remanded, with directions.

Campbell & Campbell, of Pittsburg, for appellants. Jones & Jones, of Lyons, for appellee.

PORTER, J. The action was to recover damages for the failure of defendant to ship 4,000 bushels of wheat during the month of August, 1914, according to a contract between the parties. There was a verdict and judgment for defendant, from which plaintiffs appeal.

Wallingford Bros., grain merchants at Wichita, on July 10, 1914, bought by telephone from the defendant, a grain company at Bushton in Rice county, 5,000 bushels of No. 2 hard wheat at 67 cents a bushel, basis Bushton, subject to destination weights and grades, for August shipment via Missouri Pacific Railway. The contract was confirmed by correspondence. The petition set forth these facts, and further that on August 4th

defendant tendered on the contract one car of wheat billed to New Orleans as instructed by plaintiffs, and that on August 5th defendant wired plaintiffs: "Can you use wheat on contract billed to you at Chicago? Wire answer." To which plaintiffs at once replied, instructing defendant to bill the wheat to plaintiffs at Chicago. It averred that defendant failed and refused to ship the remaining 4,000 bushels during the month of August, although importuned by plaintiffs to do so; and that upon such refusal the plaintiffs, pursuant to the contract, went into the open market and purchased for defendant's account at the then reasonable price the same amount of No. 2 hard wheat, paying therefor 39.9 cents a bushel above the contract price. Plaintiffs asked judgment for \$1,596, the amount of the difference in prices.

The answer admitted the sale by phone to plaintiffs of 5,000 bushels of wheat of the grade mentioned, but alleged the wheat was to be paid for by sight draft with bill of lading attached as each car was loaded, which draft the plaintiffs were to pay when presented at Wichita. It denied that the written confirmation of plaintiffs correctly stated the terms of the verbal contract. It averred that on August 1st the defendant, following instructions in letters from plaintiffs that the wheat be shipped to New Orleans for export, shipped one car of wheat and drew on plaintiffs for \$720, but that on August 4th the draft upon presentation to plaintiffs was protested and payment thereon refused. The answer further alleged:

That the contract "was canceled by the breach of plaintiffs and their refusal to pay said draft and the demand by plaintiffs to ship said wheat on arrival drafts, and that at no time until plaintiffs broke said contract by refusing to pay for said wheat did defendant refuse to deliver the same. That after plaintiffs failed to take said wheat and pay for same according to agreement, and protested the draft drawn therefor, it refused to ship any more wheat to plaintiffs, and is without fault. That it had a right to cancel said contract, and that it did so, and is not indebted to plaintiffs."

Attached to the answer were copies of correspondence between the parties, including letters from plaintiffs in July directing that the wheat be billed to New Orleans for export; also, plaintiffs' letter dated August 1st confirming a telegram of the same date. The letter reads:

"We wired you to-day as follows: 'Hold billing of wheat until further notice from us.' While we don't want you to think that we are not going to protect our contracts sooner or later, since the embargo has been extended on Galveston and on account of the unsettled condition prevailing throughout the entire world such as foreign wars, impending railroad strikes, etc., we have advised each one of our customers not to bill anything for us until the situation clears up. Bankers everywhere are uneasy and this embargo already has forced us to carry an immense lot of wheat and at present we don't care to jeopardize our credit or our commercial standing by trying to do the impossible. If you find you have to bill grain and can make drafts payable on arrival of car at destination, no doubt we can take care of a limited amount of it. If

you care to handle it in this way, you may write us and we will write you billing. You do not need to telephone or telegraph as that is a needless expense. We are indeed very sorry for the prevailing conditions, but these are things of which we have no control."

The reply admitted that payment of defendant's draft for the first car of wheat was refused, but it alleged that on August 4th, the day it was presented, plaintiffs called defendant by phone and explained that, owing to the outbreak of the European War, an embargo placed by railroads on shipments to Gulf ports, and the refusal of banks to discount drafts with bills of lading attached, plaintiffs could not then take care of the draft, but that, if defendant would call back the draft and draw an arrival draft on the car, they would arrange for its payment and would give the defendant billing for the rest of the 5,000 bushels to markets other than Gulf ports for export. It alleged that defendant agreed to withdraw the draft and await plaintiffs' further instructions as to handling the wheat purchased. The reply denied that defendant canceled the contract for the reason alleged, and, on the contrary, averred that defendant recognized the same as valid and reaffirmed it by wiring plaintiffs on August 5th, after it was advised of the nonpayment of the draft, asking if plaintiffs could use the wheat billed to Chicago, to which plaintiffs at once replied affirmatively and directed defendant to bill the wheat to Chicago.

The manager of plaintiffs' business at Wichita testified that he talked with Mr. Miller, defendant's manager, on the afternoon of August 4th, and told him the draft attached to the bill of lading had not been paid, and explained the unsettled conditions which made it impossible for them to protect it: that at that time he knew the draft had been presented, but did not know it had been protested; that Miller said he could have the draft held for a few days; and that he told Miller it might be possible they could bill the rest of the wheat to Chicago, as some grain was moving that way. He testified that on August 5th he received from defendant the following letter, dated August 4th:

"As per conversation over the phone this p. m. with your Mr. Wallingford about the protest on draft for car No. 99247 B. & O., wish to say that, while we were talking over the phone, our banker came in with a telegram saying that the draft had been protested, hence we thought that the best course to pursue was to let it be returned, and when we get your instructions, we will have the draft, and then can follow out your instructions. We are sorry that you did not get us in time, so that we could have saved you the protest."

It was on August 5th that defendant wired asking if plaintiffs could use the wheat at Chicago, to which plaintiffs replied in the affirmative and directed that the wheat be billed to Chicago.

The evidence shows without dispute that on August 4th the market price of wheat, basis Bushon, ranged from 62½ to 67 cents.

On August 5th the price was 67 cents, the same as the contract price at which defendant had agreed to deliver. This was the date of the telegram just referred to. On August 6th, when defendant wrote plaintiffs rescinding the contract and stating as reasons therefor that plaintiffs had refused on August 4th to pay the \$720 draft, the price at Bushton had risen to 74 cents. On the 7th, when plaintiffs received the letter notifying them of defendant's intention to rescind the contract, the price had risen to about 78 cents, and after that, in the language of one witness, it "went up like a skyrocket."

Among the findings of the jury in answer to questions submitted by plaintiffs are the following:

"(1) What, if anything, did plaintiffs fail to do, that they should have done under their contract with defendant to July 10, 1914, the contract in question? A. They should have taken care of sight draft for car in transit to New Orleans. Also, they breached their contract with defendant when they informed him they couldn't handle wheat only with delivery draft attached (on August 1st?)."

"(2) If you find that plaintiffs failed to do anything that they should have done under their contract with defendant, then state on what date defendant, or its agent, first learned of such failure or default on the part of plaintiffs. A. On August 4th by telephone. Also, when he received letter referred to above in answer to No. 1."

"(3) On what date did plaintiffs first learn from defendant that defendant wished to cancel the contract of July 10, 1914? A. When he got defendant's letter of August 6th."

"(4) Was defendant informed on August 4, 1914, that plaintiffs had not taken up his draft for \$720 attached to bill of lading showing shipment of one car of wheat by defendant to plaintiffs on the contract in question? A. Yes."

"(5) After defendant learned that plaintiffs had not taken up its draft for \$720, the purchase price of the car of wheat shipped to them, said draft being for the purchase price of said car of wheat, did not defendant ask for and get from plaintiffs instructions relative to the billing of the rest of the wheat covered by the contract? A. Yes, he asked for prompt and got delayed instructions, but not in accordance with the original contract."

"(6) After defendant company had learned that plaintiffs had not paid for the car of wheat shipped by it to them on contract, by failing to pay the draft presented to them on August 4, 1914, with bill of lading attached, what, if anything, did defendant say or do, which induced plaintiffs to believe that it intended to ship the rest of the 5,000 bushels of wheat covered by the contract of July 10, 1914? A. Sent telegram asking if plaintiff could use wheat on contract billed to him at Chicago."

"(7) Did plaintiffs, at the time that they failed to take up the draft of defendant presented to them for payment on August 4, 1914, say or indicate to defendant that they renounced the rest of the 5,000 bushel contract, and did not intend to be bound thereby? A. No, they did not."

"(8) At the time that defendant first learned of any failure on the part of plaintiffs to comply with every part of their contract with defendant of July 10, 1914, was the price of No. 2 hard wheat, basis Bushton, under the same terms as covered by said contract, higher or lower than the price of wheat on the same basis at the time when plaintiffs first learned from defendant that defendant desired to cancel its said contract with plaintiffs? A. Lower."

"(9) Was the reasonable market value of wheat at Bushton, under the same terms as ex-

pressed in the contract between plaintiffs and defendant, higher or lower than the contract price on August 4, 1914? A. Slightly lower."

"(10) Was the reasonable market value of wheat at Bushton, under the same terms as expressed in the contract between the plaintiffs and defendant, higher or lower than the contract price on August 6, 1914? A. Slightly higher."

"(11) Could plaintiffs, immediately after learning that defendant wished to cancel its contract with plaintiffs of July 10, 1914, or at any time thereafter during the month of August, 1914, have bought in the amount of wheat unshipped by defendant on said contract at a price basis Bushton, equal to or lower than the contract price of 67 cents per bushel basis Bushton? A. No."

In answer to questions submitted by defendant, the jury made the following findings:

"Did not the plaintiff commit the first breach of the contract by failing to pay the sight draft for the car of wheat shipped August 1, 1914? A. Yes."

"Did not plaintiffs, at about 6 o'clock in the evening of August 4, 1914, promise the manager of defendant company that he would write him full instructions and make arrangements to care for the draft which had been protested and that he would so write him that night? A. Yes."

"Did the plaintiffs pay, or arrange to pay or provide for the payment of the sight draft which was protested, or write the defendant with reference to the same as agreed in the conversation over the telephone the evening of the 4th of August, 1914, at any time before August 6, 1914? A. No."

"Did the defendant send the telegram of August 5, 1914: 'Can you use wheat on contract billed to Chicago? Wire answer'—relying on the promise of the plaintiff made over the telephone to write instructions on the night of August 4, 1914, with reference to the payment of the draft which had been protested? A. Yes."

"Did not defendant after sending telegram of August 5, 1914, receive back the draft protested with the bill of lading attached? A. Yes."

"Did not defendant, after receiving back the protested draft and bill of lading, notify plaintiffs by the letter of August 6, 1914, that the contract was canceled for the reasons stated in the letter? A. Yes."

"Did the plaintiffs, ever at any time before bringing this action, offer to pay to defendant the protested draft with the cost of the protest fees thereon? A. No."

"Did the defendant ever waive plaintiffs' breach of the contract in failing to pay the draft? A. No. The including of the words 'on contract,' in telegram of August 5th, saved such telegram from being a waiver."

[1] 1. Plaintiffs' letter confirming the purchase of the wheat by phone was accepted and retained by the defendant, except for a slight change in one particular which has no bearing upon the controversy, and therefore the terms of the contract as stated in the written confirmation are controlling. Strong v. Ringle, 96 Kan. 573, 575, 152 Pac. 631, 632. In the opinion in that case it was said:

"In order to avoid the consequences of misunderstandings, defects of memory, in some instances hypertrophy of memory, and in other instances equivocation or downright untruthfulness, those engaged in the grain business have adopted a method of rendering the result of their oral negotiations definite and certain. After oral negotiations have been concluded, one of the parties immediately states the result in writing and submits the writing to the other for approval. It is the duty of the recipient of the writing

to communicate his objections to the other party, if he have any, and to decline performance if unwilling to be bound by it."

The written confirmation, after stating the terms as to prices, destination, and weights, reserved the right to change destination of all shipments, and also the right to buy in the grain for the seller's account if shipments were not made according to contract. It contained other provisions which plaintiffs contend should be construed so as not to require payment for the wheat until it was delivered and accepted at New Orleans. They contend that the court erred in construing the contract when it charged that plaintiffs breached it by failing to pay the draft for the first car before it reached its destination, and in charging the jury that defendant was not obliged to ship the rest of the wheat unless it waived this breach of the contract. In the view we have taken of the case, it is not deemed necessary to consider these contentions.

[2] 2. The theory upon which plaintiffs brought the action was that defendant had waived any right to rescind the contract it may have had by reason of plaintiffs' failure to pay the draft for the first car of wheat. This became, and throughout the trial continued to be, the determinative question. The plaintiffs requested a number of instructions upon the law of waiver based upon the rule declared in *Capper v. Paper Co.*, 86 Kan. 355, 121 Pac. 519. These instructions were refused. It is true, the court instructed that, if the jury believed from the evidence that anything was said or done under the contract by the defendant to induce plaintiffs to believe that failure to pay the draft was waived, the defendant would be estopped to claim afterwards a breach by reason of nonpayment; but the court had already given instruction No. 7, which allowed the jury to excuse defendant from the consequences of such waiver, provided they found that defendant "afterwards, without fault on the part of the plaintiffs, arbitrarily breached the contract by refusing to fulfill it, on some other ground than that of the fault of the plaintiffs." The jury found that defendant did induce plaintiffs to believe it was going to ship the rest of the wheat, but that this constituted no waiver. The letter written by defendant on the evening of August 4th, following the telephone conversation in reference to the protested draft, is itself sufficient to establish the waiver. It shows, not only the cordial relations between the parties, but the entire absence of any purpose on the part of defendant to rescind the contract, at least while the price of wheat remained where it was. The letter reads:

"As per conversation over the phone this p. m. with your Mr. Wallingford about the protest on draft for car No. 99247 B. & O., wish to say that, while we were talking over the phone, our banker came in with a telegram saying that the draft had been protested, hence we thought that the best course to pursue was to let it be re-

turned, and when we get your instructions, we will have the draft, and can then follow out your instructions. We are sorry that you did not get us in time, so that we could have saved you the protest."

Followed, as this letter was, the next day by a telegram asking if plaintiffs could use the "wheat on contract" billed to Chicago, the jury could do no less than find that defendant did induce plaintiffs to believe that it intended to ship the rest of the wheat. But the jury found that this did not constitute a waiver of the nonpayment of the draft. This finding makes it apparent that the jury were misled by instruction 7, which permitted them to explore the field of speculation in an effort to discover "some other ground" upon which to avoid the waiver. And so, when asked the question, "Did defendant ever waive plaintiffs' breach of the contract in failing to pay the draft?" the jury answered:

"No. The including of the words 'on contract' in the telegram of August 5th saved such telegram from being a waiver."

On the contrary, instead of saving the message from constituting a waiver, the use of the words "on contract" only served to eliminate any possible doubt as to what particular wheat the defendant wanted permission to ship to Chicago. The courts do not need the aid of a jury to translate the meaning or declare the legal effect of plain, unambiguous language used in a telegram relating to everyday business affairs, and will not permit the rights of parties to be frittered away by an arbitrary finding of a jury declaring the legal effect of such an instrument to be something opposed to reason and common sense. Besides, in so far as the finding becomes a question of law, it is for the courts to determine and not for the jury. See *Capper v. Paper Co.*, supra.

[3] 3. The plaintiffs insist it was error to deny their motion for judgment on the special findings. The jury were asked to state what, if anything, plaintiffs did or failed to do that they should have done under the contract. The answer was:

"They should have taken care of sight draft for car in transit to New Orleans. Also, they breached their contract with defendant when they informed him they couldn't handle wheat only with delivery draft attached—(on August 1st?)."

The jury also found that defendant first learned on August 1st by letter that plaintiffs would require arrival drafts, and first learned of the failure to pay the draft on August 4th. They further found that plaintiffs were not notified until August 6th that defendant would not furnish the rest of the wheat; and that after defendant had learned that plaintiffs had allowed the draft to be protested, and after notice of the refusal to accept sight drafts before arrival of the wheat at destination, the defendant induced plaintiffs to believe that it intended to ship the rest of the wheat covered by the contract.

It would be unconscionable to permit the

defendant to rescind the contract after the wheat had suddenly advanced in price, and to base its right to rescind upon grounds which it had notice of and was willing to forgive so long as the price of wheat remained at or below the level of prices when the contract was made.

In *Capper v. Paper Co.*, 86 Kan. 355, 121 Pac. 519, an instruction was approved which charged in substance that, if plaintiff failed to make payments as provided in the contract and this provision had not been waived, the defendant had a right to cancel; but, if the jury should find from the evidence that anything said or done under the contract induced plaintiff to believe that this condition was waived, the defendant would be estopped from afterwards claiming non-performance.

In the present case, the evidence and the findings are that defendant, with notice of the very things which the jury declare constituted the breach by plaintiffs, induced plaintiffs to believe that they would ship the rest of the wheat, in other words, it waived the breach; and it then follows as a matter of law that defendant could not afterwards and when the price of wheat had risen take advantage of the breach and rescind the contract. The plaintiffs were entitled to judgment upon the findings for the amount paid by them as shown by the findings for the wheat defendant failed to deliver.

The judgment is reversed, and the cause remanded, with directions to render judgment in accordance herewith. All the Justices concurring.

On Motion for Modification of Judgment.

There is a motion asking for a modification of the judgment, the claim being that the price at which plaintiffs bought in the wheat on September 4th is not the true measure of damages. The wheat, however, was not bought as the defendant claims for "August delivery." According to the confirmation, it was purchased for "August shipment," and if defendant had shipped the wheat on August 31st, as it had the right to do, and had drawn drafts with bills of lading attached, September 4th would have been the time when, in the regular course of business, the drafts would have been presented. Plaintiffs' testimony is that they never notified the defendant that they would not accept the wheat; and their letter to defendant dated August 7th was sufficient notice that plaintiffs expected to look to defendant for the wheat. The special findings are that at no time between August 6th and September 4th could the plaintiffs have bought in the wheat at or lower than the contract price. It was a matter of pure speculation whether by extending to defendant the full time for delivery the damages would be less or greater. It is true, as defendant asserts, the time of shipment or delivery during the month of

August was wholly optional with defendant, but defendant exercised no option except to say on August 6th that it would not deliver at all.

In *Mercantile Co. v. Lusk*, 45 Kan. 182, 183, 25 Pac. 646, the general rule stated in *Benjamin on Sales*, § 1118, in a case where the buyer refuses to accept, was quoted as follows:

"The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract, and to refuse accepting the goods. 5 M. & W. 475; [*Follansbee v. Adams*] 86 Ill. 13; [*Kadish v. Young*] 108 Ill. 170 [43 Am. Rep. 548]."

And it was said that the exact converse of this rule should be applied to a case where the seller breaches the contract by refusing to deliver. Among the authorities cited is *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436, which is quoted as follows:

"The time of delivery, and not the time when the seller gives notice that he intends to break the contract, is the rule."

[4] The plaintiffs, in a brief filed in opposition to the motion to modify the judgment, concede that, if at any time between August 6th and the expiration of the time for delivery plaintiffs could have bought in the wheat at or lower than the price agreed upon, it would have been the duty of plaintiffs to have done so, in accordance with the rule declared in *Lumber Co. v. Lumber Co.*, 86 Kan. 131, 119 Pac. 321. But the finding of the jury is that this could not have been done.

In a case just decided (*Flour Mills Co. v. Dirks*, 164 Pac. 273), the contract as extended gave the seller until January 15th to deliver the wheat, and the measure of damages was held to be the difference between the contract price and the market price at the place of delivery on January 15th.

The time of shipment was during the month of August, and in the circumstances of this case the measure of damages is the difference between the contract price and the market price at the place of delivery at the time the wheat would have been delivered if shipped at the close of August 31st. It has been held that the burden rests upon, or rather that it is incumbent upon, the defaulting seller where the bargain was for delivery by installments to produce evidence that the buyer could have gone into the market and obtained another similar contract on such terms as would mitigate his damages. See authorities cited in *Mercantile Co. v. Lusk*, *supra*, where this rule as to evidence was adopted. The defendant offered no evidence of any kind upon the measure of damages, choosing to stand upon his right to cancel the contract, and now for the first time raises the question. The fact that plaintiffs could have elected to sue at once upon notice of defendant's intention to breach the contract (*Caley v. Mills*, 79 Kan. 418, 100 Pac.

09) does not control the measure of damages. Plaintiffs did not elect to sue until the expiration of the full period in which defendant might have shipped the wheat. In a recent case (*Flour Co. v. Brandt*, 98 Kan. 587, 158 Pac. 1120), the general rule declared in *Stewart v. Power*, 12 Kan. 596, and *Mercantile Co. v. Lusk*, *supra*, was recognized as the correct one, that the purchaser should buy in at the time and place of delivery. In the case at bar delivery was to be at Wichita on shipments made at any time during August. In the opinion in *Flour Co. v. Brandt*, *supra*, it was said:

"The damage to the plaintiff was caused by the defendant. He could have prevented damage to the plaintiff by performing the contract on any of the days that he might select. He refused to perform his contract and compelled the plaintiff to adopt such measures as he deemed best to reduce his losses. The defendant ought not to be permitted to cast on the plaintiff the burden of reducing these losses and then say that the plaintiff could have better reduced the losses by purchasing wheat on a different day." 98 Kan. 588, 158 Pac. 1121.

The motion to modify the judgment is denied. All the Justices concurring.

WHITEMAN v. CORNWELL et al. *
(No. 20522.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 400 — OPENING — EFFECT — BONA FIDE PURCHASER.

The rights of a purchaser of real estate who, in good faith and for a valuable consideration, and in reliance on a judgment quieting the title of his grantor, acquires the property by warranty deed, are protected by section 83 of the Civil Code (Gen. St. 1909, \S 5676), although the judgment may be opened for further consideration as to the rights of the original parties thereto.

2. JUDGMENT \S 174 — OPENING — EFFECT — BONA FIDE PURCHASER.

The defendant, a resident of Iowa, owned a tract of wild unoccupied land. The plaintiff procured a questionable and perhaps worthless title thereto, and filed an action to quiet and confirm his title. The defendant was summoned by publication; and, having no actual notice, judgment was rendered against him by default. The plaintiff then sold the land by warranty deed to a third party who relied on the judgment, in good faith and for a valuable consideration. When the judgment was opened, this third party appeared and contested with the defendant. In such a situation the rule of the Civil Code, section 83, protects the bona fide purchaser under the judgment, although it is set aside so far as it relates to the controversy between the plaintiff and defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 309, 337.]

Appeal from District Court, Seward County.

Suit by L. H. Whiteman against Allie Cornwell, Nicholas Wagener, and others. Judgment by default against defendant Wagener,

judgment opened, and appearance by W. S. Hodges, and judgment for W. S. Hodges, claimant, and defendant Wagener appeals. Affirmed.

V. H. Grinstead, of Liberal, for appellant. F. S. Macy and E. W. Davis, both of Liberal, for appellee.

DAWSON, J. This appeal presents the too familiar predicament of a man whose right to a tract of land has been cut off by a judgment founded on a publication service pursuant to the statutes. The plaintiff, who had little or no claim to the land, filed a suit against the defendant Nicholas Wagener and others, claiming to be the legal and equitable owner of the land in controversy, and other lands mentioned in his petition, alleging that the defendants claimed some estate or interest therein, but whatever such estates or interests might be they were all inferior to his estate and right to possession, and that the defendants unlawfully kept him out of possession, and praying for possession and confirmation of his title and for a writ of restitution.

Wagener, the owner of the land, resided in Iowa, and he was summoned by publication—which he of course knew nothing about—and judgment was rendered against him by default. The decree adjudged the plaintiff to be the absolute owner of the land in question, and confirmed his title and possession, and decreed that if the defendant was in possession a writ of restitution should issue forthwith to eject any and all persons in possession, and to deliver the possession to the plaintiff. When Wagener learned of these judicial transactions he filed a motion to open the judgment, and filed his answer deraigning title through mesne conveyances from the United States, and also an independent title founded on tax deeds. The judgment was opened, but one W. S. Hodges, who had procured a warranty deed to the land from the plaintiff executed 6 months and 12 days after the default judgment was rendered against Wagener, appeared and claimed the property as a bona fide purchaser without notice, and that he had relied upon the default judgment.

The court gave judgment for Hodges, the plaintiff's grantee, and Wagener appeals.

[1] If we do not find some way to upset this judgment it will not be for want of an inclination to do so, but only because of legal obstacles which we have no right to ignore. The general finding of the trial court settles all the issuable facts in favor of Hodges, so that avenue of relief for appellant is barred. The statute provides that the rights of bona fide purchasers of property the title to which has been judicially determined, after 6 months, shall not be affected by proceedings to set aside judgments obtained by default and on publication service.

Civ. Code, § 83 (Gen. St. 1909, § 5676). The precedents respecting this statute are too numerous and too formidable to be overcome. *Howard v. Entreken*, 24 Kan. 428; *Loan Co. v. Cable*, 65 Kan. 306, 68 Pac. 1127; *Morris v. Winderlin*, 92 Kan. 985, 142 Pac. 944. The case of *Randall v. Barker*, 67 Kan. 774, 74 Pac. 240, recognized this principle, although the court found it possible to rescue the true owners of the property because their adversary had not acquired title under the judgment or in reliance upon it, but had purchased the property without notice of the judgment. Nor do we find an analogy between the case at bar and that of *McNutt v. Nellans*, 82 Kan. 424, 108 Pac. 884, which counsel for appellant urges us to consider. It is there said:

"The objection which the plaintiffs still make to the title is that the judgment was rendered upon service by publication, and may be vacated at any time within three years. The doctrine, however, is established by numerous decisions that the title of a purchaser in good faith who relies upon a judgment quieting title to the land in his grantor cannot be affected or disturbed by the vacation of the judgment, but is protected by the express provisions of the statute. Civ. Code, § 77; Gen. Stat. 1901, § 4511; Code 1909, § 83; *Howard, Adm'r. v. Entreken, Adm'r.*, 24 Kan. 428; *Loan Co. v. Cable*, 65 Kan. 306, 68 Pac. 1127; *Randall v. Barker*, 67 Kan. 774, 74 Pac. 240. If, therefore, the plaintiffs had taken a conveyance from the defendant their title would not be affected by the vacation of the judgment, provided they could prove that they purchased in good faith and in reliance upon the judgment." 82 Kan. 427, 108 Pac. 835.

[2] Noticing other features of appellant's argument, we are constrained to hold that *Hodges* did maintain the burden of proof to show that he purchased the property in good faith and in reliance on the judgment—at least the trial court had sufficient evidence submitted to it to warrant such determination. There was an allegation in plaintiff's petition that defendant was in possession, but it developed that the land was not in the actual occupancy of any person, being the characteristic undeveloped land still quite common in that part of the state. There is a doctrine that wild lands are constructively in the possession of the true owner, but this doctrine cannot be extended to charge a purchaser with constructive notice of constructive possession of such lands. *Haas v. Wilson*, 97 Kan. 176, 154 Pac. 1018. There was no impropriety in the recital in the decree granting a conditional writ of possession if any person was found in possession of the land, and the issue and execution of such a writ to put the plaintiff in possession of this wild and unoccupied land would have been an idle ceremony. It is also contended that one cannot quiet his title if he has no title. He cannot if his adversary, having some sort of title, sees fit to contest with him. But if the latter foregoes a contest, shall not the plaintiff prevail? If I am sued for a sum of money which I do not owe, on a claim with-

out even a shadow for its basis, and am duly summoned into court, and I wholly ignore the judicial proceeding, the plaintiff will take judgment against me by default, and in time that judgment will become unassailable. Certainly I will then be indebted to the person who secured judgment against me, and there will be no escape from it.

We note that the attorneys who examined the title advised *Hodges*:

"If a client of ours should take title, we would want them to look up the possession of the land, at the date judgment was rendered, which was on the 6th day of June, 1913, and see who occupied the land at that time, and see whether it has been occupied since that time. If it has not been occupied, no one in possession of the land or making any claim of ownership over it, then we would say that a warranty deed from L. H. Whiteman would give good title to this land."

In deference to this suggestion, an affidavit of one who knew the land was appended to the abstract which recited that the land was not in the actual possession of any person; that it was "raw prairie land."

We see no way to overturn this case on the question of possession. That section 83 of the Civil Code serves a salutary purpose is undeniable. That its wise provisions may be perverted has frequently been recognized by this court. Much may be done by trial courts to prevent its being misused. Doubtless much is so done. But the matter of security of title is essentially a question for the Legislature. Its fiat may be wise or unwise, just or unjust, but within constitutional limitations its will is supreme, and however reluctant we may be to apply the law to a given case—and this appears to be such a one—our duty to recognize and to declare it may not be avoided. We cannot avoid it here, and the judgment is affirmed. All the Justices concurring.

EBERHARDT CONST. CO. v. BOARD OF
COM'RS OF SEDGWICK COUNTY.
(No. 21248.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. MANDAMUS \Leftrightarrow 84—PUBLIC OFFICERS—MIS-
TAKE OF LAW—JUDGMENT.

Where public officers who have entered into a contract in that capacity refuse to recognize its obligations solely by reason of a mistaken view of a pure question of law, their compliance with it may be enforced by mandamus; but it does not follow that, where the controlling body of a municipality, in the exercise of its judgment as to public policy, sees fit to refuse to proceed with a contract, preferring to answer in damages, it can be held to specific performance by a writ of mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 180-183.]

2. COUNTIES \Leftrightarrow 178—ISSUANCE OF BONDS—
SPECIAL ELECTION—NOTICE.

The statute requiring the notice of a special election to vote bonds for the erection of a county jail to be published in a newspaper "for" 30 days before the time set is not com-

plied with where the notice is omitted from the last issue of the paper prior to the date named.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273.]

3. COUNTIES \Leftrightarrow 178—BOND ISSUES—SPECIAL ELECTION.

The fact that the election was held upon the same day as the state primary does not alter its character as a special election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273.]

4. COUNTIES \Leftrightarrow 178—BOND ISSUE—SPECIAL ELECTION—NOTICE—INVALIDITY.

The failure to publish the notice of such an election for the full period required by the statute renders the election void.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273.]

5. COUNTIES \Leftrightarrow 111(2)—COUNTY JAIL—CONTRACT—VALIDITY.

The county board has no power to provide for the erection of a jail without a vote of the people, and a contract made under color of an election held without the required notice having been given is unenforceable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 181.]

6. COUNTIES \Leftrightarrow 49—COUNTY BOARD—FINDINGS.

The rule that ordinarily the finding of a public body as to the steps taken preliminary to its action is conclusive does not apply to the situation stated.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 56-60.]

7. ESTOPPEL \Leftrightarrow 62(3)—CONTRACTS.

A county cannot be required to carry out such a contract on the ground of estoppel resulting from the dealings of the commissioners with the contractor, for the reason that the rights of the public are involved.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 153.]

Original mandamus by the Eberhardt Construction Company against the Board of County Commissioners of the County of Sedgwick. Writ denied.

Burch, Litowich & Royce, of Salina, and Stanley, Stanley & Hegler, of Wichita, for appellant. Ross McCormick and Dale, Amlund & Buckland, all of Wichita, for appellee.

MASON, J. In June, 1916, the commissioners of Sedgwick county decided that it was desirable to build a jail at a cost of \$120,000. An election was held at which a majority of those voting declared in favor of issuing bonds for the purpose. In September a contract was entered into with the Eberhardt Construction Company for the building of the jail. Work under the contract was begun by purchasing material and equipment, a part of which was placed upon the ground. Two of the commissioners were succeeded by newly elected officers in January, and in that month the board notified the company that it had canceled the contract, adding that this was done upon the opinion of the county attorney that the election referred to and the acts taken in reliance thereon were without authority of law. The company seeks by mandamus to require the board to

carry out the contract. An alternative writ has been issued, and the defendants have filed an answer presenting the contention that, even if the contract were valid, its performance could not be enforced by mandamus, and that it is void because of a defect in the publication of the notice of the election. The case is submitted upon a motion for judgment on the pleadings.

[1] 1. Upon the question of procedure the defendants rely upon a line of decisions to the effect that a municipality will not be compelled by mandamus to perform specifically its ordinary business contracts. 26 Cyc. 291; *State v. Mortensen*, 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291.

The plaintiff relies chiefly upon a recent decision of this court in which the contractor was permitted to test the validity of a contract for the building of a bridge by mandamus against the county board for its enforcement. *Bridge & Iron Co. v. Labette County*, 97 Kan. 142, 154 Pac. 230; *Id.*, 98 Kan. 292, 158 Pac. 8. It was said in the opinion in that case that the remedy by an action for damages was not fairly adequate; that the profit to accrue to the plaintiff from the building of the bridge could not be definitely ascertained in advance of performance. The specific relief there sought was to require the defendants to close the site of the bridge against traffic and to give the plaintiff possession of the site for the purpose of building the bridge. The principle applicable to that situation has been thus stated:

"Where under the terms of a contract entered into by a municipality and its contractor for the performance of such work it is provided, or necessarily implied, that the municipality shall do and perform certain things essential to the performance of such work under the contract, and as preliminary thereto, if the municipality refuse, it may be compelled by mandamus." 2 Bailey on Habeas Corpus, § 262, p. 1098.

Where a valid contract has been entered into for the making of a public improvement in pursuance of a vote of the people, officials charged with a ministerial duty in that connection may be compelled to act in conformity thereto by mandamus at the instance of any one having a substantial interest in the matter. The circumstance that the persons whose action is sought to be controlled constitute the governing body of the municipality concerned does not render them immune from being required to perform a positive duty which is laid upon them by virtue of their office, and which involves no exercise of discretion. Where they seek to justify nonaction on their part solely by a reason which is founded upon a doubtful conception of their legal obligations—where the controversy grows out of a dispute over a pure question of law, an authoritative answer to which will necessarily end the matter—the practice in this state is to permit the issue to be determined in mandamus, although in some jurisdictions the interpretation of a statute by

executive officers will not be interfered with by courts in that manner. It does not follow that, where the controlling body of a public corporation, in the exercise of its judgment as to governmental policy, sees fit to refuse to proceed with a contract to which it has committed itself, preferring to answer in damages for any resulting loss to the contractor rather than to carry out a course which it has determined not to be for the best interests of the community, it can be compelled to perform specifically its engagements by a writ of mandamus. It will be assumed without deciding that the present case falls within the class to which mandamus is applicable.

[2] 2. The statute requires that a notice of an election to vote upon the question of issuing bonds to cover the cost of a county building shall be published in the official paper "for not less than thirty days preceding the day such special election is to be held." Gen. Stat. 1915, § 2553. Here the election was held on August 1, 1916. The notice was published in the official paper (a weekly) in the issues of June 30th, July 7th, July 14th, and July 21st, but not in the issue of July 28th. The language of the statute requiring a publication to be made in a paper "for" a given number of days before an event is held to mean that the publication must run during the entire period, be continuous from a time that far in advance until the date named, and therefore, although the first publication is made sufficiently early, the omission of the notice in the last issue of the paper before the event is to take place results in a failure to meet the legal requirement. *McCurdy v. Baker*, 11 Kan. 111.

[3] 3. The fact that the election was set upon the day of the holding of the state primary did not alter its status as a special election, held at a time selected by the commissioners, as distinguished from a general election, held at a time designated by the statute. Note 90 Am. St. Rep. 69, 70.

[4] 4. The failure to publish the notice of a special election for the full time required by law is a fatal defect rendering the election void and preventing the lawful issuance of bonds which depend upon it for their validity. *State ex rel. v. Staley*, 90 Kan. 624, 135 Pac. 602, and cases there cited; *Metzger v. Davis*, 98 Kan. 200, 157 Pac. 844.

Formal defects in a published notice of an election which do not diminish its efficiency in giving information by which the action of voters may be affected are not necessarily fatal. *Railroad Co. v. Scott County*, 82 Kan. 795, 109 Pac. 684; *City of Perry v. Davis*, 97 Kan. 369, 154 Pac. 1127. But, as was pointed out in *State ex rel. v. Staley*, just cited, the omission of the notice from one issue of the paper in which the law required it to be inserted might possibly have deprived some voters of an opportunity to take part in the election, and thereby have influenced the result.

[5] 5. The county board had no power to provide for the erection of a permanent building without a vote of the people. Gen. Stat. 1915, § 2552; *State v. County of Marion*, 21 Kan. 419. The contract which it undertook to make with the plaintiff was therefore in excess of its legal authority and unenforceable.

[6] 6. The plaintiff seeks to avoid the effect of these considerations by invoking the principle by which it is held that, where the action of a public body depends upon authorization by prior proceedings, its finding as to the result of such preliminary steps, made in good faith, is conclusive. *State ex rel. v. Holcomb*, 95 Kan. 660, 149 Pac. 684; *Stevenson v. Shawnee County*, 98 Kan. 671, 159 Pac. 5.

The cases cited involve the ascertainment of facts concerning which there might be some room for a difference of opinion. The time for which a notice has been published in a newspaper is a subject which admits of exact knowledge and absolute proof, and a finding contrary to the fact cannot be made the basis of official power. That the publication of the notice of an election to vote bonds for the full period prescribed by the statute is a jurisdictional prerequisite to their issue is too firmly established by prior decisions of this court to be regarded as an open question. It has been held that a failure to publish the notice of a sheriff's sale for the prescribed time is a mere irregularity which does not render the sale void. *Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422. But in that situation no question of jurisdiction is involved. The confirmation of the sale is a judicial decree, not open to collateral attack except for fraud. *Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369; 17 Cyc. 1267. A subsequent showing that the notice of sale had been omitted altogether would not avoid the effect of the confirmation. *Freeman on Executions* (3d Ed.) § 286, p. 1657; *Herman on Executions*, § 342, p. 515.

[7] 7. It is also suggested that, as the board was acting within the scope of its apparent authority, under color of an election presumably held according to law, for the regularity of which the commissioners themselves vouched, the plaintiff was justified in assuming that all the necessary steps had been duly taken, was not required to make a minute examination of the proceedings, and should be protected in his rights under the contract which he entered into in good faith in reliance on the action of the board. This reasoning, if sound, would in effect allow the board by indirection to exercise a power denied it by the statute—to accomplish a result which the law expressly forbids. The limitation on the power of the board is for the protection of the taxpayers, and acts done by the commissioners in excess of their legal power cannot work an estoppel against the public so as to require the performance of an executory con-

tract entered into without authority, or to require recognition of the obligations of such a contract after its partial execution, beyond making compensation for benefits actually received. 10 R. C. L. 707. See in this connection *Ritchie v. City of Wichita*, 99 Kan. 663, 163 Pac. 176. We do not regard the situation as one for the application of the principle by which the recital in municipal bonds that the acts on which the right to issue them depends have been duly performed is held to be conclusive against the municipality after they have passed into the hands of an innocent purchaser. That rule results from an application of a doctrine peculiar to negotiable instruments. The question whether the county should now be compelled to abide by the contract is very different from the question whether it should be compelled to pay for benefits it had received if the contract had already been carried out.

The writ is denied. All the Justices concurring.

COLVIN v. WILSON. (No. 20563.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. WITNESSES §360—IMPEACHMENT—REBUTTAL—DISCRETION OF TRIAL COURT.

Where, in the trial of an action to recover damages for alleged assaults by defendant upon plaintiff, the defendant introduced the testimony of several witnesses to contradict statements made by the plaintiff on cross-examination concerning matters collateral to the issues, the court may, in the exercise of its sound discretion, permit the plaintiff in rebuttal to prove her good reputation for truth and veracity in the community where she resides. On the facts stated in the opinion there was no abuse of judicial discretion in the admission of such rebuttal testimony.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1165, 1166.]

2. ASSAULT AND BATTERY §29—CIVIL ACTION—CHARACTER OF DEFENDANT.

In a civil action the character of a party is not admissible as evidence to disprove the act with which he is charged.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 42.]

Appeal from District Court, Bourbon County.

Action by Neta Colvin against Ed Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Oyler, of Iola, and Sheppard & Sheppard, of Ft. Scott, for appellant. Hubert Lardner and Hudson & Hudson, all of Ft. Scott, for appellee.

PORTER, J. Neta Colvin, the plaintiff, resides with her husband and children on a farm near Bronson, in Bourbon county. Ed Wilson, the defendant, is a married man living near the plaintiff's home. The two families were neighbors and visited back and forth. Mrs. Colvin brought this action

against Wilson to recover damages for two alleged assaults upon her person. The defendant answered with a general denial. The jury returned a verdict in plaintiff's favor for \$500, upon which the court rendered judgment. Defendant appeals.

The plaintiff testified that on two occasions defendant came to her home during the absence of her husband and forcibly grabbed her in his arms, pulling her close to him; that she screamed and tried to get loose and struggled with him for two or three minutes until he desisted. She testified that on the second occasion he tried to induce her to give him a kiss, and that he subjected her to other indignities.

[1] 1. The principal contention of appellant is that incompetent testimony was admitted over his objections. On rebuttal, plaintiff produced three witnesses who testified that her general reputation for truth and veracity in the community where she resided was good. The objection to this was based on the claim that no one had attacked her reputation as to truth and veracity, and therefore it was error to admit proof of such general reputation in rebuttal. The determination of the question depends upon what constitutes an attack upon the credibility of a witness. The evidence was not offered because the plaintiff was a party, but because she was a witness. On cross-examination counsel for defendant asked her a number of questions upon collateral matters, illustrated by the following:

"Q. And you never fainted before this? A. No, sir. Q. In your life? A. No, sir; I never did. Q. You didn't tell Mrs. Howard that you was out in the cow lot and a cow got after you and frightened you before this occurred? Did you tell her that? A. No, sir."

Similar questions asked her as to statements made to Mrs. Leek were answered by the plaintiff in the negative. The defense subsequently called as witnesses Mrs. Howard and Mrs. Leek, who flatly contradicted plaintiff's statements on these matters. Again, on cross-examination, plaintiff was asked if she had ever flirted with defendant at his home, and if she had ever winked at him, to both of which questions she answered "No." The defense subsequently called Mrs. Wilson and her husband, who testified that plaintiff had flirted with him at his home and had winked at him. The defendant likewise called other witnesses who contradicted plaintiff on other wholly collateral matters. In each instance counsel asked the contradicting witnesses questions for which he claimed he had laid the proper foundation by the previous examination of plaintiff. The manifest and only purpose of the cross-examination as to these matters and the introduction of the testimony contradicting plaintiff's statements in respect thereto was to impeach her veracity as a witness; and we can conceive no sufficient reason why

testimony showing the plaintiff's general reputation as to truthfulness and veracity was not competent on rebuttal. It is insisted, however, that her reputation for truth and veracity was presumed to be good until attacked. This is, of course, fundamental. But it is also insisted that no attack upon her reputation had been made. If defendant is correct in the latter contention, he cannot claim that he suffered any prejudice by the admission of testimony tending to establish something presumed and conceded to be true. The defendant, however, did make an indirect attack upon the credibility and veracity of the witness. In *Clem v. State*, 33 Ind. 418, 427, it was said:

"The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and upon his denial, calling other witnesses to show that he did make such statements, is to create a belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case the credibility of the witness is impaired. * * * If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case."

The same conclusion was reached by the court in the case of *National Bank of Bartlesville v. Blakeman*, 19 Okl. 106, 91 Pac. 868, 12 L. R. A. (N. S.) 364. In the opinion in that case the Oklahoma court concedes that there is an irreconcilable conflict in the authorities, and adopts the rule favoring the admission of such testimony in rebuttal as one founded upon the better reason.

However, we do not wish to be understood as favoring the adoption of the hard and fast rule that, wherever proof has been admitted showing contradictory statements of a witness who is a party concerning matters foreign to the issues, the party whose veracity as a witness in the particular instance has been assailed has then the absolute right to offer rebuttal testimony to show his general reputation for truth and veracity. The better rule, we think, is to leave the question of the admissibility of such rebuttal testimony to the sound discretion of the trial court. In view of the course pursued by the defendant in the case at bar, there was certainly no abuse of the trial court's discretion. The main issue was whether the alleged assaults were committed. There was a flat contradiction in the testimony of the two parties as to what occurred. Aside from his denial of the assaults, the testimony offered by defendant consisted for the most part of attempts to show that the plaintiff had testified falsely as to wholly collateral matters inquired of in cross-examination.

[2] 2. The defendant offered to prove that

his general reputation in the community as a moral, chaste, and law-abiding citizen was good, to which the court sustained an objection. It is urged by plaintiff that defendant failed to produce this testimony in support of the motion for a new trial. His own affidavit was filed stating that the three witnesses whose testimony was rejected would, if permitted, have testified that his general reputation in these respects was good. Under section 307 of the Civil Code (Gen. St. 1909, § 5901) he should have produced the evidence "by affidavit, deposition or oral testimony of the witnesses." However, no error was committed. In a civil action the character of a party is not admissible as evidence tending to disprove the act with which he is charged. In *Curtis v. Hoadley*, 29 Kan. 566, where defendant was charged with fraud, the judgment was reversed for error in admitting evidence of defendant's reputation for honesty and fair dealing. To the same effect is *Simpson v. Westenberger*, 28 Kan. 756, 42 Am. Rep. 195.

The judgment is affirmed. All the Justices concurring.

CITY OF TOPEKA v. BROOKS et al. (two cases). (Nos. 19860, 20632.) *

(Supreme Court of Kansas. Feb. 10, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \Leftrightarrow 878(1), 891—CONSTRUCTION—PARTIAL SATISFACTION — JOINT DEBTORS — RELEASE.

A city obtained a judgment against one member of a partnership for damages sustained by the fraudulent acts of the partnership and failure to complete a contract for the construction of a sewer. It released the judgment in a written instrument, expressly reserving the right to sue the other partner and the surety on the contractors' bond. *Held*:

(a) That the release of the judgment against one of those jointly and severally liable was in effect a covenant not to sue, and did not prevent the city from subsequently prosecuting an action against the other partner and the surety. *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618.

(b) That a partial satisfaction of a judgment against one joint debtor and the release of the same will operate only as a payment pro tanto of the indebtedness of the other debtors.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1653, 1655, 1702, 1703.]

2. JUDGMENT \Leftrightarrow 878(1)—JOINT DEBTORS—RELEASE—TENDER OF PAYMENT.

In a subsequent action, brought by the city against the other joint debtors, the defendants tendered to plaintiff and offered to pay into court the judgment against the other joint debtor which had been released. *Held*, that defendants could not better their position by offering to pay the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1653, 1655.]

3. DAMAGES \Leftrightarrow 72 — CREDIT FOR COUNTERCLAIM—FEES AND EXPENSES.

In the first action the city, in addition to the judgment which it released, obtained a judgment applying upon the indebtedness of plaintiff

a claim which the city owed him personally and upon which he had brought the action. *Held*, that as the defendants in the present action were given credit for the amount of this counterclaim, it was proper to render judgment against them for reasonable costs, attorneys' fees and expenses incurred by the city in establishing its right to the credit.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 147-161.]

4. MUNICIPAL CORPORATIONS \S 347(1)—CONTRACTS—ACTION ON BOND—ESTOPPEL.

The obligation of the surety company in this case is held to be an unconditional promise to answer for the defaults of the contractors, and therefore the city is not estopped to maintain an action upon the bond by reason of the fact that before the fraud was discovered it paid the contractors in full, nor by reason of the fact that the surety company released certain funds it held to indemnify itself against loss, under the belief that the city had accepted the sewer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 876.]

Appeal from District Court, Shawnee County.

Action by the City of Topeka against G. W. Brooks and the Title Guaranty & Surety Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Garver & Garver and Edwin D. McKeever, all of Topeka, for appellants. George P. Hayden and F. G. Drenning, both of Topeka, for appellee.

PORTER, J. The city of Topeka recovered in this action a judgment for \$19,231.97 against one member of a firm of contractors and the surety company for overpayments made upon a contract for the construction of a sewer. The defendants appeal.

The action originally was against G. W. Brooks and M. W. Gilmore, partners as Brooks & Gilmore, and their surety, and was commenced October 1, 1907. The sewer had been completed in 1905. While the action was pending, Gilmore brought suit against the city to recover an amount due him upon an individual contract for certain paving work, and in that case the city pleaded as a defense to his claim the same matters which are alleged in the petition in the present case. On the trial of that case it was determined that Gilmore owed the city the sum of \$8,327.78 on account of the overpayments to Brooks & Gilmore on the sewer contract. Gilmore was given credit for \$3,580.88 due him on his paving work, and the city was given a judgment against him for the balance of \$4,746.90. That judgment was never paid, and on June 19, 1914, the city agreed with Gilmore that if he would assist in the preparation of this case for trial, look up his sewer records and "rock notes," and testify at the trial, the city would release and satisfy the judgment. This agreement was carried out; the judgment was released by a written instrument expressly reserving to the city the right to proceed against Brooks, the former partner of Gilmore, and against the

surety company. In the present case a referee was appointed in October, 1914, who found against Brooks and the surety company, and the district court rendered judgment in accordance therewith.

The referee found, among other things, that Brooks and Gilmore entered into the partnership August 1, 1904, for the sole purpose of performing the contract for the construction of the sewer in question, and as partners never engaged in any other enterprise; that James F. McCabe, as city engineer, without the knowledge or consent of the mayor and city council, included in the monthly estimates, and the city paid, at contract prices for different sizes of main and lateral sewers which the contractors did not furnish or construct; that he also raised the grade throughout the system from 1 to 11 feet above the grade provided in the plans, and so relieved the contractors from excavating and backfilling to the amount of more than 6,000 cubic yards, making no deduction in the monthly or final estimate for such omitted work; and that Brooks & Gilmore had full knowledge of the fraud, and knowingly overcharged and received pay for all the extra work, as well as for the work omitted; that acting thus in collusion with the city engineer they received pay for many yards of loose rock more than that actually excavated, and also received from the city pay for the excavation of about 3,000 cubic yards of solid rock, although they had excavated less than 1,000 cubic yards. There were many other items unnecessary to mention here, in which the city was overreached in this manner. The referee found that as a part of the secret agreement between the partners and McCabe, and upon his demand, they paid to him for his personal use at different times while the work was in progress sums amounting to \$2,500.

[1] 1. The first claim is that the city, having satisfied and released the judgment against Gilmore for the wrongs complained of, is barred from maintaining this action to recover damages for the same wrongful acts. The defendants rely upon the principle declared in *Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881, the first paragraph of the syllabus of which reads:

"Where several persons jointly commit an injury, the liability is joint and several, and the party injured may sue all of them in a single action, or he may sue them separately at the same time; but, although several judgments may thus be obtained, there can be but one satisfaction, and the acceptance of payment in full upon the judgment obtained against one of such persons will operate as a bar to the further prosecution of actions for the same injury against any of the others."

In *Railway Co. v. McWherter*, 59 Kan. 345, 351, 352, 53 Pac. 135, 137, it was said in the opinion:

"The soundness of the general rule that a settlement with one of two joint tort-feasors ordinarily discharges both, is recognized,"

—but the court also recognized an exception to the rule in a case where “the wrongful act is not done jointly by the persons from whom compensation is sought, but is the deed of one or the other and not of both.” In such a case the court said it was “unable to perceive on what principle a settlement with and discharge of one affects the cause of action against the other.” The defendants’ contention is this: On the identical cause of action stated in the petition in this case, the city recovered a judgment against one of the firm of partners contracting with the city to construct the sewer. The legal liability upon which it recovered that judgment was the same as in this case, the liability of one partner for the wrongs committed by the firm; and, while the liability of each partner was joint and several, each was liable for the same amount. It is insisted, therefore, that every element is present upon which the rule in *Westbrook v. Mize*, supra, is predicated. The trial court approved the referee’s conclusion of law that the release of the Gilmore judgment did not release or satisfy the city’s claim against the other partner “except as to the amount actually collected by the city from Gilmore,” which was the sum due him on his paving contract. This ruling was based upon the authority of *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. 618, *Melxell v. Kirkpatrick*, 29 Kan. 679, and the statute authorizing compromises by partners or joint debtors. Gen. Stat. 1909, §§ 5507-5511. In the *Edens* Case the opinion contains a comprehensive review of the authorities by Mr. Justice Benson, who wrote the opinion. That case differs from this in two respects: There the release was executed before any judgment had been rendered, here after judgment against the joint wrongdoer; in that case no partnership liability was involved, here as to one of the defendants the liability was that of a partner. In the *Edens* Case the rule adopted in New York and believed to be in accordance with the weight of reason and of modern authority was followed. That rule is that the intent of the parties to the release controls, and where the creditor or injured party expressly reserves the right to pursue the other wrongdoer, the release of one cannot be set up as a defense by the other. The compromise or satisfaction is regarded as a covenant not to sue, instead of a technical release. If, on the other hand, it is an absolute release, the rule declared in *Westbrook v. Mize*, supra, controls, and the instrument necessarily discharges the liability of any other person either jointly or as surety therefor. We perceive no adequate reason why the intention of the parties to the compromise should not be carried out or a different rule enforced on the mere ground that the compromise or release was entered into after judgment had been rendered. It was in effect just as much a covenant not to sue—

that is, not to pursue the person further upon the judgment—as was the agreement in the *Edens* Case, which was given after suit was commenced and before the action had resulted in a judgment. The release of the judgment as to Gilmore expressly shows that the consideration was not accepted in full compensation for the debt or injury, and should not be given an effect contrary to the intent with which it was executed.

For another sufficient reason the defendants’ contention cannot be sustained. The statute expressly authorizes settlements by one partner or joint debtor without affecting the liability of the other. Gen. Stat. 1909, §§ 5507-5511. It is provided in section 5509 that:

“Such composition or compromise with any individual member of a firm shall not be so construed as to discharge the other copartners, nor shall it impair the right of the creditor to proceed at law or in equity against the members of such copartnership firm as have not been discharged.”

In the opinion in the *Edens* Case, supra, mention was made of section 1642 of the General Statutes of 1909 as adopting the old rule of equity in such cases. That section reads:

“Any person jointly or severally liable with others for the payment of any debt or demand may be released from such liability by the creditor, and such release shall not discharge the other debtors or obligors beyond the proper proportion of the debt or demand for which the person released was liable.”

We conclude, therefore, that a partial satisfaction of a judgment against one joint debtor and the release of the same operate only as a payment pro tanto of the indebtedness of the other joint debtors.

[2] 2. The defendants tendered in court the amount of the Gilmore judgment, and their second contention is that the partnership liability of Brooks and Gilmore was fully determined in the action against Gilmore, and therefore the city is estopped to claim a larger indebtedness than the sum then found to be due. If the city had accepted the tender, the defendants would have been discharged from further liability. *Westbrook v. Mize*, supra. But the city declined to accept it, and insisted upon establishing against these defendants a greater liability than the amount found due from Gilmore.

It seems that when the Gilmore Case was tried the city had not discovered the extent of the contractors’ fraud nor the extent of its loss thereby. Neither of these defendants was a party to the Gilmore suit. They were not bound by anything determined therein, except that any sums recovered and collected by the city in that action would to that amount reduce their liability to the city. Our statute declares that:

“All contracts which by the common law are joint only, shall be construed to be joint and several.” Gen. Stat. 1909, § 1638.

Also that:

"Suits may be brought and prosecuted against any one or more of those who are so liable." Gen. Stat. 1909, § 1641.

In *Martin v. City of Chanute*, 96 Kan. 433, 152 Pac. 20, it was held that the effect of these statutory provisions is that liability or obligation is not merged in the judgment against one of the contractors, and where such judgment remains unsatisfied it is no bar to a subsequent action against another of the debtors, citing *Jenks v. School District*, 18 Kan. 356. The judgment was not res judicata because the parties are not the same. *Martin v. City of Chanute*, supra. The defendants could not better their position by offering to pay a judgment to which they were not parties and which had been released by the judgment creditor.

[3] 3. In the *Gilmore Case* the city was obliged to pay the costs, and also incurred certain expenses for attorneys' fees and for procuring evidence to establish the fraud of the contractors. The court included in the judgment in the present case the sum of \$1,052.25 for these costs and expenses. This it is claimed was error. The referee found the expenses to be reasonable and necessary in order to establish liability against *Gilmore*. As a result of the litigation with *Gilmore* the city recovered and applied on the liability of the defendants in this action \$3,580.88, which it owed to *Gilmore* for paving, and to that extent the defendants received the benefit, having been allowed credit for that amount in the judgment in this case. The recitals of the surety bond bound the surety company to pay all damages, costs, and expenses of every kind, character, and nature incurred in consequence of the contract for constructing the sewer. The costs and expenses were properly included in the judgment. *Bank v. Williams*, 62 Kan. 431, 63 Pac. 744; *Bourke v. Spaight*, 80 Kan. 387, 102 Pac. 253.

[4] 4. The surety company presents one more contention. At the time it executed the bond it received from *Brooks and Gilmore* the sum of \$7,500 in cash to indemnify it from loss upon the bond, but under an agreement which bound it to return the money as soon as the bond was released without liability to the surety company. It alleged in its answer these facts, and, further, that after the completion of the sewer it retained the money for a time, but was forced to surrender it to *Brooks and Gilmore* by threats and a demand to return the same made by the insurance department of the state of Kansas at the instance of the contractors, and by reason of an impending suit against it by the contractors. It was further alleged that the money was returned to *Brooks & Gilmore* only upon notice from *James F. McCabe*, city engineer, duly attested by the city clerk, that the contractors had completed the work in accordance with their contract,

and that the sewer had been accepted by the city. The court sustained a demurrer to this part of the answer.

The referee found that while the city paid *Brooks & Gilmore* the balance due on the contract, it took no other action toward accepting the sewer and the work upon the contract. Had there been no false charges, no bribery or fraud, there might be some force in the claim that the city, by paying the balance to the contractors, accepted the work as completed according to the contract. But the city was not aware of the fraud and the conspiracy whereby it suffered a loss. The obligation of the surety company was an unconditional promise to make good the defaults of the contractors. Under the authority of *McMullen v. Loan Association*, 64 Kan. 298, 308, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236, and *Hier v. Harpster*, 76 Kan. 1, 90 Pac. 817, 13 L. R. A. (N. S.) 204, 13 Ann. Cas. 919, we must hold that there was no positive duty resting upon the city to discover the fraud sooner, and that, notwithstanding the delay in seeking to enforce the surety's liability, and regardless of the fact that the surety had in the meantime surrendered its indemnity, the city is entitled to recover upon the bond the full amount of the loss sustained through the fault of the principals.

The judgment is affirmed. All the Justices concurring.

BROWN et al. v. PAUL et al. (No. 20775.)
(Supreme Court of Kansas. April 7, 1917. On Rehearing, June 9, 1917.)

(Syllabus by the Court.)

1. HIGHWAYS §30(3)—NOTICE OF VIEW.

Certain land was taken for a highway, no notice of the view being served on the wife, a joint life tenant, who lived in the county, and no notice in fact to or waived by her. *Held*, that as to her the proceedings were void. Gen. Stat. 1915, § 8769.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 43, 65-67.]

2. DEEDS §133(1), 136—CONSTRUCTION—ESTATE OF LIFE TENANT.

A warranty deed was made to a son of the grantors subject to the conditions that "the above described premises to belong to the said *Ira H. Kasbeer* during his life and to his wife jointly if he should marry and while she remains his wife, or his widow, and in case he dies and leaves no issue and his widow should marry again, then the title to the said premises shall vest in the legal heirs of the said *Ira H. Kasbeer*, excepting the said widow so marrying, with the appurtenances, and all the estate, title and interest of the said parties of the first part therein." He married one of the plaintiffs, and to them were born the others, and they are all living. Subsequently the original grantors quitclaimed to the son all their right, title, and interest in the land "to him during his life and the heirs of his body * * * to have and to hold unto the said party of the second part, his heirs and assigns forever." *Held*, that the children are mere heirs apparent with no vested interest or remainder, but the wife is joint tenant

for life during wifehood or widowhood, and therefore entitled to notice.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368-370, 372, 431-433.]

3. DEEDS ¶9—CONVEYANCES.

Under section 2052 of the General Statutes of 1915, one may convey an interest in land to take effect in the future. *Miller v. Miller*, 91 Kan. 1, 136 Pac. 953, L. R. A. 1915A, 671, Ann. Cas. 1917A, 918.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 5.]

4. HIGHWAYS ¶64—INJUNCTION—DEMURRER.

The demurrer to the petition was properly sustained as to the children on account of their uncertain and contingent interest, if any, in the land.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334.]

5. HIGHWAYS ¶64—INJUNCTION—DEMURRER.

As to the wife the demurrer was erroneously sustained, and unless within 60 days from the filing hereof with the clerk she signify her willingness to proceed no further, the injunction is to be made permanent.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334.]

Appeal from District Court, Anderson County.

Suit by Hannah F. Brown, Lola F. Gregg, and Clara A. Kasbeer against N. T. Paul and others. Judgment for defendants on sustaining a demurrer to the petition, and plaintiffs appeal. Order sustaining the demurrer sustained as to plaintiffs Hannah F. Brown and Lola F. Gregg, and reversed as to plaintiff Clara A. Kasbeer, with directions to grant the injunction in her favor, unless she indicates her willingness not to proceed further.

F. J. Oyler, of Iola, for appellants. J. Q. Wycoff, of Garnett, for appellees.

WEST, J. A road was established through certain land in which the plaintiffs claim an interest, and, not having been served with notice of the view, and having had no notice thereof, and not having been present thereat, they brought this suit to enjoin the opening of the proposed highway. A demurrer to their petition was sustained, and costs assessed against the plaintiffs, who appeal. They claim to be remaindermen and to have such an interest in the land as entitled them to notice and to the maintenance of this suit. The defendants contend that the plaintiffs have no vested interest, and have no right to require notice or to be heard. The plaintiffs are the wife and daughters of Ira H. Kasbeer. In 1884 the land was conveyed by John S. and Hannah Kasbeer to their son, Ira H. Kasbeer, by warranty deed, subject to the following conditions:

"The above described premises to belong to the said Ira H. Kasbeer during his life and to his wife jointly if he should marry and while she remains his wife, or his widow, and in case he dies and leaves no issue and his widow should marry again, then the title to the said premises shall vest in the legal heirs of the said Ira H. Kasbeer, excepting the said widow so marrying, with the appurtenances, and all the estate, title and interest of the said parties, of the first part therein."

[1-3] It will be observed that this conveyance seems to have vested a life estate in Ira H. Kasbeer and his wife jointly, should he marry, to continue as such joint life estate to the two and to her surviving, while she should remain his wife or widow; that in case he should die without issue, and she should marry again, then the title to vest in his legal heirs, counting out the widow, so that in case his parents were living it would go to them under the statute of descents and distributions. What should happen in case he died leaving children and she remarried was not stated, and need not trouble us, for the reason that he and his wife and two daughters are still living. In 1897 the parents executed a quitclaim deed to Ira H. Kasbeer running to him during his life and to the heirs of his body to have and to hold "unto the said party of the second part, his heirs and assigns forever." This would seem to vest him with their reversionary interest, or with whatever fee they retained when making the first conveyance.

Section 2049 of the General Statutes of 1915 provides that the term "heirs," or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; "and every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant." In *Kirby v. Broadbush*, 94 Kan. 48, 50, 145 Pac. 875, the court, in discussing the rule in *Shelley's Case*, said of the grantor:

"His essential purpose is, as the rule interprets it, to vest the fee in the grantee, but to disable him from alienating it. This he cannot do, and the attempted restriction is ineffective."

In *Howe v. Howe*, 94 Kan. 67, 145 Pac. 873, the conveyance was to the parties of the second part, "their blood heirs and assigns"; the warranty running to the second parties, their heirs and assigns, a life estate to the grantor being reserved by a separate clause. It was held that under this conveyance the grantees were to have power to convey, but if no conveyance were made the land was to descend to their blood heirs only, and that the words "blood heirs" were words of limitation, and not of purchase; that the limitation was void, and the grantees took estates in fee simple, and not estates for life. In the opinion (94 Kan. at page 69, 145 Pac. 873) a sentence from *Washburn on Real Property*, (6th Ed.) § 163, was quoted with approval, to the effect that an estate to one and his heirs male or heirs female would be regarded as a fee simple; the limitation to the particular class of heirs being regarded as surplusage. Another quotation from *Hammond's Blackstone's Commentaries* followed to the effect that the grantor cannot change the state's law of descent and make the property descend to his sons only.

In *Miller v. Miller*, 91 Kan. 1, 136 Pac. 953, L. R. A. 1916A, 671, Ann. Cas. 1917A, 918,

the deed ran to the son for life, the remainder to his wife for life, or so long as she should remain his widow, remainder in fee to the heirs of his sons of and in default of such heirs, reversion to the grantor. It was held that the heirs of the body of the grantee could not be ascertained until his death, and that the children in being at the time of the trial would take nothing under the deed, unless they outlived their father. It was also held that under section 3 of chapter 22 of the General Statutes of 1868, and section 2062 of the General Statutes of 1915, present and future, as well as vested and contingent, estates can be passed by deed.

Under the most favorable construction of the two deeds the children are contingent remaindermen and heirs apparent in whom no estate has as yet vested, and the wife, in addition to being heir apparent to her husband, is joint life tenant with him during her widowhood and widowhood. The first deed expressly provided that when Ira H. Kasbeer took a wife she should become joint tenant with him in the life estate granted subject to the conditions referred to, and, having become his wife, and thus come into her inheritance so to speak, it was not in the power of the grantors to divest her of the estate with which they had already clothed her. She was entitled to notice.

The wife being a resident of the county where the land is situated, and having done nothing to take the place of notice, the authorities were without jurisdiction to appropriate her land for highway purposes. Gen. Stat. 1915, § 8759. This doctrine was settled as long ago as 1877, and has been repeatedly declared since. *Com'rs of Wabaunsee County v. Mühlenbacker*, 18 Kan. 129; *State v. Farry*, 23 Kan. 731; *Com'rs of Chase Co. v. Carter*, 30 Kan. 581, 1 Pac. 814; *Bourbon County v. Ralston*, 79 Kan. 432, 100 Pac. 288.

[4, 5] It appears that after the ruling on the demurrer and prior to the filing of formal notice of appeal the road was formally opened, and is now in general use. Counsel for the defendants contends that this renders this suit moot, and an injunction order incapable of enforcement, and cites authorities on the proposition that under such circumstances a ruling sustaining a demurrer will not be reviewed. In *Knight v. Hirbourn*, 64 Kan. 563, 87 Pac. 1104, the injunction suit involved the possessory right to a corpse after it had rested in an Ohio cemetery for two years. The court said that when the subject-matter of the suit has ceased to exist, and any order in respect thereto has become impossible of performance, the controversy presents nothing to be adjudicated but the question of costs. In *State ex rel. v. Insurance Co.*, 88 Kan. 9, 127 Pac. 761, it appeared that during the pendency of an action to restrain companies from unlawfully combining an act was passed, covering the matter, so that no substantial benefit could be gained by the in-

junction prayed for, and it was held that as nothing of substantial benefit could have been gained, the court was not required to give a judgment which could not be effective. To a somewhat similar effect is *Hurd v. Beck*, 88 Kan. 11, 45 Pac. 92, and *Teterick v. Parsons*, 90 Kan. 21, 64 Pac. 1028, where, pending an appeal from an order granting mandamus, the subject of the controversy was disposed of; held that the appeal would be dismissed on the ground that the order had become incapable of enforcement. These actions neither in principle nor in fact apply to the one before us. Here the wife's land was taken and the road opened without jurisdiction, and while the suit was to enjoin the defendants from establishing a road across the land, it was not the plaintiff's fault that before her rights could be adjudicated on appeal the road was open. In addition to setting out the facts in her petition she prayed for such "further and equitable relief as to the court may seem just and proper under all the facts and circumstances of the case." *Bonnewell v. Lowe*, 80 Kan. 769, 104 Pac. 853. Had the notice been given, or had the wife waiving this matter appeared and demanded damages, injunction would not lie. Doubtless in case of allowance to her of proper damages she would not desire further to obstruct the continued use of the road.

In view of the foregoing and of all the circumstances the order sustaining the demurrer is sustained as to the children Hannah F. Brown and Lola F. Gregg, and reversed as to the wife Clara A. Kasbeer, with directions to grant the injunction, unless within 60 days from the filing of this opinion with the clerk of this court the plaintiff Clara A. Kasbeer shall signify to the court below her willingness to proceed no further herein. All the Justices concurring.

On Rehearing.

The former order was made on the theory that the controversy might be adjusted. But the defendants have moved for leave to answer, and the cause will therefore be remanded for further proceedings in accordance with the former opinion, including leave to answer as to Clara A. Kasbeer. The motion for rehearing is denied. All the Justices concurring.

STATE ex rel. BREWSTER, Atty. Gen., v. BENTLEY, Mayor, et al. (No. 21333.)
(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §—48(1)—STATUTES §—94(1), 120(3)—CITY MANAGER PLAN—CONSTITUTIONALITY.

The act of the Legislature entitled "An act relating to the government of all cities in Kansas, and to establish an optional form of government," approved February 17, 1917, is a valid and constitutional enactment, so far as its operation and effect is challenged in this action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128; *Statutes*, Cent. Dig. §§ 103, 171.]

2. MUNICIPAL CORPORATIONS ¶48(1)—CITY MANAGER PLAN—ELECTION—PETITION.

The provision in the act which requires the mayor to call a special election to submit to the electors the question of the adoption of the new form of government upon the filing of a petition "signed by not less than twenty-five per cent. of the total number of legally qualified electors voting for mayor at the last preceding city election" is construed to mean that the petition must be signed by 25 per cent. of the number of legally qualified votes cast for mayor at the last election, without reference to the individuals who cast them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128.]

(Additional Syllabus by Editorial Staff.)

3. CONSTITUTIONAL LAW ¶48 — CONSTRUCTION—PRESUMPTION OF VALIDITY.

Every presumption must be indulged to uphold an act of the Legislature, and every reasonable doubt will be resolved in its favor.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; *Statutes*, Cent. Dig. § 56.]

4. STATUTES ¶150—SUSPENSION—POWER OF LEGISLATURE.

The Legislature always has the power by the adoption of a later act to suspend the operation of an earlier act, and where the two acts are in conflict the later expression of the legislative will controls.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 229.]

5. MUNICIPAL CORPORATIONS ¶125—CIVIL SERVICE LAW—REPEAL.

The civil service law has not the force of a constitutional provision, and may be repealed as to one class of cities and remain in effect as to others.

Original mandamus by the State of Kansas, on relation of S. M. Brewster, Attorney General, against O. H. Bentley, Mayor, and others, being the Board of Commissioners of the City of Wichita and others. Peremptory writ allowed.

S. M. Brewster, Atty. Gen., and Chester I. Long, Earl Blake, and Thos. C. Wilson, all of Wichita, for plaintiff. Jas. A. Conly, of Wichita, for defendants.

PORTER, J. This is an original proceeding in mandamus, and the question to be determined is whether an act of the Legislature approved February 27, 1917, which authorizes cities to adopt what is known as the city manager plan, is constitutional.

The alternative writ, issued less than a month after the law was enacted, directed the defendants, the mayor, the board of commissioners, and the clerk of the city of Wichita, to print and distribute ballots and submit to the electors the question of adopting the provisions of the act at the regular election April 3d. The election resulted in a majority of votes for establishing the new form of government. Whether the peremptory writ shall issue depends upon the validity of the statute.

Since 1909 the city of Wichita has been governed by the city commissioners' law. The new act is entitled "An act relating to

the government of all cities of Kansas, and to establish an optional form of government." It applies to all cities which shall adopt its provisions. It creates a governing board to consist of the number of commissioners provided for in the commission government act, and declares that "no distinction shall be made in titles or duties among the commissioners, except as the board shall organize itself for business." The chairman chosen by the commission takes the title of "mayor" during the year and becomes the head of the city "on formal occasions." Each commissioner draws a nominal salary, in no case to exceed \$100 a year. The commission or governing board is empowered to pass all ordinances and to provide for such offices as are necessary to carry out the provisions of the act and fix the salaries thereof.

The act requires the commission to appoint a city manager in whose hands the administration of the business of the city is placed. He holds office "at the pleasure of the board," is chosen "solely upon the basis of administrative ability," and without reference to residence qualifications. He receives a salary to be fixed by the commission, and is held responsible to the commission for the administration of all the affairs of the city. Administrative departments of law, service, public welfare, safety, and finance are created. All appointments "except department heads" are made by the manager, and "department heads" are required to report to him. The act also establishes what is known as the "budget system" of accounts and expenditures.

The foregoing presents a summary of the principal changes established in the government of cities adopting the act.

[3] We have often declared that every presumption must be indulged to uphold an act of the Legislature, and that every reasonable doubt will be resolved in its favor. The defendants realize that the statute in question lies intrenched behind these presumptions. More than 20 reasons are presented for striking down the statute, and the attack is made from all sides and leveled at every supposed salient, the general assault being preceded by what may be regarded as a "tir de barrage" or "curtain of fire," consisting of objections that the title of the act is not sufficient, and because of this and other reasons the act is in conflict with article 12, § 1, of the state Constitution, and that it attempts to delegate legislative powers in violation of section 2 of the Bill of Rights.

[1] The title of the act is sufficient. The act contains but one subject, which is clearly expressed in the title, and which is to authorize the establishment of an optional form of government in all cities. The Constitution does not contemplate that the title shall be an abstract of the entire act. *Rural School District v. Davis*, 96 Kan. 647, 152

Pac. 666. The contention that the title is too narrow on the ground that the act changes the primary election law will be considered presently in connection with other general objections to the act.

The act is in no sense a special one. It is as general as possible for the Legislature to make it covering the subject. It applies to all cities which see fit to adopt or submit for adoption the city manager plan of government. It is said, and the court takes judicial notice of the fact, that a dozen or more cities adopted its provisions at the recent election. The decision in *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1018, 22 L. R. A. (N. S.) 534, upholding chapter 114 of the Laws of 1907, empowering cities to adopt the commission form of government, completely answers the contention that the act attempts to delegate powers. See, also, *Wulf v. Kansas City*, 77 Kan. 358, 365, 94 Pac. 207.

A general assault is made against the act on the ground that it violates article 12, § 5, of the state Constitution. It is said that the governing board or commission is permitted to employ a city manager and fix his salary without restrictions as to the amount. What has come to be known as the city manager plan or Dayton plan of administration of municipal affairs contemplates the employment by the city of an executive experienced in business and with technical skill and knowledge which will enable him to conduct the city's business so far as practicable just as a great private business is successfully conducted and thereby substitute efficiency and economy for inefficiency and waste. The Legislature was not proceeding blindly in leaving the matter of his salary to the discretion of the governing board. The fixing of his salary was not only left with the board, but the act expressly declares that in selecting the manager qualifications as to residence should not control, so that, if deemed advisable, the board may choose as manager a nonresident of the state. Recognizing the difficulty in fixing a salary without information as to the amount necessary for a city to pay in order to secure the services of a manager suitable to its requirements, the Legislature also saw fit to leave to the discretion and judgment of the commission the determination of what the city could afford to pay for the services of its manager. In the wisdom of the Legislature no special restriction was deemed necessary to prevent an abuse of power in fixing the salary of the manager.

In *Wulf v. Kansas City*, supra, the validity of chapter 115 of the Laws of 1907 was attacked on the ground that it attempted to delegate to a park board the power to incur indebtedness and levy taxes in violation of this same section of the Constitution. Section 4 of the act authorizes the park board at will to "appoint, employ and discharge such engineers, surveyors, attorneys, agents, clerks and servants as it may deem necessary, and

fix the duties and compensation of all such appointees." Section 8 of the act authorizes the park board to "create and provide for the payment of debts; draw warrants upon the city treasurer; purchase, possess, sell and convey real and personal property; make contracts; issue bonds; levy taxes and special assessments; and do all other acts proper or necessary to carry out the provisions of this act, subject only to the limitations contained in this act." In many other respects the Legislature conferred power and authority limited only by the judgment and discretion of the park board. In passing upon the contention that the act is repugnant to article 12, § 5, of the Constitution, the following extract from the opinion in the early case of *Hines v. Leavenworth*, 3 Kan. 186, 204, was quoted:

"When a law is passed embracing any of the subjects mentioned in the fifth section, it is the duty of the court, when called upon, to determine whether it contains restrictions, and if it does contain them the law must be held to be valid, notwithstanding the members of the court might doubt their sufficiency to prevent abuses. It is a subject wholly under the control of the political departments of the government. Whatever the Legislature determines to be a sufficient restriction, if it be a restriction at all, must be final."

It was held that the park board act was not in conflict with section 5 of article 12 of the Constitution, and further that it does not attempt to delegate legislative powers. It is urged, however, that the act is in direct conflict with this provision of the Constitution (article 12, § 5), because, it is said, it places no restrictions on the powers of cities in taxation, assessment, borrowing money, contracting debts, and loaning their credit. Aside from creating the office of a general manager, upon whose shoulders are placed all the purely administrative functions heretofore exercised by the commissioners or by the mayor and council, and directing that certain administrative departments be established, the only other radical change in the plan of city government which the new act provides for is the budget system, which is especially designed as a restriction upon the power of the city in contracting debts. The very purpose of the budget is to compel the adoption of practical business methods in the appropriation and expenditure of the finances of the city. To this end the act requires the manager to prepare and submit to the governing body a yearly budget and to keep the city fully advised as to its financial condition and needs. The public is to have ample opportunity to be heard upon the various items of the proposed budget before it is finally adopted by the governing body. Section 14 of the act provides:

"Sec. 14. The accounts of the city shall be kept by the treasurer of the city in such a way that a full statement of the city finances may be made each month. Expenditures shall be legal only on the basis of appropriations in the budget, and on the authority of warrants issued by the director of finances countersigned by the

manager. In no case shall warrants be issued to exceed the balance in such fund. * * * Opportunities for public hearings on the making of the city budget shall be given during the two weeks preceding the submission of the estimates to the commission. The budget shall then be printed in the city papers and a further public hearing given by the commission."

These restrictions were deemed by the Legislature to be sufficient, and since they are restrictions, the court has no power to strike down the law on the ground that the court might differ with the Legislature as to their sufficiency. Moreover, it must be remembered that all the restrictions on the power of cities in taxation, assessment, contracting debts, and borrowing money which are imposed by the laws in force when the act was adopted remain in full force and effect. The act now under consideration contemplates merely a modification of the commission form of government in those cities adopting its provisions. The governing board is controlled by the provisions of the laws already in force as to cities of a given class, subject only to the restrictions and limitations imposed by the new act. The commission or governing board enacts all ordinances of the city, retaining all the legislative functions as before; it levies the taxes, determines the policies, and decides generally what shall and shall not be done. It must, however, appoint a general manager, to whom the act gives power and authority to administer the business affairs of the city. The board decides what is to be done; the manager proceeds to do the thing in the way that seems best to him as the most effective and economical in the interests of the city.

It is contended that the act is in conflict with other statutory requirements, especially the general election laws, which provide how pollbooks shall be used in registration. It appears that the registration books were closed ten days before the election, as provided by section 1069, General Statutes of 1915. Of course, they remained closed until after election, and if, as it is claimed, 1,500 voters were prevented from expressing their views upon the proposed adoption of the new law, they were disfranchised solely because of their neglect to register. It is said that the act conflicts with the primary law, more particularly sections 4175 and 4176 of the General Statutes of 1915, the former of which requires the city clerk to publish the names of candidates 45 days preceding the primary, and the latter providing for the filing of nomination papers not less than 40 days before the primary. In city elections under the commission form of government parties are not recognized, and the primary law provisions "for the organization and government of political parties" have no application. The city manager act leaves the general election laws as they were under the commission form in so far as practicable.

The act became a law February 17, 1917, and it was recognized that, as the election for commissioners would occur April 3d, the new act could not be submitted in time for adoption this year, if all the provisions of the election laws were observed. In section 18, therefore, the act provides that in any election called in the year 1917 for voting upon the adoption of the act the election should be held within 15 days of the filing of the petition, and candidates should be permitted to file their petitions within 10 days of the election. These provisions did not repeal the general laws applicable to elections under the commission form act, either impliedly or otherwise. The general law continued in force, except as the Legislature in its wisdom saw fit to provide in those cities where a petition asked for submission of the new law at the general election in April. The general election laws, not having been repealed, do not need to be revived; and for the same reason it was not necessary to set out in the new act the sections of the old law which were for the time being superseded.

[4] The Legislature always has the power by the adoption of a later act to suspend the operation of an earlier one, and where two acts are in conflict, the later expression of the legislative will controls. *Topeka v. McCabe*, 79 Kan. 329, 99 Pac. 602; *Hicks v. Davis*, 97 Kan. 312, 318, 154 Pac. 1030; 26 A. & E. Ency. L. 761.

[5] The civil service law has not the force of a constitutional provision; it may be repealed as to one class of cities and remain in effect in others. The Legislature of 1911 (chapter 95, § 6) suspended its operation in all cities of less than 30,000 population governed by commissions. In the act now under consideration the manager is given the option to require the appointment of a civil service commission or not as he sees fit.

[2] The last of the numerous contentions to be considered is one which is not directed against the validity of the act, but which is based upon the alleged insufficiency of the petition asking for the submission to the voters of the new law. It calls for a construction of the provision in section 16 which requires the mayor to call the election upon the filing of a petition with the city clerk "signed by not less than twenty-five per cent. of the total number of legally qualified electors voting for mayor at the last preceding city election." The defendants' claim is that this means 25 per cent. of the same persons who actually voted for mayor two years before. The certificate of the clerk attached to the writ shows 12,580 votes cast for mayor at the election in 1915 and more than 3,812 duly registered voters signed the petition. As suggested by the plaintiff:

"Unless the Legislature intended that the wishes of the voters of two years ago, many of whom may have moved elsewhere and some of whom may have died, should be ascertained,

rather than the wishes of the present citizens and voters, the petition is valid, as 3,145 qualified signers are all that is required, while more than 3,812 actually petitioned."

What the Legislature had in mind, of course, was one-fourth of the electors. If that percentage of the voters signed the petition, it was deemed sufficient to justify the submission of the question. Usually in similar statutory provisions the last census, or the number of votes cast for some particular office at the last election, is taken as the basis from which to calculate the required number of petitioners. In this case it was the number of legally qualified votes cast for mayor at the last election, without reference to the individuals who cast them. Any other construction seems unreasonable.

Notwithstanding the length of this opinion, it must be said that the defendants with all their numerous objections to the act have not succeeded in raising in our minds the slightest doubt as to its validity.

It follows that plaintiff is entitled to judgment, and the peremptory writ will be allowed. All the Justices concurring.

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ALEXANDER v. CLARKSON et al.
(No. 20764.)*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 642—RES ADJUDICATA—FORMER LITIGATION.

All matters involved in the litigation reported in *Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576, are res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1156.]

2. JUDGMENT \S 883(1)—SETTING OFF JUDGMENTS.

Before one judgment can be set off against another judgment, there must be mutuality in those judgments and no contravening equities.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1669.]

3. GARNISHMENT \S 230 — RIGHTS OF GARNISHEE—CLAIM AGAINST DEBTOR.

Where a garnishment proceeding has been commenced by filing a petition, giving bond, and service of summons, but the garnishee makes no answer and issues are not joined, no judgment entered, and no execution issued, the garnishee acquires no claim against the debtor in such abortive garnishment proceeding by acquiring an assignment of a judgment against the debtor rendered in another action.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 435-444.]

4. JUDGMENT \S 841 — ASSIGNMENT—CONSIDERATION.

If a judgment is assigned as security for a bona fide antecedent indebtedness, the consideration for such assignment is sufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1537.]

5. ATTORNEY AND CLIENT \S 180—LIEN—NOTICE—STATUTE.

Section 484 of the General Statutes of 1915, amending section 395 of the General Statutes of 1901, is an enlargement, and not a restriction of

the methods of service of notice of an attorney's lien, and the service of a written notice of such lien upon the attorneys of record for the adverse party is sufficient, following *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 390-392.]

6. JUDGMENT \S 668(1), 883(10) — RES ADJUDICATA—SETTING OFF JUDGMENTS.

In certain prior litigation one of the defendants herein had recovered a judgment against the present plaintiff, and an attorney's lien had been properly served on the plaintiff, and subject to that lien the successful defendant in the prior case had assigned his judgment to a bank's trustee as security for a bona fide indebtedness of long standing. After the attachment of this lien, and after the assignment of the judgment, the plaintiff acquired by assignment a judgment against his judgment creditor and another, and commenced a proceeding against the debtors under the judgment assigned to him and against the attorneys holding the lien on the judgment against him and against the trustee holding that judgment. In this latter proceeding the plaintiff sought to have the merits of the original judgments reconsidered, which in effect meant to open them, and to set off the judgment he had acquired against two of the defendants against the judgment against himself, and to restrain the enforcement of the judgment against him. *Held*, that the former judgments were res judicata, that the judgment against him and the one he had acquired were not mutual, and that the contravening equities based on the prior assignment of the judgment against him and the attorney's lien thereon would not permit a set-off between the judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1181, 1188, 1680, 1681.]

Appeal from District Court, Cowley County.

Action by M. Alexander against John Clarkson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. T. Lafferty, of Kansas City, Mo., and Hackney & Moore, of Winfield, for appellant. Jackson & Noble, of Winfield, for appellees.

DAWSON, J. This case is the aftermath of prior litigation, a full summary of which is set forth in *Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576. This prior litigation had two main aspects: One was an accounting suit between the plaintiff and some of the present defendants as his partners in the milling business, and the other was an action by the First National Bank of Winfield against those defendant partners, to recover on certain promissory notes evidencing certain of the partnership indebtedness, and in which action the plaintiff, Alexander, had not been made a party defendant because of a private agreement between Alexander and the bank to that effect. In the partnership accounting case one of Alexander's partners, John Clarkson, obtained a judgment against him. The attorneys for Alexander's partners have a lien for their services on that judgment. In the bank's case a judgment was entered against Alexander's partners, and that judgment has been assigned to Alexan-

der. Subject to the attorney's lien in the partnership case the judgment in favor of John Clarkson and against Alexander has been assigned to J. E. Jarvis, president of the Cowley County National Bank of Winfield, as trustee for his bank. The attorney's lien and the Jarvis assignment antedate the assignment to Alexander.

After the appeals in the bank case and the partnership accounting case were disposed of in *Alexander v. Clarkson*, supra, decided July 10, 1915, the present action was commenced by the plaintiff against his former partners and their attorneys and the trustee to whom the judgment against plaintiff had been assigned. The petition rehearsed certain features of the earlier litigation, and narrated the plaintiff's situation as decreed by those judgments, and that the Supreme Court had refused to consider certain errors assigned in his appeal because the motion for a new trial was filed more than three days after the judgments were rendered, although filed within three days after the formal journal entry of judgment reciting the terms of the decree was approved by the trial court. The petition is cumbered to a considerable degree with what the plaintiff chooses to urge as the wrongs, hardships, and injustice to which he had been subjected as a result of the earlier litigation, and concludes with a prayer that the partnership accounts be recast, and that a new decree be entered therein, adjusting the partnership matters between the plaintiff and his defendant partners, and that he be given credit for the amount of the bank's judgment against the Clarksons, and assigned to him, and that the defendants be restrained from proceeding to enforce the collection of the judgment to which he was subjected in the partnership accounting suit. Issues were joined, and the trial court's judgment reads:

"First. That as between the Cowley County National Bank and Alexander the equities in the case (are) with the bank.

"Second. That as between the attorney's lien claim and Alexander, the equities were in favor of the attorney's lien.

"Third. That the judgment rendered on the 6th day of March, 1914, and dated back to September 19, 1913, was res adjudicata as to all questions involved in this case."

[1] The plaintiff appeals. With his alleged grievances touching the earlier and concluded chapters of the 10 years' litigious warfare between Alexander and the Clarksons and their creditors we have no present concern. Our only jurisdiction at present is to review the correctness of the judgment which we have just quoted. There are two important ends in view in every lawsuit: The first is that it be decided right; and the second, which is only less important than the first, is that it be decided. *New v. Smith*, 97 Kan. 580, 155 Pac. 1080. All the matters which were litigated between the parties in the partnership accounting suit and in the bank's case are concluded by the judgments

entered therein, and are now res judicata. Those judgments determined for all time the sum which Alexander must pay to Clarkson or his assignee, and what the Clarksons must pay the First National Bank or its assignee. It is no longer a matter of any concern that Alexander had a private agreement with the First National Bank, whereby the bank refrained from making him a defendant in its action against his partners to recover on the partnership notes, or that he and the bank official forgot or lied about that matter when the Clarksons sought to prove it, nor can the predicament in which Alexander now finds himself on account of that private agreement affect the rights of the parties as crystallized in the judgments in the earlier litigation. And it is no longer of any judicial consequence that Alexander's motion for a new trial in the earlier litigation was out of time. Those judgments, being final, cannot now be modified or disturbed.

Let us then turn to the questions involved in this appeal.

[2, 6] There is no objection to an equitable proceeding to set off one judgment against another unless intervening rights are prejudiced thereby. *Hillis v. National Bank*, 54 Kan. 421, 423, 38 Pac. 565; *Railroad Co. v. Murray*, 57 Kan. 697, 47 Pac. 835; 15 R. C. L. 820. But since the trustee of the Cowley County National Bank had secured an assignment of Clarkson's judgment against Alexander and it was also subjected to a timely lien before Alexander acquired the assignment of the First National Bank's judgment against Alexander, we see no way to set off these respective judgments against each other. In *Schuler v. Collins*, 63 Kan. 372, 374, 65 Pac. 662, 663, it is said:

"The existence of mutual judgments does not entitle a party to have one set off against the other arbitrarily as a matter of right. Whether application for set-off is by motion or through a proceeding in equity, it is to be determined upon equitable considerations, and is only allowed when it will promote substantial justice. This was the ruling in *Herman v. Miller*, 17 Kan. 328, where it was said that: 'The exercise of that power is, in a measure, discretionary, and it will not be exercised in cases in which it would be inequitable so to do.' See cases cited, and, also, *Boyer v. Clark & McCandless*, 3 Neb. 167; *Lundberg v. Davidson*, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; *Pirie et al. v. Harkness*, 3 S. D. 178, 52 N. W. 581; *Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269; *Bartlett v. Pearson*, 29 Me. 9; *Freem. Judg.* 427-467; *Black, Judg.* §§ 954, 1000."

Other decisions are to the same effect. *Pheiffer, etc., v. Harris*, 74 Ky. (11 Bush.) 400; *Silver v. Krellman*, 89 App. Div. 363, 85 N. Y. Supp. 945; *Goldman v. Tobias* (Sup.) 88 N. Y. Supp. 991; *Elms v. Arn* (Okla.) 158 Pac. 1150.

See, also, a 12-page note on the subject of setting off one judgment against another in 109 Am. St. Rep. 137 et seq.

In some jurisdictions the matter is regulated by statute. *First Nat. Bank of Louis-*

ville v. Krieger's Assignee, 89 S. W. 733, 28 Ky. Law Rep. 612. Sometimes it is held that where judgments are strictly mutual, an assignment is subject to the judgment debtor's right to set off another judgment, which he has obtained against his judgment creditor (23 L. R. A. 335, note, 15 R. O. L. 823); but where the judgments are not mutual, the ordinary rule seems to be, and ought to be, that a bona fide assignee, especially where the element of priority is involved, is protected. In 15 R. O. L. 823, 824, it is said:

"The setting off of one judgment against another is not a legal right, but is a matter of grace, and the question whether a set-off should or should not be decreed rests in the sound discretion of the court to which the application is made. * * * The action of a court of law in granting or refusing a set-off is governed by the principles of equity and justice, and allowed only where good conscience requires it. It will never be permitted when the effect would be to deprive a party of his legal rights. Accordingly, in the exercise of the power of set-off, equitable rights of persons not parties to the suit may be considered and protected. Since good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to his clients, it is a general rule that a judgment creditor cannot defeat the attorney's lien, even by giving the attorney notice of an intended set-off."

The judgments here sought to be set off against each other are not mutual between Alexander and the Clarksons. They were never coexistent cross-demands in the hands of Alexander and Clarkson. One is a judgment in favor of John Clarkson against Alexander. The other is a judgment in favor of the First National Bank against the Clarksons. Clarkson has parted with his interest in his judgment. The bank has parted with its interest in its judgment. There was no mutuality in these judgments when rendered. There is certainly none now. The rights of third parties attached before this proceeding to set off was begun, and before the present cause of action—the acquisition of the bank's judgment by Alexander—arose.

[3] We discern nothing tangible in plaintiff's claim under a garnishment proceeding commenced by the First National Bank to garnishee Clarkson's claim against Alexander. The record does not disclose that issues were ever joined in that proceeding, nor any judgment entered therein. Counsel for defendants assert that the garnishment proceeding was abandoned, and plaintiff's petition in this action infers the same, where he pleads:

"That the plaintiff never filed any answer in garnishment in that bank case because he did not and could not know whether he was indebted to the said John Clarkson or not until the matters in controversy should thereafter be ascertained by the final determination of this court in said first-named equity action."

[4, 5] There being no answer, no issues joined, no judgment by default or otherwise, no execution in the garnishment proceeding, we see no way to use it as an off-set to the judgment against Alexander; and the gen-

eral finding of the trial court is against the plaintiff on his claim to any right found on this abortive garnishment proceeding. *Hutchinson v. Nelson*, 63 Kan. 327, 65 Pac. 670.

The evidence shows that Jarvis holds the legal title to the Clarkson judgment against Alexander as trustee for his bank, which is, and for many years has been, a creditor of John Clarkson to the extent of \$10,000, and that the indebtedness was originally incurred in furtherance of the defunct partnership business. Indeed, at one time, as security for this indebtedness, Jarvis's bank had a lien on a mill the title to which stood in Clarkson's name, but the mill was subjected to the satisfaction of the partnership debts and sold as partnership property. Surely this was a sufficient consideration for the assignment, whether it was merely as security for Clarkson's indebtedness or in diminution thereof, and it is certainly quite obvious that the equities as between Jarvis and Alexander are with Jarvis as found by the trial court.

It is next urged that the attorney's lien on the Clarkson judgment against Alexander is invalid because the service of notice was insufficient. The assignee of this judgment might raise this question, but Alexander's only concern therewith is to be on his guard against paying the judgment without considering the attorney's lien thereon. If Alexander should pay the judgment in full regardless of this notice, and the attorneys having the lien should seek to hold him thereon—to make him pay a second time on account of it—his present question as to the sufficiency of the notice would be all-important. This view, however, is not presented by counsel for defendants, and it may be proper to consider the question as presented. The statute provides:

"Such notice must be in writing, and may be served in the same manner as a summons, and upon any person, officer or agent upon whom a summons under the laws of this state may be served, and may also be served upon a regularly employed salaried attorney of the party." Gen. Stat. 1915, § 484.

The written notice of the attorney's lien was served upon Alexander's attorneys of record in the action in which the judgment was rendered and in which the attorneys' services were performed. It was filed in court. Alexander knew about it. His counsel knew about it. All this was before Alexander procured an assignment of the judgment which he seeks to offset against the Clarkson judgment. In *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670, it is said that service of a written notice of an attorney's lien on the attorney of record for the adverse party is sufficient. The new statute takes nothing from the old (Gen. Stat. 1901, § 395), but adds that the notice must be in writing, and that it may be served as above provided. That the notice be in writing is imperative.

The manner of service is not so important, the chief consideration being the fact of service, that notice be brought home to the party adjudged to pay, and here there is no doubt on that point. It seems that the Legislature intended that notice might be served upon any regularly employed salaried attorney for the litigant, although the latter was not the attorney in the particular litigation. We feel quite positive that the Legislature did not intend to limit, but to enlarge, the methods of giving notice. However, it seems clear that only the assignee of the Clarkson judgment can question the sufficiency of the service of the notice of the attorney's lien. If the lien should fail, the trustee of the Cowley County National Bank would take the entire interest of the Clarkson judgment, and his right thereto is unassailable by Alexander.

This disposes of the questions directly concerned in the present case, and nothing approaching the gravity of reversible error can be discerned. We do not think it proper to extend this opinion by attempting to follow counsel for plaintiff through the wide range of their discussion of the merits or demerits of the antecedent litigation.

The judgment is affirmed. All the Justices concurring.

HENNING v. WICHITA NATURAL GAS CO. et al. (No. 20692).*

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1042(2) — HARMLESS ERROR — STRIKING ALLEGATIONS OF PETITION.

A judgment will not be reversed because allegations are stricken out of a petition, where the evidence to prove those allegations was properly introduced under the remaining allegations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4111.]

2. APPEAL AND ERROR §1046(3)—HARMLESS ERROR—BURDEN OF PROOF.

Ordinarily a judgment will not be reversed because of error in placing the burden of proof in a trial by the court without a jury, where each party has ample opportunity to introduce evidence to support his contentions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4130.]

3. MINES AND MINERALS §73½—OIL AND GAS LEASE—SALE OF PROPERTY—RIGHTS OF LESSEE.

An oil and gas lease provided: "It is agreed that should said Beck make a bona fide sale of said 160 acres before lessee commences operations to drill on said land and refunds to lessee all money paid Beck, then lessee is to cancel this lease."

An absolute sale of the property was made. One of the purposes of the sale was to defeat the rights of the lessee. *Held*, that the lessee was deprived of its right to drill on the premises, since the sale was made before the lessee commenced operations to drill.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 200.]

4. MINES AND MINERALS §73½—OIL AND GAS LEASE—DRILLING OPERATIONS.

The driving of a stake locating a gas well and of another stake locating a place to set a boiler to drive drilling machinery does not constitute a commencement of operations to drill, under the provisions of the lease set out in the third section of this syllabus.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 200.]

Appeal from District Court, Butler County. Action by Walter Henning against the Wichita Natural Gas Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Brennan, Kane & McCoy, of Bartlesville, Okl., and A. C. Malloy, of Hutchinson, for appellants. J. P. O'Meara, of Tulsa, Okl., for appellee.

MARSHALL, J. The defendants appeal from a judgment enjoining them from operating under an oil and gas lease on land near Augusta, in Butler county.

[1] 1. In his petition the plaintiff alleged that he was the owner and in the possession of certain described land, upon which the defendants, without right, were threatening and about to enter with drilling tools and drillers, for the purpose of drilling for oil and gas, and of permanently appropriating the same to their own use.

In their answer the defendants denied each and all the allegations of the petition, denied that the plaintiff was the owner or in possession of the land described, and set up a lengthy affirmative defense, a large part of which was stricken out on the motion of the plaintiff. Of this the defendants complain. All the facts set out in that part of the answer which was stricken out might have been proved under the remaining allegations; and evidence was introduced tending to prove these facts. For these reasons this complaint of the defendant is without substantial merit. No reversible error was committed in striking out part of the answer.

[2] 2. At the opening of the trial some discussion of the burden of proof was had by court and counsel. This discussion resulted in the court's directing the defendants to go ahead with their proof, and placing the burden of proof on them. The defendants insist that this was error. The trial was by the court without a jury. There is nothing in the abstract tending to show that the defendants were prevented from introducing any competent evidence tending to support their contentions. The defendants had ample opportunity to introduce all their evidence. The order in which that evidence was produced was not of very great importance. In *Bank v. Brechelsen*, 98 Kan. 193, 196, 157 Pac. 259, 260, this court said:

"It is a modern tendency of courts to attach less importance to the phrase 'burden of proof' than was formerly the case, in so far as it is supposed to relate to or affect the order in which the parties shall offer their evidence upon

a given issue. Much is left to the discretion of the trial court, and this is especially true where the trial is by the court. Where both parties have availed themselves of the opportunity to present all their evidence, the mere fact that the trial court required the one upon whom the burden of proof would not, according to the rules of evidence, rest, to proceed first, has been held not to be error."

See, also, cases there cited.

[3] 3. A temporary injunction was granted at the commencement of this action. On the trial the defendants asked that the injunction be dissolved. This request was denied. The defendants insist that the court erred in denying the request and in rendering judgment against them. Continuously from some time prior to the 4th day of October, 1912, to the 8th day of April, 1915, J. L. Beck was the owner and in possession of the real property in controversy. On the 4th day of October, 1912, he executed an oil and gas lease on this property to the defendant Wichita Natural Gas Company. The lease contained the following stipulation:

"It is agreed that, should said Beck make a bona fide sale of said 160 acres before lessee commences operations to drill on said land and refunds to lessee all money paid Beck, then lessee is to cancel this lease."

The lease was recorded on the 9th day of October, 1912. Difficulty arose between J. L. Beck and the Wichita Natural Gas Company. This resulted in litigation by which Beck sought to have the lease canceled. Judgment was rendered against him. The time for an appeal from that judgment had not yet expired when the present action was commenced. Soon after the rendition of that judgment, and some time prior to the commencement of the present action, Beck began to make efforts to sell the land, and continued those efforts until the land was sold to the plaintiff. One of the purposes of these efforts was to defeat the Wichita Natural Gas Company's lease. About the 15th day of March, 1915, Beck orally agreed to sell the land for \$8,000, and on the 8th day of April, 1915, sold it to the plaintiff and executed to him a deed therefor. The negotiations that resulted in the execution of the deed were had hurriedly. The sale was an absolute sale of the property without conditions, except that the plaintiff gave to Beck a mortgage for \$2,500 as a part of the purchase price.

The plaintiff was engaged in the oil and gas business and had obtained a franchise from the city of Wichita to furnish gas to that city in competition with the Wichita Natural Gas Company. On April 3, 1915, that company determined to commence drilling operations on the land in controversy, and communicated this fact to its agents and employés. As a result of this determination and of these communications, the defendant Frankenberger, one of the employés of the Wichita Natural Gas Company, went on the land on the 6th day of April, 1915, and located a place for drilling a well. This he did

by driving a stake in the ground at the place where the well should be drilled, and by driving another stake at the place where the boiler should be set to drive the drilling machinery. On that day Frankenberger told J. L. Beck that he had located a well on the land. Beck then told Frankenberger not to go on the land, not to drill, and not to do anything under the lease, as he intended to appeal the former case to the Supreme Court. Nothing further was done under the lease. On the 11th day of April, 1915, this action was commenced. On the next day the order of injunction was issued.

Under the condition named in the lease, the right of the Wichita Natural Gas Company to drill for gas or oil terminated when Beck made a bona fide sale of the land, if that sale was made before the company commenced operations to drill. The sale to the plaintiff was a genuine, absolute sale of the property. One of its purposes was to defeat the rights of the Wichita Natural Gas Company under the lease. The lease provided that these rights might be terminated by a bona fide sale. Beck acted within the terms of the lease and made a bona fide sale of the land to the plaintiff.

[4] 4. Another question must be determined: Had the Wichita Natural Gas Company commenced operations to drill on the land at the time the sale was made? The driving of stakes to indicate the location of a well and of a boiler to run a drilling rig cannot be said to be a commencement of operations to drill, within the meaning of the lease, especially of such operations as will defeat a sale made before the defendant has put drilling material or machinery on the ground.

Under the circumstances disclosed by the evidence, the judgment of the district court was right, and the judgment is affirmed. All the Justices concurring.

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In re HOLLOWAY'S ESTATE.

PECKHAM v. JORGENSEN.

(No. 20820.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. JURY \Leftrightarrow 17(3)—RIGHT TO JURY TRIAL ON APPEAL FROM DECISION OF PROBATE COURT.

In an appeal from a decision of the probate court wherein that court refused to set aside an appointment of an administrator on the alleged ground that the deceased was not at the time of his death a resident of the county in which the appointment was made a jury is not demandable as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 97.]

2. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 32(2)—ACTION TO SET ASIDE APPOINTMENT—INSTRUCTIONS.

Where a jury is called in such a case to pass upon disputed questions of fact, the court may instruct them as to the rules govern-

ing the submission and determination of special questions of fact, but neither party has a right to demand the giving of instructions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 222.]

3. APPEAL AND ERROR §1065—HARMLESS ERROR—INSTRUCTIONS—IN EQUITABLE ACTION.

If the case had been tried as though a jury trial could be demanded as a matter of right, and the judgment of the court had been rendered without giving independent consideration to the facts, error in charging the jury might become important, or, if the rulings in charging the jury showed that the court had misconceived the law applicable to the case or decided it upon the wrong theory to the prejudice of a party, error might be predicated on them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4219.]

4. EXECUTORS AND ADMINISTRATORS §32(2)—ACTION TO SET ASIDE APPOINTMENT—JURY.

Upon the record it is found that the court did not treat or dispose of the case as one triable by a jury as a matter of right, but, while approving the special findings returned by the jury, it made findings of its own on which its judgment was rested.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 222.]

5. APPEAL AND ERROR §1046(3)—HARMLESS ERROR—BURDEN OF PROOF.

The placing of the burden of proof, even if erroneously done, in a case triable by the court, and where the parties were permitted to and did produce all of their testimony upon the contested questions, cannot be treated as a ground of reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4130.]

Appeal from District Court, Sedgwick County.

Proceeding by C. W. Peckham, as administrator of the estate of John S. Holloway, deceased, under appointment of the probate court of Reno county, to set aside an appointment of J. F. Jorgensen, as administrator, made by the probate court of Sedgwick county. Appointment of Jorgensen, as administrator, held valid, and Peckham appeals. Affirmed.

Keith & Wright, of Wichita, for appellant. Dale, Amidon & Buckland, of Wichita, for appellee.

JOHNSTON, C. J. John S. Holloway died November 18, 1914, in the city of Mt. Hope, in Sedgwick county, and the following day the probate court of that county appointed J. F. Jorgensen administrator of the decedent's estate. Shortly thereafter C. W. Peckham was also appointed administrator of the estate of Holloway by the probate court of Reno county, and on December 17, 1914, Peckham instituted a proceeding in the probate court of Sedgwick county to have Jorgensen's appointment set aside on the ground that Holloway's true residence at his death was in Reno county, that he was only temporarily in Sedgwick county when his death occurred, and that he was then mentally incapable of

forming an intention to change his residence. The probate court denied Peckham's application, retained jurisdiction of the estate, and decided that Jorgensen should continue as administrator. On appeal the district court submitted to a jury the question of the residence of Holloway at the time of his death, and the jury found that the deceased was residing in Sedgwick county when he died. The court approved the finding and adjudged that the Sedgwick county probate court had jurisdiction of the estate, and that Jorgensen's appointment as administrator was valid. Peckham appeals.

It appears that Holloway owned several farms in Reno county near the Sedgwick county line, and had resided on them most of the time until he became ill, when he was taken to a hospital in Hutchinson. He lived there about three months before his death, and went to live at his house in the town of Mt. Hope, in Sedgwick county, and near the Reno county line, where he was cared for by a tenant until he died. The jury found upon sufficient evidence that he went to Mt. Hope with the intention of making it his permanent residence.

[1-4] Errors are assigned on the rulings of the court in instructing the jury and in denying a new trial. Instructions are not so material in a case like this, where a jury is not demandable as a matter of right. In equitable and statutory proceedings a jury is only called at the discretion of the court, and its findings are advisory, and not conclusive. *Swartz v. Ramala*, 63 Kan. 633, 66 Pac. 649; *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031; *Mathis v. Strunk*, 73 Kan. 595, 85 Pac. 590; Gen. Stat. 1915, § 7179 (Code Civ. Proc. § 279).

The appellant concedes that he was not entitled to a jury trial as a matter of course, but it is contended that the court treated the case as an ordinary action at law, accepting the findings and rendering judgment upon them the same as if a general verdict had been rendered, and that the errors in the instructions became material and available. It was competent for the court to call a jury to pass on disputed questions of fact either upon its own motion or upon request of the parties, but, as we have seen, the court is not bound by the findings made by the jury. It was at liberty to ignore them and determine the questions of fact for itself. In such a case neither party has a right to require that instructions be given. If the court had tried the case as though a jury trial was a matter of right, and had blindly accepted and adopted the findings of the jury as its own without giving independent consideration to the facts, errors in charging the jury might become important. They might also become material if they showed that the court had misconceived the law of the case and had decided it upon a wrong the-

ory—one that would prejudicially affect the result. *Vickers v. Buck*, 60 Kan. 598, 57 Pac. 517; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307. It can hardly be said, however, that the case was disposed of as an ordinary action at law. According to the record, objection was made by appellee to the submission of the case to the jury on the ground that it was a case triable before the court, but upon the application of the appellant the court determined to and did submit to the jury the question of the residence of Holloway at the time of his death. While the finding made by the jury is spoken of as a general verdict, it is no more than a special finding of the principal fact in the case. After overruling motion for a new trial and for judgment notwithstanding the verdict, the court not only approved and adopted the findings of the jury, but it made findings of its own that:

"John S. Holloway was at the time of his death a resident of Sedgwick county, Kan., and that the probate court of Sedgwick county, Kan., had jurisdiction of this said case at the time of the appointment of an administrator, and that J. F. Jorgensen, the administrator appointed by the probate court of Sedgwick county, Kan., is not the duly, legal, qualified, and acting administrator of said estate," etc.

Under the circumstances it cannot be said that the court treated the case as an ordinary one for trial by a jury. The record shows that independent consideration was given by the court to the facts, and upon the evidence it reached the same result as the jury did. The findings being only advisory, and not controlling with the court, the instructions are of little importance. Of course, if the rulings on instructions requested and refused showed that a wrong rule had been applied, and that it necessarily entered into the result to the prejudice of the appellant, the error might be available. The objections to the instructions, however, are not deemed to be grounds of reversal upon any theory.

Complaint is made of an instruction given, to the effect that, the probate court having made the appointment of an administrator, it should be treated as having been rightfully done until a showing to the contrary was made, and that the burden of proof was on the plaintiff, who was attacking the appointment to prove by a preponderance of the evidence that the probate court had no authority to make the appointment because of the nonresidence of the defendant in the county. The probate court being a court of record, its appointment based upon the ordinary application should be treated as valid until it is shown to have been without jurisdiction to make it. It is not important here whether or not the appointment is open to collateral attack. In either event the burden of proof would be upon the one attacking the jurisdiction of the court and its appointment of the administrator to prove that Holloway

did not reside in Sedgwick county when the appointment was made.

[8] Complaint is made of a requested instruction which was refused to the effect that the residence once established remains until another is acquired, and that, as Holloway lived a great many years before his death in Reno county, the presumption would be that that was his residence until he died, and that the burden would be upon the appellee to show that there was a change of residence. That instruction is faulty as to the presumption, and also as to the burden of proof. In cases of this character triable by the court itself, and where both parties were permitted to produce all their evidence on the question of residence, the placing of the burden of proof upon one party rather than the other, even if erroneously done, could not be treated as a ground of reversal. *Bank v. Brechelsen*, 98 Kan. 193, 157 Pac. 259; *Henning v. Gas Co.*, 100 Kan. 255, 164 Pac. 297.

What constitutes a residence and what is necessary to a change of residence was carefully and correctly stated by the court in one of the instructions given. The residence of Holloway at the time of his death was the question, decided by the probate court, and upon appeal the same question was presented to and determined by the district court. It was thoroughly tried out on a great mass of evidence, each party having an opportunity to offer all the testimony he had, and regardless of presumptions and the burden of proof there was ample evidence to support the finding of the court.

The judgment is affirmed. All the Justices concurring.

FITZPATRICK v. CROWTHER et al.
(No. 20797.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. DEEDS ⇨40—DESCRIPTION—REFERENCE TO PLAT.

A general warranty deed conveyed 24 lots described by numbers and as fronting on certain streets "all in Jones' addition to the city of Salina, Kansas." *Held*, the plat of the addition mentioned being then on record became a part of the deed for the purpose of identifying the property and for certainty in the description to the same effect as if the reference to the addition had been followed by the phrase "according to the recorded plat thereof."

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 81-83.]

2. COVENANTS ⇨47—WARRANTY—DESCRIPTION.

A general warranty deed described the property conveyed as 24 lots by numbers and as fronting on certain streets "all in Jones' addition to the city of Salina, Kansas, according to the recorded plat thereof." *Held*, the recorded plat became a part of the deed as fully as though incorporated therein, but only for the purpose of identifying the property and rendering the description more certain, and the grantor did not by such reference to the plat thereby rep-

resent or guarantee the courses, distances, measurements, or quantity of the lots to be as set forth in the recorded plat.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 47.]

Appeal from District Court, Saline County.

Action by F. R. Fitzpatrick against John Crowther and another, and J. W. Crowley, Jr., and another. Judgment against defendants John Crowther and another, and denying them a judgment over against defendants Crowley and another, and Crowther and another appeal. Reversed, and cause remanded, with directions.

W. B. Crowther and Z. C. Millikin, both of Salina, for appellants. O. W. Burch, B. I. Litowich, and La Rue Royce, all of Salina, for appellees.

PORTER, J. This is a three-sided lawsuit. In October, 1913, Fitzpatrick, the plaintiff, purchased from John and Joseph Crowther 24 lots in Jones' addition to the city of Salina. Six months previous thereto the Crowthers had purchased the same 24 lots from J. W. Crowley, Jr., and Edith Crowley Webster. Both conveyances were by general warranty deed, differing only in the way the property was described. The deed by which the Crowthers acquired title described the lots by numbers and as fronting on certain streets, "all in Jones' addition to the city of Salina, Kansas." The deed by which they conveyed title to the plaintiff described the lots in the same language as to number and frontage, "all in Jones' addition to the city of Salina, Kansas," with these words added, "*according to the recorded plat thereof.*" The recorded plat of Jones' addition gave the measurement of each of the lots in question as 150 in width, and the length of the blocks was stated to be 1,220 feet. In fact, the lots were each 134.8 feet wide and 1,105 feet long.

Fitzpatrick paid the Crowthers \$5,000 for the property. After discovering the actual measurements of the lots and blocks by a survey, he brought this action to recover for the difference in quantity. The Crowthers answered by a general denial, and filed a cross-petition against their grantors, alleging substantially the same state of facts respecting their acquisition of title, and asked judgment against Crowley and Mrs. Webster for an abatement of the purchase price paid to them. The court made special findings of the facts, among which are: That the Crowthers at the time they conveyed to Fitzpatrick had no knowledge of any shortage; and that when they purchased from Crowley and Webster they paid \$4,935 as consideration for the lots. The plat of Jones' addition had been filed for many years prior to the execution of both deeds. The shortage in the lots was found to be as

already stated; and the court made the following conclusions of law:

"1. The reference to the recorded plat, in the Crowther deed, made the plat a part of the deed, and the grantors, defendants John Crowther and Joseph Crowther, thereby represented to plaintiff that the lots were 150 feet in width and the blocks 1,220 feet in length.

"2. Plaintiff is entitled to recover from defendants John Crowther and Joseph Crowther the sum of five hundred and four (\$504.00) dollars, with interest at 6 per cent. per annum.

"3. Defendants John Crowther and Joseph Crowther are not entitled to recover from the defendants Crowley and Webster in this action."

The Crowthers appeal from the judgment against them in favor of plaintiff, and also from the ruling denying them a judgment against Crowley and Webster for the same shortage in the deed by which they acquired title to the lots.

There is no suggestion of fraud or unfair dealing in either of the conveyances. The parties in each transaction had before them maps showing the plat of Jones' addition, and the grantors in each deed referred to the plat and called the purchaser's attention to the size and dimensions of the lots. The court placed its decision squarely upon the effect of the words "according to the recorded plat thereof," and held that the presence of these words in the deed to Fitzpatrick made the plat a part of the deed; that although the plat had been duly recorded in Saline county for many years, it became no part of the deed to Crowthers because of the absence in that deed of specific reference thereto.

[1] The appellant concedes, and it is well-settled law, that where a deed refers to a former deed or to a plat, the reference makes such former deed or plat a part of the deed. In *Devlin on Deeds* (2d Ed.) § 1020, it is said:

"A deed, for description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself."

Among the cases cited in the note is *Miller v. Land Co.*, 44 Kan. 354, 24 Pac. 420. The patent in that case described the lands by the numbers of the government survey and stated the number of acres, followed by the words:

"According to the official plat of the survey of said lands returned to the general land office by the surveyor general."

It was held that this reference to the government patent made the description in the United States survey a part of the deed.

But we think it clear that where a tract of land has been subdivided into lots and blocks and a plat thereof has been recorded, a deed in which the property conveyed is described as certain lots or blocks in such addition shows as manifest an intention to treat the plat as a part of the description as if the words "according to the recorded plat thereof" were inserted in the deed.

How else can the property conveyed be identified except by reference to the plat? For what purpose are town plats recorded except to identify the property comprising the town or the addition? The statute provides a penalty for selling or offering for sale any lots before a plat of the town or addition has been duly filed and recorded (Gen. Stat. 1915, § 6801), and provides that all lots intended for sale shall be accurately described "by numbers, and their precise length and width" set forth (Gen. Stat. 1915, § 6797). In 13 Cyc. 634, it is said:

"Where a plat is referred to in a description in a deed it may be used to identify the land conveyed. * * * And although a map in a deed is not expressly referred to therein it may be treated as a part of the description when it was evidently intended to be so treated."

In the deed by which appellants acquired title it was intended certainly to treat the recorded plat as a part of the description, because there was and is no other way in which to identify the particular lots mentioned as being in Jones' addition, except by reference to the recorded plat.

It is well settled that another instrument may be referred to for the purpose of identifying the property conveyed, although such instrument is not mentioned in the deed. This necessarily must be true in all cases where lots in an addition or in a town plat are described by lot and block number. In 13 Cyc. 628, it is said:

"Another instrument may in some cases be construed with a deed as a part of the same transaction for the purpose of determining the identity of the property conveyed. And a recorded plat of lots may be construed with a deed in order to determine the dimensions of the property, or a town plan may be referred to."

The following description: "Gift Map No. 2, lots No. 398 to 405, inclusive"—was held to be sufficient, "if there was a map of lands in San Francisco known as Gift Map No. 2." *Pettigrew v. Dobbelaar*, 63 Cal. 396. In *Young v. Cosgrove*, 83 Iowa, 682, 49 N. W. 1040, lots were conveyed as lots 1, 2, 3, and 4 in Bayless' addition to the city of Council Bluffs. A plat of this addition was part of the public records when the conveyance was made, and the court held that obviously the grantors, by using the description of the plat then in existence, adopted the description of the plat which in effect thereby became a part of the conveyance, and further held that the grantees "thus acquired title only to lots 1, 2, 3 and 4, which are of the dimensions as shown by the plat." (Italics ours.)

There is, we discover, a dearth of authorities directly involving the precise question in the present case. In view of the common use which everywhere prevails of similar expressions in conveyances, it would seem that the question is one which might frequently arise. It appears to be one, however, of extreme novelty. The publishers of Words and Phrases and other legal dictionaries have

taken great pains to define and cite judicial definitions of phrases such as "according to law"; "according to equity"; "according to statute"; "according to the course of the common law"; "according to the course of business"; "according to conditions"; "according to established grade"; "according to discretion," etc.; but, so far as we have been able to discover, they have not seen fit to cite a judicial definition of the words "according to the recorded plat thereof." Many authorities are cited in the briefs stating the general rule, which is conceded, that a reference in a deed to a plat or another deed makes such plat or deed a part of the deed as though incorporated therein. The cases so far as we have examined them do not decide the precise question before us.

In our opinion there is no substantial difference between the two deeds in controversy. They conveyed exactly the same property both as to quantity and identity. There is but one way by which the property described in either deed may be identified, and that is, by referring to the plat of the addition mentioned in the description, which plat the statute provides shall be filed and recorded before any transfer of title. The court found that the plat of Jones' addition had been duly filed and recorded many years before the conveyances involved. In any controversy between the parties to either conveyance respecting the quantity or description of the property conveyed, the plat of Jones' addition would be competent evidence. Both deeds described the property by number as being in that addition. It would seem, therefore, that if plaintiff was entitled to a judgment for the abatement of his purchase money, his grantors were likewise entitled to a judgment against their grantors for an abatement of the price paid as a consideration for the first conveyance.

[2] It is doubtless true that in the majority of instruments conveying town lots the description concludes with the words "according to the recorded plat thereof," or words of the same import. It being firmly established that such reference makes the plat a part of the deed the same as though incorporated therein, the question is, Does the grantor thereby guarantee the accuracy of the measurements, distances, and quantities set forth in such plat? No rule of that kind obtains where the deed to the land refers to a patent issued by the United States, although by such reference the government plat and survey are thereby made a part of the deed as though incorporated therein. *Miller v. Land Co.*, 44 Kan. 254, 24 Pac. 420. The plaintiff, however, contends that the rule is different in conveyances of farm lands because any deficiency shown to exist in lands of that character is or may be prorated between adjoining owners, and that the reason for a different rule in conveyances of town lots is found in the impracticability

of prorating the deficiency. In our view, there is no substantial reason for a different rule as to the meaning of the doctrine that a reference to a recorded plat makes the plat a part of the deed as though incorporated therein, and the same doctrine as applied to another deed or to a government survey of lands. In either case the reference is for the purpose of identifying the property, and for that purpose alone the other deed or plat is considered as incorporated in the instrument. If the rule laid down by the trial court were to be adopted, it would, we think, astonish the legal profession of this state, and compel every grantor of lots in a town or subdivision, for his own protection, to insert in all such deeds a statement that courses, distances, measurements, and quantities are not guaranteed.

The definition of "according" in *Corpus Juris* is: "Agreeing; in agreement or harmony; harmonious." We think it is clear that the words "according to the recorded plat thereof" or words of similar import often used, such as "as per recorded plat thereof" or "as shown by the recorded plat thereof," in a deed or conveyance mean the same as "in harmony with the recorded plat," and that the grantor does not thereby represent or guarantee the measurements, courses, distances, or quantities stated in the plat. These and words of like import make the plat referred to a part of the deed for the purpose of identifying the property and making the description certain; and, further, in a conveyance of lots in a town or addition the recorded plat necessarily becomes for the same purpose a part of the deed without the use in the deed of the expression "according to the recorded plat thereof," or words of similar import.

The judgment is reversed, and the cause remanded, with directions to enter judgment against plaintiff for costs in favor of the Crowthers, and against them for costs in favor of Crowley and Webster. All the Justices concurring.

RING v. PHOENIX ASSUR. CO., LIMITED, OF LONDON. (No. 20787.)

(Supreme Court of Kansas. April 7, 1917.)

(Syllabus by the Court.)

1. PLEADING \S 245(3)—TRIAL AMENDMENT.

When the case was called for trial, and the jury were in the box, the plaintiff was permitted to amend his petition by interlineation increasing the per cent. of loss and the sum sued for. The defendant objected, but made no request for delay and proceeded with the trial. Held, that granting such permission was not error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 658, 659.]

2. INSURANCE \S 558(6)—PROOFS OF LOSS—WAIVER.

A tender of a substantial sum in full settlement of the plaintiff's claims operated as a

waiver of all claimed defects in the proof of loss and of the proof itself, notwithstanding a provision of the policy that no one could waive such proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1405.]

3. INSURANCE \S 676—ACTION ON POLICY—ATTORNEY'S FEE.

The defendant, a fire insurance company of London, not shown to have been authorized to do a hail insurance business in this state, is not liable for an attorney fee, although admitting in its answer its authority to do such business here; there being no statutory authority for the allowance of such fee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1805, 1806.]

Appeal from District Court, Stafford County.

Action by O. L. Ring against the Phoenix Assurance Company, Limited, of London. Judgment for plaintiff, including an attorney's fee, and defendant appeals. Modified by deducting the attorney's fee and the excess recovery, and, as so modified, affirmed.

Ray H. Beala, of St. John, for appellant.
Paul R. Nagle, of St. John, for appellee.

WEST, J. The plaintiff sued on a policy of hail insurance issued by a London insurance company, and recovered. He was also awarded an attorney fee. The defendant appeals, and assigns as the principal errors the permission given the plaintiff to amend his petition, an excessive recovery for a certain loss, and the judgment for the attorney fee.

[1] The petition originally alleged and prayed for damages amounting to \$1,484. When the case was called for trial and the jury were in the box leave was given to amend by interlineation changing this sum to \$2,013.33 and the per cent. of loss from 40 to 66 $\frac{2}{3}$ %. The defendant objected, and sought to shut out evidence under one of the counts, but was overruled. Counsel complains that time was not given to file an amended answer. The journal entry, however, fails to show that any request for delay or to amend was made, but the parties seem to have proceeded to trial voluntarily. Under the expanse of judicial discretion supplied by section 140 of the Code of Civil Procedure (Gen. St. 1915, \S 7032), no harm appears to have befallen the defendant, and hence the trial court's discretion was not abused. *Deter v. Jackson*, 76 Kan. 568, 92 Pac. 546; *Woods v. Nicholas*, 92 Kan. 258, 140 Pac. 862.

[2] Fault is found because the strict terms of the policy touching proofs of loss were not complied with. But, regardless of the evidence as to these proofs, it appears that the defendant tendered \$576 in "full settlement and payment of all claims you may have against the said Phoenix Assurance Company, Limited, of London, for all loss and damage sustained to growing crops de

scribed in said policy of insurance by hail during the season 1915 previous to this date." Further, the petition alleged this tender and its refusal, and the answer, unverified, admitted such tender, and averred that the defendant made it "in order to avoid the trouble and expense of a lawsuit." The letter transmitting this tender stated that it was in full settlement and payment. In this state of affairs the defendant is in no condition to invoke the doctrine that the provisions of the policy could not be waived; for it had in fact and in law waived them. *Insurance Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *Insurance Co. v. Munger*, 49 Kan. 178, 30 Pac. 120; *Despain v. Insurance Co.*, 81 Kan. 722, 728, 106 Pac. 1027; note 13 L. R. A. (N. S.) 839; 14 R. C. L. p. 1155, §§ 334, 335.

"A distinct recognition of liability by the insurer, as by an offer to pay all or a part of the loss, amounts to a waiver of formal notice and proof of loss or of defects therein." 14 R. C. L. p. 1349, § 521.

The insurance covered two fields of wheat, one of 80 acres and the other of 290 acres. When the policy was issued, June 19th, the crop had already suffered damage to a certain amount, and this was understood by the parties. It was alleged that on July 3d another damage of $66\frac{2}{3}$ per cent. occurred, and that later in July another damage of 10 per cent., or \$296. This amount for the second loss under the policy was allowed by the jury. The defendant complains of this, and says that, according to the plaintiff's own testimony, 80 acres of the wheat had been cut at the time he had the second loss, which assertion is borne out by the record. When asked if he excepted the 80 acres that had been cut, the plaintiff testified there was nothing said about it; that he was not making a claim for the acres that were cut, but he did not tell the agent about it. To this the plaintiff's counsel replies that the application shows that the plaintiff was insured not for 370 acres at \$8 an acre, making \$2,960, but for the sum of \$3,020, the premium being \$151, the proper amount for the latter insurance, and more than enough to pay for \$2,960 worth. Whatever the fact may be about the premium, the policy itself, as set out in the abstract, limits the amount to \$8 an acre on 80 acres, \$640, and \$8 an acre on 290 acres \$2,380, instead of \$2,320, showing a mistake in computation, the total being \$2,960, instead of \$3,020. As the plaintiff recovered for 10 per cent. of this amount for the second loss or \$296 for 370 acres, he recovered for 80 acres too much, being entitled to \$232 instead of \$296. A motion to set aside the findings was overruled, likewise a motion for new trial. Hence the defendant is entitled to a reduction of \$64 from the amount recovered for the second loss.

[3] As to the allowance of an attorney fee it was settled by *Evans v. Insurance Co.*, 87 Kan. 641, 125 Pac. 86, 41 L. R. A. (N. S.) 1130, that, in the absence of a statute allowing it, a successful plaintiff is not entitled to recover this fee. This rule was referred to with approval in *Winkler v. Bank*, 89 Kan. 279, 131 Pac. 597, and in *Malet v. Haney*, 98 Kan. 20, 157 Pac. 386. Chapter 205 of the Laws of 1911 makes provision for this allowance only in case of judgment on a policy to insure against loss by fire, tornado, or lightning. Section 26 of chapter 206 of the Laws of 1913, relating to mutual hail insurance companies, allows an attorney fee on recovering judgment to "any member of a company organized under the provisions of this act," which, of course, does not include a London fire insurance company like the defendant. Section 5359 of the General Statutes of 1915 is section 4 of chapter 142 of the Laws of 1897, authorizing such fee only against a fire insurance company, insuring against loss by fire, tornado, or lightning. Section 5398 is section 26 of the act of 1913 just referred to. No statute has been pointed out or found authorizing such recovery in this sort of action. It is suggested by the counsel for the plaintiff that, as the answer admits the authority of the company to write hail insurance in Kansas (although no such authority appears), and as section 2140 of the General Statutes of 1915 provides that any corporation organized under the laws of another country and authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions, and penalties, except as therein provided, as corporations organized under the laws of this state, and as the defendant holds itself out as authorized, it ought to be treated like a home company. The plaintiff alleged, however, in his petition, that whether the defendant was authorized to write hail insurance he was not able to say, and could not ascertain definitely. While, therefore, it might be an act of ultimate and essential justice to penalize the defendant for doing unauthorized hail insurance business in this state, no reason is apparent why a citizen who patronizes such a company instead of one organized at home should recover more than the statute and the settled law of the state permit him to recover.

Certain other matters are complained of, but do not present errors substantial enough to require consideration.

The judgment is required to be modified by deducting therefrom the sum allowed for attorney fee and the \$64 excess recovery for the second loss, and, when thus modified, will be affirmed. All the Justices concurring.

HAWLEY v. CITY OF BUTTE. (No. 3986.)

(Supreme Court of Montana. March 29, 1917.)

MUNICIPAL CORPORATIONS §450(4) — **IMPROVEMENTS—PROTESTS.**

Laws 1913, c. 89, as amended by Laws 1915, c. 142, provides for a resolution by the city council to create a public improvement district, and for notice to the property owners that within 15 days after the first publication of the notice any owner of property liable to assessment may protest in writing and file such protest with the city clerk. At the next regular meeting of the council after the expiration of the time for filing protest, the council shall pass upon all protests, and if protests are filed which are found to be insufficient, or are overruled or denied, the council shall be deemed to have acquired jurisdiction to order the proposed improvement. *Held*, that a property owner who has signed a protest and presented it within the period allowed therefor may withdraw therefrom and thereby defeat it by leaving an insufficient number of protestants, providing he acts within the time allowed by law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1074.]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

Suit by Anna E. Hawley against the City of Butte for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

W. E. Carroll, of Butte, for appellant. John A. Groeneveld, Thomas D. Long, Louis F. Lorenz, N. A. Rotering, and Fred Furman, all of Butte, for respondent.

HOLLOWAY, J. The city of Butte undertook to create a special improvement district for paving and other purposes. Within the time allowed by statute a protest was filed with the city clerk by persons owning more than 50 per cent. of the real estate included within the proposed district. On the day following and within the same period certain of the persons who signed the protest notified the council in writing that they withdrew their objections to the creation of the district. When the council came to consider the subject, it eliminated the withdrawals from the protest and found that the protest, as thus changed, contained the signatures of the owners of only 46 per cent. of the area embraced within the proposed district, and was therefore insufficient. It passed a resolution creating the district and directed the clerk to advertise for bids, and this suit was then instituted by one of the protestants to enjoin the city from proceeding further. The cause was submitted for decision upon an agreed statement of facts. The trial court found for defendant, and plaintiff appealed.

In the agreed statement counsel for the respective parties submitted to the court but a single question: May a property owner who has signed a protest against the creation of a special improvement district within the period allowed for presenting such protest withdraw therefrom and thereby defeat the

protest? It was conceded by both parties that, if the withdrawals were not properly allowed, the protest was sufficient to defeat the project, whereas, if the withdrawals were properly allowed, the council correctly held the protest insufficient.

The statutes governing the creation of special improvement districts in cities and towns (chapter 89, Laws 1913, as amended by chapter 142, Laws 1915) provide for a resolution by the city council expressing its intention to create the district in contemplation and for notice to every one having property within the proposed district. Within 15 days after the first publication of the notice, any owner of property liable to assessment for the work may make protest in writing and file such protest with the city clerk. At the next regular meeting of the council after the expiration of the time for filing protests the council shall hear and pass upon all protests. If no protests are filed, or if protests are filed which are found to be insufficient or are overruled or denied, "immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvement." There is not any provision in the statute which in terms authorizes one who has signed a protest to withdraw therefrom; but the Legislature has seen fit to refer the question of the propriety of creating a special improvement district to the owners of the majority of the property responsible for the cost of the improvement. This right to protest is simply the right to petition—the right to express the will of the property owner affected by the improvement. In the exercise of its authority over the subject, the Legislature has limited the time within which such property owner may express his dissent, but within that limited time he is allowed the utmost liberality for the expression of his views, and it is not until the full period thus allowed him has expired that he is foreclosed from making known his final decision. So long as the subject is referred to him and he is invited by the notice to express his disapproval, if any such he has, he should be held to be free to make known his views or to change them, if he acts within the time allowed by law.

Our statute is somewhat peculiar, in that jurisdiction to proceed with the improvement is not conferred upon the city until it has first determined that a sufficient protest is not before it. The right to petition implies the right to withdraw from a petition (*State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297; *State ex rel. Fadness v. Ele*, 53 Mont. —, 162 Pac. 164); and since it is the obvious purpose of this legislation to permit the owners of a majority of the property affected to determine the propriety of the improvement, that purpose is best subserved by a liberal interpretation of the statute in favor of those directly interested, if they act with-

in the time fixed by the statute or acquiesce for that period. These views are supported by the better reasoning and by the decided weight of authority. The subject is treated thoroughly and the decided cases reviewed in *Sedalla v. Montgomery*, 227 Mo. 1, 88 S. W. 1014, 127 S. W. 50.

Neither do these views conflict in the least with the authorities which hold that, if the statute itself confers jurisdiction upon the council which is subject to be defeated by filing a protest signed by the owners of a majority of the property affected, then the withdrawal of names from such a protest sufficient in the first instance to oust jurisdiction cannot have the effect of reinvesting in the council the jurisdiction lost when the protest was filed. By the express terms of our statute jurisdiction does not attach until the council finds that a sufficient protest is not before it, and therefore the withdrawal of names from the protest before the time for filing such protest has expired does not affect the question of jurisdiction. Though its exercise may occasion disappointment to the remaining protestants, the right to withdraw cannot be denied. When the time for the presentation of protests expired, the owners of less than one-half of the property affected were objecting to the improvement, and the council properly determined that such protest was insufficient.

The judgment is affirmed.

Affirmed.

SANNER, J., concurs. BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

MONTANA RANCHES CO. v. DOLAN et ux. (No. 3946.)

(Supreme Court of Montana. March 26, 1917.)

1. RECEIVERS \Leftrightarrow 1—APPOINTMENT—EXERCISE OF POWER.

Under Rev. Codes, § 6698, as to appointment of receiver, the power is to be exercised sparingly and with unusual caution, and only to prevent manifest wrong imminently impending, or where there is no other plain, speedy, or adequate remedy.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 1.]

2. RECEIVERS \Leftrightarrow 6—APPOINTMENT—OTHER REMEDY.

The appointment of a receiver will be denied when the applicant has any other adequate remedy.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12.]

3. RECEIVERS \Leftrightarrow 8—APPOINTMENT—DISCRETION OF COURT.

An application for appointment of a receiver is addressed to the sound legal discretion of the trial court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 14.]

4. APPEAL AND ERROR \Leftrightarrow 948—APPOINTMENT OF RECEIVER—ABUSE OF DISCRETION—BURDEN OF PROOF.

The applicant for appointment of a receiver must, after denial of his motion, assume the burden of showing an abuse of the judicial discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3814.]

5. RECEIVERS \Leftrightarrow 32—APPOINTMENT—BURDEN OF PROOF.

Since the remedy by receivership is an extraordinary one, the applicant has the burden of presenting facts sufficient to disclose to the court a necessity for the remedy.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 45-50, 64.]

6. RECEIVERS \Leftrightarrow 32—APPOINTMENT—NECESSITY OF APPOINTMENT.

Appointment of receiver will not be made where the only necessity shown was that there was danger that the crops would be removed and sold to innocent purchasers and the proceeds converted; there being no allegations that defendant threatened or intended so to act.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 45-50, 64.]

7. RECEIVERS \Leftrightarrow 6—APPOINTMENT—EXISTENCE OF THE REMEDY.

Where receiver was asked for farm property and crops, if the property was not disposed of before the crops were severed from the soil and became personal property, claim and delivery would be a plain, speedy, and adequate remedy, and the receiver could not be appointed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12.]

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Action by the Montana Ranches Company against Thomas J. Dolan and wife. From an order denying application for appointment of a receiver, plaintiff appeals. Affirmed.

Wight & Pew, of Helena, for appellant. O. W. McConnell, of Helena, for respondents.

HOLLOWAY, J. In February, 1916, an action was commenced in the district court of Lewis and Clark county, the primary purposes of which were to secure the cancellation of a certain contract for the sale of real estate and the restitution of possession. In July following, and before a demurrer to the complaint had been disposed of, the plaintiff applied to the court for the appointment of a receiver. The application was denied and plaintiff has appealed from the order.

From the complaint we gain the following information: In May, 1914, the Montana Ranches Company, then having a right to sell a certain tract of land in Lewis and Clark county, entered into an agreement to sell the same and certain personal property to defendants for a stipulated price, a part of which was paid and the balance of which was to be paid in installments. Time was made of the essence of the agreement, and a provision was incorporated therein to the effect that if defendants failed to make any payment when due, the plaintiff at its option

might declare the contract terminated, and thereupon all sums previously paid should be forfeited to the plaintiff, all rights of the defendants should immediately cease, and defendants should yield up possession to plaintiff. Under this agreement, defendants were let into possession of the premises about March 1, 1915, and have since retained possession. On December 1, 1915, an installment of the purchase price, with interest, became due, but defendants failed to pay the same or any part, and in February, 1916, plaintiff notified defendants that it elected to exercise the option reserved to it in the contract, declared the contract forfeited, and demanded possession, which was refused. In the application for the appointment of a receiver, plaintiff alleges that it commenced the action above referred to, repeats the material allegations of its complaint, and then sets forth that the defendants are insolvent; that they are in the possession of the premises in controversy; that they are farming the same as their own—

"that there are large quantities of alfalfa and other grasses growing upon said lands, as well as cultivated crops of great value; that there is danger that said crops will, if relief is not granted petitioner as hereinafter prayed, be removed and sold to innocent purchasers and the proceeds converted to the use of defendants, or that said crops will be consumed by defendants and converted to their own use; that the value of said crops is upwards of \$1,500."

It is the contention of appellant that at the time its application was denied, the material allegations of its complaint were admitted by the demurrer interposed by defendants, and that, since plaintiff had exercised its option, had declared the contract forfeited, had notified defendants, and had demanded possession, all rights of defendants in or to the property were *prima facie* terminated, the title restored to plaintiff, and with it the right to immediate possession; that the ownership of the crops followed the ownership of the land, and therefore plaintiff was *prima facie* the owner of the crops. For the purpose of argument only, we will assume that these premises are correct; that as between plaintiff and defendants, the plaintiff was the owner and entitled to the possession of the land immediately upon giving notice of forfeiture, and that title to the crops then growing or afterwards planted, followed the title and right of possession in plaintiff, and that, at the time this application was made, the crops had not matured or at least had not been severed from the soil.

[1, 2] The authority to appoint a receiver is conferred by section 6693, Revised Codes, but only in the instances therein enumerated. The present application does not bring the proceeding within any of the designated classes, unless it be the last one, viz:

"In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The power to invoke the extraordinary remedy by which property is taken into the possession of the court is to be exercised sparingly, with unusual caution, and only to prevent manifest wrong imminently impending, or where the case shows clearly that the complaining party is in danger of suffering irreparable loss and there is no other plain, speedy, or adequate remedy. Where the application is made, as in this instance, before a decision adjudging the title to be in the applicant, the appointment, if made, amounts in effect to a levy of an execution *in limine*, entailing costs, expenses, and other hardships often out of proportion to the value of the property right sought to be protected. *Hickey v. Parrot S. & C. Co.*, 25 Mont. 164, 64 Pac. 337. Because of the extraordinary harshness of the remedy, courts of equity have ever been reluctant to apply it. If the applicant has any other adequate remedy, the application will be denied.

[3, 4] The record before us discloses that the application was filed in the district court on July 7, 1916; that on July 17th an order to show cause was issued; that on July 29th the application and defendants' objections thereto were submitted; and that the order denying the application was made on October 9th. The application was addressed to the sound, legal discretion of the trial court (*Hartnett v. St. Louis M. & M. Co.*, 51 Mont. 395, 153 Pac. 437), and plaintiff must assume the burden of showing an abuse of such discretion.

[5] Since the remedy by receivership is an extraordinary one, never to be allowed except upon a showing of necessity therefor (*Prudential Securities Co. v. Three Forks, etc., R. Co.*, 49 Mont. 567, 144 Pac. 158), the plaintiff was further charged with the burden of presenting facts sufficient to disclose to the court the existence of such necessity. 34 Cyc. 112.

[6] All that was presented to the court below to show such an exigency as would call for relief is contained in the portion of the application quoted above:

"That there is danger that said crops will * * * be removed and sold to innocent purchasers and the proceeds converted to the use of defendants, or that said crops will be consumed by defendants."

The expression of a fear is not the statement of a fact. It is not alleged that defendants threaten or intend to dispose of the crops in any manner, or that they will be disposed of, or that loss or waste will result from defendants' possession or control of them. It is not shown that defendants are not farming in a good workmanlike manner, or not intent upon the proper care and preservation of the crops. Indeed, we think there is not stated any fact from which the court could determine that plaintiff was in imminent peril of losing whatever interest it might have in the property.

[7] If the property was not disposed of be-

fore the crops were severed from the soil and became personal property, then claim and delivery would afford to plaintiff a plain, speedy, and adequate remedy. If the defendants threatened to dispose of the crops before severance, an injunction would defeat such purpose, and in either event a receiver would be unnecessary. We think plaintiff has failed to show such abuse of discretion as would warrant a reversal of the order.

The order is affirmed.
Affirmed.

SANNER, J., concurs.

BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

STEVENSON v. SEBRING. (No. 8727.)
(Supreme Court of Colorado. April 2, 1917.)

1. MORTGAGES \S 604—FORECLOSURE—RIGHTS OF PURCHASER—PAYMENT OF TAXES.

One who purchased land on foreclosure of a deed of trust, receiving a certificate of purchase, and paid delinquent taxes on the land, was not a volunteer in paying them, having equitable title, and was entitled to recover the taxes paid from the judgment creditor of the original owner of the land, who took out execution, had levy made, and paid to the county treasurer the amount required to redeem from the sale on foreclosure, having obtained a quitclaim deed from the original owner.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1786.]

2. MORTGAGES \S 594(2)—FORECLOSURE—REDEMPTION BY JUDGMENT CREDITOR — SALE UNDER LEVY.

Under the statute providing for redemption by judgment creditors of property sold on foreclosure of deed of trust, where property was sold on foreclosure of a deed of trust, and the purchaser, who received a certificate of purchase, paid delinquent taxes on the land, no redemption having been made by the original owner within the six months allowed, the judgment creditor of the original owner was entitled to take out execution and have levy, paying to the county treasurer the amount required to redeem from the sale on foreclosure, and the statute did not require a sale under the levy.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1713, 1714.]

3. MORTGAGES \S 604—FORECLOSURE—RIGHTS OF PURCHASER.

Purchaser of land at foreclosure sale under deed of trust, who paid delinquent taxes in good faith and to protect his interest, was entitled to lien on premises to secure repayment against judgment creditor of original owner who took out execution and had levy made, paying county treasurer amount necessary to redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1786.]

Error to District Court, Pueblo County;
C. S. Essex, Judge.

Suit by N. E. Stevenson against T. C. Sebring. To review a judgment only partially for plaintiff, he brings error, both parties signing error. Affirmed.

A. W. Arrington, of Pueblo, for plaintiff in error. B. C. Durall, of Pueblo, for defendant in error.

TELLER, J. The plaintiff in error brought suit against defendant in error to cancel a deed under which the latter claimed a tract of 80 acres, and to have the land decreed to be the property of the plaintiff.

From the record it appears that the plaintiff, on a foreclosure of a deed of trust on said land, bid it in and received a certificate of purchase therefor. A short time afterward, he paid some delinquent taxes on the land. No redemption having been made by the original owner of the land within the six months allowed therefor, the defendant, a judgment creditor of said owner, took out an execution, had a levy made, and paid to the county treasurer the amount required to redeem from the sale on foreclosure. A few days prior to the date set for the execution sale he obtained a quitclaim deed to the premises from said owner, and caused the execution to be returned satisfied. The court found that the plaintiff had a lien for the taxes paid, but was not entitled to the fee title, and gave judgment accordingly. Both sides assign error.

[1] The defendant contends that the plaintiff was a volunteer in paying the taxes, and hence is not entitled to recover them. We cannot agree with this conclusion. The plaintiff had an equitable title to the property, subject to be divested by redemption, and the payment was made to protect his interest, as well as that of all others who had an interest, either actual or potential, therein.

For the plaintiff in error it is contended that there was in law no redemption by the defendant in error, because there was no sale under the levy; that the plaintiff was entitled to a deed, as against the original owner, as soon as the six months' redemption period had expired, and that the defendant, as grantee of said owner, had no better rights than she had. If the premises were accepted the conclusion stated might follow, but the premises are false.

[2] The evident purpose of the statute which provides for redemption by judgment creditors was to enable them to subject the debtor's property to the payment of his debts; and that purpose would not be subserved by requiring a sale under the circumstances of this case. The plaintiff received, through the redemption, the amount to which he was entitled on the note, and he is, by the decree, given a lien for the taxes which he paid. To give him the land would deprive the defendant of it as a means of satisfying the judgment, and defeat, by a strained construction of the law, the very purpose of it.

[3] Plaintiff in error having paid the taxes in question in good faith, and to protect his interest in the property, is entitled to a lien

on the premises to secure their repayment. 27 Cyc. 1256.

The judgment giving this lien, and refusing further relief to the plaintiff, is correct, and is accordingly affirmed.

HILL and BAILEY, JJ., concur.

FT. COLLINS NAT. BANK v. WHITTON
et al. (No. 8789.)

(Supreme Court of Colorado. April 2, 1917.)

1. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS OF FACT.

Findings of fact supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981.]

2. FRAUDULENT CONVEYANCES §58—INSOLVENCY OF GRANTOR.

A deed given in consideration of support and maintenance will not be set aside as in fraud of creditors where the grantor at the time of executing the deed owned other property sufficient in amount to satisfy existing indebtedness in the ordinary course prescribed by law for the collection of debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 138, 140, 144-147, 158.]

3. ESTOPPEL §74(2)—CONVEYANCE TO WIFE—FRAUDULENT CONVEYANCES.

In an action to set aside a deed as in fraud of creditors, the grantor was not estopped to show that he owned a half interest in other property because of the mere fact that such other property was recorded in the name of his wife.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 190, 191.]

4. FRAUDULENT CONVEYANCES §309(6)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

In an action to set aside a deed as in fraud of creditors, an instruction that, if at the time of making the deed the jury found that the grantor retained sufficient property to satisfy the creditor's debt, and that it was within the creditor's power to satisfy such debt, was not in conflict with an instruction that before the grantor could lawfully make the deed it was his duty to retain sufficient property to pay his existing debts as they fell due, and that the property retained by him must be property available to his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 951.]

Error to District Court, Larimer County; Neil F. Graham, Judge.

Action by the Ft. Collins National Bank of Ft. Collins against John Whitton and others to set aside a deed. Judgment for defendants, and plaintiff brings error. Affirmed.

G. W. Musser, of Denver, and L. D. Thomson, of Ft. Collins, for plaintiff in error. Fred W. Stow and Herman W. Seaman, both of Ft. Collins, for defendants in error.

HILL, J. The plaintiff in error (hereafter called the bank) brought this action to set aside a deed executed by the defendant John Whitton to two of his codefendants, John and Sarah Slentz, for certain lots with two resi-

dences thereon situate in Ft. Collins, and to subject this property to the payment of a judgment held by the bank against Whitton. A jury made certain findings of facts approved by the court. Judgment was for the defendants.

It stands admitted that on January 3, 1914, Whitton conveyed the real estate in question to the defendants John and Sarah Slentz; that Whitton was then about 76 years of age; that his wife was about 74; that Mrs. Slentz was a sister of Mrs. Whitton; that the consideration for the deed was \$1, love, affection, and an agreement by the Slentzes (who were much younger than the Whittons) to provide a home, support, and maintain for the remainder of their lives both Mr. and Mrs. Whitton. The bank alleges want of consideration, a voluntary conveyance made for the purpose and with the intent to hinder, delay, and defraud it in the collection of its debt, etc. The defendants allege the making of the deed in good faith, and that the defendant John Whitton had sufficient other property with which to pay all of his indebtedness, etc., and that he had, in good faith, arranged for its ultimate payment.

In answer to special interrogatories, the jury found, that at the time Whitton executed the deed in question he was the owner of a half interest in other property, viz. lots 23 and 24 in block 18 of the city of Ft. Collins, with business buildings thereon called the Whitton Block; that its fair market value at that time was \$20,000, and that his half interest therein was sufficient to pay his individual debt to the bank; that at that time this block was of sufficient value to pay the total indebtedness of both himself and wife to the bank.

It is claimed that the court erred in refusing to disregard the findings of the jury and in not rendering judgment for the bank. In this connection it is urged that the testimony of the defendants stamps the entire transaction as a fraud. There is testimony that about ten months prior to the execution of this deed the defendant Elizabeth Whitton, the wife of John Whitton, gave to the bank her promissory note in the sum of \$13,000 to secure the payment of two notes, one due from her to the bank, the other from her husband to the bank, upon which it thereafter secured the judgment, which it seeks to have satisfied by a sale of the property in question; that the \$13,000 note was equal in amount to the two notes it was given to secure; that she also gave a deed of trust on the Whitton Block (standing of record in her name, clear of any incumbrance) to secure payment of the \$13,000 note; that at the time Whitton made his deed to the Slentzes the Whitton Block was of a value from \$19,000 to \$35,000, largely in excess of the total amount of the two notes which the \$13,000

note was given to secure; that when Whitton deeded to the Slentzes, although the record title stood in the name of his wife, he was the owner of a one-half interest in the Whitton Block; that it was then of sufficient value to pay both his and his wife's debts to the bank; that he conveyed the property to the Slentzes in good faith for the consideration and purposes therein named heretofore referred to, and with no intention of hindering, delaying, or defrauding the bank in the collection of its debts against him.

[1] The foregoing testimony being sufficient to sustain the findings of both the court and the jury, it is not the province of this court to disturb it.

It is conceded that, if Whitton retained sufficient other property for the payment of his debts at the time of the making of the Slentz deed, it is not subject to an attack like the one here attempted, but it is claimed such was not the case. The proof discloses that, when Whitton conveyed the two residences to the Slentzes, he had no other property left of any consequence except his half interest in the Whitton Block covered by the deed of trust to the bank, executed by his wife; that thereafter the bank foreclosed on the latter and caused its sale by the sheriff August 30, 1914, when it was bid in by it for \$11,000, which was insufficient to pay in full the \$13,000 note, with interest. For these reasons it is urged that the defendant John Whitton was not at the time he gave the Slentz deed possessed of sufficient property outside of that covered by this deed with which to pay his debts, or at least that it made the matter questionable, for which reason the Slentz deed was in law fraudulent and void as to creditors.

[2] We cannot agree with this conclusion. The Slentz deed was given January 3, 1914. The foreclosure sale took place about eight months thereafter. Whitton testified that at the time he executed the Slentz deed the Whitton Block was worth from \$30,000 to \$35,000. Six other witnesses fix its value at that time at \$19,000 to \$22,000. The jury fixed it at \$20,000. The bank did not call any witness concerning its value, or attempt in any manner to contradict the testimony of defendants' witnesses concerning it. At the time he gave the Slentz deed Whitton's debt to the bank was less than \$6,300, which, according to the finding of the jury, left him a margin of \$3,700 in the block over the amount necessary to pay the bank. The fact that the block sold for \$11,000 at a foreclosure sale some eight months thereafter cannot be said to overcome the testimony, which was all one way concerning its value, or the good faith of the defendant Whitton at the time he gave the Slentz deed. The test is: Was the value of the Whitton Block at that time sufficient for the payment of the two notes which the \$13,000 note and deed of

trust were given to secure? According to the finding of the jury, it was more than ample.

In *Annis v. Bonar*, 86 Ill. at page 130, it is said:

"The mere fact that a party is indebted does not operate to deny him the right of securing a future support for himself and family, or, for that matter, for any member of his family, or for a stranger, by transferring property therefor, provided that he retains other property of sufficient amount for the payment of his debts. But he cannot defraud creditors by taking everything from which they can enforce payment of their debts, and transferring it to anticipate his own future wants, or those of others."

We do not understand any case has ever held that the validity of a deed like the one under consideration is contingent upon the fact that the grantor's debt will ultimately be paid, but that it is sufficient, as stated in the case last cited, to show that the conditions were such that in the ordinary course prescribed by law for the collection of debts they would thus be paid. This was the showing here upon behalf of the defendant. In *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809, \$2,500 of a copartnership firm's money was taken by one partner with which he purchased land and conveyed it as a settlement upon his daughter. In commenting this court said:

"A debtor has no right to give away a portion of his property and leave an insufficient amount for his creditors. They should not be called upon to suffer from the hazards of his speculations, or from his financial arrangements, or improvident conduct of business. He must, before making such a settlement, make adequate provision for his existing creditors, so that in the ordinary course prescribed by law for the collection of debts these debts will be paid."

This rule was shown to have been followed here. The evidence discloses that it was through Mr. Whitton that his wife made the deed of trust to the bank upon the Whitton Block; that their total indebtedness, which it was given to secure, was about \$13,000; that thereafter, when the Slentz deed was given, the property was worth \$20,000, for which reason we cannot say that prior to making the Slentz deed he had not made adequate provision for the payment of his existing debts.

[3] It is claimed that the court erred in allowing the defendant Whitton to testify that he had a half interest in the Whitton Block, and in giving the instructions that, if the jury so found, etc., they could consider that fact in determining his financial ability, etc., because the property stood in his wife's name, etc. The testimony discloses that the notes of both Mr. and Mrs. Whitton to the bank for which the \$13,000 note and deed of trust were given as collateral security represented money borrowed from the bank, which was used in the construction of the Whitton Block; that these facts were known to the bank; that for some time the bank had no security for its payment; that when it want-

ed security it solicited the husband, who caused the wife to give the \$13,000 note and deed of trust. In such circumstances, in a case involving the husband's ability to pay his obligations, or in having made provisions therefor, we cannot agree that he is estopped or for any other reason prohibited from showing that he owned the half interest which he caused to be pledged for the payment of his debt simply because it did not stand of record in his name. *State v. Lewis*, 80 Wash. 532, 141 Pac. 1025.

[4] We cannot agree that there is any conflict between instructions Nos. 3 and 4 or that No. 3 is erroneous. It is to the effect that, if at the time of making the Slentz deed the jury found that Whitton retained sufficient property to satisfy the bank's debt, and that it was under its control so that it could, by appropriate proceedings, be applied to the payment of the debt of Whitton, then they must find that Whitton was solvent at that time. The testimony discloses that Whitton owed no one else, hence the instruction pertaining to his solvency might properly be limited to the debt of the bank, and when thus applied it states the law correctly. Likewise, when thus applied, it does not necessarily conflict with No. 4, which it is conceded states the general law correctly, and is to the effect that, before Whitton could lawfully make the Slentz deed, it was his duty to retain sufficient property to pay his existing debts as they fell due, and that the property retained by him for that purpose must be such property as is available to his creditors; it must be property which is subject to execution.

The judgment is affirmed.
Affirmed.

WHITE, C. J., and TELLER, J., concur.

RAPSON COAL MINING CO. v. MICHELL (No. 8621.)

(Supreme Court of Colorado. Nov. 6, 1916.
Rehearing Denied April 2, 1917.)

1. MASTER AND SERVANT §89(1)—SERVANT'S INJURY—SCOPE OF EMPLOYMENT—MINING.

The fact that a miner temporarily passed from his working place to a crosscut to await clearing of smoke, so that he could resume work, did not take him without the scope of his employment, since it was a natural and reasonable act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153.]

2. MASTER AND SERVANT §89(1)—SERVANT'S INJURY—SCOPE OF EMPLOYMENT—MINING.

The fact that a miner temporarily passed from his working place to a crosscut to take a drink of water, to advise a fellow employé that a can of powder had been placed there, and to test a fuse, did not take him without the scope of employment, since such acts were neither unusual nor unnecessary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153.]

3. MASTER AND SERVANT §265(1)—ACTION FOR SERVANT'S INJURY—SCOPE OF EMPLOYMENT—PRESUMPTION AND BURDEN OF PROOF.

Where employé's actions were such as might have reasonably been expected by employer under same circumstances, it will be presumed that such acts were within the apparent scope of authority, and employer has the burden of proving want of employé's authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877, 894.]

4. MASTER AND SERVANT §284(3)—ACTION FOR SERVANT'S INJURY—SCOPE OF AUTHORITY—QUESTION FOR JURY.

Whether an employé was acting within the scope of his authority at time of injury is generally a question of fact for the jury under proper instructions, and not a question of law for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1006.]

5. MASTER AND SERVANT §89(1)—SERVANT'S INJURY—SCOPE OF EMPLOYMENT—MINING.

Where it was a miner's duty to load holes and attach fuse for blasting, he was not without the scope of employment in testing fuses; since this was clearly in the interest of employer as well as employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153.]

6. MASTER AND SERVANT §235(6) — SERVANT'S INJURY—CONTRIBUTORY NEGLIGENCE—ACTION OF FELLOW SERVANT—MINING.

When an experienced miner tested a fuse near a can of powder and threw a lighted fuse in its direction, a fellow employé's failure to remonstrate with him or leave the place when he began to test the fuse was not contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 713.]

7. MASTER AND SERVANT §265(4)—ACTION FOR SERVANT'S INJURY—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—STATUTE.

The fellow-servant act (Rev. St. 1908, § 2065), making an employer liable for injuries to employé "being in the exercise of due care" from employer's negligence or that of any other servant, does not change the rule that the burden of proving contributory negligence rests on the employer; the quoted phrase being intended to show that the master's liability was not to be absolute without regard to contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 880, 899.]

White, C. J., and Bailey and Garrigues, JJ., dissenting.

Error to District Court, Las Animas County; Watson McHendrie, Judge.

Action by Achell Michell against the Rapson Coal Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rogers, Ellis & Johnson, of Denver, for plaintiff in error. Hendrick, Ralston & Hendrick, of Trinidad, for defendant in error.

SCOTT, J. The plaintiff below recovered judgment in the sum of \$1,200 as damages for injuries sustained while employed as a miner in the coal mine operated by the defendant below, plaintiff in error here.

It appears that the plaintiff, Michell, and

one Collard were coal miners in the employ of the defendant, in the same common employment and in the same part of the mine. They were engaged in driving parallel entries, together with crosscuts connecting such entries. Two of such crosscuts had been completed. Michell was driving a third, a few feet distant from his entry, and his work seems to have been in this uncompleted crosscut at the time of the accident.

The crosscut nearest the slope was closed by a curtain for the purpose of forcing the air into the crosscut near where the men were working, which was used for the circulation of air through and between the entries. In this crosscut the two workmen kept their drinking water and at least a part of their tools, including some fuse. It appears that there was in this crosscut at the time of the accident one full can of powder and another with some powder in it. Both plaintiff and Collard knew of the presence of the full can of powder, though plaintiff did not know its location, and plaintiff says he did not know of the presence of the partially filled can; also that he had borrowed powder from Collard in the forenoon of the day of the accident, and before the full can was placed in the crosscut.

The two men were the only persons working in that part of the mine, and the only inference as to the presence of the partially filled can in the crosscut is that Collard placed it there for some purpose. The two men had returned from their dinner. Collard passed down his entry and the plaintiff down his to his working place, which he found filled with smoke. He remained at this place for a short time, and then went to the crosscut, where he sat down to wait for the circulating air to clear his working place of the smoke. While in this position Collard came from his entry into the crosscut and walked to the drinking water. He then advised plaintiff that a can of powder had been placed in the crosscut. Collard took a drink of water, picked up a piece of fuse, remarking that the fuse was no good, and that he was going to test it and proceeded to do so. He was at this time about ten feet from plaintiff. He cut the covering on the fuse in three places, touched his lamp to two of these places, neither of which burned, then to the third place, which ignited, whereupon he threw the fuse away, and which apparently fell on or near the powder and the explosion occurred as a result.

The only testimony in the case concerning all of these matters is by the plaintiff. Collard was killed by the explosion, and no other person was near or had knowledge of the circumstances.

The errors assigned are: (1) That plaintiff and Collard were not acting within the scope of their authority; (2) that plaintiff was guilty of contributory negligence; and (3)

that instruction No. 5 given by the court constituted prejudicial error.

It is difficult to understand the contention of plaintiff in error that neither the plaintiff nor Collard was acting within the scope of his authority. Both the plaintiff and Collard were at the time employes of the defendant and engaged in the work for which they were employed in the mine.

[1] It seems to be urged that, because the workmen had passed temporarily from their working places into the crosscut, such action took them without the scope of their employment. But the testimony shows that while plaintiff and Collard were at dinner the shot firer had fired the shots where plaintiff was working, and upon his return, finding the place filled with powder smoke as a result of these shots, he went into the crosscut to await the clearing of the smoke before resuming his work. This, if true, and there is no testimony to the contrary, was a very reasonable and perhaps necessary thing to do, and clearly did not take him without the scope of his employment. Common knowledge and experience is that powder smoke under such circumstances is very discomforting and even dangerous. It was therefore a natural and reasonable act for plaintiff to leave this place and pass into the crosscut, which was very near, and through which fresh air was circulating, until such time as his working place was cleared of the smoke sufficiently to enable him to resume his work.

[2] Collard had passed from his working place apparently to take a drink of water, to advise plaintiff as to the fact of the can of powder having been brought to the crosscut, and to test the fuse. This would seem to be neither unusual nor unnecessary in such employment.

[3] The men were engaged exclusively in the employment of the defendant, their action was such as might reasonably have been expected by the master in the same circumstances, and therefore the presumption of law is that such acts were within the apparent scope of the servants' authority, and the defendant in such case is charged with the burden of proving want of authority. *Wood on Master and Servant*, § 559.

[4] Whether or not a servant is acting within the scope of his authority is generally one of fact for the jury under proper instructions, and not a question of law for the court. *Ward v. Teller Reservoir Co.*, 60 Colo. 47, 153 Pac. 219.

[5] It is urged that it was not within the scope of the authority of either of the servants to test the fuse, but there is no proof to sustain such contention. It does not appear that it was not the duty of the miner to load the holes and attach the fuse, or that the shot firer had any other duty than to light the fuse after the loading. Indeed, the testimony justifies the conclusion that it was the sole duty of the miner to load the holes and

attach the fuse. The testimony of the plaintiff is that both he and Collard had been experiencing difficulty with defective fuse. Inasmuch as a defective fuse must result in a missed shot, it is clearly in the interest of the employer as well as the employé that defective fuse should be avoided where reasonably possible to save time and to avoid danger.

[6] It is urged that the plaintiff was guilty of contributory negligence in that he did not remonstrate with Collard, or leave the cross-cut when Collard began to test the fuse. It is not reasonable to infer that the plaintiff could anticipate that his fellow workman and an experienced miner would throw a lighted fuse in the direction of or into a powder can, and after he did so it was too late to take refuge. There is no testimony in the case to indicate that the circumstance of testing the fuse was unusual or dangerous in the exercise of reasonable prudence upon the part of the person making the test. It is plain that the explosion was the result of the unexpected and negligent act of Collard in casting the fuse in the direction of the powder. This is not contributory negligence. *Miller v. Camp Bird*, 46 Colo. 569, 105 Pac. 1105.

[7] Instruction No. 5, complained of, is as follows:

"You are further instructed that the question of contributory negligence of the plaintiff is a matter of defense, and the burden of proof is on the defendant to establish by a preponderance of the evidence. If upon this question of contributory negligence you should find that the evidence is equally balanced, then upon such question it would be your duty to find in favor of the plaintiff."

It is agreed that this was a correct statement of the law prior to the act of 1901, but it is contended that the enactment of the fellow-servant statute changed the rule in this respect. It has been held in this jurisdiction that such contention is not well founded. In *National Fuel Co. v. Maccla*, 25 Colo. App. 441, 139 Pac. 22, it was said:

"The trial court instructed the jury that the burden of proving contributory negligence was placed upon the defendant company. Counsel for defendant predicates error on this instruction, and upon the theory that, since one of the counts in the complaint was based upon the fellow-servant statute, and since said statute gives a remedy denied by the common law, that he who would invoke the aid of the statute must plead and prove that he, the plaintiff (or in this case the deceased plaintiff's husband), was in the exercise of due care; in other words, that while this instruction of the court was correct as applied to the first count, it was wrong as to the second count, which was based upon the statute, and the court made no limitation as to the application of the instruction. There appears to be authority supporting counsel's contention, but the same is contrary to the rule laid down in *Lorimer v. Railway Co.*, 48 Minn. 391, 51 N. W. 125; *Dugan v. Chicago Ry. Co.*, 85 Wis. 609, 55 N. W. 894; and *Andrews v. Chicago Ry. Co.*, 96 Wis. 348, 71 N. W. 372. Under statutes similar to our own the Minnesota and Wisconsin courts have held that it was not

within the purpose of the fellow-servant act to change the rule as to the burden of proving contributory negligence, and these courts maintain that the phrase 'without contributory negligence on his part,' appearing in their acts, which is similar to the phrase 'being in the exercise of due care,' appearing in our act, was obviously inserted in the statute from motives of caution, that it might not be supposed that the declared liability of the master was intended to be absolute, and without regard to any negligence of the complainant contributing to the injury. The Wisconsin and Minnesota rule meets with our approval."

We think the construction thus placed upon the statute is both logical and sound.

It is admitted by the plaintiff in error that the amount of damages awarded is not excessive, and that the sole question here is as to the liability of the company.

The judgment is affirmed.

On Rehearing.

PER CURIAM. Motion for rehearing denied en banc.

WHITE, C. J., and BAILEY and GARRIGUES, JJ., dissent.

STOKES et al. v. KINGSBURY. (No. 8832.) (Supreme Court of Colorado. April 2, 1917.)

1. JUDGMENT \S 521—COLLATERAL ATTACK—INJUNCTION.

A bill in equity, brought by a judgment creditor against the plaintiff in the judgment and a sheriff to restrain collection thereof, constitutes a collateral attack upon the judgment where the record is fair on its face and the jurisdiction of the court undenied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 964.]

2. JUDGMENT \S 768(1)—LIEN—NOTICE.

Where a transcript of a valid judgment was filed in another county during the same month in which it was rendered, the judgment debtor was bound to know of the judgment lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1325.]

3. EXECUTION \S 172(4)—INJUNCTION—EVIDENCE.

In a suit to enjoin the collection of a judgment, the record held to show that the judgment debtor had full knowledge of the entry of the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 525-532.]

Error to District Court, Garfield County; John T. Shumate, Judge.

Suit by Marie K. Kingsbury against Charles A. Stokes and others to restrain the collection of a judgment. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Stokes & Sherman, of Denver (O. W. Darrow, of Glenwood Springs, of counsel), for plaintiffs in error. J. W. Dollison and E. C. Kingsbury, both of Glenwood Springs, for defendant in error.

BAILEY, J. Plaintiffs in error, defendants below, bring this cause here for review on error from the District Court of Garfield

County. Defendant in error, plaintiff below, instituted proceedings therein to restrain collection of a judgment rendered against her in the District Court of the City and County of Denver, in favor of Charles A. Stokes and Jesse H. Sherman, two of the plaintiffs in error. Jessup, as Sheriff of Garfield County, made a levy upon certain lands of defendant in error, and in that capacity was one of the defendants below and plaintiffs in error here. The complaint as originally filed alleged among other things, lack of service of summons in the original action, and attacked the judgment upon grounds going to the merits of the case. On plaintiff's own motion this complaint was amended and the allegation of lack of proper service withdrawn. Defendants answering, set up, among other things, the plea of a valid judgment, in effect a plea of *res adjudicata*. Upon preliminary hearing a temporary order was granted, restraining defendants below from proceeding with the execution and sale. After what was to all intents and purposes a trial *de novo* of the issues which were, or might have been, adjudicated in the action in which the judgment in question was rendered, a special verdict was returned, and approved with slight modification by the court, the restraining order was made permanent, and defendants enjoined from attempting to enforce the lien of the judgment, which lien was set aside and held for naught, with damages to plaintiff in the sum of \$250.00.

[1] The record here plainly shows that the judgment of the District Court in and for the City and County of Denver, upon which execution issued, which was enjoined, was valid and enforceable, that personal service was had on defendant, and that an answer was filed by her attorney, although judgment was later entered without contest. The record is fair on its face, and the jurisdiction of the court undenied, and the judgment, therefore, not open to collateral attack. That the attack was collateral is established by the great weight of authority, including our own decisions. Black on Judgments, § 253, speaking to this point, says:

"A bill in equity seeking to enjoin the enforcement of a judgment at law, by execution or otherwise, constitutes a collateral attack upon the judgment, and cannot be maintained on account of mere errors or irregularities, but only on a showing that the judgment is void."

This rule is laid down in *Harter v. Shull*, 17 Colo. App. at page 166, 87 Pac. at page 912, and is approved in *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027:

"A collateral attack on a judgment is in its general sense any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree. The fact that the parties are the same and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule or make the attack any the less a collateral one. It is well settled that judgments of a court of competent jurisdiction are not subject to collateral attack, unless they are void, and by void is meant that they are an absolute nullity."

It is established law here that where the court has jurisdiction of the parties and the subject matter in a particular case, its judgment, until reversed or annulled in some direct proceeding, is not open to attack by parties or privies in any collateral action or proceeding whatsoever. *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193. In *Clarke v. Asher*, 53 Colo. 313, 125 Pac. 538, suit was brought in the District Court of La Plata County to enjoin the levy of an execution on a judgment rendered by the County Court of Hinsdale County, wherein plaintiff in the injunction proceeding was defendant, and defendant therein was plaintiff, as in the case at bar. Injunction was asked on the ground that the judgment was void in that the complaint in the action in which it was rendered failed to state a cause of action. The court quoted *Trowbridge v. Allen*, *supra*, with approval, and held that the attack upon the judgment was collateral and without effect to enjoin the execution. The opinion in *Clarke v. Asher*, *supra*, must rule this case, as in principle it determines precisely the same questions which are involved and for determination in the case before us.

The defense pleaded by the defendants below was a final judgment of the tribunal having jurisdiction both of the subject matter and the person, and, even though erroneous, is conclusive upon collateral attack. *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57, and the District Court of Garfield County should have dismissed the action.

[2, 3] The judgment was rendered in December, 1912. A transcript thereof was filed in Garfield County during the same month, and defendant in error was, therefore, bound to know that there was a judgment lien upon her lands. It is not necessary, however, to rely upon the constructive notice of the filing of the transcript to charge her with full knowledge of all the proceedings prior to the entry of the judgment which she assails. The record shows that she was represented by an attorney, who filed an answer for her, under which every defense and objection urged in the instant case against the judgment in the District Court of the City and County of Denver might properly have been there presented and urged. It is claimed that no defense was made at that time for the reason that defendants below agreed with her not to proceed with the action, and that she relied thereon. It conclusively appears, however, that defendants wrote and mailed her a letter, in which it was stated that if she did not deliver to them certain collateral, as security for the payment of the debt upon which the judgment is based, they would go forward with the action. She denies the receipt of this letter. Her attorney, however, received written notice of the setting of the case for trial, and she herself admits receiving other communications from defendants wherein their proposed action in going forward with the suit in the Denver district

court, in the event that she refused to deposit the collateral, was reiterated. It is worthy of note, also, that at the hearing upon which the temporary injunction was granted, she denied having any attorney when the judgment was secured, and denied any knowledge of the answer which was filed for her, or that she authorized the filing of any answer. Later, however, she admitted that the attorney who appeared for her in the Denver suit was authorized to do so, and on the trial at which the restraining order was made permanent, the attorney who filed the answer was present to testify, and she objected to his testimony, and to the admission of a certain letter she had written to him in reference to the judgment, on the ground that these matters were privileged, as communications between attorney and client. Upon the whole record, her claim that she was not aware that the action was pending, or of the judgment rendered, or of the facts and circumstances of the case from beginning to end, is so contrary to that which the documentary and record evidence shows, that, even if her contentions could properly have been heard by the Garfield County District Court at all, they are unworthy of serious consideration.

Under the law she is charged with knowledge of the judgment, yet she took no steps to reverse, impeach, annul, or set it aside, either by writ of error, other direct attack, or at all. In *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545, the Supreme Court of the United States has this to say:

"The doctrine of this court, and of all the courts of this country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will * * * be considered when the judgment is brought collaterally into question."

Black on Judgments, after quoting the above opinion, at sec. 245, continues as follows:

"This principle is not merely an arbitrary rule of law established in the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. 'It is one,' says the court in Virginia, 'which has been adopted in the interests of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after a period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation, and no fixed established rights. A judgment, though unreviewed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title.' * * * The rule against collateral impeachment applies to every judgment, order, decree or judicial proceeding, of whatsoever species, that is not absolutely

void. If the judgment is void on its face, it is of course a mere nullity and is of no avail for any purpose, and this may be urged against it whenever it is brought into question. But otherwise, whether it be regular or irregular, correct or erroneous, valid or voidable, it is not subject to collateral attack."

The judgment of the trial court will be reversed, and the cause remanded with instructions to dismiss it.

Judgment reversed and remanded, with instructions.

WHITE, C. J., and ALLEN, J., concur.

REIL v. PEOPLE. (No. 8393.)

(Supreme Court of Colorado. April 2, 1917.)

1. CRIMINAL LAW §298—DEMURRER—ADMISSION.

Demurrer to the plea of *autrefois acquit* admits the facts set up in the plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 672.]

2. CRIMINAL LAW §202(1) — FORMER JEOPARDY—AUTREFOIS ACQUIT.

Where defendant was acquitted of the charge of having had sexual intercourse with a female under 18, the acquittal was a bar to subsequent prosecution for nonsupport of the girl and her illegitimate child.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 386-395, 398, 400-403.]

3. CRIMINAL LAW §294—FORMER JEOPARDY—AUTREFOIS ACQUIT—ANSWER.

In prosecution for nonsupport of an illegitimate child and its mother, where defendant pleaded *autrefois acquit* because he had been acquitted in a prosecution for having had sexual intercourse with the mother, if the acquittal was on the ground that she was over 18, and not on the ground that he did not have connection with her, the matter should have been set up by the state's answer to the plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 673.]

Scott, J., dissenting.

Error to Jefferson County Court; Alexander D. Jameson, Judge.

Roy Reil was convicted of an offense, and he brings error. Reversed and remanded.

May 4, 1914, the district attorney filed an information in the county court of Jefferson county, charging that Roy Reil on May 5, 1913, and thence continuously to April 13, 1914, at that county and state, did willfully neglect, fail, and refuse to provide reasonable support and maintenance for Roy Etta May Reil Giggey, his illegitimate child under 16 years of age, and did willfully fail, refuse, and neglect to provide proper care, food, and clothing for Lois Giggey, the mother of the child, during child-birth and attendant illness. To this information defendant interposed a special plea of former jeopardy and *autrefois acquit*, which alleges: That at the November term of the district court of Jefferson county he was tried by a jury duly impaneled and sworn, upon an information charging that August 16, 1912, he feloniously

had sexual intercourse with Lols Giggey, an unmarried female person under the age of 18 years; that the state offered evidence upon three separate acts of sexual intercourse, to wit, one August 11, 1912, another August 16, 1912, and another on some date between August 16, 1912, and August 29, 1912; that she testified on the trial that these were the only offenses committed upon her by him; that evidence of the birth of Roy Etta May Reil Giggey was offered in corroboration of the commission of the charge, and the child was produced in court, pointed out to the jury on the trial, and they heard her cry; that Lols Giggey testified she was under the age of 18 years when all of the alleged transactions were committed; that at the conclusion of the people's evidence defendant's counsel moved that the prosecution elect upon which one of the offenses the state would rely to secure a conviction, which was denied, and he was forced to defend and was in jeopardy as to all three; that at the conclusion of the evidence the people elected to ask for a conviction on the offense testified to as having occurred August 16th, and the jury returned a verdict of acquittal; that the matters set out and the evidence to support the information herein were admissible and were admitted in evidence upon the former trial wherein he was acquitted, and the evidence of the people on the former trial was such that, had the jury believed it, a verdict of guilty might properly have been returned; that, the jury having passed upon that evidence at the former trial and returned a verdict of not guilty, defendant cannot again be put in jeopardy for the same matters; that he has been in jeopardy of the same facts, matters, and transactions charged against him herein, in which the same evidence will be admissible as in the former case, and he tenders and offers to prove all of the facts and matters set forth in this plea and demands a jury trial thereon.

The people demurred to the plea for the reason that it does not state facts sufficient to constitute a plea and answer to the information, which was sustained and defendant ordered to plead. May 22, 1914, he pleaded not guilty and was placed on trial. May 28, 1914, the jury returned the following verdict:

"We, the jury, find the defendant, Roy Reil, guilty in manner and form as charged in the information filed herein."

After motions for a new trial and in arrest of judgment were overruled, June 20, 1914, the defendant was sentenced by the court to not less than four nor more than six months in the penitentiary, and he brings the case here on error.

A. D. Qualintance, of Denver, for plaintiff in error. Crump & Allen, of Denver, amici curiæ. Fred Farrar, Atty. Gen., and Clement F. Crowley, Asst. Atty. Gen., for the People.

GARRIGUES, J. (after stating the facts as above). [1] 1. One Lols Giggey, an unmarried female under the age of 18 years, gave birth to an illegitimate child of which she claimed defendant, Roy Reil, was the father. She thereafter caused his arrest and trial in the district court of Jefferson county upon a charge of sexual intercourse with her, an unmarried female person under the age of 18 years, which is a statutory offense punishable by imprisonment in the penitentiary. Upon this trial she testified that she was under the age of 18 years when all the acts of sexual intercourse occurred; that there were but three such acts with defendant, one on August 11, one on August 16, and the other some time between August 16 and August 29, 1912. In corroboration of her testimony she produced the child in evidence in court on the trial and testified that defendant was its father and that it was the result of these acts of sexual intercourse. At the close of the people's evidence defendant's counsel moved that the prosecution be required to elect upon which transaction it would ask for a conviction. The request was refused, which made it incumbent on Reil to defend against and introduce evidence on all the transactions. At the close of all the evidence the people elected to rely for a conviction upon the transaction testified to by her as having occurred on August 16th, and the jury returned a verdict of acquittal upon the merits. She afterwards caused the arrest and trial of the defendant in the same court upon a charge of nonsupport of the same child and herself upon the ground that he was its father, which under the statute is a crime punishable by imprisonment in the penitentiary, and on this trial the jury returned a verdict of guilty. The demurrer to the plea of autrefois acquit, which was sustained, admitted all these facts, and the question is whether the first prosecution is a bar to the second.

[2, 3] 2. The two alleged crimes are so clearly allied and dependent upon the same evidence that an acquittal in the former bars the subsequent prosecution. Proof of the charge of being the father of the child depended upon the identical facts charged in the former case, and acquittal upon the merits was a bar to this prosecution charging him with being the father of the child which it is alleged he neglected to support. The same ingredient is the basis of both charges. The crime of nonsupport is grounded upon the fact of its being his illegitimate child. To prove this it would be necessary to prove on the trial at least one of the identical acts and facts of sexual intercourse of which he had at the previous trial been placed in jeopardy. The issue upon acquittal was upon the merits as to the main acts, and not upon the allegation of the female being over the age of 18 years. If the acquittal was upon the latter ground, so that he might still have been the father of the child, that should

have been set up by an answer. To acquit on the former trial it was as necessary for the jury to find that he was not the father of the child as it would be necessary in the latter case to convict for them to find that he was the father of the child.

But it is said that, while the facts are the same, the crimes are not; therefore defendant has not been in jeopardy of the crime charged. True, they are not the same in name, but in character and identity of evidence they are closely associated. When accused was tried and acquitted upon the merits of the charge of having sexual intercourse with the prosecutrix, he was placed in jeopardy upon all acts of sexual intercourse concerning which evidence was given at that trial, and he could not subsequently be convicted upon a charge of not supporting the child claimed to have been begotten at such time. The jury could not carve out of the evidence that he was the father of the child without proof of some identical act of sexual intercourse upon which he had been acquitted.

In 12 Cyc. 288, it is said:

"Doubtless an acquittal upon the charge of assault and battery would be a bar to a subsequent indictment for rape, where both charges are based on the same transaction."

The point is made that the title of the act "to compel men to support their wives and children." (Laws 1911, p. 527) refers to legitimate children, and is not broad enough to include a criminal prosecution under it for the nonsupport of an illegitimate child and its mother. Upon this contention the court expresses no opinion.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

TELLER, J., specially concurs. SCOTT, J., dissents.

WILLIAMS v. WEST PUB. CO. (No. 1571.) (Supreme Court of Arizona. April 18, 1917.)
APPEAL AND ERROR ¶786—**COSTS** ¶260(2)
—**FRIVOLOUS APPEAL** — **DISMISSAL** — **DAMAGES**.

An appeal taken for delay, and without any meritorious cause, will be dismissed and damages for a frivolous appeal will be awarded to appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3128; Costs, Cent. Dig. §§ 984, 996.]

Appeal from Superior Court, Cochise County.

Action by the West Publishing Company, a corporation, against S. K. Williams. From a judgment for plaintiff, defendant appeals. Dismissed.

Alexander Murry, of Bisbee, for appellant. O. Gibson, of Tombstone, for appellee.

PER CURIAM. On the 1st day of March, 1916, the West Publishing Company recov-

ered a judgment against the defendant and appellant, S. K. Williams, in the sum of \$254. Motion for a new trial was made and denied on April 1, 1916. Notice of appeal was given on April 20, 1916, and a supersedeas bond was filed April 28, 1916. On September 23, 1916, a transcript of the evidence was lodged with the clerk of the superior court. Nothing further has been done to prosecute the appeal to effect. These facts are duly authenticated.

Appellee moves this court to dismiss as for a frivolous appeal, with damages. This motion is not resisted by appellant.

It appearing that the appeal was taken solely for delay and without any meritorious cause, following the rule laid down in *Willis v. Ivy*, 16 Ariz. 120, 141 Pac. 570, *Nienstedt v. Dorrington*, 16 Ariz. 121, 141 Pac. 569, and *Baca v. Noyes-Norman Shoe Co.*, 181 Pac. 884, it is ordered that the appeal be docketed in this court, and the said appeal be dismissed, and that appellee recover its costs.

The judgment appealed from being for the recovery of money, it is further ordered and adjudged that a sum not exceeding 10 per cent. of the judgment appealed from be, and the same is hereby, fixed at \$25, which amount is awarded to appellee as damages for a frivolous appeal.

HAMMOND v. STATE. (Cr. 411.)

(Supreme Court of Arizona. April 18, 1917.)
CRIMINAL LAW ¶1182—**APPEAL AND ERROR**
—**FAILURE TO SET OUT EVIDENCE**—**EXTENT OF REVIEW**.

Where accused submitted cause on judgment roll forming transcript on appeal with no record of evidence, made no appearance by argument or brief, the judgment will be affirmed, where it does not appear that any substantial right has been denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3208-3214.]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

A. L. Hammond was convicted of violating the prohibition amendment to the Constitution, and appeals from the judgment of conviction and order overruling his motion for a new trial. Affirmed.

Robert E. Morrison, of Prescott, for appellant. Wiley E. Jones, Atty. Gen., and P. W. O'Sullivan and J. H. Morgan, both of Prescott, for the State.

PER CURIAM. Information for violating the prohibition amendment to the Constitution, and an appeal from the judgment of conviction and order overruling his motion for a new trial.

The cause is submitted to this court on the judgment roll forming the transcript on appeal. The evidence is not in the record. The appellant makes no appearance and gives no assistance to the court by way of

argument, brief, or assignment of errors. The record has been examined for fundamental error, and we fail to find that any substantial right of the appellant has been denied.

The judgment and order must be, and are therefore, affirmed.

McMILLON v. TOWN OF FLAGSTAFF.
(No. 1510.)

(Supreme Court of Arizona. April 18, 1917.)

1. REFORMATION OF INSTRUMENTS ¶19(1)—**MUTUALITY OF MISTAKE.**

A deed containing a perfectly plain description of a certain 40 acres would not be reformed, where no mistake was made by the scrivener, and the land was that which the purchaser intended to buy, and the mistake was solely that of the vendor as to the proper description.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74, 76-78.]

2. REFORMATION OF INSTRUMENTS ¶22—**RATIFICATION.**

Where at the time of contract and partial cash payment deed of the property was placed in escrow, the later acceptance by vendor of the agreed purchase price and her permitting the escrow keeper to deliver the deed to the purchaser after she discovered a misdescription of the land in contract and deed operated as a surrender of her claim of mistake and a ratification of the written instrument as speaking the truth.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 81.]

3. EQUITY ¶3—**DISTURBANCE OF EXECUTED CONTRACT.**

Where parties, with full knowledge of the terms and conditions of a contract, dealing at arm's length, fully perform it, equity will not interfere or lend its aid to disturb the situation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 7-12.]

Appeal from Superior Court, Coconino County; F. W. Perkins, Judge.

Action by Katherine McMillon against the Town of Flagstaff. From a judgment for defendant, plaintiff appeals. Affirmed.

Thomas A. Flynn, of Phoenix, and Francis D. Crable, of Flagstaff, for appellant. Edward M. Doe, Mercer Hemperly, and Jones & Jones, all of Flagstaff, for appellee.

ROSS, J. This action was brought by the appellant, who was the plaintiff below, to reform a deed for 40 acres of land executed by her to the town of Flagstaff, appellee, for a consideration of \$4,500. The land was purchased for a reservoir site for the town. Negotiations for its acquisition had been carried on since some time in the summer or fall of 1913 and until April 24, 1914, on which day a written agreement was entered into between the parties, whereby appellant gave a 40-day option to the appellee to purchase the "east one-half of the northwest quarter of the northwest quarter and the west one-half of the northeast quarter of the northwest quarter of section 4 in township 21

north, range 7 east of the Gila and Salt River base and meridian, situate in Coconino county, state of Arizona." At the same time and place the appellant executed her deed to the appellee for the identical property described in the contract and placed the same in escrow. A cash payment of \$500 was made to the appellant, and, by the agreement, the appellee was to pay the balance of \$4,000 on or before 40 days, and upon such payment was to receive from the escrow keeper the deed to the above-described property. Some time after the execution of the contract of sale and the deed, and prior to the expiration of the option, the appellant, who was preparing to farm some portion of the described land, was notified by some person acting for the appellee that her farming operations were upon land that had been sold or optioned to the town of Flagstaff, whereupon the appellant, claiming that the contract and deed failed to describe the land she intended to sell, requested the appellee to change the description in said instruments by substituting therefore "northwest quarter of the northwest quarter" of section 4 in township 21 north, range 7 east of the Gila and Salt River base and meridian. The municipal authorities of Flagstaff refused to make the changes requested, and insisted that the contract be performed as originally written and executed. Later the appellant accepted from the appellee the balance of \$4,000, and the escrowed deed was delivered to appellee.

Negotiations of the sale were all carried on personally by the appellant. She submitted testimony on the trial to the effect that the northwest quarter of the northwest quarter was "pasture land" or "rocky land," and that she understood it to be the land she was selling. When questioned concerning the contract of sale, she said:

"I did not even read it carefully. I thought I knew the land so well. * * * I thought it was the pasture land I was selling; I was positive that was the land I was selling them at that time."

It is shown that the matter of the description of the land as contained in the contract and deed was not discussed at the time of signing or at any other time prior to her discovery of the alleged mistake.

The above is a condensed statement of the facts as disclosed by the pleadings and the evidence introduced on behalf of the appellant. At the close of her case the appellee moved for judgment, basing its motion upon a lack of evidence to establish the appellant's cause of action or any cause of action against the appellee. The motion was granted, and judgment was entered against appellant, from which she appeals.

The finding of the trial court on the question as to whether there was mistake in the description of the premises conveyed or not is as follows:

"That the lands and rights of way agreed by plaintiff to be by her sold and conveyed to defendant were the identical lands and rights of way mentioned and described in the said agreement and in the said deed, and that the same were the identical lands and rights of way which the defendant intended to buy and acquire from plaintiff, and that no mistake was made by the scrivener who drew the said agreement and deed, or otherwise, or at all."

We think the finding was fully justified by the evidence.

The trial court properly ordered judgment for the appellee for two good and sufficient reasons:

[1] First. The evidence failed to show the mistake, if any, was a mutual mistake. At most, it was a unilateral mistake as to the identity of the subject-matter. It is not shown that the appellee intended to purchase any other piece of land than the one described in the contract and deed.

"A party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake, and acts in perfect good faith. A unilateral error, it has been said, does not avoid a contract." 6 R. C. L. § 42, p. 623; 9 Cyc. 394; 34 Cyc. 915.

[2] Second. After the appellant had discovered the misdescription of the land in the contract and deed, as she claimed, she accepted the agreed purchase price and permitted the escrow keeper to deliver over to appellee the deed conveying the property. In doing so it would seem that she surrendered her claim of mistake and acquiesced in and ratified the written instrument as speaking the truth.

[3] Where parties with full knowledge of the terms and conditions of a contract, dealing at arm's length, fully perform it, equity will not interfere or lend its aid to disturb the situation. Appellant, after full knowledge of all the facts, accepted the consideration and delivered the deed of conveyance, and thereby, we think, foreclosed herself from ever thereafter questioning the transaction. 34 Cyc. 942, and cases cited under notes 13 and 14.

Judgment is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

WOOLEY v. LOCARNINI. (No. 1519.)
(Supreme Court of Arizona. April 18, 1917.)

1. APPEAL AND ERROR ⇐216(3)—OBJECTIONS BELOW—INSTRUCTIONS—NECESSITY OF REQUEST.

An instruction on counterclaiming defendant's measure of damages was not reviewable, where plaintiff neglected at the proper time to request a proper instruction, setting forth the true rule of damages as he understood it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 640.]

2. FRAUD ⇐59(3) — DAMAGES — DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUE.

Where plaintiff pleaded in his reply to defendant's counterclaim for fraud in sale of land that the land was of the value paid by defendant, the measure of defendant's damages was the difference between the purchase price and the actual value as found; for, under such pleading, the purchase price was the represented value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62.]

3. APPEAL AND ERROR ⇐1068(4)—HARMLESS ERROR—INSTRUCTION ON MEASURE OF DAMAGES.

The giving of an instruction on measure of appellee's damages was not injurious, where the jury did not follow it, but applied a rule more favorable to appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Trial, Cent. Dig. § 484.]

4. APPEAL AND ERROR ⇐1170(9)—REVERSAL — TECHNICAL ERROR.

An instruction objected to as susceptible of being understood to require a finding for counterclaiming appellee in excess of the amount admittedly due appellant, in the event appellee suffered any damages whatever, was not reversible error, under the constitutional prohibition of reversal for technical errors, where the jury specially found the amount of appellee's damages, from which it deducted his admitted debt to plaintiff, and returned verdict for the balance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Millard Wooley against Joe A. Locarnini. From judgment for defendant, plaintiff appeals. Affirmed.

G. W. Silverthorn, of Mesa, for appellant.
M. J. Dougherty, of Mesa, for appellee.

CUNNINGHAM, J. During the month of July, 1913, the appellee visited Arizona for the purpose of buying a tract of land for farming purposes. He is a farmer, and had followed that occupation for a number of years in California. He visited friends at or near Gilbert, in Maricopa county, and while so visiting he, with his friends, met the appellant. Upon inquiry, the appellant offered to sell to the appellee 80 acres of productive farm land. The appellee was shown the land, and the parties had a number of conversations about the land, and the quality of the land. The appellant fixed as the price for which he offered to sell at \$110 per acre. After the parties had concluded negotiations on the occasion of the appellee's visit, without arriving at any agreement, the appellee returned to California, and later wrote from California to the appellant, accepting the offer of the land for \$110 per acre. Later, about the 1st of August, 1913, the appellee returned to the land, and a contract of sale was prepared and signed by the parties, by the terms of which the appellant agreed to sell the 80 acres of land described, for a consideration of \$110 per acre or the full

sum of \$8,800, which should be paid to the party of the first part in the following manner: \$800 had been paid; the sum of \$15 per acre, or the sum of \$1,200, should be paid as soon as an abstract of said property had been prepared and found to show clear title, except certain incumbrances; and the balance of said purchase price, to wit, \$6,800, on or before the 15th day of September, 1913. A failure to pay any of the amounts of money provided to be paid the parties agreed would work a forfeiture of the contract at the option of the seller. The appellee took possession of the land as agreed, and, agreeable to the parties, he paid \$8,000 of the purchase price, and on January 7, 1914, \$800 of the purchase price remained due and payable. Thereupon the appellee made, executed, and delivered to the appellant his promissory note, due six months after date with interest, for the said balance of said purchase price of the land, and appellant accepted said note therefor. Prior to the date of maturity of the said note, the appellee notified appellant that the land involved was not of the quality represented, and that before the appellee paid the appellant the amount of the note, and other amounts of account between the parties, an adjustment of the matter would be insisted upon. The appellant accompanied the appellee over the land, and appellee pointed out portions of the land he claimed were not as represented, but which was worthless. No agreement was reached by the parties concerning this dispute. When the note matured, the appellant, as plaintiff, commenced this action to reduce the note and an account to a judgment. The defendant admitted the making of the note and its nonpayment. He admitted that he owed the account, and interposed a counterclaim based upon the allegations that the plaintiff—

"* * * represented to defendant, that the said lands were fertile, and every part thereof was of such nature that the same would raise good crops; that there was no sterile, or so-called 'slick' soil upon said land, 'slick land' being such land as would not respond to irrigation, and would not raise crops under any conditions of proper care and farming; also represented that plaintiff had raised crops upon each and every portion of said lands; that defendant, by an examination of said lands, could not ascertain that said representations were false, and relied upon plaintiff's statements, respecting the quality of said lands, and, relying thereon, then and there agreed to pay the plaintiff a total price per acre for said lands, the sum of \$110 per acre; that all of said purchase price has been paid, except the amount represented by the note described in the complaint. That the representations made by plaintiff to the effect that there was no 'slick lands' upon said 80-acre tract were false and fraudulent, and that plaintiff knew that they were so false and fraudulent, and knew that defendant relied upon same as being true, and were made for the purpose of inducing defendant to purchase said lands at a price greatly in excess of the real value of said lands, and defendant, relying upon said statements and representations as being true, did pay for said lands all the purchase price thereof, except the said note,

* * * and was on account thereof cheated and defrauded to an amount * * * of over \$4,000; * * * that defendant should recover that amount from plaintiff as the difference between the real value of the land and the value thereof had said representations been true."

The plaintiff replied or answered the counterclaim so set forth by the defendant. Therein he denies that he made the representations complained of on January 7, 1914, when the note was made, or at any time. He denies:

"That said land was fertile, and every part thereof of such a nature that the same would raise good crops."

He denies:

"That there was no sterile or slick soil upon said land, or that this plaintiff had raised crops upon each and every portion of said land."

The plaintiff further denies:

"* * * That defendant, by an examination, could not ascertain that said representations were false, and denies that the defendant relied upon the plaintiff's statements, or any statements of plaintiff, regarding the quality of said land, but alleges that defendant purchased said land with full knowledge of the condition of the same after having examined said land by going upon the same and with full opportunity to judge of the conditions of said land and soil."

This portion of the plaintiff's reply is in effect such a character of pleading as amounts to an admission that plaintiff made the statements and representations with which he is charged with having made, but that he did not make such statements with regard to the making of the note in suit. This portion of the pleading is a clear admission on the part of plaintiff that there is sterile, slick soil on the tract, and that plaintiff knew it existed thereon, and that the defendant had ample opportunity to know that such soil was on the tract and the extent thereof, and with full knowledge in that respect the defendant nevertheless proceeded to, and did, purchase the land, after having examined the same. The issue thereby raised is: Whether the defendant relied upon plaintiff's representations, which were admittedly false, or whether he relied upon the result of his personal examination of the condition of the lands. In other words, whether the false representations of the condition of the land, made by the plaintiff, were the proximate efficient cause of defendant's injury and damage. The reply continues further, as follows:

"Plaintiff denies that any representations made by this plaintiff to the defendant as to the quality and condition of said land were false and fraudulent, or that the plaintiff knew that any statements made by him to the defendant regarding said land were false and fraudulent, and denies that the defendant relied upon any statements made by plaintiff, or relied upon the truth of any statements made by plaintiff in regard to said land, or that any statements whatsoever were made by this plaintiff with the intention of inducing the defendant to purchase said land at a price in excess of the value of said land."

The clear effect of these denials is to assert that, while the plaintiff did make the alleged representations, such representations

so made are true, and were made with the intention of informing the defendant of the actual worth of the property represented, and for no other purpose. That the land as represented was actually worth the price asked and paid therefor, in both quality and condition. Consequently the "plaintiff denies that the defendant * * * was cheated or defrauded in any amount whatsoever." As a further answer, the plaintiff asserts that at the time defendant made the note, he had been in possession of the land several months, and thereby had full opportunity to determine the true condition and quality and value of the land. This entirely avoids the issue, and is not responsive thereto. It is surplusage. As a further answer the plaintiff says:

"* * * That said land sold by plaintiff to defendant was, at the time of said sale, in every respect of the quality and in the condition in which the same was represented by plaintiff to be, and that the same was of the value paid therefor by defendant."

The last answer is in effect the same as the preceding answers, all of which are simply reasserted in the last. Certainly, the plaintiff's defense to the counterclaim is, as determined from all of the allegations of his answer thereto, that the land sold and purchased was of the quality and in the condition which the plaintiff represented it, and, being of such quality and in such condition, it was actually worth the sum for which it was sold to the defendant. Consequently the answer is a denial when considered as a whole, that the representations and statements made by plaintiff to defendant as to the quality of the land were false and fraudulent, for the reason such statements made are true, and that the land sold was actually worth the price agreed upon.

Upon a trial the jury returned a verdict for the defendant in the sum of \$115. As an explanation of their verdict, the jury included therein a special finding as follows:

"We find a total damage of \$1,286 for defendant and deduct therefrom the plaintiff's claim for \$1,171, leaving balance damage of \$115.00."

The verdict was recorded, and judgment entered in accordance therewith. From the judgment and from an order refusing a new trial the plaintiff appeals.

The controverted questions litigated on the trial were whether the plaintiff made any statements or representations relative to the quality of the land involved, and whether in fact the land contained sterile, hard, slick, worthless spots, and, if so, the amount in area of such worthless land contained in such spots.

The actual value of the land, at the time of its sale, is alleged by plaintiff to be \$110 per acre, or \$8,800 for the 80 acres, the amount of the purchase price. This fact is not questioned by the defendant otherwise than by his assertion that the land was not of the quality it was represented to be. Plaintiff asserts that it was of such quality.

Hence the plaintiff's allegations, to the effect that the land was of the quality represented, and was actually worth the purchase price agreed upon, is only partially controverted, but that the actual value of land of the quality represented was \$110 per acre at the time of the purchase and sale is not controverted.

The defendant introduced evidence in support of his counterclaim, tending to show that the plaintiff did make the alleged statements and representations he is charged with having made, and frequently repeated them prior to the close of the agreement; that the statements made by the plaintiff were, in effect, that the 80 acres of land were all good farming land, and contained no slick, hard, worthless land, and that he would guarantee that it contained no such worthless land; that the defendant was a stranger to the Arizona lands, and so informed plaintiff; and that defendant relied upon plaintiff's statements and representations made regarding the quality of the land and its worth for farming purposes, of which the defendant informed the plaintiff prior to the time defendant agreed to purchase the land. The defendant further informed the plaintiff that he, defendant, would buy no kind of land other than good productive farming land; that thereupon the plaintiff stated and represented that this particular 80 acres of land was all productive farming land, and that he (plaintiff) would guarantee it of such quality. After a few days consideration, the defendant, having returned to California, accepted the plaintiff's offer and notified plaintiff by letter that such offer was accepted, and in due time their contract of sale and purchase was prepared and signed, by the terms of which contract the defendant agreed to pay therefor \$8,800 according to the conditions of the written agreement.

The evidence further tends to show that the defendant took possession of the land and paid \$8,000 of the agreed purchase price, agreeably to some subsequent understanding of the parties; that on January 7, 1914, the balance of the purchase price, viz. \$800, became payable; that the defendant made and delivered the note in suit as, and the plaintiff accepted such note in payment of the said balance of the purchase price. Before the said note became due, the defendant found, by actual farming, that a great portion of the tract of land is in fact sterile, hard, slick unproductive land, wholly worthless for the purposes of farming for which the defendant purchased the land. The amount of such worthless land is estimated by the witnesses at amounts from nothing, by plaintiff's witness, to 15, 18, 20, 25, 28%, and 30 acres, by the defendant's witnesses. The defendant estimated that one-third of the tract was of such worthless land. Others of defendant's witnesses estimated 18 to 20 acres; others, 20 acres; still others as

much as 30 acres of worthless sterile, hard, slick lands. No witness introduced by the defendant estimated the amount of such land as less than 18 acres. The plaintiff, testifying, did not admit that any part of the land is sterile or slick soil. He testified that it is all good productive soil. He admitted that barren spots appear on the land, the spots testified to by the defendant's witnesses as worthless slick land, but he asserted that while such spots occur, they are caused from defective irrigation, cultivation, and from pasturing cattle on the land at a time when the ground was wet and the crop of alfalfa was too young to withstand such treatment. He estimated that the barren spots would aggregate about 15 acres, but with farmerlike care, such spots would produce to the same extent of fertility as the other concededly fertile portions of the tract.

The plaintiff, testifying to other matters, denied that he made any representations at all at any time with regard to the matter of slick, hard land on the tract. He states that the subject was not mentioned at any time.

The evidence introduced by the plaintiff, bearing upon the matter of the existence of sterile, slick land on the 80-acre tract, squarely conflicts with the evidence introduced by the defendant, bearing on that matter.

The defendant in rebuttal introduced evidence tending to show that the land while in defendant's possession had been leveled, plowed, seeded, and irrigated in a proper, farmerlike manner, and still failed to produce crops; that the land had not been unreasonably pastured and thereby been damaged.

Considerable testimony was introduced in the case tending to show the value of land in the vicinity. The witnesses fixed as the value of good productive land in that vicinity, during the year 1913, from \$100 per acre to \$135 per acre. One witness testified that such land was worth \$150 per acre. The plaintiff testified that this particular tract of land in his judgment was worth \$110 per acre. The various witnesses estimated the value of this land by the prices paid for other land in the vicinity at the time in question. All of the witnesses agreed that slick land, when it actually occurs, is absolutely worthless for the purpose of farming.

Such is a brief summary of the evidence before the jury at the close of the testimony.

The court instructed the jury satisfactorily to the parties with regards to the controverted matters of fact. At least, no assignment of error is based upon such controverted matters.

The court instructed the jury regarding the alleged false and fraudulent representations of the quality of the land and their duty in respect to such matters. Thereupon the court gave the following instruction, of which appellant has not complained:

"If you believe from all of the evidence the alleged representations were made by Wooley or

Locarnini; that the same were false when made, and were such representations as a man of ordinary prudence would rely upon; that Wooley knew them to be false; that the defendant, Locarnini, did in fact rely upon the representations, and was thereby induced to purchase the land from Wooley, and has been damaged thereby, then the defendant should be allowed such damages as he may have suffered."

The court followed with an instruction applying the same rule in case the jury believed that Wooley had no knowledge of the facts represented by him, but claimed to know the facts. This was followed by an instruction to the effect that the proof of the falsity of a material representation made with knowledge of the falsity, and with the intent to deceive the defendant, and that defendant was actually deceived thereby to his damage, justifies a recovery by the defendant. Thereupon the court instructed the jury as follows, of which complaint is made:

"(1) If you find the defendant has been damaged, you should allow him as damages that sum which will represent the difference between the purchase price of the land and what it is actually worth; for example, if you find from the evidence (Wooley) represented there was no hard spots or slick land on the place, and you find all the other facts necessary to entitle the defendant to an award of damages, as explained in these instructions, you should allow the defendant the difference between the value of the land purchased and the purchase price of \$110 an acre, and what such land is worth with hard spots or slick spots thereon.

"(2) If you find the defendant has suffered damages, then you will deduct from the amount of his damages the amount of the plaintiff's note and the interest thereon and sums due him on his open accounts, and return a verdict for defendant for the balance of amount."

The first quoted paragraph is said to be—
 " * * * erroneous for the reason that it does not state a correct measure of damages and form a proper basis for a consideration of the evidence by the jury. The correct measure of damages in cases of this kind is the difference between the value of the land at the time of purchase, if it had been as it was represented and its actual value at that time."

[1, 2] This contention cannot be allowed, for two reasons: First, because the plaintiff neglected at the proper time to request a proper instruction setting forth the true rule of the measure of damages as he understands that rule; and, second, because the plaintiff alleged in his reply to defendant's counterclaim:

" * * * That said land sold by plaintiff to defendant was, at the time of said sale, in every respect, of the quality and in the condition in which the same was represented by plaintiff to be, and that the same was of the value paid therefor by defendant."

The plaintiff is thereby precluded from contending that the price paid for the land was other than the actual value of the land at the time of the sale, and the actual value if it was as represented. Whether the land was of a value less than the purchase price was the issue on trial. If found to be of a less value, then the measure of damages was the difference between the actual value as

found and the actual value it was represented to be as represented by the purchase price paid for the land. This is the rule the jury were instructed to follow, and is the correct rule of damages under the pleadings in this case.

An examination of the verdict of the jury will disclose, however, that the damages found for the defendant are not measured by the rule as given by the court. Under the evidence, the plaintiff attempted to show that the land was worth \$110, and was cheap at that price. Other witnesses testified that land in the vicinity, in 1913, sold at prices ranging from \$100 to \$135 per acre. We have above mentioned the evidence fixing the amount of sterile land in the tract from nothing to as much as 30 acres. The jury evidently believed that the tract contained some sterile land. They evidently believed that the reason the spots in the land do not produce crops is that such spots are sterile spots as claimed by the defendant; that the amount in the aggregate of such spots is 15 acres. The plaintiff conditionally estimates the barren spots on the land at 15 acres. The jury were fully justified in finding, if they did find, that the barren spots are sterile, worthless land, and such land amounts in the aggregate to 15 acres.

Assuming that the jury so found as a fact that 15 acres are worthless, then, following the rule they were instructed by the court to follow, in measuring the damages, viz. to find the difference between the purchase price, \$8,800 and what it is actually worth, they evidently found that 15 acres are admittedly worthless. Then the land was actually worth \$8,800, less the purchase price of 15 acres, viz. \$1,650, the amount of the damages under the rule given.

The rule contended for by the appellant, viz. to find the difference between the value of the land at the time of purchase, if it had been as it was represented, and its actual value at that time, if applied, would bring what result? The plaintiff having alleged that the land was actually worth the price paid for it, \$8,800, such is the value of the land at the time of purchase if it had been as it was represented. What was its actual value at that time? Assuming that the jury found that 15 acres of the land were worthless, then the value of the 65 remaining acres of land is as it was represented to be, and worth the amount of \$110 per acre paid for it because plaintiff alleges the land was of that value. Consequently the 65 acres of land was actually worth \$7,150. The difference between the value of the land at the time of the purchase, if it had been as it was represented to be, that is, the difference between \$8,800 and its actual value at the time, viz. \$7,150, is the sum of \$1,650, the identical amount of damages produced from the rule given by the court, because the

pleadings of the plaintiff fix the actual value of the land at the purchase price, and the court by its rule fixes the same sum, not as the actual value of the land, but as the purchase price paid for the land, which is the same thing. Consequently, the effect of the rule given, and the rule contended for by appellant, is identical upon the same assumed facts, under plaintiff's pleadings and evidence of value.

Either rule followed by the jury, after finding the amount of the sterile worthless land to be 15 acres would have produced a verdict for the defendant of \$1,650 as his damages. But the jury evidently followed neither rule, for the reason they found the defendant was damaged in the sum of \$1,286. In order to have reached this exact sum, and also to have found that 15 acres of the land were worthless, they evidently found that land of the character this land was represented to be in the vicinity where this land is located was actually worth more than \$110 per acre; that such land was actually worth \$115.60 per acre as some of the witnesses testified; consequently that 65 acres of land was of the character as represented, and was therefore worth \$115.60 per acre, or \$7,514; that the 15 acres of land was worthless, but that defendant was not injured to the full extent of the sum he actually paid for the 15 worthless acres of land, but that he was injured in a sum equal to the difference between the amount he paid for the whole tract, having bought at a bargain, and the sum the land which was of the character it was represented to be was actually worth at the time, or a difference between \$8,800, the purchase price paid, and \$7,514, the actual value of the land at the time, viz. \$1,286. Hence the jury found that the actual value of land in the vicinity of this land, of the quality the plaintiff represented it to be, was actually worth more than the purchase price agreed upon by the parties, and actually worth more than plaintiff contended for it. And because defendant did not pay the full worth for 65 acres of such land, his injury by reason of paying \$110 per acre for 15 acres of worthless land only amounted to the difference between the sum he paid less than the actual value of the 65 acres of the character of land represented to him he was buying and the price paid for the worthless land. In other words, he paid \$1,650 for 15 acres of worthless land. He paid \$7,150 for 65 acres of land worth \$7,514. Hence he paid \$364 less for the 65 acres of land than such land was actually worth. Therefore he was benefited in that respect to the amount of \$364, and damaged to the amount of \$1,630, by reason of the worthless 15 acres of land. He suffered actual damages, to the amount equal to the difference between the sum he was injured, viz. \$1,650, and the sum he was benefited, viz. \$364, or in the sum of \$1,286.

Thereby a rule is followed by which the jury ascertained the difference between the actual value of the land at the time of the sale and the value of the land had it been as it was represented to be, which not only ignores the court's instructions and the plaintiff's allegations of value, but is the rule that is approved, and here insisted upon, by the appellant, notwithstanding the allegations of his reply, which would have made the strict application of the rule to his disadvantage.

[3] I can find no injury resulting from an instruction given which was not followed by the jury. And the jury evidently did not follow the instruction the court gave in this respect, but did follow a rule in measuring the damages which was just and equitable both to the plaintiff and the defendant and gave neither the benefit of a bargain. The instruction complained of is without injury to the appellant's rights, and was therefore harmless.

[4] The second paragraph of the instruction, quoted, is complained of as prejudicial "for the reason that it is a direct charge to the jury to find some sum for the defendant in excess of the amount admitted to be owing to the plaintiff in the event the jury should find that the defendant had suffered any damages whatsoever." The language of the instruction permits of such an understanding of its meaning. The language used is as follows:

"If you find the defendant has suffered damages, then you will deduct from the amount of his damages, the amount of the plaintiff's note, and the interest thereon and sums due him on his open accounts, and return a verdict for defendant for the balance of amount."

The verdict of the jury on its face specially sets forth that the jury finds that the defendant has been damaged in the sum of \$1,286, from which sum the jury deducts \$1,171 as the total amount of the plaintiff's claim. How could such instruction, here complained of, conceding that it is erroneous, have resulted to appellant's prejudice, when the face of the verdict gives to the plaintiff credit against the damages found for the defendant, to the full amount claimed by the plaintiff, and \$1 additional? If a reversal of the judgment should be ordered in such circumstances, such reversal would be granted because of a clear technical error, which on its face actually wrought no injury. Reversals for such reasons should not be granted as of right, and this court ought not grant a reversal in such case for the further reason the Constitution prohibits the reversal of a judgment for technical errors in pleadings and proceedings when upon the whole case justice has been done. Such appears to be the situation presented by this record.

Other alleged errors are assigned, but upon consideration no reversible error appears in

the record for which reason a discussion is of no benefit and will be omitted.

I find no reversible error in the record.

The judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur in the judgment.

BASHARA v. STATE. (No. A-2306.)
(Criminal Court of Appeals of Oklahoma.
April 26, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 761(6)—INSTRUCTION—ASSUMPTION AS TO PROVOCATION OF DIFFICULTY.

The court instructed the jury as follows: "You are further instructed, gentlemen of the jury, that while the law permits a person to defend himself or his wife against real or apparent danger, such is defensive and not offensive; and therefore you are instructed that a person under the law cannot arm himself and invite and provoke a difficulty, and thereupon assault and slay his adversary, and invoke the right of self-defense. And you are instructed, gentlemen of the jury, if you believe from the evidence in this case beyond a reasonable doubt that this defendant armed himself with a rifle and sought the deceased, either acting alone or in conjunction with his wife, for the purpose of provoking or engaging in a difficulty with the deceased, and in furtherance of any such design between husband and wife either husband or wife invoke and provoke a difficulty with the deceased, and thereupon the defendant shot and killed the deceased, then the defendant cannot invoke the right of self-defense." *Held*, that the foregoing instruction does not assume that the appellant invited or provoked a difficulty with the deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1731.]

2. HOMICIDE. \S 300(7)—INSTRUCTION—SELF-DEFENSE — PROVOCATION OF DIFFICULTY — EVIDENCE.

Evidence examined, and *held* sufficient to authorize the trial court to give the aforesaid instruction in this case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622.]

3. CRIMINAL LAW \S 1038(1)—HARMLESS ERROR—INSTRUCTION.

Where no objection is made or exception taken to the giving of an instruction at the time it is given, and said instruction is partially erroneous, the giving of said instruction is not reversible error, unless some constitutional or express statutory right of the defendant has been invaded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2646.]

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

Charles Bashara was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The appellant, Charlie Bashara, was a merchant in the town of Tuttle, Okl. His place of business was located on the north side of Main street. The deceased, Selby, was engaged in the real estate business in said town, and his place of business was situated just east of Bashara's store. There was

an open space about 18 inches wide between the buildings occupied by these parties. In windy weather a considerable amount of trash blew into this space, and Selby went to Bashara and got permission to place some upright planks across this opening. Some time later Bashara became angry at the manner in which he claimed Selby was using this place between the buildings, claiming that the manner of its use was very annoying to him and his family. After that these planks were torn down, and on the morning of this occurrence they were found in the street in front of the premises. Selby and his partner, Steward, got the planks and nailed them between the opening again. Immediately thereafter Bashara came out and tore them down and threw them back into the street. Again they were nailed up by Selby, and thereafter Bashara went to see a justice of the peace about it, but the justice refused to do anything, and Bashara returned home, informing his wife of that fact. Immediately Mrs. Bashara told her husband that she would tear the planks down if they had to be torn down. This was agreeable to Bashara, and Mrs. Bashara then proceeded to attempt to tear the planks down with her hands. While she was making this attempt Selby stepped out in front of his building and admonished her not to tear the planks down; that if they were on her premises, he would tear them down himself. Mrs. Bashara remarked that she did not propose to have that space used for the purpose for which it had been used, and that she intended to tear those planks down. She then proceeded to go to a little building in the rear of her store to get an axe, and she immediately returned with the axe and commenced to knock the planks down. Selby still admonished her to leave the planks alone, and, according to the witnesses for the defendant, laid his left hand upon her and pushed her back and away from the planks. According to the witnesses for the state Selby never touched her. About this time the appellant appeared upon the scene at the west end of his store building. He says that he told his wife not to let Selby hurt her; that at that time Selby was pushing her with his hand; that he thought Selby intended to hurt her; that Selby's attention was attracted to him, and he immediately remarked, "You ———, ——— coward, why don't you come and remove these planks?" Selby was wearing a knit sweater which was entirely buttoned up in front. At this remark the defendant says he stepped back into a little building occupied by him as a dining room and kitchen just to the west of his store building, and procured his Winchester rifle, immediately returning. When he returned he says Selby made the remark, "You ———, ——— coward, I will plug you one," and accompanied this remark with a motion of his right hand to his breast; that thereupon he levied his

rifle upon him and fired the fatal shot; that when he fired Selby had his hand inside of his sweater, and was attempting to withdraw something from it, and that he saw something move around that looked to him like a ball. The witnesses for the state testifying that at the time Selby was shot he was making no attempt whatever to draw a gun or to make any other demonstration of violence toward this applicant; that the appellant stepped out from the west side of his building and told his wife to stand back, and that she stood back against the wall of the building, and that the appellant immediately fired the fatal shot; that at that time Selby was standing on his own porch merely admonishing Mrs. Bashara not to remove the planks. He reeled to the rear and fell dead just inside of the front door of his office. After his death an automatic six-shooter was found buttoned up under his sweater. Several witnesses testified on rebuttal for the state that a short time after the killing the appellant said, in explaining the homicide, that at the time he shot the deceased he was making a motion with his right hand toward his hip pocket. This occurred in Chickasha while he was in the custody of the sheriff. It is evident that according to the testimony of the witnesses for the state the crime committed here was murder. The evidence on the part of the defendant tends to sustain his plea of self-defense. The parties to the transaction had had some minor difficulties prior thereto, but nothing of a serious nature. Certain evidence was introduced tending to show that the deceased had on one or two occasions threatened the appellant. The jury found the appellant guilty of manslaughter in the first degree, and sentenced him to imprisonment in the penitentiary for a term of 10 years. From this judgment of conviction an appeal was taken to this court.

Barefoot & Carmichael, Bond, Melton & Melton, and E. E. Riddle, all of Chickasha, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Ass't Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1] The only alleged errors relied upon for reversal in this case are the giving of certain instructions, the first of which is instruction No. 15, to which instruction objection was made and exception taken at the time of its giving, and which instruction is as follows:

"You are further instructed, gentlemen of the jury, that while the law permits a person to defend himself or his wife against real or apparent danger, such is defensive and not offensive; and therefore you are instructed that a person under the law cannot arm himself and invite and provoke a difficulty, and thereupon assault and slay his adversary, and invoke the right of self-defense. And you are instructed, gentlemen of the jury, if you believe from the evidence in this case beyond a reasonable doubt, that this de-

fendant armed himself with a rifle and sought the deceased, either acting alone or in conjunction with his wife, for the purpose of provoking or engaging in a difficulty with the deceased, and in furtherance of any such design between husband and wife, either husband or wife invoke and provoke a difficulty with the deceased, and thereupon the defendant shot and killed the deceased, then the defendant cannot invoke the right of self-defense."

The contentions of counsel for appellant that this instruction is erroneous are as follows:

"The court clearly in this last language assumes without sufficient testimony, which point was controverted, that the defendant, to carry out the design which he had formed to slay the deceased, and in furtherance of such design and conspiracy between him and his wife, invited or provoked a difficulty, etc. If there were any testimony tending to show a collusion or conspiracy between the defendant and his wife, certainly the jury should have been permitted to have passed upon and determined that issue."

"The court in the case at bar, in giving the instruction complained of, very strongly intimates a conspiracy or collusion between the defendant and his wife to provoke a difficulty with the deceased for the purpose of slaying him. We doubt if there is sufficient testimony in the record warranting the court to charge upon an issue of conspiracy by and between the defendant and his wife; but if there be such testimony, certainly a jury should have been permitted to determine this issue; and the detriment to the defendant by the court's assuming such state of facts cannot be calculated."

We cannot agree with these contentions. First, said instruction does not assume that the defendant invited or provoked a difficulty. The instruction assumes nothing. It will be noted that the court instructed the jury that if they believed beyond a reasonable doubt from the evidence that the defendant armed himself and sought the deceased, either acting alone or in conjunction with his wife, for the purpose of provoking or engaging in a difficulty with the deceased, and in furtherance of any such design did provoke a difficulty with the deceased, and thereupon killed him, then the defendant could not invoke the right of self-defense. The clause, "if you believe from the evidence beyond a reasonable doubt," qualifies everything that follows it in the sentence. This was a correct exposition of the law, as this court has repeatedly held in the following cases: *Moutry v. State*, 9 Okl. Cr. 623, 182 Pac. 915; *Koozer v. State*, 7 Okl. Cr. 336, 123 Pac. 554; *Rollen v. State*, 7 Okl. Cr. 673, 125 Pac. 1087.

But it is contended that the court should have gone further and instructed the law to be that, if after any such design on the part of the defendant to seek the deceased for the purpose of engaging in a difficulty he abandoned such design and then thereafter his life was put in immediate danger, he would have the right to defend himself. The court is only required to instruct upon the law as applicable to the facts. In this case there was not a syllable of evidence falling from the lips of any witness on either side that there was any withdrawal from

this conflict on the part of this appellant. As we view the evidence, from his own testimony, the appellant is at least guilty of manslaughter in the first degree. The testimony of his wife would also corroborate this view. The testimony of the only other witness for the defendant does not show a justification or excuse for the homicide.

[2] As to the further contention that the foregoing instruction is not warranted by sufficient testimony in the record, we conclude that this contention is not meritorious. We have carefully examined this record and reach the conclusion that the acts and conduct of the appellant and his wife on the occasion of this homicide disclosed a state of facts which fully authorized the giving of this instruction. Considered then, from all the angles complained of, we are of the opinion that the trial court did not err in giving the aforesaid instruction on the law of self-defense.

[3] It is also contended that the court erred in giving instruction No. 19, as follows:

"Evidence has been offered in this case, gentlemen of the jury, relative to certain previous difficulties and threats, and certain opprobrious epithets alleged to have been used by the deceased as against the defendant. You are instructed that even though you should believe from the evidence that the deceased used such epithets and engaged with the defendant in previous difficulties, such previous difficulties nor epithets cannot serve as a justification or defense in this case, unless you should find the defendant justifiable and excusable in doing what he did under the evidence and the instructions given you in this case."

An examination of the record discloses that no objection was made or exception taken to the giving of this instruction. In the absence of any such objection or exception, an erroneous instruction could not be ground for reversal unless fundamentally wrong. The instructions are to be considered as a whole, and we find that in this case the court, by instruction No. 17, fully informed the jury relative to threats and former difficulties. In instruction No. 17 the court, among other things, said that such threats were competent for consideration by the jury, together with all the other facts and circumstances in the case, "in determining the guilt or innocence of this defendant." Considered as a whole, and in view of the fact that the defendant under his own testimony and that of his witnesses is at least guilty of manslaughter in the first degree, this court cannot say that there was prejudice in the giving of this instruction, which counsel for the defendant did not see fit to object to at the time. It is the duty of counsel to call the trial court's attention to alleged errors in instructions, in order that he may have an opportunity to correct them; and, where this is not done, this court has repeatedly held that only such errors in the instructions as directly conflict with the constitu-

tional and plain statutory rights of the defendant will be considered.

Upon an examination of the entire record we find no error prejudicial to the appellant, and the judgment is accordingly affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

WEST v. STATE. (No. A-2426).
(Criminal Court of Appeals of Oklahoma.
April 26, 1917.)

(Syllabus by the Court.)

1. WITNESSES \S 52(7) — COMPETENCY — WIFE AGAINST HUSBAND.

In a prosecution against a husband for willful and corrupt perjury in making a false affidavit in a suit for divorce against his wife in order to obtain service of summons by publication as required by the statutes of this state, the wife is a competent witness for the state on the trial of such criminal prosecution.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 132-134.]

2. CRIMINAL LAW \S 824(1) — HARMLESS ERROR — INSTRUCTIONS — PENALTY.

Where the statute fixes the maximum punishment for a crime, but fails to provide a definite minimum punishment therefor, and the court instructs the jury as to punishment practically in the language of the statute, and no more definite instruction as to the minimum term of imprisonment is requested by counsel for the defendant, the giving of such instruction in the absence of such request is not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1993, 2004.]

3. CRIMINAL LAW \S 1186(1) — HARMLESS ERROR — INSTRUCTIONS.

Mere technical objections to the wording of the court's instructions do not meet with the favor of this court. The judgment of conviction will not be reversed on the ground of misdirection of the jury unless in the opinion of this court, after the examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3215-3217, 3219, 3230.]

Appeal from District Court, Oklahoma County; George W. Clark, Judge.

Roy T. West was convicted of perjury, and he appeals. Affirmed.

Prulett, Sniggs & Tripp, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This was a prosecution against the appellant lodged in the district court of Oklahoma county charging him with the crime of perjury, in that in said court, in an action which the appellant had then pending against his wife, Rhoda A. West, for divorce, the said appellant filed a false affidavit in order to procure constructive service of summons upon the said Rhoda A. West by publication, the information in substance

alleging that the said affidavit was false, and that the said defendant at the time knew that it was false, and that the same was filed in said divorce proceeding for the purpose of procuring service of summons by publication; the material allegations contained in said affidavit so filed being as follows:

"That the said defendant did not know whether said Rhoda A. West was at the time in the state of Oklahoma; that the last time he had heard of her was about 18 months prior thereto, and at that time the said Rhoda A. West was in St. Louis, in the state of Missouri; that he was unable to procure service of summons upon the said Rhoda A. West within the state of Oklahoma for the reason that he did not know her whereabouts; and that her whereabouts could not be ascertained by any means within his control."

The state clearly established upon the trial every material allegation of the offense. The only testimony introduced on behalf of the defendant was as to his previous good reputation for truth and as a law-abiding citizen.

Two alleged errors are called to the attention of this court by reason of which counsel for appellant claim that this judgment should be reversed: First, that the court erred in admitting the testimony of Rhoda A. West, the wife of appellant, over his objection and exception; second, that the court erred in failing to instruct the jury as to the minimum punishment which could be inflicted for said offense.

Section 5882, Revised Laws 1910, provides:

"Except as otherwise provided in this and the following chapter, the rules of evidence in civil cases are applicable also in criminal cases: Provided, however, that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, but they may in all criminal cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other."

[1] It is contended on behalf of the appellant that perjury committed under the circumstances as above set forth is not a crime committed against the wife within the meaning of the above statute, and that therefore the wife is an incompetent witness against her husband in such a proceeding. With this contention we cannot agree. It may be admitted that, if our statute was simply a declaration of the common-law rule, then the wife would be incompetent to testify in this proceeding. Under the common law neither the wife nor the husband were competent witnesses either for or against the other, but from the necessity of things an exception obtained to this rule, and the rule was enlarged upon to the extent that in criminal prosecutions against one for personal violence committed upon the other either the wife or the husband, as the case might be, were permitted to testify against the other

in such proceedings. But this court has held that our statute is not declaratory of the common-law rule; that there are other interests not only affecting society at large, but also peculiarly affecting the marital relations, which are as sacred to be protected as prosecutions involving the elements of violence. Therefore this court held in the case of *Heacock v. State*, 4 Okl. Cr. 606, 112 Pac. 949, that in a prosecution for adultery the husband or wife is a competent witness to prove the offense. Also in the case of *Hunter v. State*, 10 Okl. Cr. 119, 134 Pac. 1134, L. R. A. 1915A, 564, Ann. Cas. 1916A, 612, it was held:

"In a prosecution against a father for willfully failing to supply his children with necessary food, clothing, shelter, or medical attendance, his wife is a competent witness against him."

In that case the court, speaking through *Furman, J.*, said:

"In reason and in justice we believe that, whenever a husband or wife is guilty of conduct which constitutes a public offense, and which also constitutes a direct violation of the legal rights of the other, the crime is against such other, as well as against the public, and that such husband or wife should be permitted to testify in all such cases. Suppose a husband should publish a libel or slander upon his wife, would it not be a prostitution of reason, and a mockery upon justice to exclude her evidence upon the ground that it would impair the sanctity of the home and destroy the confidence, peace, and harmony of the marital relations to permit her to testify? Many other illustrations could be offered. What we are after is the principle involved, the ground upon which the testimony of the wife is excluded. Considering the substance rather than the form of things, we are of the opinion that the idea that the wife can only testify against her husband for an assault committed upon her person is a relic of barbarism. We decline to perpetuate any such idea in Oklahoma."

In the case of *Dill v. People*, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254, the exact question here involved was under consideration by the Supreme Court of Colorado, and that court in a very able and exhaustive opinion by *Elliott, J.*, held:

"Where a husband is indicted for willful and corrupt perjury in making a false affidavit in a suit for divorce against his wife, the wife is a competent witness for the state on the trial of such indictment."

In the body of the opinion it was said:

"In the case at bar, defendant was charged with committing the crime of perjury in an action for divorce against his wife. The purpose of the affidavit was to aid him in his suit against her; it was to give the court jurisdiction of the cause without personal service of process upon his wife; and the object of that portion of the affidavit of which perjury is predicated was to enable him to give the court jurisdiction without mailing a copy of the summons to his wife. If in making such affidavit defendant committed perjury, the effect of his crime was to diminish the wife's chances of obtaining notice of the divorce suit, and thus deprive her of the privilege of making any defense. It is clear, therefore, that she was the particular individual whose private rights and interests would be affected by the crime. It is true the crime of perjury committed in such a case was a crime against the public administration of justice; the public are deeply interested—every good citi-

zen is interested—in punishing and preventing the crime of perjury; but the perjury in this case was calculated to inflict upon the wife of defendant a direct private injury to her individual rights and interests. That the crime was against her, in the sense in which every crime is an injury to a particular individual, cannot be doubted. In the first place, the perjury was liable to deprive her of the right of making defense; if deprived of that right, she might be wrongfully deprived of her husband, and of her right to support from his estate or from his labor; besides, if divorced, she would be subjected to the stigma of having been false to her marital vows. A decree of divorce, in the estimation of all good people, causes ignominy and disgrace to fall, more or less heavily, according to the nature of the case, upon the party adjudged to be in the wrong. The rule of the common law that a wife may testify against her husband in a case where he is charged with a crime of violence against her person rests, it is said, upon the principle of affording her the means of self-protection. In the ruder period in which the common law took its rise life and limb were principally regarded. Property was also esteemed worthy of protection. But the property rights of the wife were greatly restricted, and her personal status was almost entirely merged in that of her husband. In the present age there have been great changes; other than tangible things are more highly esteemed. Should it, therefore, be deemed strange that modern legislation should give the wife the means of protecting that which is often dearer to her than life, liberty, or property?"

The reasons given and the argument supporting those reasons that the wife is a competent witness against her husband in a prosecution such as this meet the entire approval of this court. The doctrine is firmly established in this state, and we do not propose at this time to take a backward step. This crime was peculiarly injurious to the wife. It was a crime committed against her to her particular injury. It tended to deprive her of certain legal and property rights protected by the laws of this state. In our opinion, it would be absurd to say that the false making of such an affidavit in a divorce proceeding was not a crime against her. It is also immaterial whether or not by reason of such affidavit a divorce was obtained. It was through no fault of this appellant that discovery was made of his attempt to obtain a divorce through perjury and fraud upon the court, and had not this been discovered and prosecution commenced two days before the case was set for trial we doubt not that by such means this appellant would have procured his divorce. It is also immaterial, as we view the matter, whether or not had such divorce been obtained this prosecuting witness could have by law set it aside. Such corrupt practices must be put to an end, and under our criminal procedure it is the duty of this court to so construe the law that the purposes for which it was enacted may be fully carried into effect. We are required under our statutes to give a liberal construction to the law in order to effectuate its purposes. We admit that in the case of *People v. Carpenter*, 9 Barb. (N. Y.) 580, it was held that in a proceeding of this kind the wife was not a competent wit-

ness against her husband, but the New York court followed the common-law rule, which this court has already seen fit to discard. We therefore hold that in a prosecution for perjury based upon the making of a false affidavit in a divorce proceeding in order to procure constructive service upon his wife such crime under our statutes is a crime against the wife, and that she is competent to testify for the state.

[2] It is also contended that the court erred in giving the following instruction:

"The punishment prescribed by the law of the state of Oklahoma for the crime charged in the information is imprisonment in the state penitentiary for a period not exceeding five years. If you find the defendant guilty of said offense, you will, in addition thereto, assess his punishment therefor."

Under the statutes of this state the crime of perjury is punishable by imprisonment in the state penitentiary for various terms of years according to the circumstances under which the false oath was taken. If taken upon a trial for a felony, the punishment is by imprisonment for a period of not less than ten nor more than twenty years. If taken upon any other trial or proceeding in a court of justice punishment is for a term of not less than five nor more than ten years. In all other cases punishment is by such imprisonment not to exceed five years. This offense comes within the punishment prescribed in the last provision of the statute, and it is contended on behalf of the appellant that the instruction is erroneous and prejudicial in that it fails to define the exact minimum term of imprisonment. It will be noted that the court told the jury, that, if they found the defendant guilty, they should assess his punishment at imprisonment in the penitentiary for a period not exceeding five years. The instruction therefore was practically identical with the statute, except that the court told the jury that in assessing the punishment the jury must fix a definite period of time. In our opinion, this instruction was equivalent to saying that the jury might fix any period of time not to exceed five years' imprisonment. But it is contended that in the case of *Colbert v. State*, 4 Okl. Cr. 487, 113 Pac. 561, it was held that an instruction which only states the maximum term of imprisonment and omits to state the minimum or alternative punishment that may be imposed is reversible error. The *Colbert Case* is easily distinguishable from this. In that case the punishment prescribed by statute was "by fine of not more than one thousand (\$1,000.00) dollars, or by imprisonment for not more than fifteen years, or by both such fine and imprisonment." The court in instructing the jury only instructed that, "If they should find the defendant guilty, they should assess his punishment which is not over 15 years in the state penitentiary." In that case the court entirely overlooked the fact that the jury might find the defendant guilty and assess only a fine against him

of not more than \$1,000, or that the jury might find the defendant guilty and assess both a fine and imprisonment. In other words, in the *Colbert Case* the court failed to instruct the jury fully as to the punishment provided for the offense by failing to give the alternative punishment that might have been imposed, and for that reason, as indicated in the opinion, the judgment was reversed. Not so in this case. Here the court instructed as to the punishment provided by the statute. If counsel for the appellant had desired a more definite and certain instruction than that given, he should have requested it at the time. This was not done. Also it is our opinion that the jury was not misled by the instruction given.

In the case of *State v. Rose*, 178 Mo. 25, 76 S. W. 1003, it was held:

"An instruction that the jury, on finding defendant guilty, should assess his punishment at imprisonment in the penitentiary for a term of not less than two years or more than seven years, or by imprisonment in the county jail not exceeding three months, was not misleading for failing to designate the minimum punishment by imprisonment in the county jail."

In the body of the opinion it is said:

"The first contention of appellant is that the failure of the court to designate by express terms in instruction No. 1 the minimum punishment as to the imprisonment in the county jail was unfair to defendant, and constitutes error. That part of instruction No. 1 of which complaint is made, after requiring, in usual form, the jury to find a certain state of facts, concludes as follows: 'Then you will find the defendant guilty as charged in the information in this case, and assess his punishment at imprisonment in the penitentiary for a term of not less than two years nor more than seven years, or by imprisonment in the county jail not exceeding three months.' It will be observed that in this instruction the jury are told in express terms what is the maximum punishment by imprisonment in the county jail—not to exceed three months in the county jail. This is the usual form of an instruction intended to guide the jury in fixing the punishment, and we are of the opinion that it is not misleading; and it requires but very ordinary intelligence to understand, from the use of the terms 'or by imprisonment in the county jail not exceeding three months,' that any length of time of imprisonment may be fixed, so that it does not exceed the time expressly designated. There is no merit in this contention, and it must be ruled against the appellant."

We hold, therefore, that where the statute fixes the maximum punishment for an offense, but fails to provide a definite minimum punishment therefor, and the court instructs the jury as to the punishment practically in the language of the statute, and no more definite instruction is requested by counsel for the defendant, the giving of such instruction in the absence of such a request is not prejudicial error.

It is also contended that the court erred in giving the following instruction:

"The defendant is not required by law to prove his innocence, but the burden is upon the state to prove his guilt. He is, in law, presumed to be innocent of the offense charged against

him, and of each and every necessary ingredient of that offense; and unless his guilt is established upon the trial of the case to your satisfaction beyond a reasonable doubt, or if, after a careful consideration of such evidence, facts, and circumstances, you have a reasonable doubt as to his guilt, you must acquit him."

[3] It is claimed that this instruction is misleading because of the word "such" before the word "evidence"; that it left the jury to form their own conclusion as to what evidence was meant to be considered. With this we cannot agree, for the reason that the instruction, considered as a whole, clearly refers to the evidence, facts, and circumstances established on the trial of the case. Technical objections of this kind do not meet with the favor of this court. The substantial rights of the appellant were not prejudiced by this instruction, and it states the law correctly.

For the reasons above given, judgment of the district court of Oklahoma county is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

SHULL v. CRAWFORD. (Civ. 2216.)

(District Court of Appeal, Second District, California. Feb. 17, 1917. Rehearing Denied by Supreme Court April 16, 1917.)

1. CONTRACTS § 261(1)—FAILURE OF CONSIDERATION—STATUTE.

In view of Civ. Code, § 1689, providing for rescinding of a contract if consideration becomes entirely void, plaintiff could rescind an oral agreement, whereby defendant agreed, but later refused, to teach plaintiff to sell washing machines and subagencies therefor, upon the strength of which plaintiff purchased contract giving him the right to sell subagencies at an enormous profit, and for purchase price of which he had given a mortgage; it being an unexecuted contract, and defendant was not entitled to foreclose mortgage and leave plaintiff to an action for damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174, 1177.]

2. QUIETING TITLE § 7(2) — MORTGAGE AS CLOUD—FAILURE OF CONSIDERATION—RIGHT OF ACTION.

Since plaintiff could show, in foreclosure action, failure of consideration for which a mortgage was given, he may maintain an action to remove from his premises the cloud of such mortgage.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 15, 18, 19, 21-23, 25.]

3. CANCELLATION OF INSTRUMENTS § 22—TOTAL FAILURE OF CONSIDERATION—NOTICE OF RESCISSION.

Where there is a total failure of consideration, it is not necessary to give notice of rescission before bringing suit to cancel the contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 30.]

4. CANCELLATION OF INSTRUMENTS § 37(8)—TOTAL FAILURE OF CONSIDERATION—SUFFICIENCY OF COMPLAINT.

Complaint alleging that defendant orally agreed to teach plaintiff to sell washing machines and subagencies therefor at an enormous profit, whereby plaintiff was induced to make the con-

tract giving him the right of sale, and that defendant refused to perform, held to sufficiently state a cause of action for cancellation of the contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 68.]

5. APPEAL AND ERROR § 1170(3)—HARMLESS ERROR—AMENDMENT OF COMPLAINT—STATUTE.

Where defendant was not prejudiced by the allowance of an amendment to complaint, after notice, the cause will not be reversed therefor, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside for error as to any matter of pleading unless the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542.]

Appeal from Superior Court, Riverside County; W. H. Thomas, Judge.

Action by Joseph M. Shull against W. H. Crawford. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Miguel Estudillo, of Riverside, for appellant. McFarland & Irving, of Riverside, for respondent.

SHAW, J. This action was brought to cancel and annul a certain conveyance of real estate made by plaintiff and his wife to defendant, which instrument, while in form a deed absolute, was in fact conceded to have been given as a mortgage to secure an alleged indebtedness due from plaintiff to defendant. The appeal is from a judgment in favor of the plaintiff and an order of court denying defendant's motion for a new trial.

It appears that a corporation known as the Domestic Utilities Manufacturing Company was engaged in the manufacture and sale of what was known on the market as the "Vacuum Clothes Washer." The company had adopted a lengthy, complex, and confused form of agency contract in appointing agents and making sales of its washers to those who could be induced to purchase the same in lots of 1,667, and whereby the purchaser was allotted the exclusive right to operate in territory selected and agreed upon. The form and substance of this contract was, if not intended as a means for the perpetration of fraud, well calculated to deceive the unwary and appeal to the gullible, for the reason that, while the purchaser was required to pay \$5,000 for which he received 1,667 washing machines, it gave him the right, provided he could find persons equally unsophisticated, to sell like contracts for \$5,000, for each of which he was to retain as his commission \$3,333, the balance of \$1,667 going to the company for the 1,667 washing machines which it furnished to the purchaser of the contract, who likewise was given the right, upon like inducement, to search for "prospects" and, if found, develop them if possible. The evidence, however, shows that to

render one a successful agent in selling the vacuum washing machines, and particularly in selling the contracts, from which latter the profits were to be derived, required that the agent or purchaser be "posted, informed, and educated"; so the contract provided that an agent making a sale of "family rights," or to persons to whom he might sell "said articles at wholesale," or those "appointed as subagents," should "post, inform, and educate" them. Whether or not defendant was the holder of one of these valuable contracts is immaterial; at all events, it appears that he was authorized to sell the same, and selected Riverside as a fertile field for operation, and where it seems his labor was rewarded by the discovery of plaintiff, who was recognized as a "likely prospect." Defendant, it seems, was what is known as a "live wire" in the business, and without much effort convinced plaintiff that he, too, upon being "posted, informed and educated," could, with like success, find unsophisticated individuals whom he could induce to buy the privilege of making like sales in this endless-chain scheme.

On September 22, 1911, defendant consummated the sale of a contract to plaintiff, under which the latter was appointed the duly authorized agent of the company in the territory embracing the city of San Diego, and received the 1,667 vacuum clothes washers, with the power to sell like contracts of agency, for which washers he paid defendant as the agent of the company the sum of \$1,667, and at the same time executed to defendant the mortgage as security to him for the payment of his commission of \$3,333, which plaintiff knew he was to receive. In his complaint plaintiff alleges, and the evidence shows, that, in consideration of his purchase of said contract, the defendant orally promised and agreed that he would "post, inform, and educate" plaintiff with reference to said clothes washer, so that he would fully understand how to operate and demonstrate the same to the best possible advantage, and enable him to secure the appointment of other agents and subagents, and further agreed "that upon said plaintiff's selecting the territory in which he desired to have the exclusive right to sell said washers, that said defendant, Crawford, would accompany said plaintiff to said territory, and would put on lectures for a period of two months, said lectures to be delivered daily during said period with the exception of Sundays"; that plaintiff selected the city of San Diego as territory, where he opened offices for the transaction of said business, and demanded that defendant put on lectures for the purpose of demonstrating and assisting him in the sale of said washers, but that defendant at all times refused to comply with said demand and deliver said lectures, or to post, inform, and educate plaintiff in the use of the same or demonstration thereof; "that the said agreement on the part of the said de-

fendant Crawford to put on said lectures as hereinbefore alleged, and to educate, post, and inform said Shull in the use of said washers and in the methods to be pursued in securing other agents and subagents for the said company was the sole and only consideration which induced the said plaintiff Shull to enter into said agreement with said defendant Crawford, or to accept an appointment as agent of said corporation, or to execute said contract as agent with said corporation, or give said note for \$3,333 secured as hereinabove alleged; that said plaintiff, Shull, has, by reason of the failure of said defendant, Crawford, to put on said lectures and instruct and inform and post him in the use of said washers, been unable to sell said washers or to interest the public therein, or to secure other agents or subagents for said company"; that had plaintiff known that said Crawford would not fulfill his said agreement, plaintiff would not have purchased said contract, and would not have given the mortgage to secure to defendant the payment from him of said sum of \$3,333; all of which allegations the court, in effect, found to be true. It is also alleged that said deed so given as a mortgage, if left outstanding, would constitute a cloud upon plaintiff's title to the real property therein described.

[1] The theory of the complaint, and that upon which the action was tried, was that the mortgage was given to defendant, which in fact it was, and not to the utilities company, which received from plaintiff all that was due to it; that the consideration for the mortgage so made to defendant was his agreement to perform certain services, without which promise plaintiff would not have bought the contract so made by the utilities company, sale of which was made to him by defendant; that defendant refused to perform the services constituting the consideration for the sale so made by defendant to plaintiff, and upon the ground of a failure of consideration moving to plaintiff from defendant, there remains nothing upon which to found plaintiff's promise to pay to defendant the \$3,333 for which the mortgage was given; and likewise for a failure of consideration defendant is not entitled to a foreclosure of the mortgage, which he sought by a cross-complaint. Plaintiff was not seeking to rescind the written contract made with the utilities company under and by virtue of which he obtained the 1,667 washing machines, but sought to rescind the oral agreement made with defendant whereby he was induced to enter into the written contract, for failure to perform the services in consideration of which plaintiff purchased the contract, and to have the mortgage constituting a cloud upon his real estate set aside and annulled. Section 1689 of the Civil Code provides that a party to a contract may rescind the same if the consideration therefor becomes entirely void from any cause.

The consideration for the purchase of the contract was defendant's promise of 60 days' services in posting and educating plaintiff in the operation and demonstration of said machines and assisting him in the making of sales of \$5,000 agency contracts at a profit of \$3,333, as well as washing machines, which promise defendant refused to perform. Nevertheless, appellant contends that he is entitled to foreclose the said mortgage and leave plaintiff to an action for damages. To our minds, such a course, under the circumstances of this case, would be highly inequitable. In support of this contention counsel for appellant cites the cases of *Lawrence v. Gayetty*, 78 Cal. 132, 20 Pac. 382, 12 Am. St. Rep. 29, and *Schott v. Schott*, 168 Cal. 342, 143 Pac. 595, in which the plaintiffs sought to have deeds, which had been made and delivered upon the promise of the grantees to support the plaintiffs during their lives, set aside. Such relief was denied upon the ground that the transaction constituted a fully executed contract. Such, however, is not the case here. It is an unexecuted contract like that involved in *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 299. Plaintiff has not parted with his property, but has merely given a mortgage thereon to secure his promise to pay defendant \$3,333, which the defendant by a cross-complaint is seeking to enforce.

[2] To our minds, plaintiff, as a defense to the foreclosure action, is entitled to show a failure of the consideration for which the mortgage was given; and, if this be true, it must follow that he has the right to maintain an action to remove the cloud from the title to his property.

[3] There was a total failure of consideration for plaintiff's promise to defendant, and hence it was not necessary to give notice of rescission before bringing suit to cancel the mortgage. *Glass v. Glass*, 4 Cal. App. 604, 88 Pac. 734; *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 62 Pac. 39.

[4] In our opinion, not only did the complaint state a cause of action, but the findings to the effect that the allegations of the complaint were true support the judgment, and they in turn are supported by the evidence. The action is not based upon fraud, either constructive or actual, of the utilities company, nor that of defendant, but solely upon the ground that since defendant failed to perform the promise in consideration of which the mortgage was given, it would be inequitable to enforce it.

Numerous complaints are made as to rulings of the court in admitting evidence. These alleged errors are based upon appellant's contention that the action was one to rescind the contract between plaintiff and the utilities company, instead of which the rulings were based upon the theory of the court that the subject of the litigation was the

oral contract made between plaintiff and defendant, which plaintiff sought to have annulled for want of consideration. Considered upon this theory, we find no prejudicial error in the rulings of the court.

[5] Nor was defendant prejudiced by reason of the court permitting plaintiff to file an amended complaint after notice. Even should we concede such error, it could not be said that it resulted in a miscarriage of justice. Section 4½, art. 6, Const.

In our opinion, the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

MARVIN v. ENG-SKELL CO. (Civ. 1886.)

(District Court of Appeal, First District, California. Feb. 19, 1917. Rehearing Denied March 21, 1917. Denied by Supreme Court April 19, 1917.)

1. SALES §417 — REMEDIES OF BUYER — FRAUD OF BUYER—SUFFICIENCY OF EVIDENCE.

In an action for damages for breach of a written contract to sell and deliver block tin pipe, evidence held insufficient to show that the contract was procured by plaintiff's fraud and misrepresentations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173.]

2. DEPOSITIONS §81 — FAILURE TO ATTACH SEAL OF COURT—ADMISSION IN EVIDENCE—STATUTE.

Where a deposition of a witness, taken out of the state on a commission, did not have attached to it the seal of the court, as required by Code Civ. Proc. § 2024, so that the court granted motion to suppress it, but later, on learning that the witness was not in New York, where he was when the deposition was taken, but somewhere in South America, and that to have the deposition taken again would cause an indefinite delay, the court properly granted motion to amend the process of the court by affixing its seal, permitting the deposition to be read in evidence, since the court has control over its process, and it should permit an amendment in the interest of justice, especially when the party complaining can show no resulting injury.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 213-217.]

Appeal from Superior Court, City and County of San Francisco; Daniel O. Deasy, Judge.

Action by M. E. Marvin against the Eng-Skell Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. J. Hayes, of Oakland, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in favor of plaintiff for \$494.80 with interest and costs.

The action was brought for the recovery of damages for the breach of a written con-

tract, under the terms of which the defendant agreed to sell and deliver to the plaintiff four reels of block tin pipe, each reel weighing 500 pounds, at a price of 50 cents per pound, and which contract the defendant refused to carry out.

It appears that the day after the contract was entered into the defendant learned that the market price of block tin pipe had gone up from 45 cents to 68 cents per pound, which increase in price was due, according to the testimony of the defendant's manager, to the European conflict then and now prevailing. This witness also testified that the defendant company was a small dealer in this article of merchandise; that it knew nothing of its sudden rise in price, but that the plaintiff did; that when the plaintiff asked the price of such pipe and stated the quantity he required he was advised by the defendant to place the order directly with the Selby Smelting & Lead Company (which was at that time the only wholesale dealer in the commodity in California); and that plaintiff concealed his true reason for not purchasing from that company (which was that he would have to pay 68 cents a pound therefor), and, with the purpose of misleading and deceiving the defendant, represented to defendant that he was not on friendly terms with the Selby Company and did not care to have any personal dealing with it.

[1] Assuming that the evidence introduced by the defendant tended to sustain the allegations of the answer, that the contract was conceived in fraud, and is therefore void, still we cannot reverse the judgment, were we ever so inclined, for the simple reason that there is an abundance of evidence in the record sustaining the findings of the court that no misrepresentation was made by the plaintiff to the defendant, and that there was no concealment or fraud practiced by the plaintiff upon the defendant. Furthermore, we are at a loss to see how the court could have made any other finding. The record discloses that on the 5th day of August, 1914, the plaintiff called at the place of business of the defendant and asked for a price on block tin pipe, stating also the quantity he desired. The clerk of the defendant was unable at that time to quote a price, and the plaintiff was requested to call again. He did so that afternoon and again on the next day, when the defendant quoted the price above stated and the agreement in writing was made. The plaintiff denied emphatically that he made any of the misrepresentations referred to. It also appears in the record that block tin was quoted in San Francisco at 45 cents per pound the day the agreement was made. We conclude therefore that this first contention of the appellant is without merit.

Equally so is the point that the defendant in purchasing the block tin from the Selby Company to fill plaintiff's order was acting as the agent of the plaintiff. It is

sufficient to say in this behalf that the evidence does not sustain this contention.

[2] A more serious question is whether or not the court committed error in admitting in evidence the deposition of M. E. Marvin. When the commission to take the deposition was issued, it did not have attached to it, as required by section 2024 of the Code of Civil Procedure, the seal of the court; and at the trial the defendant for the first time objected to the deposition, and made a motion to suppress it. The motion not being opposed, it was granted, but later, learning that the witness was not in New York, where he was when the deposition was taken, but was somewhere in South America, and it appearing that to again have his deposition taken would cause an indefinite delay, the plaintiff made a motion to set aside the order suppressing the deposition, and to amend the process of the court by affixing its seal thereto. This motion was granted, and the deposition read in evidence. The granting of this motion is now contended to be error.

We are of the opinion that under the facts the court correctly granted the motion. The court has control over its process, and it should permit an amendment to the same in the interest of justice, especially when, as in this case, the party complaining can show no resulting injury. The authorities sustain this view. In the case of *Oriental et al. v. Barclay*, 16 Tex. Civ. App. 198, 206, 41 S. W. 117, 122, the court, referring to that part of a motion to quash a commission based upon the ground that it did not bear the seal of the court, said:

"The commission having been issued by the clerk of the court trying the case, and the deposition of the witness having been taken under such commission, the failure to place the seal upon the commission was a mere irregularity, which could not have worked an imposition; and it was not error to allow the clerk to place the seal upon the commission, and to refuse to quash the deposition upon this ground."

See, also, *Austin v. Lamar F. Ins. Co.*, 108 Mass. 338; *Goodyear v. Vosburgh*, 41 How. Prac. (N. Y.) 421; *Linslie v. Kerr* (Tex. Civ. App.) 34 S. W. 765; *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21; *Wallace v. Byers*, 14 Tex. Civ. App. 574, 38 S. W. 228; *Wood v. Fleetwood*, 19 Mo. 529; *Freeman on Executions*, vol. 1 (3d Ed.) § 70.

The judgment is affirmed.

CLARK v. BERLIN REALTY CO. (Civ. 2206.)

(District Court of Appeal, Second District, California. Feb. 20, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

1. ACTION ~~ON~~ 45(4)—MISJOINDER.

Where a corporate creditor sought to recover from a stockholder its proportionate liability as such for the indebtedness of the corporation, the creditor may, in a single action, join claims for various debts.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 430-448.]

2. PLEADING \Leftrightarrow 54—COMPLAINT—REFERENCE.

In an action by creditor against a corporate stockholder to hold it liable for corporate debts, where there were several counts, essential allegations showing the stockholder's liability contained in one count may by reference be incorporated in another.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118.]

3. PAYMENT \Leftrightarrow 16(1)—NOTE.

The taking of a promissory note from a debtor or third party will not extinguish the debt and create a new obligation, unless received under an express agreement to that effect.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 63.]

4. PAYMENT \Leftrightarrow 74(3)—PRESUMPTIONS—NOTE.

Where a corporation indebted to plaintiff gave a note in payment of other debts evidenced by notes which were delivered to the corporation marked "paid," the presumption of payment is not conclusive, and does not establish a payment of the earlier debt, so that one who ceased to be a stockholder before the second note was taken was freed from liability.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 188, 230.]

5. APPEAL AND ERROR \Leftrightarrow 1011(1)—REVIEW—FINDING.

Where the evidence was conflicting, a finding by the trial court cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

6. APPEAL AND ERROR \Leftrightarrow 1068(1)—REVIEW—HARMLESS ERROR.

The exclusion of testimony is harmless where other similar evidence of equal value was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by S. N. Clark against the Berlin Realty Company, a corporation. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Valentine & Newby, of Los Angeles, for appellant. Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent.

JAMES, J. Judgment in this action was for the plaintiff. The appeal is taken from the judgment and from an order denying the motion made by the defendant for a new trial. Plaintiff, as assignee of the Merchants' National Bank of Los Angeles, brought this action for recovery against the defendant on account of an indebtedness created by the Berlin Dye Works & Laundry Company, a corporation, of which latter corporation defendant was at certain times material herein a stockholder and the owner of 209,535 shares of stock. The total capital of the Berlin Dye Works & Laundry Company was represented by 300,000 shares, all of which had been issued. Recovery was sought against the defendant for its proportionate liability as a stockholder. Plaintiff in his amended complaint, upon which issue was joined and trial had, alleged first in detail

the fact of the corporate existence of the Berlin Realty Company and the Berlin Dye Works & Laundry Company. He then set out in the first cause of action that the Merchants' National Bank, on April 1, 1911, loaned to the Berlin Dye Works & Laundry Company (which for convenience we will hereinafter refer to as the "Laundry Company") the sum of \$8,000 and the making of a promissory note payable 90 days after date by the Laundry Company to cover the amount of that loan with interest, with a condition as to the payment of attorney's fees. It is then alleged that on the 14th day of April of the same year the same bank loaned to the Laundry Company the sum of \$1,500, taking a promissory note in like form, payable one day after date; that on the 8th day of May the same bank loaned to the Laundry Company the sum of \$2,000, taking a one-day note in like form as was used in the preceding transactions; that on the 12th day of June of the same year the same bank loaned to the Laundry Company the further sum of \$1,000 and took the Laundry Company's one-day note covering that amount; that on the 30th day of June, 1911, a new note for \$8,000, and in renewal of the note dated the 1st day of April of that year, was given, and it was alleged that the sole purpose of the making of this note was to renew the \$8,000 note formerly given. It was further alleged that on the 29th day of November, 1912, the same bank loaned to the Laundry Company a further sum of \$2,000 and took a one-day note covering the amount involved in this last transaction. It was then alleged that on the 5th day of March, 1913, a note was made by the Laundry Company in favor of the bank and duly delivered for the principal sum of \$14,500, payable one day after date. This note it was alleged was given, in its aggregate amount, to cover each of the notes hereinbefore described, and it was alleged that the five notes theretofore given were surrendered to the Laundry Company, and that the "said note dated March 5, 1913, for \$14,500, was accepted and retained in place and renewal thereof by said bank, and not otherwise." There was also an allegation that the principal amount of the indebtedness so incurred at the several times had not been paid. It was next alleged that at the time the \$8,000 indebtedness was incurred the Berlin Realty Company was the owner of 209,535 shares of the 300,000 shares constituting the total and issued capital stock of the Laundry Company. In the second cause of action, plaintiff, by reference therein stated, incorporated all of the material allegations set forth in the first alleged cause of action, and then alleged that at the time the indebtedness of \$1,500 was incurred by the Laundry Company on April 14, 1911, defendant herein was the owner of the number of shares of stock described. The third cause of action was in

like form, but referred to the indebtedness of May 8, 1911; and the fourth cause of action was set forth in like manner and form, but referred to the \$1,000 indebtedness of June 12, 1911. No recovery was sought on account of the \$2,000 note dated November 29, 1912, for the reason that the defendant at that time had ceased to be a stockholder of the Laundry Company. Defendant demurred to the complaint setting forth various special grounds therefor, in addition to the general one that sufficient facts were not stated to constitute a cause of action. The demurrer was overruled and an answer filed.

[1, 2] It is contended, first, that the court erred in overruling the demurrer. The complaint in its allegations of fact was simple and quite clear. In it was first set forth the alleged facts of the transactions had by the Laundry Company with the bank, and these allegations were specific and particular as to the amounts of money borrowed, the dates, etc. There seems to be no ground upon which to base the contention, as suggested in one of the asserted grounds of demurrer, that the complaint was uncertain. There was no misjoinder of causes of action. The first alleged cause of action, to be sure, contained statements of the several transactions had with the bank the individual ones of which might no doubt have been set out separately; but we cannot see how, assuming that such a procedure had been followed, defendant could have been any better informed of the facts upon which the plaintiff relied to sustain his suit. The contention that the allegations of the first cause of action, being substantial ones and essential to the pleading, could not by reference be incorporated in the subsequent alleged causes of action, is not supported by the California cases. The case cited on behalf of appellant to this point, to wit, *Haskell v. Haskell*, 54 Cal. 262, is not sustained by the later decisions in *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20, and *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331.

[3-5] The main contention, however, and that which forms the substance of the defense interposed by the defendant, is that all of the indebtedness incurred by the Laundry Company to the bank and as evidenced by the several promissory notes was extinguished when the note for \$14,500 was given on March 5, 1913, which was after the defendant had ceased to be one of the stockholders in the Laundry Company. It appeared in evidence that, at the time the note for \$14,500 was made, the notes previously taken were delivered to the Laundry Company and marked "paid." The defendant urged and now insists that, under the facts shown by the evidence, when the last note was made a novation was effected, and under the agreement of the parties the new obligation extinguished the old debt. It has been held numerous times and by the decisions of this state that the taking of a promissory note

from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by the creditor under an express agreement that it shall have that effect. It is further asserted in the authorities that there is not a presumption in favor of a note being received as payment under such circumstances; and, where a note was given to take up another note, it was said that because the original note was surrendered and marked paid on its face "was not conclusive evidence of the extinguishment of the debt." In the case of *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 78, the text of the decision supports these statements, and a number of cases are therein collected and cited which are all to the same general point and effect. See, also, *Gnarini v. Swiss American Bank, etc.*, 162 Cal. 181, 121 Pac. 726. In *London & S. F. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64, the court said:

"In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt."

In the same case it is further observed that:

"The plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation."

And such was the action of the plaintiff here. There was, to be sure, some testimony heard by the trial judge which, taken by itself, may be said to tend to show an intention on the part of the bank to consider the last note as creating a new and distinct obligation—one which would cancel the old indebtedness. But the court had other testimony to consider which indicated that no extinction of the original indebtedness was intended to be worked by the taking of the last note, and, such being the condition of the evidence, it is sufficient to say that an appellate court has no right to make any further review of the testimony, for, in view of the conflict, the decision of the trial judge in that matter is final.

[6] We think there was no prejudicial error in refusing to allow a question to be answered which was asked of the cashier of the bank relative to his knowledge as to a change in the management of the Laundry Company being made prior to November 29, 1912. As is properly said by respondent, the president of the bank gave testimony which furnished an admission as against the bank, if it may be so termed, fully as favorable as that which the expected answer of the cashier could have supplied. The objection that the court erred in refusing to allow the case to be reopened after the parties had rested, in order to permit defendant to introduce further testimony, is addressed to a matter which is regulated by the sound discretion of trial judges, in the exercise of which appellate courts will not interfere. There is noth-

ing shown from which we may conclude in this case that the court abused its discretion.

No other points are presented which call for discussion or consideration.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

SCHALLMAN v. HAAS. (Civ. 1624.)

(District Court of Appeal, Third District, California. Feb. 16, 1917. Rehearing Denied by Supreme Court April 16, 1917.)

1. EVIDENCE §43(2)—JUDICIAL NOTICE — COURT RECORDS.

Where a motion to compel defendant to pay plaintiff certain sums for the support of an illegitimate child and for expenses pending an appeal was heard by the judge who tried the case on the merits, the court on the hearing of the motion had a right to take judicial notice of the record in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 63.]

2. BASTARDS §92—SUPPORT — POWER OF COURT—SUPPORT PENDING APPEAL.

While a court has inherent power, after granting a divorce where the marriage was admitted for the husband's fault, to compel the husband to pay to the wife money for her expenses in resisting the husband's appeal, and for the support of herself and children pending the appeal, it has no such inherent power in an action under Civ. Code, § 196a, to compel a father to support his illegitimate child, since in the latter case the obligation does not arise until the judgment has established the fact.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228-239.]

3. BASTARDS §92—SUPPORT — POWER OF COURT—STATUTES.

Civ. Code, § 196a, requiring the father to give a child support and education suitable to his circumstances, and authorizing a civil suit in behalf of a minor child by his mother or guardian to enforce such obligations, in which action the court shall have power to enforce performance thereof the same as under Civ. Code, §§ 138-140, does not, by making sections 138-140, which provide for orders in divorce actions requiring the husband and father to pay the wife's expenses and for the support of the wife and children, a part of that section, impose a similar obligation on defendant in an action to support an illegitimate child, but merely authorizes the obligation already created to support such child after his liability has been determined, to be enforced in the manner in which the other obligations may be enforced, and therefore does not authorize the court to require defendant to pay for the support of the child and the expenses of resisting an appeal from the judgment fixing his liability.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228-239.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Anna Schallman against Carl F. Haas. From an order requiring defendant to pay plaintiff's attorney's fees and expenses in resisting defendant's appeal from a judgment requiring defendant to support an illegitimate child, and to pay a monthly sum

pending the appeal for the support of the child, defendant appeals. Order reversed.

Tum Suden and Tum Suden, of San Francisco, for appellant. J. J. Dunne, of San Francisco, for respondent.

HART, J. This action was commenced for the purpose of obtaining a decree or judgment compelling the defendant to pay a monthly sum reasonably necessary for the support, maintenance, and education of the alleged minor child of the parties.

The complaint, in substance, alleges: That the plaintiff is the mother and the defendant the father of a minor child, who was born in the city and county of San Francisco, on the 26th day of July, 1911; that the defendant has failed, neglected, and refused for several months immediately preceding the time of the commencement of this action to provide for said minor child's support and maintenance; that the plaintiff is wholly without the means to provide for and maintain said minor child, being able only, through her own personal labors and work, and with the assistance of relatives, to provide for herself the common necessities of life; that "the defendant has and possesses the present means and ability to pay to plaintiff a reasonable sum for the support, maintenance, and education of said minor child, together with a reasonable sum as and for plaintiff's counsel fees and costs of court." The prayer is for judgment requiring the defendant to pay to plaintiff a reasonable sum monthly for the support, etc., of said child, together with a reasonable sum for plaintiff's counsel's fees and cost of court herein.

The answer denies each and every one of the above-stated allegations of the complaint, and avers in paragraph 3 thereof:

"Defendant alleges that he is under no legal liability or responsibility whatever to provide for the maintenance and support of the said minor child, Albert Schallman; that said Albert Schallman was born out of wedlock."

The court found that the plaintiff and the defendant were the mother and father, respectively, of the minor child referred to in the complaint; that the defendant has failed, neglected, and refused to provide said child with support, maintenance, etc., as alleged in the complaint; that, as likewise alleged, the plaintiff is wholly without the means, and that the defendant possesses sufficient means and ability to provide such support, maintenance, etc., for said child. Finding 6 reads:

"That all the facts set forth in defendant's answer herein contrary to these findings are untrue."

Within due time the defendant duly served and filed a notice of appeal to the Supreme Court from said judgment, and to stay the execution thereof gave a bond in the sum of \$1,600, to which no exception was taken, and which covers a sum which would accrue within a period of approximately three years,

should the judgment be affirmed. *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. Thereafter the plaintiff noticed and filed an application to the trial court for an order allowing her costs and attorney's fees to cover the expense for transcribing the testimony taken at the trial, to be used on the motion of the defendant for a new trial and upon the appeal from the judgment, for the printing of briefs on the appeal, for compensation of her counsel in those proceedings, and further asked for an order requiring the defendant to pay to plaintiff a reasonable sum for the support and maintenance of the said child "pending the determination of defendant's motion for a new trial and decision of defendant's proposed appeal to the Supreme Court herein." Upon hearing the above-mentioned motion the court made an order allowing the same, as follows, briefly: That the defendant immediately deposit with the clerk of the court the sum of \$150, to be expended in the payment of such costs, charges, and disbursements "as may be necessary for plaintiff's costs and expenses in preparing her amendments to defendant's bill of exceptions and all of her costs necessary to be expended by her in preparation on her part against defendant's said motion for a new trial herein and defendant's appeal herein"; that defendant pay to plaintiff the sum of \$75 as and for her counsel fees on said motion for a new trial and defendant's appeal herein; that, pending the hearing of said motion for a new trial and appeal and the final determination of both, the defendant pay to the plaintiff the sum of \$20 per month for the support and maintenance of said minor. The defendant took an appeal from said order, and filed a bond to stay the execution thereof. It is the appeal from said order with which we are here concerned.

[1] The bill of exceptions in the transcript does not contain the judgment roll. It states, however, that, at the hearing of the application for the order from which this appeal is prosecuted, the defendant offered in evidence the judgment roll. It is quite probable that the judgment roll was, as a matter of fact, received in evidence, but that, under the decision in *Harron v. Harron*, 128 Cal. 303, 60 Pac. 932, it was deemed unnecessary to incorporate it in the bill. The notice of the motion in this case stated that said motion "will be made upon this notice of motion and upon all of the pleadings and papers filed herein, and on all of the proceedings had and taken herein, and upon such oral and documentary evidence as may be produced upon the hearing hereof." The order appealed from here was made by the judge who tried the case upon the merits and rendered the judgment thereon. The record in the case was judicially before the court upon the motion, and, in the hearing thereof, it took, as it had a right to do, judicial notice thereof. *Harron v. Harron*, supra.

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The action purports to be based upon section 196a of the Civil Code, which reads:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

It is vigorously argued by the defendant that the complaint does not state a cause of action under said section, and that the findings, which follow, substantially, the averments of the complaint, do not support the judgment. It is further claimed that the complaint on its face shows that the minor child therein referred to and not the plaintiff is the real party in interest in this action, and for this reason said pleading fails to state the existence of a right of action in the plaintiff upon the cause of action so stated. We recognize much merit in the first stated of these contentions. As to the second we intimate no opinion, since we do not find it necessary to consider it on this appeal. Indeed, we prefer not to consider either of said points, inasmuch as there is, it appears, an appeal from the judgment pending and supported by some other record which is not here, and it is preferable that the questions suggested should be disposed of on said appeal.

[2] We think the court transcended its power in making the order complained of here. To our minds, the whole question, whether a trial court is legally authorized to make such an order after judgment in an action based upon section 196a of the Civil Code, must be determined upon a consideration of statutory law, conceding that it is within the competence of the Legislature to confer such power upon trial courts in a case like this. In other words, the power of the court to make such an order is not inherent, but, if it exists and can exist at all, it must come from direct legislative authority. The soundness of this proposition cannot well be challenged.

It is doubtless true that, in actions for divorce (and it will be understood that we are now referring to cases of that character wherein there is no contested issue of marriage—that is, wherein the marriage is not denied), even in the absence of statutory regulation of the matter or express legislative authority therefor, the courts having cognizance of such causes have the power to make after judgment suitable and reasonable provision for temporary or permanent alimony or support and provision for the payment by the husband to the wife of such sums as may be found to be requisite to defray the expenses necessary to be incurred by her in prosecuting the action or defending against it at the trial or in prosecuting or resisting the appeal, if one be taken. This power naturally follows from the nature of the marriage

relation and the rights and duties of the parties thereupon arising, and from the fact that an action for a divorce is for the purpose of dissolving that relation. The husband upon the marriage becomes the head of the family, and has exclusive control, under certain restrictions as to disposition, of the community property. As a rule, he alone holds the "purse strings," and this is true even where the principal sources of his income are the property or belongings of the community. But, even if there be no community property and the wife is without separate means, the authority of the court to compel the husband after judgment to pay to the wife such sum or sums as may reasonably be required to prosecute or resist an appeal and for the support of their minor children pending the appeal will be recognized. "Natural justice and the policy of the law," says Mr. Bishop, in his work on *Marriage and Divorce*, volume 2, § 976, "alike demand that in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they should have equal command of funds. So that if she is without means, the law having vested (given control of) the acquisitions of the two in (to) him, he should be compelled to furnish them to her, to an extent rendering her his equal in the suit. This doctrine is a part of the same whereon proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of Parliament, and nearly all of our own have accepted the doctrine as of common law."

Of course, where the matter of costs, attorney's fees, and temporary or permanent support is regulated by statute, then the rules so promulgated must govern, and, undoubtedly, where, in a divorce action, a trial court failed to follow the statute in the matter of awarding costs, etc., or transcended its authority under the statute in that regard, its action therein would be annulled or set at naught upon appeal as being void or beyond the jurisdiction of the court. In this state, as well as in most of the states at the present time, the matter of costs, attorney's fees, and alimony, in divorce actions or suits for maintenance and support, is entirely regulated and governed by statute.

But there is no analogy between divorce suits or any other action between a husband and wife pertaining to or involving their marital relation and obligations and an action founded upon section 196a of the Civil Code. No more than in any other of the various classes of actions has a court the inherent power, if, indeed, it can have or be given any power in that respect at all, to require a litigant in a case of this character to provide his adversary with the means necessary to defray the costs and expenses incident to the prosecution or resisting of an appeal or for the support of such ad-

versary, pending the disposition of the cause on appeal. This proposition necessarily follows from the fact that the essential issue to be determined in an action of this kind is contested. The gist or gravamen of this action is the paternity of the alleged illegitimate child. The defendant entered the court denying that he was the father of the child. His legal liability for its support can therefore only be fixed by proof that he is the father. There is not as to the defendant and the infant, as is true in divorce actions, wherein the marriage is admitted or not denied, a fixed and admitted status upon which the court is authorized to exercise a power whereby a decree affecting the rights of the parties may be made in advance of the trial of the issues of fact or in the absence of proof. Nor is it any less true in this case than in any other action, except in suits for divorce and kindred actions, that a court, after judgment, has no right to require the defendant to provide the plaintiff with the financial means with which to defend the judgment on appeal and to pay a monthly sum for the support of the children pending the determination of the appeal. To recognize such power in the trial court would be to assume that, with the rendition and entry of the judgment, the questions at issue had been definitively determined and settled, a position in direct contradiction to the rule that:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Code Civ. Proc. § 1049; *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 87 Am. St. Rep. 23; *In re Blythe's Estate*, 99 Cal. 472; 34 Pac. 108; *Story v. Story & I. Commercial Co.*, 100 Cal. 41, 34 Pac. 675; *Borges v. Hillman*, 29 Cal. App. 144, 150, 154 Pac. 1075.

[3] Thus it is very clear that there is no inherent power or authority in a trial court to make, after judgment, such an order as the one here complained of, and, assuming without deciding, but questioning the constitutional right of the Legislature to confer upon trial courts the power of making such an order as the one here after judgment in a case of this kind, we know of no statute investing such courts with such authority, unless, as counsel for the plaintiff contends, it is to be found in sections 138, 139, and 140 of the Civil Code, the provisions of which are by section 196a expressly made applicable to a limited extent to actions based upon the last-mentioned section. The sections named read:

"Sec. 138. In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same.

"Sec. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the

children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

"Sec. 140. The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

The only section of the above which appears to lend support to the contention of the plaintiff is 138. But when we examine the language of section 196a, which refers to the above sections, it seems to us that the irresistible conclusion is that it was not thereby intended to create any additional rights in favor of the illegitimate child, but that the sole purpose was thus to provide a full and complete remedy for the enforcement of the rights previously given in said section. The language, it will be noted, is that "the court shall have power to order and enforce performance" of what? The obligations which, in the preceding part of the section, are established in favor of the child as against its parents, and this to be attained, as far as a court is authorized to go in a case of this character and no further, in the manner and mode pointed out by sections 138, 139, and 140 as applicable to actions for divorce. Of course, we are not to be understood as saying that, if the present, or a like case, is affirmed on appeal, and thus it is definitively determined and settled that the "obligations" created by section 196a rest upon the parent proceeded against, the trial court, in such case, would not retain jurisdiction of the cause to the extent of requiring the parent, if deemed necessary, to give reasonable security for providing maintenance, etc., for the child and of modifying from time to time, if the circumstances appeared to call for it, the judgment in so far as is concerned the sum to be paid for the child's maintenance and support. This proposition we do not decide, however, it being unnecessary for the purposes of this decision to do so.

But, as declared, we are firmly of the opinion that, in making sections 138, 139, and 140 a part of section 196a, the intention of the Legislature was not to create in behalf of the illegitimate child rights additional to those established for it by the latter section, but merely to provide a remedy for the enforcement of the rights so established or created.

Our conclusion is that the trial court was without jurisdiction to make the order from which this appeal is prosecuted, and it is accordingly reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

Ex parte HINES. (Cr. 517.)

(District Court of Appeal, Second District, California. Feb. 20, 1917.)

LICENSES § 7(3)—VALIDITY OF STATUTE—CLASS LEGISLATION.

An ordinance of a city of the sixth class established the rate of licenses for certain occupations, and provided for every person, firm, or corporation conducting, managing, or carrying on a laundry \$12 per annum, for every person, etc., operating a wagon for the delivery of laundry work to and from any laundry situated outside of the city limits \$120 per annum, and for every person, etc., operating an agency for the collection and delivery of laundry work on behalf of any laundry situated outside of the city \$120 for each agency. The ordinance also provided that violation of it should constitute a misdemeanor. *Held*, that the provisions relative to laundries outside of the city are void as an attempt to create or enforce a discrimination not based upon differences in the nature of the business being transacted, etc.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 9, 19.]

In the matter of the application of Thomas Hines for writ of habeas corpus. Petitioner discharged from custody.

Hutton, Jensen & Fogel and Chester L. Coffin, all of Los Angeles, for petitioner. Fredericks & Hanna, of Los Angeles, for respondent.

CONREY, P. J. The petitioner is held in custody by the city marshal of the city of Venice, a city of the sixth class. His imprisonment is pursuant to a judgment of conviction of the offense of operating and maintaining a laundry wagon for the soliciting and delivery of laundry work in the city of Venice without having first procured a license therefor as provided by an ordinance of that city; it being charged that the petitioner was operating and maintaining said wagon for the delivery of laundry work to and from a laundry situated outside of the limits of the city of Venice. He was sentenced to pay a fine, with the alternative of one day's imprisonment for each dollar of such fine being unpaid, and he refused to pay the fine; thereupon he was committed to the custody of the marshal to be imprisoned until, at the rate aforesaid, the fine shall be paid.

Ordinance No. 510 of the city of Venice is an ordinance providing for licensing and regulating the carrying on of certain described businesses. Subdivision 34 of section 10 of that ordinance, as amended by Ordinance No. 636, establishes the rate of licenses for certain businesses and occupations; and, so far as applicable to this case, the provisions thereof requiring the payment of license are as follows:

"For every person, firm, or corporation conducting, managing, or carrying on a laundry, \$12.00 per annum. For every person, firm, or corporation owning, operating, or maintaining a wagon or other vehicle for the delivery of laundry work to and from any laundry situat-

ed outside of the limits of the city of Venice, whether such wagon or other vehicle shall be used to collect laundry direct from the customers or from other wagons operated by the same, or some other person, firm, or corporation, for each such wagon or vehicle, \$120.00 per annum. For every person, firm, or corporation running, operating, or maintaining an agency for the collection or delivery of laundry work on behalf of any laundry situated outside of the limits of the city of Venice, \$120.00 for each such agency so operated or maintained."

Another section of the ordinance declares it to be unlawful to carry on any of the described kinds of business within the corporate limits of the city of Venice without first having procured a license from said city to do so, and provides that violations of the ordinance shall constitute misdemeanors punishable by fine or imprisonment, or both fine and imprisonment.

Petitioner claims that the ordinances above mentioned are void, and that the recorder's court was without jurisdiction to try him upon the alleged offense; that the ordinance requires and imposes no tax upon wagons maintained for delivery of laundry work to and from laundries situated in said city of Venice, and imposes a tax of only \$12 per annum on laundries located within said city; that there is nothing in the nature of vehicles delivering laundry to and from laundries outside of the city limits of Venice to require any further regulation than is required of laundry wagons operated to and from laundries inside of said city, or to require or justify a discrimination in the amount of license collected therefrom; that the charge of \$120 per annum is discriminatory against him and other owners and operators of vehicles for the delivery of laundry outside of the city of Venice, and in direct violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to petitioner and other such persons the equal protection of the law and abridges their privileges and immunities, and especially, he claims, that such ordinances are in violation of sections 13 and 21 of article 1 of the Constitution of the state of California. Said section 21 is as follows:

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laun-

dries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice or laundry wagons doing business with laundries located in the city of Venice, and apparently they have no other purpose. The case is similar in principle to that of *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642. The ordinance under consideration in that case provided that any person who in San Francisco should sell property of sundry kinds defined by the ordinance without at the time having the goods in San Francisco or a bill of lading or receipt of a common carrier showing on its face that the goods named therein had been shipped and were then in transitu to San Francisco should pay licenses in certain stated amounts. The same ordinance provided another set of license fees, much less in amount, payable by persons selling the same kinds of merchandise within the city and having their goods actually within the city or in transitu under bill of lading. It was held that the ordinance was inoperative and void; that it was flagrantly unjust, oppressive, unequal, and partial; that it discriminated between merchants in the same place dealing in the same kind of merchandise for no better reason than that one dealt in goods either actually in the corporate limits or in transitu under a bill of lading, while the other dealt in goods outside of the corporate limits and not in transitu under a bill of lading. The same observations apply to the present instance, and it is our opinion that the provisions of the Venice ordinances to which we have referred are likewise inoperative and void.

The petitioner is discharged from custody.

We concur: JAMES, J.; SHAW, J.

MERRILL v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2073.)

(District Court of Appeal, First District, California. Feb. 21, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

1. DEPOSITIONS — SUBPOENA — JURISDICTION OF COURT.

Under Code Civ. Proc. § 1986, subsec. 3, declaring that if a subpoena is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon order of such court or judge thereof, a subpoena issued by the clerk upon the order of the superior court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has the same territorial force and effect as a subpoena issued by the clerk, requiring the attendance before the court, and such subpoena may require the attendance of a witness though he resides outside the county, but within the 50-mile limit.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 125; *Witnesses*, Cent. Dig. § 9.]

2. DEPOSITIONS ¶71—ORDERS FOR TAKING —CONTEMPT.

Under Code Civ. Proc. § 1991, declaring that disobedience to a subpoena or refusal to be sworn or answer as a witness, or to subscribe an affidavit or deposition, may be punished as a contempt, that when the subpoena requires the attendance of a witness before an officer or commissioner out of court, such officer or commissioner must report any disobedience or refusal to the court issuing the subpoena, and that the witness must not be punished for any refusal to answer a question, or to subscribe an affidavit of deposition unless after hearing upon notice the court orders him to answer or subscribe, and then only for disobedience to such order, and that any judge or other officer may report such disobedience or refusal to the superior court, and such court has power upon notice to order the witness to perform the omitted act, and any refusal may be punished as a contempt, the superior court cannot punish a witness for contempt in disobeying a subpoena issued to require him to appear before a commissioner for the taking of his deposition without a hearing first upon notice and disobedience of the order made, regardless of any difference between a refusal to answer a question or subscribe to an affidavit or deposition and a refusal to obey a subpoena or to be sworn.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 182.]

Application by E. H. Merrill for a writ of review against the Superior Court of the City and County of San Francisco, State of California, and others, to review an order adjudging petitioner guilty of contempt. Annulled.

R. H. Countryman, of San Francisco, for petitioner. Joseph K. Hutchinson and Walter Slack, both of San Francisco, for respondents.

KERRIGAN, J. This is a petition for a writ of review. The facts are briefly as follows: On November 2, 1916, there was filed in respondent court the affidavit of Joseph K. Hutchinson, one of the attorneys for the plaintiff in the action of California Trona Co. v. Harry E. Lee et al., pending in the superior court of the state of California in and for the county of San Bernardino, showing that summons had issued therein and had been duly served on all the defendants therein; that petitioner E. H. Merrill (one of the defendants) was a necessary and material witness for plaintiff, and that said witness resided out of the county of San Bernardino, and more than 50 miles distant from the place of trial of said action, and in the county of Alameda. Upon the filing of this affidavit an order was made directing subpoena to issue, and the clerk of respondent issued a subpoena as directed, requiring the attendance of petitioner before H. B. Denison, a notary public, on November 9, 1916, at his office in San Francisco. The subpoena was duly served on petitioner, and a witness fee of \$2.50 paid him, on November 3, 1916. Petitioner failed to appear at the time specified in the subpoena, or at all. This fact was made to appear to respondent by the certificate of the notary and the affidavit of Jo-

seph K. Hutchinson. From the latter it appeared that petitioner resided within 50 miles of the place where said deposition was noticed for taking. On November 16, 1916, respondent made an order directing the sheriff to attach the petitioner and have him in court on November 29, 1916, to show cause why he should not be punished for contempt for disobeying said subpoena. This order, together with copies of the notary's certificate, affidavit of Joseph K. Hutchinson, and other papers relating to the matter, were served on petitioner on November 16, 1916. On November 29, 1916, petitioner appeared in court with counsel, and after argument respondent made an order, on December 5, 1916, finding and adjudging petitioner guilty of contempt. Judgment on this order was duly entered and recorded on December 6, 1916, and petitioner by this proceeding seeks to have it reviewed and annulled.

[1] But two of the points discussed by petitioner in his brief require detailed notice. It is unquestioned that under the provisions of the second paragraph of subdivision 3 of section 1986 of the Code of Civil Procedure an order to take the deposition of a witness may be made by the superior court of a county other than that in which the action is pending. But the petitioner does question the power of that court to compel the attendance of a witness before an officer for the purpose of taking his deposition, when such witness resides outside of the county in which that court is situated, even though his place of residence be within 50 miles from the place where the deposition is noticed to be taken. In other words, the petitioner contends that since the action was pending in the superior court of San Bernardino the superior court of the city and county of San Francisco had no jurisdiction to require the petitioner, a resident of the county of Alameda, to appear in San Francisco for the purpose of there giving his deposition.

When a subpoena is issued to require the attendance of a witness before the superior court, or at the trial of an issue therein, the subpoena is issued by the clerk of the court as a matter of course, upon the application of the party desiring it. If it is issued to require attendance before a commissioner or other officer for the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon an order of such court or of a judge thereof. Code Civ. Proc. § 1986. We can see no good reason why a subpoena issued by the clerk, upon the order of the superior court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has not the same territorial force and effect as a subpoena issued by the clerk, requiring the attendance before the court, or at the trial of an issue

therein; and accordingly we hold that such a subpoena may require the attendance of a witness for the purpose indicated, even though he resides outside of the county in which it is issued, but within the 50-mile limit.

[2] The remaining objection involves the question of whether or not it was the duty of the superior court, after a hearing upon the report of the officer of the disobedience of the witness, to make an order requiring the petitioner to obey the subpoena before finding him guilty of contempt of court—the solution of which question depends upon the construction and application of provisions of section 1991 of the Code of Civil Procedure. That section reads:

"Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena. When the subpoena, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpoena; and the witness must not be punished for any refusal to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to so answer or subscribe and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision 3 of section 1986, may report any such disobedience or refusal to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court."

It is the contention of the petitioner that before the superior court may punish a witness for contempt of court for failure to obey a subpoena commanding him to appear before an officer for the purpose of giving his deposition, there must be a report to the court of such disobedience, and after a hearing thereon a direction to the witness by the court to obey the subpoena.

Counsel for the respondent, on the other hand, contends that such is the method designated by section 1991, only when the witness refuses to answer a question or to subscribe an affidavit or deposition; but that where he refuses to be sworn or disobeys the subpoena he is defying a direct and lawful order of the court, and that upon the establishment of either of these facts he may be punished as for a contempt of court by reason of such disobedience without the court making a further order that he perform the act in question.

A better reason may be conceived in the case of a refusal to answer a question or to subscribe an affidavit or deposition, for the requirement that the court, after a hearing upon the report of the officer concerning such refusal, should order the witness to perform the omitted act before punishing him for a contempt of court, than in the case of a fail-

ure to obey the subpoena. In the former case the question may be an improper one, and the witness justified in declining to answer it; and until the contrary has been determined by the court (the officer taking the deposition having no such authority), there has been no disobedience of a lawful command. But in the other case, the subpoena being lawfully issued, a refusal to obey it is a direct disobedience of the command of the court, and hence there would appear to be no logical necessity for the court to specially order the witness to appear before the officer as enjoined by the subpoena; nevertheless the lawmaking power in enacting the section above quoted may have deemed it advisable to provide that before a witness should be punished for disobeying a subpoena commanding him to appear before an officer and give his deposition, there should be an investigation by the court as to the sufficiency of the original showing, made ex parte for the order for the deposition, and of the good faith of the witness in refusing to obey the subpoena. However that may be, it seems to us that the language of the section makes no distinction between a refusal to answer questions or subscribe an affidavit or deposition, and a refusal to obey a subpoena or to be sworn. In each instance the refusal must be reported to the court, and, following the language of the section, upon the report of the "disobedience or refusal" to the superior court, the court has power upon notice "to order the witness to perform the omitted act, and any refusal or neglect to comply with such order, may be punished as a contempt of such court."

In the present case the record discloses that there was no order by the court to the petitioner upon notice "to perform the omitted act." The judgment of the respondent, therefore, finding him guilty of contempt of court in the premises, was beyond its jurisdiction.

The judgment is annulled.

We concur: LENNON, P. J.; RICHARDS, J.

POTTER v. BACK COUNTRY TRANSP. CO. (Civ. 2210.)

(District Court of Appeal, Third District, California. Feb. 16, 1917.)

1. MUNICIPAL CORPORATIONS §706(6, 7)—AUTOMOBILE ACCIDENT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries when struck by defendant's automobile, question of defendant's negligence and also the question of plaintiff's contributory negligence held for the jury under the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. APPEAL AND ERROR §1002—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

The appellate court is bound by the jury's determination of the facts, where the testimo-

ny of plaintiff and his witnesses was in conflict with the testimony of defendant's witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

3. APPEAL AND ERROR §216(1)—RESERVATION OF GROUNDS OF REVIEW—PRESENTATION OF INSTRUCTIONS.

Appellant may not in the appellate court for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627, 630-641, 662-676.]

4. MUNICIPAL CORPORATIONS §706(8)—INJURIES FROM AUTOMOBILE—INSTRUCTION.

In an action for injuries when struck by an automobile, where there was testimony tending to show that by change of direction of the automobile plaintiff was suddenly placed in peril, the trial court was authorized to give an instruction as to plaintiff's duty under circumstances of sudden and unexpected danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

5. APPEAL AND ERROR §1064(1)—HARMLESS ERROR—INSTRUCTION.

In an action for injuries when struck by an automobile, an uncertain and confusing instruction on the doctrine of last clear chance, finally stating that if the jury saw fit to apply the last clear chance to plaintiff's actions, if they believed that plaintiff discovered the automobile was in danger of being run into by him or put in a place of danger where it might suddenly be called upon to swerve and cause danger to itself or its driver, and that plaintiff discovered that the danger was not apprehended or understood by the driver, and that he could by the exercise of ordinary care avoid it or by the exercise of a high degree of care avoid it, it was his duty to do so, and that the same rule applied to both parties, was harmless to defendant; there being no injury to the automobile or its driver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Trial, Cent. Dig. §§ 475, 525, 528, 553.]

6. NEGLIGENCE §83—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE.

Strictly considered, the doctrine of last clear chance can be invoked only in favor of the person who is injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Jay H. Potter against the Back Country Transportation Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Doolittle & Morrison and Morganstern, McGee, Henning & Hendee, all of San Diego, for appellant. Kirk & Kirk, of San Diego, and E. E. Kirk, of Los Angeles, for respondent.

CONREY, P. J. The action is one to recover compensation for personal injuries which resulted from a collision between plaintiff and an automobile driven by a servant of the defendant. Pursuant to the verdict of a jury, judgment was entered in favor of the

plaintiff, and the defendant appeals therefrom.

[1, 2] There is evidence tending to show the following facts: Late in the afternoon of November 16, 1913, the plaintiff was walking across and toward the west side of Fourth street in the city of San Diego. After passing the middle of the street he saw defendant's car coming toward him at a distance of not more than 150 feet and at the rate of about 12 miles per hour. Observing that the automobile was changing its direction, the plaintiff took a step backward, checked himself, and then started backward again. Thereupon the automobile turned again toward the plaintiff and struck him. It knocked him about 8 feet, ran upon his leg and broke it, then reversed and backed away. If these were the facts, they were sufficient to authorize the jury to find in favor of the plaintiff upon his charge that the defendant wrongfully, unlawfully, carelessly, and negligently struck the plaintiff with its automobile, whereby the plaintiff was injured. This is so, notwithstanding testimony tending to show that the plaintiff was intoxicated and that the plaintiff ran back into the path of the automobile after he had gotten across and out of danger. These were disputed facts, and the question of negligence of the defendant and also the question of contributory negligence of the plaintiff were questions of fact to be determined by the jury in accordance with their belief derived from the testimony presented. The testimony of the plaintiff and his witnesses as to these matters was in conflict with the testimony of the witnesses produced by the defendant, and we are bound by the jury's determination of the facts. It may be noted, by the way, that the driver of the automobile was not a witness at the trial, although there is evidence indicating that his testimony could have been obtained. Appellant insists that it should not be held liable for the injury which plaintiff "sustained by suddenly stepping in front of defendant's automobile." The difficulty with this proposition is that, according to the testimony which the jury had a right to believe and did believe, the injury was not thus sustained.

Numerous objections are urged with respect to the instructions given by the court to the jury. These criticisms refer to an instruction defining negligence; to alleged failure of the court to give direction to the jury to find the circumstances surrounding the occasion under consideration, or the measure of care owed by the defendant to the plaintiff under those circumstances; to the alleged failure to instruct the jury that, if the plaintiff stepped in front of the automobile so close to it that there was not sufficient time in which the appellant could have prevented it from striking plaintiff, there was no duty on the defendant to avoid the acci-

dent, the failure to perform which duty is legal negligence; to alleged comments on the evidence, which appellant claims were charges to the jury upon matters of fact; to alleged errors of instructions to the jury upon the duty and obligation of the defendant towards plaintiff upon the theory that plaintiff had been placed in a position of emergency and of sudden and unexpected danger; to an alleged erroneous instruction upon the doctrine of "last clear chance"; to ambiguity and confusion in the instructions as a whole; to alleged errors in instructions upon the measure of damages.

[3] The record shows that the court refused to give instructions which were offered by the respective parties, but does not show what these instructions were. And we do not know how far the instructions given by the court on its own motion were inconsistent, or that they were inconsistent at all, with those requested by the appellant. With regard to omissions to give instructions, we need say no more than that an appellant may not here for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to that court. *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 697, 89 Pac. 976; *Hardy v. Schirmer*, 163 Cal. 272, 275, 124 Pac. 993.

[4] We find no prejudicial error in the instructions as given. Since a recital of those instructions would not raise any novel question of law or deal with any unusual application thereof, we shall not prolong the discussion very much beyond a general statement of our conclusions upon the objections presented, or set forth in detail our concurrence with appellant as to various inaccurate words and phrases which do not in any important sense affect the court's statement as a substantially correct exposition of the law. Notwithstanding these inaccuracies, the instructions contain a fair statement of the doctrine of negligence; of the rule requiring ordinary care on the part of the defendant to avoid injuring the plaintiff and requiring ordinary care on the part of the plaintiff to avoid exposing himself to injury; and of the rules governing the measure of damages. The language of the court in referring to the testimony did not in any instance amount to a statement of the judge's opinion upon any disputed fact; but, on the contrary, he directed the jury that in determining the facts they were not even to draw any hints or inferences from any statement made by him. There was testimony tending to show that by the change of direction of the automobile the plaintiff was suddenly placed in peril, and therefore the court was authorized to give the jury an instruction as to the duty of plaintiff under circumstances of sudden and unexpected danger.

[5] Complaint is made that the court stat-

ed that the doctrine of the last clear chance "has no application to the acts of the plaintiff in this case, so far as the circumstances involved in this case are concerned," and then proceeded to instruct on the subject on the contrary theory. The instruction as a whole is uncertain and confusing in its terms, and finally states that:

"If you see fit to apply the last clear chance to plaintiff's actions, if you should believe that the plaintiff discovered that the automobile was in danger of being run into by him, or put in a place of danger, where it might suddenly be called upon to swerve and cause danger to itself or its driver, and that the plaintiff discovered that that danger was not apprehended or understood by the driver, and that he could by the exercise of ordinary care avoid it, or by the exercise of a high degree of care, avoid it, it was his duty to avoid it. I suppose the same rule does apply to both parties."

[6] It does not seem that appellant could have been injured by this instruction. As there was no injury to the automobile or to its driver, the last foregoing quoted statement hit only the viewless air, so far as this case is concerned. And there was no error in the court's earlier statement that the doctrine of last clear chance had no application to the acts of the plaintiff in this case. For, "strictly considered, this doctrine can be invoked only in favor of the person who is injured." *Spear v. United Railroads*, 16 Cal. App. 637, 659, 117 Pac. 956.

Counsel for appellant state in their brief that the defendant has appealed from the judgment and from an order denying its motion for a new trial. The transcript does not show that there is any appeal, other than from the judgment.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

CARLSON v. FARM LAND INV. CO. (Civ. 1631.)

(District Court of Appeal, Third District, California. Jan. 20, 1917. Rehearing Denied by Supreme Court March 21, 1917.)

1. CANCELLATION OF INSTRUMENTS §37(6)— FRAUD—SUFFICIENCY OF COMPLAINT.

Complaint, charging false representations by letter from a minister alleged to be agent of an investment company, concerning value of land in a missionary colony held demurrable in not alleging knowledge of falsity, fraudulent purpose, or actual untruth of statements made, the letter being largely an expression of opinion as to values, and only showing a desire to colonize for religious purposes.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

2. CANCELLATION OF INSTRUMENTS §37(6)— PLEADING FRAUDULENT REPRESENTATIONS.

The simple statement that representations relied upon were false and fraudulent is insufficient, in the absence of statements of the real facts, since otherwise such allegations are mere conclusions of law.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

3. VENDOR AND PURCHASER ⇨33—MISREPRESENTATION BY VENDOR — STATEMENT OF OPINION.

Mere expressions of opinion by a vendor are not false representations although not warranted by the facts, unless they were not honestly given and made with knowledge of falsity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40-43, 66.]

4. CANCELLATION OF INSTRUMENTS ⇨37(6)—PLEADING FRAUDULENT INTENT.

Merely alleging the making of false representations by agent of vendor was not sufficient, where no fraudulent intent to induce the purchaser to act upon them is shown.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action to rescind land contract by Edward Carlson against the Farm Land Investment Company. Judgment dismissing complaint, and plaintiff appeals. Affirmed.

For petition for rehearing in Supreme Court, see 164 Pac. 348.

Curtis Hillyer, of San Francisco, and Wetmore & Davies, of Marysville, for appellant. A. A. De Ligne, of Sacramento, and W. H. Carlin, of Marysville, for respondent.

PLUMMER, Judge pro tem. Plaintiff appeals from a judgment entered in the lower court dismissing the action herein for failure to file an amended complaint as allowed by the order of the trial court after sustaining a demurrer to the plaintiff's first amended complaint. The action was begun by the plaintiff to secure a decree rescinding, on the grounds of fraud and deceit, a contract of purchase for a tract of land comprising between eight and nine acres situated in Arboga Colony, county of Yuba, state of California, entered into between the plaintiff and defendant on or about the 15th day of October, 1912, and for the recovery of damages alleged to have been suffered by the plaintiff. The demurrer to the complaint was both special and general, and was sustained by the lower court with leave to amend, which was not done.

[1] The complaint shows that the plaintiff, a Swede by birth, a farmer by occupation, was prior to the 10th day of October, 1912, a resident of the state of Michigan, of the same religious faith as one Hallner, living in Sacramento, in the state of California, a pastor of a church of the same faith as plaintiff; that on or about the 1st day of October, 1912, a letter was received by the plaintiff from said Hallner in reference to the Arboga Colony and its desirability as a place of residence. As this letter is made the foundation of the complaint, is annexed thereto and made a part thereof by proper references, the sufficiency of the complaint must, in large measure, be determined by the contents of the letter. The letter is as follows:

"Concerning Arboga Colony.

"Dear Brother in the Lord: Grace and Peace. It seems to be my duty to say a few words regarding Arboga Colony. I have myself looked over the ground and have myself made inquiries about it. Therefore I know what it contains. When I 9 years ago wrote up Turlock, I was abused, criticized by a great many. But they now must all acknowledge that I understood the case better and that I had a clear view of the future than those of my belligerent friends who criticized me at the time. My sole purpose at the time was to get together a great Swedish colony and a strong missionary movement. And I believe it must be admitted that we succeeded therein. I have now allowed myself to be persuaded to participate in the foundation and development of the Arboga Colony. And I am positive that it will succeed just the same as it succeeded in Turlock, sandstorms, grasshoppers and criticisms notwithstanding. It will succeed because God the Creator has ordained that the earth shall be filled and inhabited by people who will overcome and rule her (1 Mos. 1, 28). It must succeed because our purpose is the preservation of God's children in the faith and upbringing of the children in Christ and the faith of the fathers, and a vigorous missionary activity, which cannot be attained if our people are divided into small groups here and there. Think beside how costly missionary work is.

"Other conditions are much better in Arboga than they were in Turlock. A great quantity of potatoes was recently harvested, the largest and finest I have ever seen. All bearing witness to its extraordinary fertility.

"There we also find water transportation, lakes and fishing, for business as well as pleasure, in the neighborhood and also a good market and splendid communications. Our good land company has by means of restricting clauses in contract and deed shut out the liquor traffic and saloon keeping, as well as 'nuisances,' or in other words all that contend to degrade or lower the morals of the community.

"Just think what a great advantage this is; where have such opportunities ever been given to our people before? Can one imagine a place more fitted for homes for families and raising children? Moreover good milk cows are furnished free to new settlers who cultivate and live in their homes in such a way that half of their income from the cream is credited toward the payment of the cows. Mr. J. M. Henderson, Jr., cashier of the Sacramento Bank (which has 11,000 depositors with a combined capital of \$6,210,539.97), is one of the largest owners. I have been acquainted with him for 17 years. No father or brother could have done more for our Swedish folk in and around Kingsburg and Riverside than he has done. He has been tried and found to be a true friend. It is therefore quite natural that I feel safe because I know that our people will be well treated and taken care of in Arboga. As far as the price of the land is concerned, it is cheap in proportion to the fertility of the soil and location.

"It is cheaper here at from \$75 to \$150 per acre than Turlock property was at from \$25 to \$32.50 per acre. I also believe that one can begin with the same capital here as there, but the prospect for himself and family for the future is far pleasanter.

"Finally, let me assure you that I have no connection with nor interest in the land company, nor have I received any allowance on the land I have bought, for which I have paid the same price as all others, but I do this out of pure interest for the Swedish people and for our mission.

"I believe in systematic colonizing by gathering our Swedish people in large Swedish communities, because it is better for them and bet-

ter for the missionary activities, but not only that, our people will be protected against exploiters and schemers who will not stop extolling poor land for the sake of personal gain without the slightest possible care for the buyer's loss or ruin.

"I have already been requested to prepare plans as well as to produce drawings and the estimate for our meeting house or church, if one would so call it, and the building of which will take place in the near future.

"Preparations have accordingly been made to take care of both the colonists' temporal and spiritual welfare, which we, as Swedes and friends of the mission ought to duly appreciate.

"[Signed] A. Hallner.

"Sacramento Bank Bldg., Sacramento, Cal.
"March 1st, 1912."

The complaint then alleges:

"That in and by said letter said Hallner falsely pretended and represented to plaintiff:

"(A) That said land so offered for sale to plaintiff was of a character greatly superior to the land about Turlock, California.

"(B) That said land was a better bargain at \$75.00 to \$150.00 an acre than similar land at Turlock at \$25.00 to \$32.50 per acre.

"(C) That said land was of extraordinary fertility.

"(D) That a great quantity of potatoes had been recently harvested on said land, which were the choicest and finest ever seen by said representatives.

"(E) That said Hallner was not in any way financially interested in the sale of said land, and that the interest of said Hallner arose from his desire to get together a great Swedish colony, and promote a strong missionary movement."

That at the time said representations were made by said Hallner in said letter, said Hallner was an agent and employé of said defendant; that in said letter said Hallner fraudulently concealed from plaintiff the fact that said land was worthless and of no value, and that it was known as overflow land; and that there was present in it certain "hard pan," located at such distance from the surface that it was impracticable to drain the same of water so as to permit the profitable growth of plants and trees.

It is further alleged that the defendant, by means of advertising circulars sent by defendant to plaintiff—

"falsely pretended and represented that there was no hardpan in any of defendant's land so offered for sale; that said defendant in said circulars likewise fraudulently concealed from the plaintiff the fact that there was hardpan on said lands at such distance from the surface that it was impracticable to drain the same so as to permit profitable growth and culture of plants and trees; that an advertising circular was sent by defendant to plaintiff and received by plaintiff, reproducing as a part of said circular a photograph of a hop ranch, located near Wheatland in the county of Yuba, containing a picture of said Hallner in the foreground thereof, and said defendant falsely pretended and represented in said circular that said hop ranch was located in Arboga Colony; that another advertising circular was also sent by defendant to plaintiff, reproducing a photograph of an alfalfa field located near to the tract of land offered for sale by defendant, but not a part of said tract of land; and said defendant falsely pretended and represented to plaintiff in said circular that said alfalfa field was located in Arboga Colony."

It is further alleged that the plaintiff closed up his business in the state of Michigan, came to the state of California on or about the 15th day of October, 1912, was met by the said Hallner, who took charge of him and acted as friend and adviser, both business and spiritual. That the plaintiff relied implicitly upon said Hallner as such adviser, and believed him to be entirely actuated by spiritual motives, etc.

It is further alleged that upon the plaintiff's arrival at Arboga, defendant, through its representatives, exhibited the land referred to, while the same was free from overflow and during the dry season, and repeated the representations previously made by defendant, as aforesaid, prior to plaintiff's arrival, and continued to conceal the existence of the facts so concealed, and such false representations and such fraudulent concealments then and there made by defendant and its representatives were as heretofore stated, repeating in substance and with almost identical language the allegations hereinbefore set forth; and further alleging "that plaintiff was totally ignorant of the existence of the facts and entirely unfamiliar with swamp and overflow lands; that said representations so made by the defendant and its representatives both before and after the arrival of the plaintiff at Arboga, were false, as defendant and its representatives then and there well knew."

It is further alleged that the plaintiff did not discover the falsity of the alleged representations until during the winter of 1913-1914, when the lands referred to were flooded by the high waters of that season, whether by breaking the levees referred to in the complaint, or otherwise, does not appear; and by reason of the flooding great damage was suffered and the lands rendered entirely unfit for the purposes for which they were falsely represented to be fit. It will be seen by the allegations of the complaint that reliance was placed by the plaintiff upon the representations made by Hallner, and not upon anything said or done by any other representative of the defendant. While it is alleged that other representatives made similar statements, and that circulars were sent by the defendant to the plaintiff, the complaint is entirely silent as to any confidence being placed therein by the plaintiff, or that he made any purchases on account of any such representations. The complaint is also silent as to whether the representations made by Hallner in his letter were actually known by him to be false, or were in truth and in fact false, other than by way of mere recital. The language of the complaint is, "That in and by said letter said Hallner falsely pretended and represented to plaintiff," etc. The pleader, by paragraph 8 of his complaint, after stating that different representatives of the company had made certain representations, uses the following language:

"That said representations so made by defendant and its representatives, both before and after the arrival of the plaintiff at Arboga, were false, as defendant and its representatives then and there well knew."

This is not a direct allegation that anything said or written by Hallner was either false, or known by him to be false. The special demurrer calls direct attention to this defect. An analysis of the letter shows that the principal purpose of the writer was the building up or founding of a Swedish colony of his own religious faith. This is not alleged to be either false or fraudulent. After speaking of the conditions in Arboga, the letter states:

"A great quantity of potatoes was recently harvested, the largest and finest I have ever seen, all bearing witness to its extraordinary fertility."

From all that appears in the complaint, Arboga Colony may have produced a large quantity of potatoes, and of a quality asserted by Hallner. The language of the complaint is, "that a great quantity of potatoes had been recently harvested on said land." This is not an allegation that such potatoes were not raised in Arboga Colony; it is, at most, only an allegation that they were not raised on the small tract bargained for by the plaintiff. The letter further states: That market communications are good; this is not denied. That the deeds to the different tracts in Arboga Colony contain stringent clauses restricting the liquor traffic. The truth of this statement is not questioned. Then follows a reference to what one J. M. Henderson, of Sacramento, has done for the Swedish people. Upon this question the complaint is also silent. A comparison is then drawn as to the respective values of land in Turlock, Cal., and lands situate in the Arboga Colony. There is nothing in the complaint showing that this statement was not made in good faith, and, when carefully analyzed, whether such statement is not in fact true. The letter then concludes with the statement of the writer's belief in the advisability of colonizing and gathering the Swedish people together in large communities; that the writer had been requested to prepare plans for a Swedish meetinghouse or church. There is nothing in the letter, nor is there anything in the complaint, from which the trial court could infer that Hallner knew anything about any hardpan underneath the lands in Arboga Colony, or from which it can be inferred that Hallner was fraudulently or otherwise concealing such fact, if it be a fact. Nor is there anything in the complaint, or in the letter, from which the trial court could infer that Hallner was concealing from the plaintiff that the lands involved are worthless or of no value, if such be the fact. The language of the complaint in this particular, in the first instance, is as follows:

"That in said letter said Hallner fraudulently concealed from plaintiff the fact that said land was worthless and of no value."

And further on, as a basis for charging the valuelessness of the lands, the complaint alleges:

"That said land was inundated from flood waters to the plaintiff's great damage, rendering the same entirely unfit for the purposes for which it was falsely represented to be fit, as aforesaid."

This is not an allegation that the lands were otherwise than as represented by Hallner, or that they are not, in fact, both valuable and fertile; nor is there any allegation in the complaint alleging the actual existence of hardpan underneath the lands described therein, the nearest approach being the statement that said Hallner concealed from plaintiff that there was present in it certain hardpan located at such distance from the surface that it was impracticable to drain the same. If such were, in fact, the case, there might be "certain hardpan" in the land, and yet the tract, as a whole, still fertile and valuable.

Much time and space has been occupied by counsel in their briefs touching the question as to when an expression of opinion may be regarded as equivalent to a statement of a fact and rescission granted, but from the analysis of the complaint and the letter upon which it is based, as hereinbefore set forth, it does not seem to the court necessary to review a long list of authorities on questions which are not disputed.

[2, 3] The real point involved in this action is decided in the case of Baker-Boyer National Bank v. Hughson, 5 Wash. 100, 31 Pac. 423. The court there says:

"The simple statement that such representations were false and fraudulent, in the absence of any statement of what the real facts were, is a simple conclusion of law, and no issue of fact could be made upon it."

That the mere expression of opinions by a vendor is not such a misrepresentation as might avoid a sale, even although such opinions are not warranted by the facts, is too well established to require the citation of authority. The allegation in that case was as follows:

"That it was falsely and fraudulently represented that said real estate was situated," etc.

Here, it is not pretended that Hallner fraudulently represented anything, it being alleged only that he falsely represented and pretended. This language does not include any element of willfulness or lack of good faith on the part of the person making the representation, or that the truth is actually different from such representations.

In the case of Spreckels v. Gorrill, 152 Cal. 383, 386, 92 Pac. 1013, the language of the complaint was, "falsely and fraudulently," but the court points out that no special demurrer was interposed, and says:

"If the objection had been raised by special demurrer for uncertainty, perhaps it might have been held fatal, but no demurrer was filed to the complaint. The defendant answered, denying practically all the substantial allegations of the complaint, and the case was tried upon

the theory that the complaint was sufficiently direct and positive."

The court further says:

"The lack of a direct allegation that the statements were untrue, conceding it to be a defect, is one of that character which, in the absence of a special demurrer, is cured by the verdict of the jury or the finding of the court, and which cannot be taken advantage of when urged for the first time on appeal."

And, further:

"The same rule applies to the defect of allegation of fraudulent intent on the part of Gorrill. While the allegation that he made the statements 'falsely and fraudulently' to induce Spreckels to buy, might not, in the face of proper special demurrer, supply the place of a direct allegation that Gorrill knew them to be untrue, or made them in a manner not warranted by his own information, although he believed them to be true, nevertheless it implies all this; and, where no special demurrer is interposed, it will be held sufficient after the verdict or decision upon the merits."

[4] In that case it was alleged that the representations were made falsely and fraudulently and with intent to deceive. In the case at bar, it is only when Hallner falsely pretended and represented without any fraudulent intent; and, so far as the complaint goes, without any purpose to deceive or mislead the plaintiff in any particular. The trial court upon demurrer held:

"That it was not alleged in the complaint that the false statements were made with intent to deceive the plaintiff or induce him to make the purchase to his injury" (citing Sutherland Code Pleading, § 6886; Barber v. Morgan, 51 Barb. [N. Y.] 116; Heller v. Dyerville, 116 Cal. 133, 47 Pac. 1016).

And, further, that there was no allegation in the complaint that the plaintiff had, in fact, been injured by reason of his purchase, citing Truett v. Onderdonk, 120 Cal. 588, 53 Pac. 26. This defect in the complaint further appears by reference to 12 R. C. L. § 167, where it is stated:

"Fraudulent intent must be alleged in all cases where it is a material ingredient of a fraud relied on. In an action of deceit, it is proper to allege facts showing knowledge on the part of the defendant that his representations were false, and generally in such an action scienter must be alleged either expressly or by alleged facts which are tantamount thereto. It must also be alleged that the representations were made with a fraudulent intent, and for the purpose of inducing the other party to act on them. In all cases where the representations relied on relate to matters of opinion, it must be alleged that they were knowingly false, and were not honestly given."

Nothing of this kind appears in plaintiff's amended complaint. If the necessary facts existed to constitute a cause of action, the trial court, allowing 20 days within which to file a second amended complaint, provided ample time.

We are of the opinion that the defendant's demurrer to plaintiff's amended complaint was properly sustained, and that the judg-

ment of the lower court should be affirmed. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

CARLSON v. FARM LAND INV. CO. (Sac. 2342.)

(Supreme Court of California. March 21, 1917.)

CANCELLATION OF INSTRUMENTS § 37(8)—ALLEGATION OF FRAUDULENT INTENT.

A complaint was demurrable where it failed to allege that false statements relied upon in inducing plaintiff to purchase land, were made with intent to deceive plaintiff and induce him to purchase land.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

In Bank. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

On petition for hearing in Supreme Court. Petition denied, and judgment sustained.

For opinion, of District Court of Appeal, see 164 Pac. 344.

Curtis Hillyer, of San Francisco, and Wetmore & Davies, of Marysville, for appellant. A. A. De Ligne, of Sacramento, and W. H. Carlin, of Marysville, for respondent.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we deem it proper to say that we do not desire to be understood as approving everything stated in the opinion of that court.

It seems to us that there can be no question of the correctness of the action of the trial court in sustaining the demurrer on the ground, among others, that it was not alleged in the complaint that the false statements were made with intention to deceive the plaintiff or induce him to make the purchase to his injury.

This being so, the judgment of that court would have to be affirmed in any event.

Ex parte MADALINA. (Cr. 2032.)

(Supreme Court of California. March 23, 1917.)

1. BASTARDS § 1—NONSUPPORT—LIABILITY OF FATHER OF ILLEGITIMATE CHILD—STATUTE.

Civ. Code, § 195, provides that the presumption of legitimacy can be disputed only by the husband or wife or the descendants of one or both of them. Pen. Code, § 270, provides that the parent of either a legitimate or illegitimate minor child shall be liable to a criminal prosecution, as each parent is liable under Civ. Code, § 196a, to a civil action, for its nonsupport. Held, that while under Pen. Code, § 270, the father of an illegitimate child may be prosecuted criminally for its nonsupport, a criminal proceeding will lie against the father only where the child is the illegitimate offspring of an unmarried woman, and will not lie in the case of a child which was born in wedlock, though in fact

illegitimate, since the state cannot raise the question of legitimacy.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 1-3.]

2. BASTARDS —1—NONSUPPORT—AUTHORITY OF STATE TO RAISE QUESTION OF LEGITIMACY—STATUTE.

Authority in the state to raise the question of legitimacy where a child is born in wedlock is not to be implied from the enactment of Pen. Code, § 270, authorizing criminal proceeding for nonsupport of legitimate or illegitimate child, since the provision applies to cases where the question of the legitimacy of the child will not arise or will be a proper subject of inquiry at the suit of the state.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 1-3.]

In Bank. Petition for habeas corpus by Andrew Madalina. Writ granted, and petitioner ordered discharged from custody.

E. J. Dole, of Petaluma, for petitioner. Clarence F. Lea, Dist. Atty., and C. W. Hoyle, Asst. Dist. Atty., both of Santa Rosa, for respondent.

LORIGAN, J. Petitioner seeks his release in this habeas corpus proceeding from the custody of the sheriff of Sonoma county, who holds him under a commitment by a magistrate to answer before the superior court of that county for failure to provide for his alleged illegitimate child. The facts presented on the hearing before the magistrate and upon which the commitment was based, but which are claimed to be legally insufficient to warrant his detention, are stipulated by the attorney for petitioner and the district attorney of Sonoma county.

The petitioner was prosecuted under section 270 of the Penal Code as amended in 1915 (St. 1915, p. 572), which reads as follows:

"A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both."

The facts as stipulated are that the minor child referred to in the complaint is about eight months old; that it was born in lawful wedlock to a woman whose husband was alive when said child was born to her and between whom there had been no judgment of divorce. At the preliminary examination, so it is stipulated, the mother testified to the nonaccess of her husband or of any person other than said petitioner for a period of two years next prior to the birth of the child. It was further stipulated that no action had ever been begun by the said mother or by any other person under section 196a of the Civil Code to determine the parentage of said child or to obtain a judgment against the petitioner or any other person for the support of said child and that there is no such judgment.

In disposing of this petition, several sec-

tions of the Codes are to be taken into consideration.

Section 196a of the Civil Code, a moment ago referred to, provides:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139, and 140 of the Civil Code, in a suit for divorce by a wife."

By section 193 of the Civil Code it is provided that "all children born in wedlock are presumed to be legitimate."

Section 195 of the same Code declares:

"*Who May Dispute the Legitimacy of a Child.*—The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact."

The sections quoted are all the sections of the Code, criminal or civil, which bear directly upon the principal, and in our opinion the sole question involved here, namely, whether the state of California in a criminal prosecution of this character brought in its name is authorized to question the legitimacy of a child born in wedlock.

The first legislation in this state of the nature involved here was enacted in 1913, when section 196a, heretofore quoted, was passed providing for a civil suit at the instance of the mother of an illegitimate child, or its guardian, against its father for its support and education. In 1914, one Gambetta was prosecuted under section 270 of the Penal Code as it then stood; it being claimed that the said section 270, aided by section 196a, provided for the criminal prosecution of the father of an illegitimate child for its nonsupport. This court on habeas corpus (In re Gambetta, 169 Cal. 100, 145 Pac. 1005) held that section 270 of the Penal Code as it then stood had no application to the father of an illegitimate child, and that section 196a of the Civil Code, adopted in 1913, imposing an obligation on a father to support his illegitimate child, had not changed the application of said section 270 of the Penal Code in any way. Subsequent to this decision, and in 1915, the Legislature amended section 270 of the Penal Code to provide as it does now that the parent of either a legitimate or illegitimate minor child shall be liable to criminal prosecution, as each still remains, under section 196a of the Civil Code, liable to a civil action for its nonsupport. While it thus appears that under the amendment to section 270 of the Penal Code the father of an illegitimate child may be prosecuted criminally for its nonsupport, it is contended by counsel for petitioner that a criminal proceeding will lie, under said section, against the father only in a case where the child is the illegitimate offspring of his intercourse with an unmarried woman and that it will

not lie, and was not intended to lie, against him in the case of a child which had been born in wedlock. The last portion of the contention of petitioner is the only point in the case which we deem it necessary to consider. As amplified by him in his argument, his position respecting it is this: That it being conceded that this child, of which the petitioner is alleged to be the father, was born in wedlock, the presumption is that it is legitimate; that the declared policy of this state as expressed in its legislation is that the presumption of such legitimacy can be disputed only by the husband or wife or the descendants of one of them; that no one else may do so; that the state having thus by express legislation inhibited any question as to the legitimacy of a child born in wedlock being raised except as above indicated cannot itself raise it in a criminal prosecution or other proceeding. It is, of course, to be understood that, when it is said that the state cannot itself raise the question of the legitimacy of a child born in wedlock, it is not meant that it has no power to enact legislation authorizing such inquiry in a proceeding in its name, but only that it has not so far done so; that, on the contrary, it has denied itself this right by expressly declaring who of others alone may do so.

[1] We are satisfied that the position of counsel for petitioner is correct, and that any claim to the contrary is answered by a consideration simply of section 195 of the Civil Code, which declares that the presumption of the legitimacy of a child born in wedlock can only be raised by the husband or wife or the descendants of one of them. This is the declared policy of this state and is simply the adoption of a rule prevailing generally in all civilized communities. If the state has decided to depart from that policy, it certainly has not declared that intent by any express language found in or any reasonable inference to be deduced from the terms of section 270 itself, or considered in connection with section 196a. Counsel for respondent strenuously contends that section 195 of the Civil Code is inapplicable, because the criminal proceeding under section 270 is found in the Penal Code which as to all criminal procedure governs. But this contention is not sound. A mere place in the Codes is not decisive of the effect or the application of Code provisions. The Civil Code by section 195 was laying down a rule of public policy in a matter which the state deemed vital to society; it was following the civilized rule and made it applicable under all circumstances where the question of legitimacy of children born in wedlock was sought to be raised, prescribing a limitation as to the persons who might raise the question by expressly enumerating those who might do so; it eliminated itself from doing it under an application of the familiar rule that an enumeration of persons to be affected by a

Code provision is an implied exclusion of all others. By the Civil Code section the inquiry was expressly limited on behalf of certain persons. When it came to providing for proceedings under section 270, the Legislature did not in any language found therein, or anywhere else, abrogate what it had laid down in section 195 as to questioning the legitimacy of a child born in wedlock. This section 195 is to be considered with section 270 as in *pari materia* with the latter and must be construed as a part of it. Pol. Code, § 4480 et seq.

[2] But it is said by counsel for respondent that authority to raise the question of legitimacy where the child is born in wedlock must be implied from the enactment of section 270 authorizing the criminal proceeding; that such a proceeding can only be brought in the name of the state. True, the criminal proceeding must be in the name of the state—the people—and is authorized to punish the parent of an illegitimate or legitimate child for an omission without excuse to support it. Parents of legitimate children may be prosecuted at the suit of the state; parents of illegitimates born out of wedlock may also be prosecuted. So that the Code provision is not without cases for its application where the question of the legitimacy of the child will not arise or where it will be a proper subject of inquiry at the suit of the state. But when it is attempted to bring within its terms in a criminal prosecution a question of the legitimacy of children born in wedlock, there is nothing directly or inferentially in the language of section 270 which authorizes the state to raise that question. To the contrary, the expressly declared policy of the state as found in section 195 precludes it from doing so, and in the interests of public policy, decency, morality, and the protection of innocent children this commends itself. Public policy and common decency are opposed to the bastardizing of children born in wedlock against the wishes and perhaps against the protest of their putative parents. If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question. It will appear, too, that the welfare, comfort, and happiness of innocent children are, under this policy of the state, best conserved, as they are protected against the stigma of illegitimacy, or aspersions cast upon their birth being raised by third persons, either through excessive zeal or actuated by sinister motives in criminal proceedings brought in the name of the state.

The writ is granted, and the petitioner ordered discharged from custody.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.

KEENAN v. KEENAN et al. (No. 2257.)
(Supreme Court of Nevada. April 16, 1917.)

1. DIVORCE \Leftrightarrow 830—JUDGMENT—CONSTRUCTION.

In a suit instituted in a foreign state other than the state of her husband's residence and in which he had no property a wife secured a decree of divorce. *Held*, that such decree, though treated as one in rem, dissolving the bonds of matrimony, has no binding effect in personam against the defendant husband, though he was personally served with process in the state of his residence, for such service did not bring him within the jurisdiction of the foreign court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 839.]

2. DIVORCE \Leftrightarrow 831—ALIMONY—DIVISION OF PROPERTY—STATUTE.

Rev. Laws, § 2166, declares that in case of the dissolution of the marriage the community property must be equally divided between the parties, and the court granting the decree must make such division as the nature of the case may require, provided that when the decree is rendered, on the ground of adultery or extreme cruelty, the party found guilty is entitled only to such portion of the community property as the court granting the decree may, in its discretion, deem just and allow. A wife secured in a foreign state a decree divorcing her from her husband, who was a resident of the state of Nevada, in which state the community property of the parties was situated. *Held*, that she could not thereafter maintain an independent action in the Nevada courts to secure a division of the community property pursuant to the statute; the statute having reference only to the court granting the divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842.]

3. JUDGMENT \Leftrightarrow 17(3)—PROCESS—SERVICE—VALIDITY.

Process cannot run beyond the borders of the state, and constructive service by publication or personal service on a nonresident will not support a decree in personam, though it may support a decree affecting property within the state where process is issued.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 26.]

4. JUDGMENT \Leftrightarrow 818(3)—FOREIGN JUDGMENT—ACTIONS UPON.

While an action may be maintained in one state on a judgment or decree rendered in another, such judgment must be valid, and it will support no action where rendered against a nonresident, who was not served within the state and did not appear.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1466-1470.]

5. JUDGMENT \Leftrightarrow 823—SERVICE OF PROCESS—SUBSTITUTED SERVICE.

A judgment on substituted service of summons is enforceable only on the property within the state out of which summons is issued.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1491, 1501-1503.]

6. DIVORCE \Leftrightarrow 331—ACTIONS—DIVISION OF PROPERTY.

Where a wife procured a judgment of divorce in a foreign state other than Nevada, of which her husband was a resident, she cannot, on the ground of the liberality of the Nevada divorce laws, maintain an action for the division of community property situated in Nevada, for

she might properly have maintained her suit in Nevada.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842.]

7. APPEAL AND ERROR \Leftrightarrow 240—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The dismissal of an action without affording plaintiff an opportunity to amend cannot be complained of, where there was no application for a modification of the order or for time to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1372, 1373, 1400, 1406, 1411, 1412.]

8. APPEAL AND ERROR \Leftrightarrow 1040(2)—REVIEW—HARMLESS ERROR.

Where plaintiff's complaint was based on a record of a judgment rendered in a foreign state, the sustaining of a demurrer and dismissal of the complaint without affording an opportunity to amend was harmless, though contrary to the better practice, for an amendment could not change the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4097.]

Appeal from District Court, White Pine County; C. J. McFadden, Judge.

Action by Emma G. Keenan against William M. Keenan and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Paul Pizey, of Boise, Idaho, for appellant. James Lockhart, of Ely, for respondents.

McCARRAN, C. J. This action was presumably brought under the statute of this state (section 2166, Revised Laws of Nevada 1912), which we find to be as follows:

"In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require; provided, that when the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the community property as the court granting the decree may, in its discretion, from the facts in the case, deem just and allow; and such allowance shall be subject to revision on appeal in all respects, including the exercise of discretion, by the court below."

From the record we learn that appellant and respondent were married at Los Angeles, Cal., January 6, 1902; that on August 31, 1914, pursuant to the suit and prayer of this appellant, a decree of divorce was rendered by the district court of Ada county, state of Idaho. At the time of the bringing of the action for divorce, this respondent, defendant in the divorce action, was in business and in possession of certain real and personal property at the town of East Ely, White Pine county, Nev. Nothing in the record would indicate that he was ever a resident of Idaho. Summons in the divorce action commenced in Ada county, Idaho, was served upon the defendant, respondent here, personally, at East Ely, White Pine county, Nev.

The record discloses that in the divorce action in Idaho this respondent made no appearance, either in person or by attorney, and made no attempt to plead or defend in said action; hence default was entered against him. Some time after the decree of divorce was entered in the Idaho court, this action was commenced in the district court of White Pine county for a partition of the real and personal property "according to the respective rights of the parties interested therein," and that the defendant Keenan, respondent here, be made to disclose and account for the personal property and the value thereof on hand on the 3d day of August, 1914, and the rents and profits of said real property and the profits of his business since that date. A demurrer raising the question of jurisdiction having been sustained by the trial court, appeal is taken to this court from such order.

[1] We deem it unnecessary, in arriving at a conclusion here, to pass upon questions suggested as to the jurisdiction of the Idaho court to render the decree of divorce. The appellant here, plaintiff in the Idaho court, chose that forum to determine and terminate the marriage status existing between herself and the respondent. The record would indicate that at the time of the commencement of the action in Idaho the respondent was living in this state and was in possession of considerable property situated in this state. It appears from the decree of the Idaho court, copy of which is in the record, that no property of any nature belonging to respondent or in which he was at all interested was found in the state of Idaho. This fact must have been known to the wife prior to the commencement of her action for divorce, and we refrain from conjecture as to why such action was commenced in a jurisdiction other than that in which the husband resided and the community property, if it was community property, existed. Appellant here, however, having submitted her cause for divorce to the Idaho court, is entitled to the full force and effect of the Idaho decree in so far as the court rendering that decree had power to make it effective, but no more. As to whether that court had jurisdiction, in view of the allegations of the complaint for divorce, to determine the marriage status of the parties or to render a valid decree, is not a question with which we deem it necessary to deal. An action in divorce is generally regarded as proceedings in rem, and the Idaho court may have been, and probably was, warranted in entering its decree dissolving the marriage status, inasmuch as one of the parties was deemed to be properly before that court; but further than this the Idaho court could not, and, indeed, did not, attempt to go. It had acquired no jurisdiction over either the person of the defendant in the divorce action, respondent here, or over the property. Whatever may be the

effect of the decree of the Idaho court on the marriage status of respondent here, the great weight of authority holds that under such circumstances as those presented in the record no binding decree in personam could have been entered against the respondent. *Black on Judgments*, vol. 2, § 933; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. Rep. 168, 2 Ann. Cas. 819.

The proceedings here have not even the dignity of a personal judgment rendered against the respondent in a foreign state. Indeed, even if such were the case, under the rule announced by most eminent authority, such would be void, defendant in that action having been at the time of the rendition of the judgment a nonresident of the state in which the judgment was rendered, and he never having been brought within the jurisdiction of the Idaho court. *Haddock v. Haddock*, 201 U. S. 567, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; *Pennoyer v. Neff*, *supra*.

[2] Our statute (section 2186) relied upon here, is, in our judgment, quite distinct in so far as its intentment is concerned:

"In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property * * * as the nature of the case may require."

It is "the court granting the decree" that must make such order for the division of the community property. The expression here emphasized is found later on in the same section, and in each instance its intentment is clearly indicated. Continuing, the statute reads:

"When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the community property as the court granting the decree may * * * allow."

In the case at bar, it was a foreign court, a tribunal in a foreign jurisdiction, that granted the decree. No court having jurisdiction over the property was called upon to render a decree dissolving the marriage status or to determine as to equitable distribution. Hence this is not a case involving dissolution of a marriage status by decree of a court of competent jurisdiction in so far as the community property is concerned.

In California, under a somewhat similar condition, the courts have held that when a decree of divorce is granted and no disposition made of the community property, the wife might assert her interest in such property by another suit in another court, but in the same state. To the same effect has been the holding in a Texas case. *De Godey v. Godey*, 39 Cal. 157; *Whetstone v. Coffey*, 48 Tex. 269. We do not here assume to determine, and, indeed, the question is not before us, as to whether a similar construction

would apply to our statute under like conditions.

[3] It is a well-settled rule that process from the tribunals of one state cannot run into another and summon parties therein domiciled to respond. It is equally true of process sent to parties out of the state in so far as such would tend to establish personal liability. Whatever might be said as to the validity of the judgment and the decree of divorce rendered by the Idaho court as the same might have affected property of respondent in the State of Idaho, where service of summons was by publication or by personal service in a foreign jurisdiction, it will suffice to say in the matter at bar that the effect of the decree of the Idaho court on property within this jurisdiction is nil. 15 R. C. L. 913.

[4] It is stated as a proposition of law that an action may be maintained in one state on a judgment or decree rendered in another, whenever such judgment or decree creates a personal obligation. But where such rule is sought to be enforced, the jurisdiction of the court rendering the original judgment or decree must be complete. Such cannot be said when the court rendering the original decree has never acquired jurisdiction either over the person of the defendant or over property that might be involved.

Where a party is neither within the jurisdiction nor served with process therein, and no voluntary appearance is made to the suit either by himself or by his authorized representative, the rule is eminently supported that a judgment under such circumstances cannot be enforced against him in a foreign state. *McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666; *Phelps v. Brewer*, 19 Cush. (Mass.) 390, 57 Am. Dec. 56; 15 R. C. L. 912; *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; *Grant v. Swank*, 74 W. Va. 93, 81 S. E. 967, L. R. A. 1915B, 881.

[5] Eminent authority supports the rule that where there is substituted service of summons, the most that can be acquired is a judgment enforceable upon property within the state. 15 R. C. L. 913.

The identical question found in the case at bar, but considered under circumstances which if presented here would be much more favorable to the contention of appellant, was decided in the case of *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505, wherein the Circuit Court of the United States for the District of Oregon held that a statute somewhat similar to ours, existing in the state of Oregon, was limited as to its effect to divorces granted by the courts of Oregon, and could not be taken advantage of to affect community property within the state of Oregon, where the divorce was granted in another jurisdiction. In that case the divorce had been granted in the state of California; the jurisdictional features were complete, inasmuch as both parties were before

the California court at the time that tribunal granted the decree. The opinion of Mr. Justice Gray in dealing with the question is quite illuminative of the subject, and the principles of law there enunciated we think may be applied with propriety to the matter at bar.

[6] Counsel for appellant, in his brief, lays much stress on the liberality of the divorce laws of Nevada, and by way of argument infers that by reason of such laws the courts of this state as a matter of comity should recognize the decree granted to appellant in the state of Idaho.

Counsel's position in this respect is dwelt upon at length by the Supreme Court of Idaho in a case, the circumstances of which were almost identical to those presented in the matter at bar, wherein that court held that where the wife abandoned her husband and home in the state of Idaho and took up her residence in another state, voluntarily leaving the jurisdiction of Idaho and leaving the domicile and community property located in that state, and obtained a decree of divorce in another jurisdiction on constructive service, she could not thereafter maintain an independent action within the jurisdiction of the state of Idaho for a division of the community property located therein. *Bedal v. Sake*, 10 Idaho, 270, 77 Pac. 638, 66 L. R. A. 60. The court in that case dwelt at some length on the subject, and took occasion to observe that:

"The grounds upon which a divorce may be granted in this state (Idaho) are as numerous as any of our sister states. Hence, under ordinary circumstances and conditions, it is unnecessary for any one to seek another forum in which to prosecute an action for divorce. The plaintiff in this action, for some reason best known to herself, saw fit to leave this state and prosecute her action in Oregon, certainly knowing that a division of the community property could not be decreed by the courts of that state on a service by publication. * * * As we view it, it was the duty of the plaintiff to commence her action in the jurisdiction where the property was situated, procure personal service on the defendant, and thus acquire jurisdiction of the property, and, in the disposition of the case, place the court in a position to settle their marital relations as well as their property rights."

We deem the observation of the Supreme Court of Idaho quite appropriate and applicable to the matter at bar, in view of the circumstances of the case.

[7] Counsel for appellant complains of the action of the trial court in dismissing the proceedings without affording opportunity for appellant to amend. Whatever force there might have been in the contention of appellant in this respect, we take it to have lost its significance, inasmuch as no application was made to the trial court for either a modification of the order dismissing the action or for time in which to amend.

[8] In all cases where a demurrer to a complaint is overruled, we suggest that it is proper practice for the court to afford opportunity for amendment. In the matter at

bar, however, the complaint in the action was based upon the record of the Idaho court, all of which was fully set forth. It would be difficult to conjecture how or to what extent the complaint could have been amended, even had opportunity been afforded. Hence, as we view it, no prejudice resulted from the action of the court in failing to extend time in which appellant might amend.

The order of the lower court in sustaining the demurrer should not be disturbed. The order appealed from is therefore affirmed.

SANDERS, J., concurs. COLEMAN, J., did not participate.

SMITH v. GRAHAM et al

(Supreme Court of Idaho. Feb. 23, 1917. Rehearing Denied April 19, 1917.)

1. SHERIFFS AND CONSTABLES § 92—INDEMNITY BOND—DUTY OF OFFICER.

Under the provisions of section 4478, Rev. Codes, as amended by Sess. Laws 1913, p. 308, where property, levied on by a constable is claimed by a stranger to the writ, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted indemnity, he is bound to proceed and rely on his bond in indemnity.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 134, 135.]

2. TRIAL § 251(2) — INSTRUCTIONS — EVIDENCE.

Where it appears that the only question properly at issue in an action was as to whether or not the defendant had performed his statutory duty as constable in proceeding to levy upon sufficient property of the judgment debtor to satisfy the judgment, and that the question of the solvency of the judgment debtor was therefore immaterial, an instruction by the trial court upon the latter question is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 589.]

3. TRIAL § 251(2) — INSTRUCTIONS — EVIDENCE.

Held, that the question of the exemption of the property levied upon is not involved in this case, as it appears that the judgment debtor made no claim of exemption, and the court accordingly erred in instructing the jury upon the question of exemption.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 589.]

Appeal from District Court, Twin Falls County; Chas. O. Stockslager, Judge.

Action by L. C. Smith against R. A. Graham and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with instruction to enter judgment for plaintiff against defendants.

See, also, 25 Idaho, 174, 136 Pac. 801.

James H. Wise, of Twin Falls, for appellant. Longley & Hazel, of Twin Falls, for respondents.

BUDGE, C. J. Appellant here recovered a judgment against one Dora Patrie in the probate court of Twin Falls county, on June 24, 1911, for the satisfaction of which a writ

of execution was duly issued out of said court on the 14th day of August, 1911, and by respondent, as constable of precinct No. 1, Twin Falls county, levied upon certain personal property alleged to have been the property of said Patrie. On the 16th day of August, 1911, one Cherry notified the respondent Graham that he was the owner of said property, and demanded that the title to the same be tried by a constable's jury, as provided for by section 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308. Whereupon Graham summoned said jury, to whom the question of the ownership of the property was submitted. The jury found that the property belonged to Cherry. Thereupon Graham notified appellant that he would not proceed further under the execution unless indemnified by appellant. On the 29th day of August, 1911, the appellant furnished Graham with a bond in the sum of \$600, which was accepted and filed with the probate court on the 1st day of September, 1911, and the said property, levied upon under the writ of execution, was on that day advertised to be sold on the 7th day of September, 1911. On the 2d day of September, 1911, however, it appears that Graham returned the execution wholly unsatisfied.

This action was commenced against Graham and his sureties on his official bond to recover damages for his alleged failure and neglect to properly perform the official duties of his office as such constable of said precinct, in that he failed, neglected, and refused to satisfy said judgment by the sale of the said property, levied upon by him after he had been furnished, upon demand, and accepted an indemnity bond. This controversy was before this court upon a prior occasion, and will be found reported in 25 Idaho, 174, 136 Pac. 801, to which reference may be had for a more detailed statement of the facts.

We deem it necessary to consider only the two following assignments of error: First, that the verdict of the jury was contrary to the evidence; second, the action of the trial court in giving and refusing to give certain instructions. The assignments will be discussed in the order stated.

[1] It is admitted in this case that judgment was duly entered; that a writ of execution issued out of the probate court; that said writ was delivered to the respondent Graham, as constable of said precinct, and that he levied upon certain personal property alleged to have been the property of the judgment debtor; that the property was claimed by a third party, whereupon an indemnity bond was demanded, furnished, accepted, and filed with the probate court; that the property was advertised for sale; and that the execution was returned unsatisfied. Under these facts, in our opinion, the appellant was entitled to recover judgment

against the constable, Graham, and his sureties. Section 4478 Rev. Codes, as amended by the Sess. Laws 1913, p. 306, provides:

"If the property levied on be claimed by a third party as his property by a written claim * * * and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties."

As was stated in substance in the former opinion in this case: This statute was enacted for the purpose of meeting the kind of a situation which arose in this transaction. Where the officer entertains doubt as to the title to the property or the right of the third person who claims it, he may call a jury of his own selection. If the jury returns a verdict that the property belongs to the third party claimant, then the statute is explicit to the effect that the officer "may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." After the jury has decided against the title of the execution debtor, the respondent may refuse to proceed a step further with the execution of the writ unless he receives a satisfactory indemnity bond from the execution creditor. When that bond is given the sheriff no longer has any discretion, he must proceed and sell the property, for the reason that he has received security sufficient to cover all damages which may be recovered against him in the event the third party claimant is able to establish his title to the property, in a judicial proceeding and obtain a judgment in damages for conversion of the property. *Smith v. Graham, supra*. In the case of *Corson v. Hunt et al.*, 14 Pa. 510, 53 Am. Dec. 568, the court said:

"It is in full proof that an execution was put into the hands of the defendant, who was a constable, by the justice, and that a short time afterwards, he said he had levied, but that some person had claimed the property. A bond of indemnity was then given to him, at his request, which he accepted, expressing himself satisfied therewith. Notwithstanding which, the constable made the following false return: 'Returned for want of sufficient indemnification.' * * * He was bound to proceed to sell the goods levied upon in satisfaction of the debt, and his neglect or omission to do so rendered him responsible to the plaintiffs for the amount of the execution, * * * but, having demand-

ed and accepted indemnity, * * * he is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity."

To the same effect are the following authorities: *Adams v. Disston*, 44 N. J. Law, 662; *Stone v. Pointer*, 5 Munf. (Va.) 287; *Davis v. Tibbatts et al.*, 7 J. J. Marsh. (Ky.) 264; 10 R. C. L. 1285; and *Murfree on Sheriffs*, par. 614.

We think the general rule to be that under a statute such as we have in this state (section 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308), after an execution, issued upon a valid judgment, is delivered to a sheriff or constable, it is his duty to proceed and levy upon sufficient of the property of the judgment debtor to satisfy the judgment, and if the property so levied upon be claimed by a third party, he may refuse to proceed further and demand a bond of indemnity; and if this is furnished by the judgment creditor and accepted by the officer, it then becomes his duty to sell the same, unless enjoined by a court of competent jurisdiction, and he cannot justify his refusal to sell such property by showing that it did not belong to the judgment debtor or was not subject to levy.

[2, 3] All of the material facts alleged in the plaintiff's complaint are admitted by the answer, and are supported by the undisputed evidence in the case. We have examined the instructions given by the trial judge, and, without discussing them separately, will say that many of them are erroneous as well as misleading, and only tended to confuse the minds of the jury. The learned trial court proceeded upon the erroneous theory that the question of exemption of the property levied upon was involved, although it clearly appeared that the judgment debtor made no such claim. It further appears that the question of the solvency of the judgment debtor was made an issue upon the trial, which was also wholly immaterial. The judgment of the court is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of the appellant and against respondents, as prayed for in plaintiff's complaint. Costs awarded to appellant.

MORGAN and RICE, JJ., concur.

In re CALLAHAN.

CALLAHAN v. DUNN, District Judge.

(Supreme Court of Idaho. March 23, 1917.)

1. DIVORCE \S 214(4)—MOTION FOR ALIMONY—PLACE OF HEARING.

A motion for alimony and suit money in an action for divorce must be heard in the county or district in which the action is pending.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 628-631.]

2. DIVORCE \S 210—ALIMONY AND SUIT MONEY—ORDER.

An order for alimony and suit money cannot be made in an original proceeding in this court instituted for the purpose of prohibiting a trial judge from exceeding his powers in a divorce action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 610-612.]

Original application by James F. Callahan for a writ of prohibition to Hon. Robert N. Dunn, one of the Judges of the District Court of the Eighth Judicial District of the State of Idaho. Alternative writ made absolute.

Walter H. Hansen and H. L. Heward, both of Wallace, for plaintiff. Featherstone & Fox, of Wallace, for Helen Elizabeth Callahan.

RICE, J. James F. Callahan instituted proceedings in the district court of the First judicial district, in and for the county of Shoshone, against Helen Elizabeth Callahan, for the purpose of obtaining a decree of divorce and settlement of property rights between the parties.

On the 2d day of January, 1917, upon the application of the defendant in that action, an order was entered changing the place of trial of said cause "to the district court of the Eighth judicial district of the state of Idaho and to the Honorable Robert N. Dunn, one of the judges of the said district court."

On the 10th day of January, 1917, James F. Callahan perfected an appeal from the order changing the place of trial. On the same date Helen Elizabeth Callahan served upon the attorneys for James F. Callahan in said action a second amended answer and cross-complaint and affidavits in support of a motion and notice of motion for suit money, attorney's fees, and temporary alimony. The pleadings and other papers so served were all entitled in the district court of the First judicial district of Idaho, in and for the county of Shoshone.

The notice was to the effect that the defendant would move the Honorable Robert N. Dunn, one of the judges of the Eighth judicial district of the state of Idaho, to grant the order. The concluding portion of the notice is as follows:

"The said motion will be made before the said Honorable Robert N. Dunn, judge of the district court of the Eighth judicial district, as aforesaid, under the provisions of section 3894 of

the Revised Codes of the state of Idaho, and by reason of the absence of the said Honorable William W. Woods, judge of the above-entitled court from the state of Idaho, said absence being evidenced, among other things, by the certificate of the clerk of the above entitled court, which said certificate is also hereunto annexed, hereby referred to and made a part hereof."

The certificate referred to states that the Honorable William W. Woods, judge of the First judicial district of the state, was absent from the district and the state, having left on the 2d day of January, 1917. The plaintiff was notified that the motion would be heard on the 20th day of January, 1917, at chambers in the courthouse in the city of Wallace, Shoshone county, Idaho.

It further appears that Judge Dunn was unable to hear the motion on the day specified in the notice, and orally notified the plaintiff's attorneys that the hearing would not be had until the 29th of January. On the 16th day of January, 1917, Judge Dunn made the following order:

"It is ordered that the time of the notice of motion of the defendant in the above-entitled action for temporary alimony, suit money, and attorney's fees be and the same hereby is shortened, and that the said motion be set for hearing and heard before the undersigned judge at chambers in the courthouse at Sandpoint, Bonner county, Idaho, on the 20th day of January, A. D., 1917, at 2 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard."

The said order was made at chambers at Sandpoint, in the county of Bonner, and within the Eighth judicial district of the state. It was served on the attorney for James F. Callahan on the 17th day of January, 1917. On the 18th day of January, 1917, it was stipulated by the attorneys for the parties to said action that the time for the hearing might be fixed for the 24th day of January, 1917, without the said James F. Callahan waiving any of his rights, legal or otherwise, and saving all his right to question and challenge the jurisdiction of the said Robert N. Dunn to hear such matter at said or any time or place. Upon application of James F. Callahan an alternative writ of prohibition was issued out of this court to the defendant, directing him to show cause why such alternative writ should not be made absolute.

[1] Helen Elizabeth Callahan gave her notice of application for alimony, suit money, and attorney's fees upon the theory that the original divorce action is still pending in the district court of the First judicial district, in and for the county of Shoshone. The substance of the notice of motion expressly states that the matter is to be heard before the Honorable Robert N. Dunn, one of the judges of the Eighth judicial district, on account of the absence of the judge of the First judicial district, and pursuant to section 3894, Rev. Codes.

Said section of the Revised Codes, as

amended by Sess. Laws 1911, p. 676, provides:

"In case of a vacancy in the office of any district judge, or in his absence from the judicial district or state, or his sickness or inability to act from any cause, motions may be made before, or orders granted by, any other district judge, who shall have the same jurisdiction under this chapter as though he was the judge of said district, and orders, writs and judgments entered by such judge shall be made matters of record as herein directed and have the same effect as though made by the judge of said district."

This notice precludes any contention that the matter was pending in any county comprising the Eighth judicial district. It was wholly insufficient to empower any court of the Eighth judicial district, or any judge thereof, to hear the motion or make an order therein. In view of this condition of the record, the consideration of this case will proceed upon the theory that the order changing venue did not divest the district court of Shoshone county of jurisdiction, and that the matter is still pending therein.

Under section 3894, as amended, jurisdiction is conferred upon a judge of any other district, to the same extent as the judge of the district for whom he is acting. He is also bound by the same limitations.

The action of Judge Dunn in setting the hearing at Sandpoint, in Bonner county, was not taken pursuant to the original notice served in the case of Callahan v. Callahan, which notified plaintiff in that action that the motion would be heard on the 20th day of January 1917, at chambers in the courthouse in the city of Wallace, Shoshone county, Idaho. This action assumed that under the provisions of section 3894, Rev. Codes, as amended, in the absence of a district judge from his district, a district judge of any district in the state might hear the motion out of the district in which the action was pending.

Section 4881, Rev. Codes, is as follows:

"Motions must be made in the county in which the action is pending, or in any county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state."

This section was first enacted in Idaho by the Eleventh territorial session (chapter 44, Laws 1881, p. 158). Section 58 of this same act enumerates the powers of district judges at chambers, and reads as follows:

"District judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications, and may, at chambers, hear and dispose of such writs and of motions for new trials, and try and determine writs of review, mandate and prohibitions, and may hear applications to discharge all such orders and writs. In case of vacancy in the office of any District Judge, or his absence from the territory, motions may be made before and orders granted by any other district judge."

Since the enactment of said sections, the powers of district judges at chambers in Idaho have been greatly enlarged. See Sess. Laws 1905, p. 7, and section 3890, Rev. Codes.

The same act which enlarged the powers

of district judges at chambers contained what is now section 3893, Rev. Codes, which is as follows:

"Unless otherwise specified by the district judge, all chamber matters shall be heard at the judge's chambers in the county where said judge resides, but said judge is hereby granted jurisdiction and power to sit at chambers in any other county in his district than that in which he lives."

See Sess. Laws 1905, p. 7.

It would seem that section 3893 was intended to apply to judges of the district, and that, when a judge of another district, under section 3894, assumes to act for an absent or disabled judge, he is subject to the limitations prescribed by section 3893.

In the case of *Matthews v. Superior Court*, 68 Cal. 638, at page 641, 10 Pac. at page 129, the court construed section 1004 of the California Code of Civil Procedure, which is substantially the same as section 4881 of our Codes, in the following language:

"Orders made out of court may be made by the judge of the court in any part of the state. Code Civ. Proc. § 1004. The motions referred to in section 1004, just cited, which by it are required to be made in the county or city and county in which the action is pending, in our opinion, are such motions as must be made and heard in court, and not the ex parte motions which may be made and passed on at chambers."

We think that the proper construction of these various statutory provisions requires that all motions of which notice must be given, and which may be contested, must be made and heard in the county in which the action is pending, or in any county in the same judicial district, and that orders which may be made in any part of the state, as provided by section 4881, are ex parte orders which may be made without notice.

We conclude, therefore, that Judge Dunn would not have power to hear the motion at Sandpoint, without the confines of the First judicial district.

[2] Helen Elizabeth Callahan has filed a motion to quash the writ of prohibition in this action, and the service thereof, and has asked this court for an allowance of \$2,000 as attorney's fees for prosecuting this matter, and the further sum of \$250 for costs and disbursements necessarily incurred herein. She has supported her application for attorney's fees and expense money by her own affidavit and that of her attorneys.

An examination of sections 2662 and 2673, Rev. Codes, clearly shows that original jurisdiction in the matter of granting alimony and suit money in connection with divorce actions is vested in the district courts and the judges thereof at chambers. It is clear that this court does not have original jurisdiction in such matters. Such orders are made by this court only where it is necessary to a complete exercise of its appellate jurisdiction. *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938; *Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054.

This is not an action for divorce. Helen Elizabeth Callahan is not a party to this action. There is no provision in the statute for the allowance of attorney's fees in an action of this nature. *Jenkins v. Com. Nat'l Bank*, 19 Idaho, 290, 113 Pac. 463.

The alternative writ heretofore issued by this court must be made absolute. Costs not awarded to either party.

BUDGE, C. J., and MORGAN, J., concur.

PETTENGILL v. BLACKMAN et al.

(Supreme Court of Idaho. March 24, 1917.)

1. QUIETING TITLE §21—FORM OF ACTION.

Held, that in this case an action to quiet title is a proper form of action to attain the end desired, as shown by the pleadings.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 51-53.]

2. QUIETING TITLE §21—SCOPE OF REMEDY—ADVERSE INTERESTS.

In a suit to quiet title the plaintiff has a right to have every adverse interest determined, and any one claiming to hold any interest in the property in question, which would be adverse to plaintiff's interest, may be required to come in and set up the nature of his interest and its source. The interest of a mortgagee is an interest adverse to the holder of a legal title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 51-53.]

3. PLEADING §291(2) — ANSWER—VERIFIED DENIAL—ADMISSION—EFFECT.

Where plaintiff has waived his right to introduce evidence attacking the due execution or genuineness of a written instrument pleaded and set forth in defendant's answer, by failing to file an affidavit denying the same, as required by section 4201, Rev. Codes, such omission does not place him in the position of admitting the validity of such instrument, but he may interpose any evidence on the trial tending to show that such instrument, irrespective of its due execution and genuineness, is void, invalid, and of no effect for the purpose.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 864.]

4. CORPORATIONS §544(1) — INSOLVENCY—PREFERENCE OF CREDITORS.

In the absence of collusion or fraud, an insolvent corporation is not prohibited from preferring certain creditors over others.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2167-2169.]

5. CORPORATIONS §544(6) — INSOLVENCY—TRANSFER TO SECURE CREDITOR.

Where an insolvent corporation makes a bona fide transfer of property to a creditor as security for an actual indebtedness and for an adequate consideration, neither collusion nor fraud in its legal sense can be predicated on such transaction.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2163.]

6. CORPORATIONS §298(3)—MEETING OF DIRECTORS—"RATIFICATION" OF ACTION.

Where a meeting of the board of directors of a private corporation was not lawful, for the reason that notice was not given to all of the directors as required by the by-laws, the failure of absent directors or the stockholders to dissent or take any action to set aside the action of the board of directors, under such

circumstances, with knowledge of such action, amounts to a "ratification" thereof.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1296-1300.

For other definitions, see *Words and Phrases*, First and Second Series, *Ratification*.]

7. CORPORATIONS §426(10)—ILLEGAL TRANSACTION—"RATIFICATION."

Where a private corporation receives and retains the benefits of an unauthorized or illegal transaction, on the part of its board of directors, such conduct amounts to a "ratification."

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1702, 1704, 1714.]

8. MORTGAGES §25(2)—EXTENSION OF TIME—CONSIDERATION.

The extension of time by a creditor within which to pay an old obligation is as much a consideration and as much an extension of credit as the granting of a new loan.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 31, 32, 35-40.]

9. CORPORATIONS §425(4) — TRANSACTIONS WITH AGENT—ESTOPPEL.

Where one without collusion or fraud deals with a corporation through an officer, who is in active management of the corporate business, if the act done by such officer is one which the corporation might do, such corporation will be estopped from relying upon any lack of authority on the part of such officer as a defense against the rights of the party so dealing with the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1700, 1701.]

10. CORPORATIONS §425(4) — TRANSACTIONS WITH AGENT—EFFECT.

Where a party deals with a corporation in good faith and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1700, 1701.]

Appeal from Third Judicial District Court. Ada County; Charles P. McCarthy, Judge.

Action by Ben. Q. Pettengill, as Special Deputy Bank Commissioner of the State of Idaho, and as Receiver in the matter of winding up the affairs of the Boise State Bank, Limited, an insolvent bank and trust company, against William H. Blackman and others. Decree for defendants and plaintiff appeals. Case remanded to the district court, with instructions to modify its findings, and decree in accordance with opinion.

Martin & Cameron, of Boise, for appellant. Wyman & Wyman, of Boise, for respondents.

BUDGE, C. J. This is an action brought by Ben. Q. Pettengill, as receiver of the Boise State Bank, Limited, against William H. Blackman, Edward Payne as trustee, and Edward Payne, for the purpose of quieting title to lots Nos. 1, 2, 3, 4, and 5 of block No. 13, Riverside addition to Boise City, Ada county. Herbert F. Lemp was also made a defendant, but plaintiffs dismissed as to him.

The case comes before us on appeal by the

plaintiff from an adverse judgment entered by the district court of the Third judicial district, in and for Ada county, where the suit was brought. The complaint is in the usual form, setting out the manner in which plaintiff came to be receiver of the bank, fee-simple title to the property in question, in the bank, and "that the defendants claim an interest or estate in said premises adverse to the Boise State Bank, Limited, and to this plaintiff in his capacity as set forth in the title of this cause. That the claims of said defendants are without any right whatever, and that the said defendants have not any estate, right, title, or interest whatever in said land or premises or any part thereof." The complaint contains a prayer that the defendants be required to set forth the nature of their claim. That all adverse claims of the defendants be determined by the decree of the court; that it be decreed that the defendants have no estate or interest whatever in or to said land or premises, and that the title of the bank is good and valid; that the respondents be enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the appellant or to the bank; and for such other relief as the court shall deem proper.

The answer denies that the bank is an owner in fee or otherwise of the lands in question, and denies "that the claims of these respondents are without any right whatever, and deny that these respondents have no estate, right, title, or interest in said lands," and as an affirmative defense alleges: That the respondent Blackman was the holder of a certificate of deposit of said bank, dated Boise, Idaho, November 10, 1910, due six months after date. That the certificate had not been paid. That on or about the 3d day of November, 1911, Blackman informed the bank that he desired to cash the certificate. That the bank agreed with Blackman that in consideration of his not insisting upon immediate payment and of his extending the time until May 10, 1912, such certificate should bear interest at the rate of 8 per cent. per annum from and after November 3, 1911. That the bank would cause said debt to be secured by a mortgage upon the lands in question. That pursuant to the agreement Blackman did not insist upon the payment of the certificate, but did extend the time to May 10, 1912. That the bank made the following indorsement upon said certificate:

"In consideration of security and extension of time of payment hereof until May 10, 1912, this certificate is to bear interest at the rate of eight per cent. per annum from Nov. 3, 1911."

That Blackman performed all the conditions of said agreement upon his part to be performed. That in pursuance of the agreement, the bank, on or about November 3, 1911, executed and delivered to defendant Edward Payne, as trustee, a deed conveying the property in question to said Payne in trust, "with the express understanding and

upon the express condition that said Payne, as such trustee, would thereupon, and immediately after receiving said deed, execute and deliver to said Blackman his certain promissory note for \$14,144.14, dated November 3, 1911, due on or before six months after the date thereof, bearing interest at the rate of 8 per centum per annum, which said note was to evidence the same debt, also evidenced by the certificate of deposit; and also that the said respondent, Payne, as such trustee, would immediately secure the payment of said note by mortgaging" the property in question. That on or about November 3, 1911, the respondent Payne, as said trustee, pursuant to said agreement, executed and delivered to respondent Blackman his promissory note for \$14,144.14, and at the same time executed and delivered to Blackman a mortgage upon the property in question. That Payne, as trustee, duly performed all the terms and conditions of said agreement on his part to be performed. That neither the note nor the debt evidenced thereby has been paid. That Blackman is the holder and owner of the certificate of deposit and the note and the debt evidenced thereby, as well as the mortgage. That the respondent Payne claims no interest in the property except as trustee for the purpose set forth, and that respondent Blackman claims no interest except the lien of his mortgage.

Copies of the deed from the bank to Payne as trustee, of the note from Payne as trustee, to Blackman, and of the mortgage from Payne as trustee, to Blackman are attached to the answer as exhibits and included in the pleadings set forth in the answer by proper references.

The plaintiff did not file any affidavit denying the genuineness or due execution of either the deed, note, or mortgage.

The record discloses the following facts: On the 25th day of October, 1911, the bank was insolvent; on the 25th, 26th and 27th of October, 1911, V. W. Platt, then bank commissioner of the state of Idaho, conducted an examination of the bank, and told the officers of the bank, including Payne, who was then president, that the bank "was broke wide open." At that time Blackman was the holder of the certificate of deposit mentioned in the pleadings, which had been due since the previous May. It appears that Blackman had kept, for a time long prior to this examination of the bank, a large sum of money on deposit with the bank, and had held the bank's certificate of deposit therefor; that these certificates had come due from time to time and had been renewed, each new certificate apparently including, not only the principal of the previous certificate, but also the accrued interest. Several of these renewals had taken place, the last one being the certificate of deposit which was outstanding at the time the bank was examined in October, 1911. After Payne had been advised by the bank commissioner that the bank "was broke

wide open," he and his son, Eugene, the cashier of the bank, made a trip in the nighttime in an automobile to Mountain Home, Idaho, to see Blackman, and, being unable to see him, left word for Blackman to come to Boise, that Payne wished to see him. Blackman came to Boise a day or so afterwards and went to see Payne at his home, between 8 and 9 o'clock one morning, and said that he wanted his money, and Payne told Blackman that it would cripple the bank, and asked him if it would be satisfactory if the bank would give him security. On November 3, 1911, the directors of the bank held a special meeting, at which all of the directors except one Pence, who had not been notified, were present; and a resolution was adopted that Payne be made trustee of the property in question, to execute a deed to Blackman to secure his certificate of deposit. On the same day the bank deeded the property to Payne, trustee, and Payne as trustee, gave the note and mortgage in question to Blackman.

[1] In order to discuss the points involved in this case it will be necessary at the outset to give some consideration to the pleadings. Respondent says in his brief:

"It might seem from appellant's brief that this action was brought by the receiver, Pettengill, to remove a definite cloud upon the title to certain realty claimed by the receiver. Such, however, is not the case. The action is the familiar one brought under the statute to quiet title."

Respondent is evidently proceeding upon the theory that the plaintiff, in order to secure the relief he is seeking, should have so drafted his complaint that it would have set forth the existence of the deed, note, and mortgage in question; the reasons why they should be held void, and included in his prayer a specific prayer that the instruments in question be canceled of record, and that, inasmuch as appellant has not so drafted his complaint, he should not be granted the relief he is demanding. Conceding that such would have been a proper way to proceed, still we are satisfied that the method selected by appellant is also a proper one and, so far as the pleadings are concerned, adequate for the desired end. Suppose that the defendant had defaulted in this case and that plaintiff had gone ahead and secured a decree, not only quieting the title in him or in the bank, but also decreeing the further relief expressly prayed for, namely, that the defendant had no estate, right, title, or interest in or to the property in question. It will not be seriously contended but that in that event defendant's interest would have been effectively eliminated. In order for the defendant to protect whatever rights he had in the property it was necessary for him to appear in the action and pursue the identical course which the record shows he did pursue, namely, to set up affirmatively by way of defense the grounds upon which his interest, if any, was based. Except in so far as the affidavit under section 4201, Rev. Codes, may

be considered a pleading, there is no provision under the Code by which plaintiff was either required or permitted to set up any affirmative matter by way of replication to the defendant's answer, but under section 4217, Rev. Codes, the plaintiff would be permitted to interpose any evidence which would tend to establish the matter relied upon affirmatively by the plaintiff, such as the failure of the instrument for want of consideration, or fraud, or other matters in avoidance thereof, except that in the particular case, having failed to file his affidavit, he could not interpose evidence attacking either the due execution or the genuineness of the instruments attached to defendant's answer.

It should be noted here that there is a distinction between the situation of a defendant who fails to plead matters relied upon as an affirmative defense on the one hand, and the situation of a plaintiff under the Code, which has abolished the replication, when it comes to attacking affirmative matter, pleaded as new matter in the answer. In order for a defendant to take advantage of an affirmative defense he must specifically allege it, or his proof will not be admitted. *Puritan Mfg. Co. v. Toti & Gradi*, 14 N. M. 425, 94 Pac. 1022. But the plaintiff may take advantage of any affirmative matter which would tend to avoid the affirmative matter set forth in defendant's answer as fully as if he were permitted to specifically plead his matter defensive thereto. *Cox v. Northwestern Stage Co.*, 1 Idaho, 376; *Curtiss v. Sprague*, 49 Cal. 301; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423; *Myers v. Sierra Valley, etc., Ass'n*, 122 Cal. 669, 55 Pac. 689; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Bradley v. Bush*, 11 Cal. App. 287, 104 Pac. 845.

A bill to cancel an instrument which casts a cloud upon plaintiff's title may well be included in the statutory suit to quiet title. A suit to quiet title is the larger and the inclusive term; whereas a bill to cancel an instrument is only one specific instance of an equitable action for the removal of a cloud. 1 *Bouvier Law Dic.*, *Rawles* (3d Ed.) 364, and cases cited therein; *Daniel's Chancery Pleading and Practice* (6th Am. Ed.) vol. 3, p. 2040; *Carpenter v. Shinnors*, 108 Cal. 339, 41 Pac. 473.

[2] In a suit to quiet title the plaintiff has a right to have determined every adverse interest, and any one claiming to hold any interest in the property which would be adverse to plaintiff's interest may be required to come in and set up the nature of his interest and its source. It must be conceded that the interest of a mortgagee is an interest adverse to the holder of a legal title. The mortgagee is the holder of an equitable title and interest, and has a definite lien upon the mortgaged premises, and in the event of the failure or inability of the mort-

gagor, for any reason, to pay the debt secured by the mortgage, he would be subjected to a foreclosure suit, and his property would be subject to forced sale, and if sold he would have nothing left except the right for a limited period to redeem. Certainly an interest which may be attended with consequences of such moment and which may operate to entirely defeat every interest of the holder of the legal title must be denominated an adverse interest. We are compelled to conclude, therefore, that the course pursued by appellant in this case is at least a proper one.

[3] The defendant contends that, inasmuch as the plaintiff failed to file an affidavit denying the genuineness and due execution of the deed, note, and mortgage, attached to defendant's amended answer, plaintiff had thereby admitted the "validity" of said instruments, or at least had waived any right to question their validity. This contention is based upon section 4201, Rev. Codes, which reads as follows:

"When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

The respondent in support of this view relies upon the following authorities: *Cox v. Northwestern Stage Co.*, supra; *Martin v. Dowd*, 8 Idaho, 453-456, 89 Pac. 276; *Sloan v. Diggins*, 49 Cal. 38; *Carpenter v. Shimmers*, supra; *Rianda v. Watsonville Water, etc., Co.*, 152 Cal. 523, 98 Pac. 79; *Petersen v. Taylor*, 4 Cal. Unrep. Cas. 835, 34 Pac. 724; *Cordano v. Wright*, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044; *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891; *Moore v. Copp*, supra; *Reynolds v. Pa. Oil Co.*, 150 Cal. 629, 89 Pac. 610; *Myers v. Sierra Valley etc., Ass'n*, supra. Without going into a discussion of these authorities, suffice it to say that they generally hold; that in the event of failure to file an affidavit denying the genuineness or due execution of instruments pleaded in this manner, the party so failing to file said affidavit is precluded from introducing evidence attacking either the genuineness or the due execution of said instruments.

On the other hand, appellant contends, and we think correctly, that, notwithstanding he has waived his right to introduce evidence, attacking the due execution or the genuineness of the instruments, this does not put him in the unfortunate position of admitting the "validity" of the instruments, and takes the position that he should be allowed to interpose any evidence tending to show that the instruments, notwithstanding their due execution and genuineness, are void, invalid, and of no effect, as to the depositors of the bank. As above indicated we are persuaded

from our examination of the authorities that this position of appellant's is the correct one. All of the cases cited by respondent can be reconciled to this view, whereas the cases cited by appellant, particularly *Myers v. Sierra Valley, etc., Ass'n*, supra, *Cox v. Northwestern Stage Co.*, supra, and *Moore v. Copp*, supra, are tenable under no other theory. In *Cox v. Northwestern Stage Co.*, supra, this court held that a failure by plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing, set forth in the answer as the foundation of the defense, does not preclude the plaintiff from showing on the trial that it was procured by fraud or misrepresentation. This question is closely allied with the question raised in the discussion in the pleadings, supra.

In *Curtiss v. Sprague*, supra, it was held that where a defendant set up a counterclaim which was barred by the statute of limitations, plaintiff would be considered to have pleaded the statute by way of replication.

In *Colton L. & W. Co. v. Raynor*, supra, it was held that a plaintiff may introduce upon the trial evidence of any fact which contravenes or overthrows any new matter set up in the answer to the complaint.

In *Brooks v. Johnson*, supra, it was held that the failure of the plaintiff, in an action to foreclose a mortgage, to file an affidavit denying the genuineness and due execution thereof did not preclude proof by the plaintiff, on the finding by the court that the extension of time was without consideration.

In *Myers v. Sierra Valley, etc., Ass'n*, supra, it was held that, while failure to file an affidavit precluded plaintiff from interposing evidence contravening the genuineness and due execution of the note, with this exception plaintiff could show any matters in confession or avoidance thereof. The trial court in this case seems to have borne this distinction in mind when making the so-called "sticker ruling," in excluding portions of plaintiff's evidence, which was admitted at the trial with the understanding that the ruling thereon would be reserved. The trial court said:

"Upon final submission of the case the objection to the evidence offered is sustained in so far as the same attacks the genuineness or due execution of the written instrument upon which the defense to the action is founded, for the reason that the plaintiff did not file with the clerk of this court, within ten days after receiving a copy of the answer, an affidavit denying the genuineness or due execution of said instrument, and serve a copy thereof on the defendant in accordance with the provisions of Idaho Revised Codes, § 4201, the objection as to the identification of said evidence is overruled, and said evidence is admitted in so far as it is relevant or material to any other issue in the case."

The case of *Cox v. Northwestern Stage Co.*, supra, appears to be one of the leading cases upon the question of what is meant by

genuineness and due execution. The court in that case used the following language:

"The due execution of an instrument goes to the manner and form of its execution according to the laws and customs of the country, by a person competent to execute it. The genuineness of an instrument evidently goes to the question of its having been the act of the party just as represented, or, in other words, that the signature is not spurious; and that nothing has been added to it, or taken away from it, which would lay the party changing the instrument, or signing the name of the person, liable for forgery."

Respondent appears to be laboring under the erroneous impression that the by-laws and the minutes of the directors' meeting are not in evidence, and therefore ought not to be considered by this court. That the contrary is true clearly appears from the ruling of the trial court above quoted, where the court says:

"* * * Said evidence is admitted in so far as it is relevant or material to any other issue in the case."

[4, 5] Appellant seems to lay great stress upon the fact that the bank was insolvent at the time the mortgage was given to Blackman. He does not contend, however, that the bank would not have authority to prefer a creditor even while insolvent. And indeed it must be regarded as settled law in this state that in the absence of collusion or fraud an insolvent corporation is not prohibited from preferring certain creditors over others. This principle was announced in the case of *Wilson v. Baker Clothing Co.*, 25 Idaho, 378, 137 Pac. 896, 50 L. R. A. (N. S.) 239. And the rule there laid down by this court was followed in the case of *Capital Lumber Co. v. Saunders*, 26 Idaho, 408, 143 Pac. 1178. The insolvency of the bank, therefore, would only be material in the event that appellant were able to show either collusion or fraud. But the trial court found that Blackman had no knowledge of the insolvency of the bank at the time of taking the mortgage, and this finding is supported by the evidence. The trial court further found, and it is not questioned by appellant, that the bank was indebted to Blackman substantially in the amount for which the security was given. And we think the rule to be that wherever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and that fraud in its legal sense cannot be predicated on such a transaction. *Bump, Fraud. Conv.* (2d Ed.) p. 187; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848-852.

[6] Appellant seeks further to attack the validity of this mortgage on the ground that the meeting of the board of directors, at which it was authorized, was not a lawful meeting, for the reason that notice was not given to all of the directors as required by the by-laws of the bank, and takes the position that any action of the board of directors under such circumstances would be void, and hence not binding upon the bank. Respondent, however, contends that the action

of the board of directors was ratified by the failure of the absent director to take any action by way of dissent after he was advised by Payne that the security had been given. He further contends that the bank received certain benefits from the transaction which it has not returned; that the bank has acquiesced in the giving of the security; that there was an agreement by the president to give the security upon the consideration that Blackman would extend the time of payment on the certificate of deposit; and that the bank is estopped from attacking the validity of the mortgage.

[7] As to the question of ratification, the trial court found, in substance, that the action of the board of directors was ratified. The authorities upon the question of ratification are not altogether harmonious, and it would be a task altogether beyond the scope of this opinion to attempt to reconcile them. There is abundant authority, however, to the effect that under similar circumstances the failure to dissent or to take any action looking towards the setting aside of the action of the board of directors under such circumstances, where knowledge of it has been at hand, amounts to a ratification of the action in question. *Cook on Corporations* (7th Ed.) §§ 808, 809, and cases cited; *Thompson on Corporations* (2d Ed.) §§ 2019-2044, inclusive, and cases cited; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590.

We shall not attempt to discuss all the authorities so holding, but will refer to a few. Receiving and retaining the benefits of the transaction, although unauthorized or irregular, will amount to a ratification. See the authorities cited supra; *Bank of New London v. Ketchum*, 64 Wis. 7, 24 N. W. 468; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. 267, 23 Atl. 565; *Ida County Savings Bank v. Johnson*, 156 Iowa, 234, 136 N. W. 225; *Currie v. Bowman*, supra; *Vaught v. Ohio County Fair Co. (Ky.)* 49 S. W. 426; *Kelsey v. Nat. Bank of Crawford County*, 69 Pa. 426; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86 Am. Dec. 351; *Sherman et al. v. Fitch*, 98 Mass. 59; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; *Manhattan Hdw. Co. v. Phalen*, 128 Pa. 110, 18 Atl. 428; *Manhattan Hdw. Co. v. Roland*, 128 Pa. 119, 18 Atl. 429; *Nevada Nickel Syndicate, Ltd., v. Nat. Nickel Co. (C. C.)* 96 Fed. 133.

[8] But appellant contends that the bank received no benefits, and that the mortgage to Blackman is in reality without any consideration. Under the facts in this case, however, such contention seems unwarranted in law. The extension of time within which to pay the old obligation is as much a consideration and as much an extension of credit as the granting of a new loan. In the case of *Auten v. City Electric St. Ry. Co. (C. C.)* 104 Fed. 395, the court expressly so held.

In the last case cited the property was conveyed by an absolute deed to a grantee

who is designated in the deed as a "trustee," the conveyance was in fact made to secure an indebtedness due a third party, and such fact was admitted. The court held that the debtor could not invoke the statute of frauds to invalidate the deed or to defeat the trust thereby created on the ground that the deed failed to disclose the object of the trust or the beneficiary, but that the power, nature, and purpose of the transaction could be shown by the creditor by parol, particularly in the absence of any objection by the grantee who held the legal title. In the same case it was also held that the fact that no formal action was taken by the directors of the company authorizing the conveyance would not defeat the equitable right to enforce the security, the company having received the entire benefit thereof. The questions of ratification, receiving and retaining benefits and estoppel are closely related and the decisions have not always made it plain as to just which ground is decisive in any particular case.

[9] It seems to be the well-recognized rule that where one without collusion or fraud deals with a corporation through an officer who is in the active management of the business, if the act done by said officer of the corporation is one which the corporation might do, the corporation will be estopped from relying upon any lack of authority in said officer as a defense against the rights of the party so dealing with the corporation. *Sherman et al. v. Fitch*, supra; *Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Akers v. Ray County Savings Bank*, 63 Mo. App. 316; *German Nat. Bank v. Grinstead* (Ky.) 52 S. W. 951; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130. In the latter case it was held that the president of a bank, being its executive head under the usages and customs of modern banking, the rule that his power is limited to transactions expressly authorized by the directors no longer obtains. In *Cook on Corporations* (7th Ed.) vol. 3, § 716, the rule is laid down as follows:

"So also a company is bound when it ratifies or accepts a contract after it is made, or accepts the benefits of the contract. Having knowingly received the benefits of a contract made and carried out by the president, even without authority, the corporation must perform on its part."

And many cases are cited approving the doctrine. One of the cases there cited sums up the rule, saying of the board:

"They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of their power to dispute its validity." *Curtis v. Leavitt*, 15 N. Y. 9-49.

The rule is further announced by the same author (section 725, p. 2569):

"A mortgagee is not bound to inquire into the observance of the rules and regulations of the company relative to the call of meetings."

[10] This principle of law was applied in *Louisville, N. A. & C. R. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. The opinion quotes as authority from the case of *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008, the following proposition, which is designated as an axiomatic principle in the law of corporations:

"Where a party deals with a corporation in good faith * * * and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

The court, after reviewing a number of the leading English and American authorities, further said that the records of the board of directors were private records—

"which a purchaser of the bonds was not obliged to inspect, as he would have been if the fact had been required by law to be entered upon a public record."

The trial court found that the legal title of the property in question was in the bank. This is clearly wrong, but is probably an oversight, inasmuch as the point does not seem to have been regarded as material by either appellant or respondent. It must be conceded, however, that the legal title to this property is in Payne, as trustee.

If for any reason the circumstances require the appointment of a new trustee, the trial court has ample jurisdiction to give it effect.

The case is remanded to the district court, with instructions to modify its findings and decree in accordance with the views herein expressed. Costs awarded to respondent.

MORGAN, J. I concur in the conclusion reached that the judgment of the trial court should be affirmed, and base my concurrence upon the failure of appellant to deny, as required by section 4201, Rev. Codes, the genuineness and due execution of the deed, upon which the defense was founded and which was annexed to and made a part of the answer.

RICE, J. I concur in the opinion of Mr. Justice MORGAN that the failure of the plaintiff to deny the genuineness and due execution of the deed and mortgage in question is an admission of the authority for their execution, and precludes appellant from urging the illegality of the meeting of the board of directors or limitations upon the authority of Payne as trustee.

I concur in the opinion of Chief Justice BUDGE that, even if the authority for the ex-

ecution of the deed and mortgage were lacking in the first instance, the plaintiff is estopped from questioning the authority, for the reason that it cannot be held that respondent Blackman did not forego substantial rights by the acceptance of the note and mortgage.

JAIN et al. v. PRIEST et ux.

(Supreme Court of Idaho. March 31, 1917.)

1. HABEAS CORPUS §113(3) — CUSTODY OF CHILDREN—RIGHT OF APPEAL—STATUTE.

The judgment of a district court in a habeas corpus proceeding involving the custody of a child is appealable.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 104.]

2. HABEAS CORPUS §95—CUSTODY OF CHILDREN—RETURN.

The Supreme Court is authorized to make a writ of habeas corpus issued by it returnable before any district court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 58, 59, 80.]

3. HABEAS CORPUS §99(4) — CUSTODY OF CHILDREN—EVIDENCE.

Where children have been removed from the custody of their parents by the probate court because of certain faults of the parents, specified in the findings and order of the court, and the question as to whether the parents have overcome these faults and permanently reformed arises in a subsequent proceeding by which the parents attempt to regain the custody of the children, the material evidence is evidence as to the conduct of the parents since the children were taken from them, and the exclusion of evidence of their conduct before that time on the ground of immateriality is not error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84.]

4. HABEAS CORPUS §113(12)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Even if certain testimony of a physician should have been excluded on the ground of privileged communication, still the admission of it is not reversible error, where the patient, who was also a witness, testified on her cross-examination to substantially everything to which the doctor testified. As to whether the testimony should have been admitted over the objection of appellant, there being nothing in the record to show that the witness expressly consented that the testimony might be given, quere.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114.]

5. GUARDIAN AND WARD §25 — TERMINATION—POWER OF DISTRICT COURT—STATUTE.

When a benevolent or charitable corporation is made the guardian of a child by order of the probate court under the provisions of an act of the Tenth session, approved March 6, 1909 (Sess. Laws 1909, p. 38), the probate court has the same control over such corporation as guardian as over any other guardian. Such guardianship may be terminated by said court in the same manner in which any other guardianship may be terminated.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 78-98.]

6. GUARDIAN AND WARD §23 — TERMINATION OF GUARDIANSHIP — POWER OF PROBATE COURT.

While such corporation may voluntarily resign the guardianship or apply to the court for permission to surrender the children to the

parents, the ultimate decision as to whether the guardianship shall be terminated or the children surrendered to the parents is with the probate court in each case.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77.]

7. GUARDIAN AND WARD §25—MINOR CHILDREN—TERMINATION.

Whenever it appears to the probate court on application of the ward or otherwise that the guardianship is no longer necessary, it may be terminated. Reasonable notice of the proceedings and termination of the guardianship should be given the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 78-98.]

8. GUARDIAN AND WARD §25 — NOTICE — TERMINATION—CONSTRUCTION OF ORDER.

That certain order made by the probate court for Shoshone county in this case on October 2, 1915, has the force and effect of an order terminating the guardianship of the Idaho Children's Home Finding and Aid Society. Under the facts of this case the society had sufficient notice of the proceedings to be bound by such order.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 78-98.]

9. ADOPTION §7—CONSENT TO ADOPTION—GUARDIANS.

Such benevolent or charitable corporation, as guardian of minor children, has no authority to consent to their adoption when the children are not surrendered to it by the parents, but are committed to it as guardian by the probate court in a proceeding by which they are taken from the parents without their consent.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10.]

10. ADOPTION §7 — CHILDREN — POWER OF PROBATE COURT.

Under section 2708, Rev. Codes, a probate judge is not authorized to make an order of adoption of children without the consent of their parents, on the ground that such parents have been judicially deprived of their children on account of neglect, unless it appears in the record before such judge that such is a fact.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10.]

11. ADOPTION §7 — CHILDREN — POWER OF PROBATE COURT—CONSENT OF PARENTS.

A probate judge is not authorized to make an order of adoption of children without the consent of the parents on the ground that the parents have been judicially deprived of the custody of their children on account of neglect, unless it appears in the record before him that the parents have been permanently and absolutely deprived of such custody by a final and unconditional judgment of a court. An order of a probate court temporarily depriving the parents of the custody of their children, but granting them an opportunity to reclaim the children upon a proper showing of reform, is not such a judgment as dispenses with the necessity for the consent of the parents to an adoption proceeding.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10.]

12. ADOPTION §7—CHILDREN—CONSENT OF PARENTS—ORDER OF PROBATE COURT.

That certain order of the probate court of Shoshone county in this case made on October 2, 1915, by which the children of appellants were removed from their custody and committed to the custody of the Idaho Children's Home Finding and Aid Society as guardian, does not permanently and absolutely deprive the parents of the custody of their children, and is not such

a final and unconditional judgment as dispenses with the necessity of the consent of the parents to adoption proceedings.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10.]

13. QUERE.

As to whether the parents must in all cases be notified of adoption proceedings in order to make the same binding upon them, quere.

14. GUARDIAN AND WARD ~~6-4~~ — RIGHT OF PARENTS.

The parents of minor children, being themselves competent to transact their own business, and not otherwise unsuitable, are entitled, to the guardianship and custody of said children. Rev. Codes, § 5774.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 4, 5.]

15. HABEAS CORPUS ~~6-113~~(12)—CUSTODY OF CHILDREN—RETURN TO PARENTS—EVIDENCE.

There being a substantial conflict in the evidence as to whether the parents have reformed and are now suitable persons to have the custody of their minor children, the findings of the district court in favor of the appellants on that point will not be disturbed by this court on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114.]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Petition for habeas corpus by William Priest and wife against Charles Jain and Jessie Jain, his wife, and petition for habeas corpus by the same petitioners against W. E. Tipton and Nellie Tipton, his wife, to determine the custody of petitioners' minor children. Petitions consolidated, and children returned to petitioners, and from such order and judgment, defendants appeal. Affirmed.

John Nesbit, of Moscow, for appellants. Featherstone & Fox, of Wallace, for respondents.

MCCARTHY, District Judge. This case involves the question of the right to the custody of Ruth Priest and William Priest, the minor children of William Priest and Marie Priest, the respondents. The appellants W. E. Tipton and Nellie Tipton claim right to the custody of Ruth Priest, and the appellants Charles Jain and Jessie Jain claim right to the custody of William Priest. Two petitions for writs of habeas corpus were filed in the Supreme Court by the parents, one alleging that Ruth Priest is unlawfully detained by Mr. and Mrs. Tipton, and the other alleging that William Priest is unlawfully detained by Mr. and Mrs. Jain. A writ was issued in each case and made returnable in the district court of the First judicial district, before Hon. William W. Woods, district judge. The two cases were consolidated for trial, and the district court ordered the children returned to their parents. From that order and judgment of the district court an appeal is prosecuted to this court by Mr. and Mrs. Tipton and Mr. and Mrs. Jain.

In September, 1914, a petition was filed in the probate court for Shoshone county al-

leging that the appellants were not proper persons to have the care and custody of said minor children, and praying that a citation be issued by said court to appellants requiring them to show cause why said children should not be removed from their custody and control and surrendered to the Idaho Children's Home Finding and Aid Society and treated as wards of the court. A hearing was had. The court found that the appellants were at that time unfit and improper persons to have the control and custody of the said children, and adjudged that the said children should be removed from the custody and control of the appellants and surrendered to the Idaho Children's Home Finding and Aid Society, to be treated as wards of the court. The Idaho Children's Home Finding and Aid Society will hereafter be referred to in this opinion as the society. The children were taken to the branch home of the society at Lewiston, Idaho. The probate judge, the appellants, the representative of the society at Lewiston, and every one else concerned understood that the order was not a final order, permanently depriving the parents of the custody of the children, but merely an order temporarily depriving them of such custody until such time as they should reform and convince the court that they were again entitled to the children.

On October 2, 1915, the probate judge, upon petition of the parents, found that they had reformed and were proper persons to have the care and custody of their children, and made a written order to the effect that the children should be removed from the custody of the society and returned to the parents. On the same day he wrote a letter to the representative of the society at Lewiston, inclosing a copy of the order. The representative at first acquiesced in this action, as shown by his letter of October 4th. Having later heard some disquieting rumors concerning the parents, the probate judge on October 7th sent a telegram to the representative telling him to hold the children; that other developments made it necessary to revoke the order for their return.

On October 11th the society, through its state superintendent, consented to the adoption of Ruth Priest by Mr. and Mrs. Tipton and of William Priest by Mr. and Mrs. Jain. On October 15th adoption proceedings were had in the probate court for Latah county by which the Tiptons adopted Ruth Priest and the Jains adopted William. The Jains and Tiptons were residents of Latah county. By permission of the society, Ruth had been living with the Tiptons and William had been living with the Jains for some months prior to the adoption. On October 11th the probate judge, having satisfied himself that the rumors about the parents were unfounded, wrote the representative of the society stating in effect that after investigation he

had decided the children should be returned to the parents, and directed that arrangements be made for that purpose. The society replied that the children had been adopted, and that it no longer had control over them. Thereafter the parents sued out writs of habeas corpus, resulting in the proceedings above mentioned.

[1] The first question which arises in this case is whether a judgment of a district court in a habeas corpus proceeding involving the custody of a child is appealable. While the question is not raised by either of the parties to the action, we think that it is squarely raised by the proceedings, and that it is the duty of the court to take notice of it. Section 4807, Rev. Codes, as amended by chapter 111, Sess. Laws 1911, provides that an appeal may be taken to the Supreme Court from a final judgment of the district court in an action or special proceeding commenced in the court in which the same is rendered. This relates only to civil actions or special proceedings of a civil nature. A proceeding in habeas corpus to determine the right to the custody of a child is a proceeding of a civil nature, and more especially of an equitable nature. *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787; *Harrison v. Harker*, 44 Utah, 541, 142 Pac. 716; *Telschek v. Fritsch*, 38 Tex. Cr. R. 43, 40 S. W. 988; *Ex parte Calvin*, 40 Tex. Cr. R. 84, 48 S. W. 518; *Hall v. Whipple* (Tex. Civ. App.) 145 S. W. 308-310.

The judgment or order of the court is a final judgment in the sense that by it the parties to the action are concluded as to the particular issues presented. *Bleakley v. Smart*, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125; *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 87 L. R. A. 787, 1 Ann. Cas. 256; *Hall v. Whipple*, supra; *Clifford v. Williams*, 37 Wash. 460, 79 Pac. 1001; *In re Hamilton*, 68 Kan. 754, 71 Pac. 817. We are of the opinion that the judgment of the court in such a proceeding is a final judgment within the purview of our statute relating to appeals.

We conclude that an appeal lies from the judgment of the district court in such a proceeding. *Stewart v. Paul*, 141 Ala. 516, 37 South. 691; *Bleakley v. Smart*, supra; *Hall v. Whipple*, supra; *State v. Baird & Torrey*, 19 N. J. Eq. 481; *Jamison v. Gilbert*, 38 Okl. 751, 135 Pac. 342, 47 L. R. A. (N. S.) 1183; and other cases cited above.

The court is not called upon to decide and does not decide whether an appeal will lie to this court from the final judgment of the district court in the ordinary habeas corpus proceeding involving the legality of the imprisonment of a party by virtue of the commitment of a court.

The specifications of error, so called, are very general, and this court feels it is called upon to specifically notice only those points which counsel has attempted to support by

argument or citation of authorities in the briefs or on the argument.

[2] It is contended that the district court of the first judicial district had no jurisdiction, and that the case should have been sent to the district court for Latah county, in which county the children were residing. Under sections 3816 and 3842, Rev. Codes, the Supreme Court had the authority to make the writ returnable before any district court, and in this case it made it returnable before the district court, where a hearing could be had with the greatest degree of convenience to the witnesses.

[3] It is contended that the court erred in refusing to permit the introduction of testimony relative to the conduct of William and Marie Priest prior to the time that the children were removed from them. Such testimony was offered for the purpose of showing the extent to which the parents were addicted to the use of intoxicating liquor and other bad habits, as tending to show whether or not it would be possible for them to have reformed as claimed. The principal question of fact in the case is whether they had reformed. The findings and order of the probate court stand as evidence against the parents, and the burden was upon them to show that they had corrected the serious faults set forth in said findings. The order of the probate court could not be collaterally attacked by either party to this proceeding. It does not seem, however, that admitting such testimony for the purpose stated would have had the effect of making a collateral attack upon said order. However, the principal question being whether the parents had reformed, it seems that the material evidence upon the point is evidence as to their conduct since the children were taken from them. From the record in this case we do not think that testimony as to their conduct before that time was sufficiently material to require that it be admitted. The rejection of such testimony was therefore justified on the ground of its immateriality.

The alleged error in permitting witnesses to testify relative to what happened in the proceeding in the probate court of Latah county at the time of the alleged adoption of the children is not material, because this court does not think that the mere fact that the children and parties were not examined separately, if it be a fact, would of itself invalidate the proceedings.

[4] No objection to the testimony of Dr. Dettman on the ground of privileged communication was made in the trial court, and that point cannot be raised for the first time in this court. We do not consider it necessary to pass upon the question as to whether or not the testimony of Dr. Lindsey should have been admitted, for the reason that he testified only in regard to Mrs. Ella Rivers, and she herself on cross-examination admitted practically everything to which the doc-

tor testified, she stating that she had been a slave to the morphine habit for 29 years and 6 months. In view of this fact the admission of the doctor's testimony, even if erroneous, could not be prejudicial or reversible error.

Most of the other points raised by appellants relate to the question of the validity and effect of the several proceedings had in the probate court, to wit: First, the original proceeding by which the children were taken from their parents and committed to the custody of the Children's Home Finding and Aid Society by order of the probate court for Shoshone county; second, the order of the probate court for Shoshone county by which the guardianship of the society was revoked and the children were ordered returned to their parents; third, the order of adoption of the probate court for Latah county.

[5-7] We will first consider the force and effect of the order committing the children to the custody of the society. It is ordered by the court that the said children be removed from the custody and control of their parents and surrendered to the society, to be treated as wards of the court. By using the words "wards of the court" it would seem that the probate court intended to retain some control over the children. The probate courts have jurisdiction in guardianship matters. Const. art. 5, § 21. For this purpose they are courts of general jurisdiction. In *re Arva and Elmer Brady*, 10 Idaho, 366, 79 Pac. 75; *Ex parte Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886. The Legislature has no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate branch of the government. Const. art. 5, § 13. By the order of the probate court, which was made pursuant to the provisions of section 2, Sess. Laws 1909, pp. 39, 40, and 41, the society was made the guardian of the children. By virtue of its general jurisdiction the probate court had the same control over the society as guardian as it would have over any other guardian, and this power was one which the Legislature could not take from the court. In the latter part of said section 2 it is provided that the society shall continue to be the guardian during the minority of the children, unless the guardianship is canceled by the board of directors of the society. Said provision cannot have the effect of depriving the probate court of its control over the society as guardian, because to give it such effect would be to invade the jurisdiction of the probate court in violation of the Constitution.

Section 3 of said act on page 41 provides that the parents may petition the board of directors of the society, asking that the children be returned to them on the ground that they have reformed, or are in condition to properly care for the children, and if the board, after an investigation, deem it for the best interests of the child, it may be return-

ed to its parents, and the guardianship of the society shall terminate, and the parents shall resume their natural relationship to such child. Such provision cannot have the effect of vesting jurisdiction to decide that the child shall be returned to its parents exclusively in the board of directors of the society and of depriving the probate court of jurisdiction to decide such matter, because to give it such effect would again be an unconstitutional invasion of the powers and jurisdiction of the probate court. The board of directors may decide for the society whether or not it desires to voluntarily resign the guardianship or to return the children to their parents, but the ultimate decision in each case is with the probate court. The probate court had the same control over the society as guardian as it would have over any other guardian, and it had jurisdiction to revoke the guardianship of the society and return the children to their parents, if a proper showing were made.

Under section 5822, Rev. Codes, a guardian of any person may be discharged by the probate court when it appears to the court, on the application of the ward, or otherwise, that the guardianship is no longer necessary. Under this provision the probate court had authority to discharge the society as guardian of the children and order them returned to their parents at any time when it appeared to the court that the guardianship of the society was no longer necessary. If the parents convinced the probate court, by a proper showing, that they had reformed and were suitable persons to again have custody of their children, then the guardianship of the society would be no longer necessary, and the court could and should discharge the society and return the children to their parents. The statute does not expressly provide for any notice to the guardian before terminating the guardianship. In this it differs from the preceding section (5821, Rev. Codes), concerning the removal of a guardian on the ground of being incapable or unsuitable. That section provides that such notice shall be given to the guardian as the court may require. We think that the nature of the proceeding requires a reasonable notice to the guardian when terminating the guardianship, even though it is not expressly required by the statute. In this case no formal notice was given to the guardian. However, it appears that on October 2, 1915, upon petition of the parents, and after investigation, the probate judge made a written order to the effect that the children be removed from the custody of the society and returned to the parents. He wrote a letter to the representative of the society at Lewiston, inclosing a copy of the order, and telling him that the children should be returned to their parents. The representative at first acquiesced in this action, as shown by his letter of October 4th. Having later heard some disquiet-

ing rumors concerning the parents, the probate judge sent a telegram on October 7th to the representative telling him to hold the children; that other developments made it necessary to revoke the order for their return. Without waiting to hear further from the probate judge the society consented to the adoption of the children, and, instead of holding them, as the telegram directed, the adoption proceedings were allowed to take place. On October 11th the probate judge again wrote the representative of the society, telling him that after investigation he had found the rumors about the parents to be unfounded, that he had decided the children should be returned to their parents, and that arrangements should be made to that end.

[8] The order of October 2d was in effect an order terminating the guardianship and discharging the society as guardian. There was no formal hearing of the matter. No formal notice was given the society. However, an informal notice was given, and its representative at Lewiston was apprised of the fact that the probate court had terminated its guardianship and the reasons for such action. Under the circumstances we think the society had sufficient notice of the order in order to make that order binding upon it. If the society desired to be heard in objection to the petition of the parents, or the order of the court, it should have made such objection in the probate court for Shoshone county. It would then have been the duty of the court to hear such objection. Upon receipt of the telegram on the 7th, the society should have held the children as directed, instead of putting them beyond its control.

[9] However, the society is not a party to this proceeding. The appellants base their right to the custody of the children upon the orders of adoption made by the probate court for Latah county. Under the provisions of the act of 1909 the society has authority to receive, control, and dispose of children under 18 when the father, mother, or person legally entitled to act as their guardian shall surrender them in writing to the society, or when the person legally authorized to make such surrender is not known, and a notice is published in a newspaper. When a child shall have been so surrendered, and such child shall have been accepted by such society, then (but not otherwise) the rights of its natural parents or of the guardian of its person (if any) shall cease, and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate such child or place it temporarily or permanently in a suitable home in such manner as shall best secure its welfare. Such corporation shall have authority when such child has been surrendered to it in accordance with any of the preceding provisions, and it is still in its control, to consent to its adoption under the laws of Idaho.

These provisions are all in section 1 of the act. In cases arising under section 2, where a child is taken from the parents without their consent on the ground that they are not proper persons to have custody of it, the law does not give the society power to consent to the adoption of the child, nor does it provide that the rights of the natural parents shall cease. In such cases the society simply becomes the guardian of the child, subject to the control of the probate court as heretofore explained. In the present case the children were not surrendered by the parents, but were removed from their custody by the court without their consent. The case therefore comes, not within section 1, but within section 2. The society consented to the adoption of the children; the parents did not consent, and in fact were not notified. The adoption proceedings cannot be upheld by virtue of any of the provisions of the law of 1909.

[10, 11] The appellants fall back upon the provisions of section 2703, Rev. Codes, in relation to adoption. It provides that a legitimate child cannot be adopted without the consent of its parents, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty or neglect. It is claimed that these parents had been judicially deprived of the custody of their children by the order of the probate court for Shoshone county on account of neglect, and that therefore they were not entitled to notice of the proceedings. It appears from the proceeding in the probate court for Latah county that the action of the court was based upon the consent of the society to the adoption, and not upon any allegation or proof that the parents had been judicially deprived of the custody of their children on account of neglect. In order to authorize the probate court to make an order of adoption without the consent of the parents, it must appear in the record before that court that the case comes within some of the exceptions mentioned in the statute. This, we think, is a jurisdictional requirement, and must be complied with in order to make the order valid. No such showing was made before the probate court in this case, and therefore the order, made without the parent's consent, was invalid. *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894.

[12, 13] The question as to whether the parents of a child must in all cases be notified of adoption proceedings is a difficult one, as to which the authorities do not agree. Conceding that in the cases mentioned in section 2703, Rev. Codes, the consent of the parents to the adoption is not necessary, there is still a question as to whether they should not be notified of the proceedings in order to have an opportunity to show whether or not their consent is necessary. It is

indeed drastic to hold that the natural parents may be permanently deprived of their status of parentage and its accompanying rights by a proceeding of which they have no notice. Some authorities seem to have gone this far; some have refused. We do not pass on this vexing question for the reason that it is not necessary to do so for the purposes of this case. Even if it should be conceded that the parents were not entitled to notice of adoption proceedings in case they had previously been judicially deprived of the custody of their children on account of neglect, we do not think that this is such a case. When the statute says that the consent of the parents is unnecessary where they have been judicially deprived of the custody of their children on account of neglect, we construe it to mean cases where they have been finally and permanently deprived of such custody by a final, absolute, and unconditional judgment of the court. In view of the language used in the order of the probate judge for Shoshone county, and under all the facts of this case, we do not think that such order was a final and unconditional judgment, absolutely and permanently depriving the parents of the custody of their children. *Ex parte Martin*, 29 Idaho, 716, 161 Pac. 573.

Our conclusion is that the probate court of Latah county had no authority to make the orders of adoption without notice to the parents under the facts of this case, and that the orders of adoption are not binding upon the parents.

From the views above expressed in regard to the several proceedings in the probate court for Shoshone county and the probate court for Latah county, it follows that the legal rights of the parties, so far as the custody of the children is concerned, are not finally concluded by any of said proceedings.

[14, 15] Section 5774, Rev. Codes, provides that either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. This section is construed and upheld by this court in *Re Crocheron*, 16 Idaho, 441, 101 Pac. 741, 33

L. R. A. (N. S.) 868. In that case the court, in referring to its former decision in *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787, makes it clear that it is only where the legal right of the parent to the custody of the child is not clear that the child can be committed to the custody of another on the ground that it will be better cared for by such other. If the parent fulfills the requirements of section 5774, he is entitled to the custody of his child, even though another person may be even more suitable to have the custody. The rights of these parents not being affected by the orders of adoption, they are entitled to the custody of the children if the evidence shows that they are now competent to transact their own business, and not otherwise unsuitable. Upon these questions the lower court found in favor of the respondents.

"It is the settled law of this state that an appellate court will not disturb the findings or judgment of the trial court where there is a substantial conflict of the evidence. This rule applies with equal force in actions at law and suits in equity, where a trial is had on oral evidence." *Smith v. Faris-Keal Const. Co.*, 27 Idaho, 407, 150 Pac. 25, and other Idaho decisions there cited.

We hold this rule applies to a habeas corpus proceeding of a civil nature to determine the right to the custody of children as well as to other actions at law or suits in equity. Upon the question as to whether these parents have reformed and are now proper persons to have the custody of their children in view of the requirements of the statute, there is a substantial conflict in the evidence, and therefore the findings and judgment of the trial court will not be disturbed by this court.

The decision of the district court, affirmed by this court, is to the effect that the parents are now entitled to the custody of their children. The parents must understand that their right to maintain such custody in the future depends upon whether they continue to conduct themselves in such a way as to deserve it.

The judgment of the district court is affirmed.

BUDGE, C. J., and RICE, J., concur.

METROPOLITAN INVESTMENT & IMPROVEMENT CO. v. SOHOUWEILER et al.

(Supreme Court of Oregon, April 10, 1917.)

1. APPEAL AND ERROR ⇐895(2)—FINDINGS OF FACT—EQUITY CASE.

Findings of fact by the trial court, though supported by evidence, are not conclusive, but only persuasive, on appeal, in an equity case, which is tried anew in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3647.]

2. EXECUTION ⇐172(4) — SUIT TO ENJOIN SALE—REGULARITY OF ATTACHMENT—SUMMONS.

Defendants in a suit to enjoin an execution sale, in which to substantiate their superior right they must show a valid attachment, must plead and prove issuance of summons in the action in which the attachment was sued out, as under L. O. L. § 295, such writ could not be legally secured till summons had issued.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 525-532.]

Department No. 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

On rehearing. Denied.

For former opinion, see 163 Pac. 599.

W. B. Shively, of Portland, for appellant. Daniel E. Powers and W. S. Hufford, both of Portland, for respondents.

MOORE, J. [1] In a petition for a rehearing, it is maintained that an error was committed in disturbing the findings of fact made by the trial court. The transcript does not contain a copy of such findings if any were made. This is a suit in equity which is tried anew in this court, and in such cases findings made by the lower court are only persuasive. Attention is called to the rule prevailing in the trial of actions at law on appeal from a judgment given upon findings of fact made by the lower court in a cause tried without the intervention of a jury. In such cases, the findings of fact, when supported by any evidence, are conclusive. That legal principle, however, has no application to the trial of an appeal from a decree in a suit in equity.

[2] The pleadings in this suit nowhere allege that a summons was ever issued in the action in which the attachment was sued out. No writ of that kind could legally have been secured until the summons had been issued. L. O. L. § 295. It was incumbent upon the defendants, in order to substantiate their superior right to the real property attached, to allege and prove every step leading up to the filing of the certificate of attachment; but, they having failed in the particular mentioned, we adhere to our former opinion.

McBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

WARD v. JAMES et al.

(Supreme Court of Oregon, April 10, 1917. On Petition for Rehearing, May 29, 1917.)

1. VENDOR AND PURCHASER ⇐116—RESCISSION BY PURCHASER—TENDER OF PURCHASE PRICE.

Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind and recover payments thereon for defects in vendor's title, where he has not tendered or paid purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208.]

2. VENDOR AND PURCHASER ⇐214(6) — ASSIGNMENT BY PURCHASER—STATUS OF VENDOR.

An assignment, or arrangement for an assignment, of a contract for the purchase of land, does not change status of vendor; the assignee standing in no better position than assignor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 447, 448.]

On Petition for Rehearing.

3. VENDOR AND PURCHASER ⇐116—RESCISSION BY PURCHASER—DEFAULT IN PAYMENT OF INTEREST.

Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind for defects in vendor's title, where, after allowing purchaser all credits to which he is entitled, he is still in default in payment of interest at the time vendor brings suit to foreclose the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208.]

4. VENDOR AND PURCHASER ⇐116—RESCISSION BY VENDOR—CONDITIONS PRECEDENT.

In order to put the vendor in default and claim a rescission of the contract, the purchaser must be ready to pay the entire purchase price, must offer so to do, and demand a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208.]

5. VENDOR AND PURCHASER ⇐112(1) — RESCISSION—GROUNDS—DEFECTS IN TITLE.

Under a contract providing for a deed after payment of purchase price, payable a long time subsequent to date of contract, a defect in vendor's title does not call for rescission, provided sale is in good faith, and vendor has not by some affirmative act put it out of his power to perform; it being sufficient that he have title when purchaser has a right to a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200.]

6. VENDOR AND PURCHASER ⇐299(2)—STRICT FORECLOSURE—"GOOD COMMERCIAL TITLE"—NECESSITY.

Although contract did not require delivery of a good and sufficient deed free from all legal incumbrances until payment of purchase price, vendor must, where he seeks a strict foreclosure, requiring purchaser to pay within a limited time a large sum of money due on purchase price, or lose his interest in property, be able to furnish a good commercial title, a title such as attorney for purchaser should advise his client to accept.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 838.]

7. VENDOR AND PURCHASER ⇐114—RESCISSION BY PURCHASER—FAILURE TO FURNISH ABSTRACT—ESTOPPEL.

Granting that contract should be reformed, so as to require vendor to furnish an abstract of title, purchaser, who purchased an abstract and made payment on purchase price after vendor's

alleged failure, was not entitled to rescind for vendor's failure to furnish an abstract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 202-204.]

Department 2. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by George D. Ward against W. F. James, Francis E. James, and others. From a decree in favor of Francis E. James, plaintiff appeals. Dismissed without prejudice, on rehearing.

This is a suit to foreclose a contract for the sale of land, sought to be rescinded by the defendants. From a decree in favor of defendant Francis E. James rescinding the contract and for \$3,245.65, partial payments made and damages, plaintiff appeals.

On April 14, 1913, plaintiff, George D. Ward, and defendant W. F. James entered into a contract for the sale by the former and the purchase by the latter of a farm in Lane county, consisting of 640 acres, for \$18,000, to be paid in the following manner: \$7,000 upon delivery of the contract and \$11,000 on or before 10 years from that date, with interest at 7 per cent. per annum payable annually. Defendant W. F. James was to pay the taxes on the land. A farm in South Dakota was conveyed to plaintiff for \$8,000, and the sum of \$1,000 in cash was paid by the Jameses, who entered into possession of the premises. The contract, *inter alia*, provided as follows:

"That the said party of the first part (Ward) hereby agrees and binds himself and his heirs that in case the aforesaid sum of eighteen thousand (\$18,000.00) dollars, with the interest, shall be fully paid, at the times and in the manner above specified, he will on demand thereafter cause to be executed and delivered to the said party of the second part (James), or his legal representatives, a good and sufficient deed in fee simple of the premises above described, free of all legal incumbrances except the taxes herein agreed to be paid by the party of the second part. And it is agreed that, if the party of the second part shall fail to make any of the said payments at the time and in the manner above specified, this agreement shall henceforth be utterly void, and all payments thereon forfeited, or said party of the first part may foreclose this contract for the amount due thereon, together with costs and attorney fees, second party to have possession of said premises from May 1, 1913, free of charge so long as he complies with the terms of this agreement."

Some live stock and personal property valued at \$2,000 were transferred with the place which are not mentioned in the written agreement. On February 27, 1914, the defendants James entered into negotiations with the defendants Rickman for the transfer of the former's interest in the property and for the assignment of the contract of sale which assignment was executed and recorded. The Rickmans entered into possession of the premises and remained there until after this suit was begun. On August 26, 1914, plaintiff commenced this suit for a strict foreclosure of the contract of sale, alleging that there was due and unpaid \$952.26, interest, and \$128.35, taxes on the land, which plaintiff was compelled to pay. The Jameses an-

swered and asserted that the contract was made by W. F. James as agent for Mrs. Francis E. James and asked to have the same reformed in this respect, which was allowed. All the defendants defended upon the ground that there were defects and irregularities in Ward's title to the land and the Jameses asked to have the contract rescinded for that reason.

J. M. Williams and O. H. Foster, both of Eugene (Williams & Bean, Jesse G. Wells and Foster & Hamilton, all of Eugene, on the brief), for appellant. C. A. Hardy, of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondents.

BEAN, J. (after stating the facts as above). [1] It is contended by the plaintiff's counsel that the time for Ward to furnish a good title and convey the land to the Jameses or their assigns has not arrived, and that the vendor is not in default in the premises, and therefore the contract of sale cannot be rescinded. The stipulation of the agreement of sale provides for a deed of conveyance to be made by Ward after the payment of the purchase price is completed. It appears that the consideration for the deed has not been paid nor tendered to Ward. In order to put Ward, the vendor, in default, such payment, or a valid tender thereof, must be made to him according to the agreement of sale.

[2] The assignment, or an arrangement for an assignment, of the contract by the Jameses to the Rickmans, did not change the status of the vendor. The Rickmans would stand in no better position than the Jameses did prior to such deal. Neither of the defendants is entitled to make the defense that there are defects in Ward's title and the Jameses are not entitled to rescind the contract of sale.

It is sufficient if the vendor have good title when the vendee by payment or tender of the purchase money places himself in a position to demand title, where the vendee is in possession and there is no fraud. *Waterman on Specific Performance*, § 420. In actions by the vendor for the purchase money before the time when he is required by the contract to pass the title, the purchaser cannot defend on the ground that the title is defective, since the vendor may acquire title before the specified time. It is sufficient if he has a good title at the time when the conveyance is to be made, and the objection that he had none when the contract was made will be unavailing. A purchaser in possession is estopped from denying the title of the vendor. The vendor and vendee stand in the relation of landlord and tenant. *Frink v. Thomas*, 20 Or. 265, 273, 25 Pac. 717, 12 L. R. A. 239; *Maupin on Marketable Title to Real Estate*, § 308, p. 741; 39 Cyc. p. 1574, p. 1614; *Gervaise v. Brookins*, 156 Cal. 103, 103 Pac. 329. There can be no rescission and recovery of purchase price by the purchaser where the vendor is able and willing to perform within the time limited by the contract of sale. 39 Cyc. 2006. If the vendor fail to furnish good

title at the time fixed for performance, the purchaser may maintain an action to recover the price paid. 39 Cyc. 2009, note; Eggers v. Busch, 54 Ill. App. 279. Prior to the expiration of the time fixed for tendering the conveyance James, the purchaser, cannot recover the partial payments made where no deed was required to be given by Ward until the balance of the price is paid as agreed; the purchaser not having paid nor tendered the amount. Sievers v. Brown, 36 Or. 221, 56 Pac. 170, and cases there cited; McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339; Woodward v. Van Hoy, 45 Mo. 300. Where the payment of the purchase money or a deferred portion thereof and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part. Frink v. Thomas, supra, 20 Or. 273, 25 Pac. 717, 12 L. R. A. 239.

After the negotiations between the Jameses and the Rickmans an abstract of title was prepared and examined by an attorney, resulting in a letter from James to Ward requesting him to straighten out the title and put the same in a marketable condition. After the commencement of this suit it appears that plaintiff took steps to do this. James claims that \$500 for the possessory right to a tract of land should be credited as a payment to Ward.

The rights and equities of the parties in the premises depend largely on what has taken place since the beginning of this litigation. From the present state of the record it would be impossible for this court to adjust the equities of the case with safety. From the findings of the trial court it does not seem that Ward does not own the land in question, but that the record does not show a perfect title in him. Plaintiff seeks a harsh and unfavored remedy of a strict foreclosure: Wiltse on Mortgage Foreclosures, vol. 2 (3d Ed.) § 965; 27 Cyc. 1648 (b). This should not be granted without the court being informed as to the present conditions and as to the prospect of a compliance with the terms of the contract on the part of the Jameses. Quite a large payment in land and cash has been made. It appears that the personal property transferred with the place has been partly dissipated which has a bearing on the case.

It is asserted by counsel for defendants in their brief that before a vendor can foreclose a sale contract he must be able to tender and tender a title in accordance with his contract. This rule applies where the payment of the purchase money and the making of the conveyance are by the contract to be concurrent acts. It cannot be invoked where by the terms of the contract payments of installments of interest are to be made which are conditions precedent to the execution of a deed. In other words, making a deed "in accordance with his contract" in this case

means furnishing such conveyance when the stipulated payments are made. The rule as claimed would permit the purchaser under certain conditions to remain in possession of the premises for ten years without paying interest. The parties have made their agreement and should abide by the same.

The decree of the lower court should be reversed, and the cause remanded, with permission for the respective parties to make application to that court to present the issues of the case as they now exist, if they so desire, and for such further proceedings not inconsistent herewith as may seem proper. Neither party should recover costs in this court; and it is so ordered.

McBRIDE, C. J., and MOORE and McCAMANT, J.J., concur.

On Petition for Rehearing.

Williams & Bean, Jesse G. Wells, and Foster & Hamilton, all of Eugene, for appellant. M. Vernon Parsons and Thompson & Hardy, all of Eugene, for respondents.

McCAMANT, J. [3-5] Defendants have filed a petition for a rehearing, and we have re-examined the questions raised by this appeal. There can be no doubt of the correctness of the former opinion, in so far as it denies defendants the right to rescind the contract and recover their payments thereon because of the defects in plaintiff's title. The defendants are entitled to certain credits on the purchase price, including \$500 as the value of a homestead relinquishment; but after all credits are allowed they were still in default on the payment of interest when the suit was brought. This of itself precludes granting them the affirmative relief prayed for. Eames v. Der Germania Verein, 8 Ill. App. 663, 673-674; Ketchum v. Evertson, 13 Johns. (N. Y.) 359, 365, 7 Am. Dec. 384; Hudson v. Swift, 20 Johns. (N. Y.) 24; Green v. Green, 9 Cow. (N. Y.) 46, 52. In order to put the vendor in default and claim a rescission of the contract, the vendee must be ready to pay the entire purchase price, must offer so to do, and demand a deed. Eames v. Der Germania Verein, 8 Ill. App. 663, 673-674; Foster v. Jared, 12 Ill. 451, 454; Hudson v. Swift, 20 Johns. (N. Y.) 24. When, as in this case, the purchase price is payable at a time long subsequent to the date of the contract, a defect in the vendor's title does not call for a rescission of the contract, provided the sale is made in good faith, and the vendor has not put it out of his power to perform the contract by some affirmative act, as a conveyance of the property to a third party. It is sufficient that he have title when the vendee has a right to a deed. Investment Co. v. Harris, 209 Fed. 291, 297, 126 C. C. A. 217; Winkler v. Jerrue, 20 Cal. App. 555, 559, 129 Pac. 804; Morris v. Canal Co., 75 Wash. 483, 486, 135 Pac. 238; Reard v. Homes Co., 78 Wash. 180, 187, 138 Pac. 678; Land Co. v. Johnstone, 25 N. D. 148, 160, 141 N. W. 76; Foster v. Jared, 12 Ill. 451, 454-455; Eames v. Der Germania Verein, 8 Ill. App. 663, 672; Tanzer v. Land Corporation, 150 App. Div. 351, 144 N. Y. Supp. 613, 615; 39 Cyc. 1529. In the opinion of the writer the above rule is of doubtful wisdom as applied to the conditions under which real estate is marketed in Oregon; but it is a firmly established principle of the law of contracts, and if it is to be departed from in this jurisdiction, the departure should be based on legislative action.

[6] The principle as laid down in the books has its limitations; it is held that, when the vendor calls on the vendee to perform his part of the contract, the vendor must be able to pass

title; *Eggers v. Busch*, 54 Ill. App. 279, 284. We think that the case at bar falls within the operation of this principle. Plaintiff seeks a strict foreclosure; he asks a decree requiring defendants within a limited time to pay the large sum of money still unpaid on the purchase price, and in default of such payment to lose their interest in the property. It is only just to require plaintiff in such case to be able to furnish a good commercial title; the defendants may desire to borrow a part of the purchase price on the security of the land, and they should be given a title adequate for such purpose. It is held that a vendor is not entitled to a forfeiture of the interest of the vendee, unless he is in a position to furnish such a title as the contract calls for. *Bryson v. Crawford*, 68 Ill. 362, 365. This principle is held inapplicable when the only defect of title is an incumbrance of such size that it can be liquidated by the purchase price. *Reard v. Homes Co.*, 78 Wash. 180, 133 Pac. 678; *True v. Northern Pacific*, 126 Minn. 72, 77, 147 N. W. 948. In the opinion of the writer this exception to the rule should be further limited to cases where the purchase price has been set apart or appropriated to the payment of the incumbrance. Our holding that a vendor should be denied the remedy of foreclosure, unless he is able to furnish such title as the contract calls for, is supported by 39 Cyc. 1534, and *McKinney v. Jones*, 55 Wis. 39, 50, 11 N. W. 606, 12 N. W. 381.

The record sufficiently shows that plaintiff at this time does not have a good commercial title. It appears that he has brought suit to quiet his title, and that this suit is contested. We forbear to express any opinion as to the merits of this litigation, except in so far as the decision of this cause requires such expression. It is sufficient to say that the title of plaintiff is not such as an attorney for a purchaser should advise his client to accept, and that therefore it is not such as is called for by the contract of these parties.

[7] Defendants contend that they are entitled to rescind because plaintiff failed to furnish an abstract of title, and we are cited to a number of authorities in support of this contention. These were all cases in which the furnishing of such abstract was made a condition precedent by the contract of sale. The contract in the case at bar makes no mention of an abstract. Defendants contend that it should be reformed in this respect; it is doubtful if they are entitled to a reformation, but if the contract were so reformed we would have to hold that defendants have waived their right to rescind on this ground. It appears that defendants purchased an abstract, and that they seek to counterclaim the price against plaintiff; furthermore, that they made a payment on the purchase price after plaintiff's alleged failure to furnish the abstract. They cannot now treat the furnishing of an abstract as a condition precedent. *McAlpine v. Reicheneker*, 56 Kan. 100, 42 Pac. 339.

As the result of our re-examination of the issues we think the decree should be one of dismissal without prejudice. The defendants should recover their costs and disbursements in the lower court, and plaintiff should have a like recovery here.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

MEAGHER v. EILERS MUSIC HOUSE.

(Supreme Court of Oregon. April 17, 1917.)

1. APPEAL AND ERROR \S 1010(1)—REVIEW—FINDINGS.

The findings of the trial court being equivalent to a verdict, the evidence will not be examined on appeal except to ascertain whether any of it is competent to support the findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3979-3981.]

2. LANDLORD AND TENANT \S 109(7)—LANDLORD'S ACCEPTANCE OF PREMISES.

Where the tenant abandoned the premises and attempted to surrender them to the landlord, and the latter refused to accept them, the landlord's reletting the premises to another for the benefit of the original lessee and "subject to the order and ready for the occupation" of the tenant at any time he should return did not operate as an acceptance of the premises by the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. \S 355, 356.]

3. LANDLORD AND TENANT \S 195(2)—RELET- TING ABANDONED PREMISES.

Where a landlord relet abandoned premises for the benefit of the abandoning tenant, but was unable to collect any rent from the new tenant, the abandoning tenant was liable for the rent, as if the premises had not been relet.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. \S 792, 793.]

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge. Action by D. V. Meagher against the Eilers Music House. From judgment for defendant, plaintiff appeals. Affirmed.

This is an action to recover part of a deposit given by a lessee to a lessor as security for the payment of rent. The Eilers Music House, a corporation, leased two rooms in the Eilers Building, in the city of Portland, to D. V. Meagher for a term commencing on July 1, 1912, and ending August 31, 1916, for \$13,750, payable "in monthly payments of \$275 each, in advance, on the 1st day of each and every month" during the term. At the time of entering into the agreement of lease with the Eilers Music House the lessee deposited \$550 with the lessor with the understanding that, if Meagher performed all his agreements, then the deposit "shall be applied to cover the rent" for the last two months of the term, but, if Meagher failed to keep his promises or failed promptly to pay the rent, "then the said sum of \$550 shall be retained by the lessor as liquidated damages for such breach or failure to pay rent." Meagher paid the rent to and including the month of September, 1913, but made no more payments.

After reciting the execution of the lease, the deposit of \$550 as security for the payment of the rent, payment of the rent until and including September, 1913, and default in payment for the month of October, the complaint alleges that the lessor "on the 7th day of October, 1913, elected to and did declare the said lease forfeited and rented the same to one R. E. Farrell under a verbal lease until November 7, 1913, when the defendant entered into a written lease for the period of 4 years 11 months." Continuing, the complaint avers that, "after deducting the amount of rent due from October 1, 1913, to the time the defendant elected to declare said lease forfeited," the defendant has remaining in its hands and belonging to the plaintiff a balance of \$485.83.

The answer denies that the lessor "forfeited" the lease and alleges that Meagher per-

sonally occupied the rooms until about August 1, 1913, when he left Portland "for parts unknown and left one Campbell occupying the premises." The defendant avers that subsequently on October 7, 1913, the plaintiff, acting through Campbell, abandoned the premises and "attempted to surrender the same to the defendant, and left the keys for said premises in the place of business of the defendant herein in the city of Portland, without the knowledge or consent of the defendant; that the defendant upon the learning of the vacating and abandoning of said leased premises by the agent of the plaintiff, the said ——— Campbell, notified the plaintiff that said premises were still at his disposal, and the plaintiff thereupon refused to repossess or to take charge of said leased premises."

The defendant avers that, because the rent was not paid for the months of October and November, 1913, it applied the deposit in payment of the rent for those two months, and that the rooms were "left subject to the order and ready for the occupation of the plaintiff at any and all times had the plaintiff returned to Portland to occupy the same, either by himself or any representative until the 30th day of November, 1913."

The parties waived a jury, and the cause was tried by the court. After hearing the evidence the court found that Meagher abandoned the premises and attempted to surrender the rooms to the lessor by leaving the keys "in the place of business of the defendant" without the knowledge or consent of the lessor, who upon learning of the abandonment notified Meagher that the rooms were at his disposal, that on October 7, 1913, the defendant permitted R. E. Farrell to occupy part of one of the rooms under a verbal agreement to the effect that he could occupy the "premises temporarily and only until the said D. V. Meagher would return and take charge of said leased premises," and that on November 7, 1913, the defendant entered into a written lease with Farrell for one of the rooms for a period of five years, "said lease to go into effect from and after the 7th day of December, 1913, and which lease was not delivered and was not to be considered binding at any time should D. V. Meagher return and take possession and occupy said premises under his said lease." The court also found that the "leased premises were left subject to the order and ready for the occupation of the said D. V. Meagher at any and all times had he returned to Portland to occupy the same either by himself or any representative until after the end of November, 1913, and the said D. V. Meagher was not ejected from said premises, and the defendant did not elect to and did not declare said lease forfeited for nonpayment of rent or otherwise until after the end of the month of November, 1913, and the defendant did not collect any money or rent from the said Farrell or from any other person for said premises for the said months of October and

November or either of them excepting as the defendant received the rent for said premises during the said two months by charging the same against the said deposit of \$550 upon failure of the said D. V. Meagher to pay the rent for said two months or either of them."

The trial court ruled that, on the facts found by him, the plaintiff was not entitled to recover, and consequently a judgment was entered for the defendant, and the plaintiff appealed.

W. L. Cooper, of Portland, for appellant.
Miller Murdoch, of Portland, for respondent.

HARRIS, J. (after stating the facts as above). Quoting from the printed brief filed by the plaintiff:

"So the only question we have to present to this court at this time is: Was the leasing of the building to Farrell an acceptance of the surrender of the lease by the tenant or was the building leased to Farrell for the benefit of the plaintiff as alleged in the defendant's answer?"

[1] The findings of the trial court are equivalent to a verdict, and consequently upon appeal the evidence will not be examined except to ascertain whether any of it is competent to support the findings. *Eugene v. Lowell*, 72 Or. 237, 143 Pac. 903; *Weigar v. Steen*, 81 Or. 72, 74, 158 Pac. 280.

There was evidence relating to the facts found by the trial court, and hence we shall make no further inquiry concerning the evidence.

In brief, the facts as found by the court disclose a lease, a deposit to secure the payment of rent, a default in the payment of rent, an abandonment of the premises by the lessee and reletting by the lessor, but "subject to the order and ready for the occupation" of Meagher at any and all times. The plaintiff contends that reletting one of the rooms to Farrell of itself terminated the lease to Meagher. The defendant argues that the reletting was for the benefit of Meagher and subject to his lease, and that therefore the first lease was not affected by the reletting.

The instant case does not present a situation where there was an agreement of the lessor and lessee manifesting an intention to cancel the lease, or where there was a surrender by the lessee and an express acceptance by the lessor, or where there was an express release by the lessor, or where the lessor has himself actually put the tenant out of possession by legal process or otherwise, or where the landlord has given notice of the termination of the lease; and consequently we must put aside most of the authorities relied upon by plaintiff, such as *Carson v. Arvantes*, 27 Colo. 77, 59 Pac. 737; *Cunningham v. Stockon*, 81 Kan. 780, 106 Pac. 1057, 19 Ann. Cas. 212; *Sutton v. Goodman*, 194 Mass. 389, 80 N. E. 608; *Hall v. Middleby*, 197 Mass. 485, 83 N. E. 1114; *Hecklau v. Hauser*, 71 N. J. Law, 478, 59 Atl. 18; *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425; *Scott v. Montells*, 109 N. Y. 1, 15 N. E.

729; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58.

[2] Meagher abandoned the premises and attempted to surrender them to the lessor, but the latter refused to accept the surrender, unless it can be said that the reletting to Farrell of itself operated as an acceptance. In reletting to Farrell for October and November, the Ellers Music House did all that it could have done to manifest its purpose to continue the leasehold interest of Meagher, for it let the room to Farrell subject to the lease of Meagher, and possession of the premises could have been had by the latter "at any and all times had he returned to Portland." The letting to Farrell did not operate to exclude Meagher, but, on the contrary, Meagher's right was preserved, and until the end of November both the defendant and Farrell recognized that Meagher's right was superior to any right granted to Farrell. Upon the abandonment of the premises the lessor could have left the rooms vacant, and, without attempting to relet them, it could have applied the deposit in payment of the rent for October and November. Reletting one of the rooms was for the benefit of Meagher, since liability under the lease was reduced to whatever extent rentals were paid on the reletting. Some authorities declare that a reletting is of itself a termination of the lease, while others hold to the contrary. Some precedents declare that the right to relet is dependent upon the consent of the lessee, express or implied, and this line of precedents involves the element of prior notice to the lessee, but within the rule of this class of cases the lessor could not relet and at the same time preserve the first lease if the whereabouts of the original lessee were unknown; and, moreover, many adjudications adhering to this doctrine strikingly illustrate the extremes to which courts have been pushed in order to hold that a reletting was with the consent of the lessee. It is not necessary, however, to analyze the reasoning of the cases announcing the variant doctrines in the different jurisdictions for a quarter of a century ago this court took its place with those tribunals which hold that a landlord may relet for the benefit of an original lessee who has abandoned the premises, and that the act of reletting does not of itself necessarily effect a termination of the lease. The Ellers Music House did not repossess itself of its former estate, but it did what it did for the benefit of the lessee and subject to his recognized, admitted, and preserved right to the possession of the premises. If the landlord had done nothing, the lessee would nevertheless have been liable for the full rental, even though the premises had remained vacant; and the lessee should not complain if the landlord did its best to minimize his liability. This conclusion is not only in conformity with *Bowen v. Clarke*, 22 Or. 566, 30 Pac. 430, 29 Am. St. Rep. 625, but it

is also in complete harmony with many other well-considered adjudications. *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; *Humiston v. Wheeler*, 175 Ill. 514, 51 N. E. 896; *Marshall v. Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; *Auer v. Penn.*, 99 Pa. 370, 44 Am. Rep. 114. See, also, the exhaustive note to *Higgins v. Street*, as reported in 13 L. R. A. (N. S.) 396.

[3] The Ellers Music House was not able to collect any money from Farrell; and according to the finding of the trial court the landlord did not collect rent from any person for the months of October and November except as rent was received by applying the deposit in payment of the rental; and hence the defendant is not chargeable with moneys that it did not receive and could not collect from Farrell.

The judgment is affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

SCHOOL DIST. NO. 24 OF MARION COUNTY v. SMITH, County School Superintendent.

(Supreme Court of Oregon. April 17, 1917.)

SCHOOLS AND SCHOOL DISTRICTS § 87 — DISTRICT EXPENSES—STATUTORY CONSTRUCTION.

Under Gen. Laws 1915, p. 331, § 4, providing that cost of educating a high school pupil be fixed by dividing the cost of maintaining the schools by the average daily attendance, etc., interest items paid on debt incurred for construction of the school cannot be included in the maintenance charges.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 206, 207.]

In Banc. Original mandamus proceeding by School District No. 24 of Marion County, State of Oregon, against W. M. Smith, County School Superintendent of Marion County, State of Oregon. Demurrer sustained, and amended writ dismissed.

This matter was originally heard in this court, and is reported in 161 Pac. 706. By an amended writ it is alleged that the district was compelled to borrow \$70,000 of the \$135,000 used to construct the building, that there has been paid during the school year of 1916 the sum of \$3,500 as interest on the sum so borrowed, and that the defendant refuses to allow such sum as a part of the amount "expended by the high school district for maintaining high school" during that year. This is the sole issue raised by the amended writ, to which defendant demurs.

Smith & Shields, of Salem, for petitioner. Max Gehlhar, Dist. Atty., and James G. Heltzel, Deputy Dist. Atty., both of Salem, for respondent.

McBRIDE, C. J. The words "maintain," "maintenance," and "maintaining" have such

varied meanings in statutes that no mere lexicographical definition will fit every particular statute. Their meaning in each case is to be derived from a consideration of the whole statute, the circumstances under which it was enacted, and the object to be attained with a view to ascertain that somewhat elusive thing called the "intent" of the lawmaker. In our original opinion we stated that the word "expended" means "paid out; disbursed;" but this language was applied to the matter then before the court, and, of course, with reference to moneys expended for the purpose of maintaining the school. There is a distinction to be drawn here between maintenance and construction. It has been held in many cases that a statute authorizing a corporation or municipality to "maintain" a building, a street, or a road does not confer authority to construct such building or other improvement. *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340; *In re Warren Insane Hospital*, 15 Pa. Co. Ct. R. 83.

"The word 'maintain' does not mean to provide or construct, but means to keep up, to keep from change, to preserve." *Worcester's Dict.*

"To hold, to keep in any particular state or condition, to keep up." *Webster's Dict.*

From these definitions it would seem that the cost of constructing a school building could hardly be construed as part of the expense of maintaining a school in a building already constructed. The statute now under consideration presupposes a high school building already erected; it does not require any district to erect one to accommodate pupils from any other district. Indeed, the statute might well be called permissive in its character, and it was probably not in the legislative mind that the high school districts provided with buildings would increase their capacity or employ an extra force of instructors for the accommodation of pupils of other districts who might wish to take advantage of their facilities, nor is it likely that the petitioner here has employed an additional teacher or incurred a dollar of expense in excess of that which it would have expended if no outside pupils had attended its high school, unless it be a very trifling amount expended for supplies. It is not every dollar paid out during the year on account of the construction of a high school building that may be said to be a part of the expense of maintaining the school. Such a theory would lead to results so absurd that it cannot be held to have been within the legislative intent. If, instead of merely paying the interest upon the debt, the principal had been discharged upon that theory, the whole \$70,000 would have to be charged up as a part of the maintenance of the high school, because it was money expended during that year. It seems to be assumed by petitioner that the \$70,000 indebtedness incurred in construction is something in the nature of a lien

against the building, and that the school cannot be held unless the interest is kept up, and that for this reason it is in a way a maintenance charge; but this is not the case. Should a default in interest occur, there is no law by which the building could be taken. But it is needless to speculate upon contingencies which in the nature of things are not likely to arise. It was not the purpose of the law that high school districts should make a profit off of their less fortunate neighbors, or off of the general taxpayers; neither was there a purpose to compel outside taxpayers to contribute directly or indirectly to the erection of buildings. It evidently was the intention to permit districts having high school buildings to enter outside pupils and to receive from the educational fund of the county the actual cost of educating them, and nothing more. This includes salaries of teachers and caretakers for the building, supplies of a temporary character, lights, telephones, water, insurance, and such repairs as are necessary to keep the building in a state of efficiency, but it does not include money paid for construction nor interest upon money borrowed for such purpose.

The demurrer is sustained, and the amended writ dismissed.

DRAGSETH v. MASON.

(Supreme Court of Oregon. April 17, 1917.)

WATERS AND WATER COURSES §177(1)—ENJOINING DAM—SUFFICIENCY OF EVIDENCE.

Substantially uncontradicted evidence that defendant's dam backed water onto plaintiff's land, preventing cultivation of some land, and interfering with pumping pure water to his house, held to require an injunction against such an obstruction of the stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262.]

Department 2. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Suit by Martin Dragseth against A. I. Mason. From a decree denying relief, plaintiff appeals. Reversed, with directions.

This is a suit to restrain the defendant from obstructing a stream so as to back water onto plaintiff's land. From a decree denying relief to the latter, he appeals.

Plaintiff Dragseth and defendant Mason are the owners of adjoining tracts of land in Hood River Valley, except that there is a 40-foot county road between their holdings. Defendant's property lies immediately north of that of plaintiff. A stream of water enters Dragseth's premises on the east, and flows northwesterly across the county road into and through the lands of the defendant, discharging into Hood river. In its natural state this stream was winding, but plaintiff straightened the same through his low land, removed logs and brush, and placed about 700 feet of tilting therein to drain the same. About 300 feet south of defendant's land and

near this stream plaintiff installed a ram for the purpose of forcing water to his dwelling from a spring owned by him. In order to improve his land in 1911 the defendant erected in the middle of the channel of this stream at the south line of his land, a cement basin, octagonal in shape, and about 51 inches in height. This was done over plaintiff's protest. This basin is so constructed that the waters of the stream flow into it through an incision on the south side, the north side being solid, and drop to the floor therein. Strings of tile leading from the bottom of the basin conduct the water from thence to the premises of the defendant on the north, there to operate a ram and other contrivances for his personal use. Plaintiff complains that this construction raises the water in the stream, hinders its flow, backs it into his ram pit, and retards the drainage of his low lands adjoining so that they cannot be cultivated to advantage; that these waters flow through chicken yards, hog pens, and the like before reaching his premises, into which stream there is also discharged above him the sewage from the tanks and toilets of the schoolhouse.

A. J. Derby, of Hood River, for appellant.
George R. Wilbur, of Hood River, for respondent.

BEAN, J. (after stating the facts as above). The question presented is one of fact. Counsel for defendant does not contend that Mason has the right to back the water onto plaintiff's land to his damage as charged in the complaint. It appears from the evidence that Dragseth has owned his tract since 1901. In 1903 he commenced to drain the low land along the stream, and arranged his tiling so that the main part or trunk of the system emptied into the creek a short distance south of Mason's line where the stream had not been changed; the lower end of the tiling being above the surface of the water so that it drained the land. In 1911 Mason constructed in the bed of the creek a cement octagonal box 6 feet across, with wing dams reaching across the creek, the back or north side being about 51 inches in height or 40 inches above the floor, and the south side or intake 20 inches from the bottom. This was done in order to turn the water into the tiling connected with the basin, one string of which was higher than the other at this end, and carried water to Mason's ram, and furnished power for pumping. At that time Mason changed the location of some of his tiling and raised the end towards Dragseth's land. After this obstruction was placed in the bed of the stream water backed up onto Dragseth's premises for about 300 feet to where he had a ram and submerged it. Silt accumulated in the creek so that the end of plaintiff's tiling which before that time was above the surface of the water was about 16 inches below the soil in

the brook and the lower part of his land could not be drained, was very swampy, and would not raise crops. Dragseth states that the cement work raised the water in the creek 20 to 24 inches above its natural flow; that in times of high water the highest part of the cement basin serves as a dam and raises the water 4 or 5 feet. In the principal part of his statement he is corroborated by his neighbor farmers and road supervisor.

We have looked carefully through the evidence to find any substantial contradiction of plaintiff's claim and find none only in theory. The very competent civil engineer who took levels of the creek, basin, tiling, ram, etc., drew a diagram of the premises, and testified as a witness in the case, for some reason was not requested to place his opinion in the balance. Other nonexpert witnesses expressed their views. On cross-examination Mr. Mahr, witness for plaintiff, testified thus in regard to the water of this stream:

"Well, apparently; of course, the way it is now, apparently the water is kind of held back in order to strike that one pipe there, that top pipe."

In order to divert water from its natural channel it is ordinarily necessary to construct a dam in the stream at least part of the way across the same. To turn the water into his tiling Mason did as people usually do, but instead of calling the obstruction a dam, termed a portion thereof a cement basin; nevertheless it served the same purpose as a dam, and, as the evidence clearly shows, obstructs the water so as to throw it back onto Dragseth's land about 300 feet. This is not a great distance, but the result prevents Dragseth from cultivating a small amount of good land, and interferes with the successful operation of his ram so as to pump impure creek water to his house instead of pure spring water. Mr. Mason states that there is too much fall in the creek. We are unable to determine whether he erected the south end of his tile too high by accident or on account of convenience. We find that the cement basin is an obstruction to this stream of water to plaintiff's damage; that all that part of the cement work of the basin above the lower floor thereof should be removed; and that defendant should be enjoined from obstructing the stream to that extent. The decree of the lower court will therefore be reversed and one entered in accordance herewith.

It appears that both parties have made an honest effort to ascertain their rights in the premises, and that there has been no willful trespass on the part of the defendant. We believe the ends of justice will be served if each party pays his own costs; therefore neither will be allowed costs.

MOORE, BENSON, and McCAMANT, JJ., concur.

HINDERLITER v. McDONALD.

(Supreme Court of Oregon. April 17, 1917.)

1. MONEY LENT §7(2) — ADMISSIBILITY OF EVIDENCE.

It is competent to establish by parol testimony that money was borrowed, irrespective of the purpose to which it was to be applied.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. § 12.]

2. FRAUDS, STATUTE OF §128—PLEADING — CONSTRUCTION.

Under a complaint that plaintiff advanced money for defendant to pay his share of a mining claim they had agreed to purchase, the allegation regarding the agreement to purchase the mining claim is material and must be proved by competent evidence, since the advance of money was merely incidental for that purpose.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 278.]

3. FRAUDS, STATUTE OF §56(8) — MINING CLAIM.

L. O. L. § 5132, making mining claims real estate, section 5134, making mining claims conveyances, subject to provisions governing other realty, and sections 804, 808, requiring conveyances, etc., of real estate to be in writing, prevent oral proof of an agreement to purchase a mining claim interest.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 84.]

4. MINES AND MINERALS §85—SUFFICIENCY OF EVIDENCE.

Plaintiff cannot recover for money advanced for defendant to pay his share of a mining claim interest they had agreed to purchase and own together, where plaintiff took the title to the entire interest in his own name.

In banc. Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Action by W. A. Hinderliter against W. L. McDonald. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

The complaint in this action contains the following averment:

"That on or about the 28th day of February, 1914, in the city of Grants Pass, Oregon, the plaintiff and defendant entered into an agreement to purchase for the sum of \$400.00 the ½ interest of one B. F. Fry in a certain group of mining claims known as the 'Afterthought Mine' located in Jackson county, Oregon, and under and by virtue of said agreement the plaintiff and defendant were to share equally in said interest and each was to pay one-half of the said purchase price of four hundred (\$400.00) dollars; that at the time of said purchase the defendant requested the plaintiff to advance, to the said B. F. Fry for his ½ interest in said mine, one-half of the purchase price, to wit, \$200.00 as a loan from the plaintiff to the defendant which the defendant promised and agreed to repay to the said plaintiff within a day or so after the date of the said advancement, and thereupon and in consideration of the promise to repay as aforesaid to the plaintiff as aforesaid this plaintiff and defendant did purchase said interest of Fry, and this plaintiff did advance for the defendant the sum of \$200.00 upon the said purchase price on the 2d day of March, 1914."

The remainder of the pleading is to the effect that the defendant agreed to repay the

plaintiff the sum of \$200 within a day or so after the latter had paid it to Fry, but has not done so. The answer is a denial of all the allegations of the complaint except the nonpayment of the money demanded. At the close of the plaintiff's case the defendant moved for a judgment of nonsuit on the ground:

"That the testimony shows that the agreement, if any existed, or whatever agreement there was between the plaintiff and the defendant was verbal, not in writing, not subscribed to by the party to be charged and was an assumption on the part of the defendant to pay the debt of another, and that the same is clearly within the statute of frauds."

The trial court overruled this motion. The jury returned a verdict for the plaintiff in the sum of \$200 and interest. From the ensuing judgment the defendant appealed.

A. C. Hough, of Grants Pass, for appellant. C. A. Sidler, of Grants Pass, for respondent.

BURNETT, J. (after stating the facts as above). [1-3] The contention of the plaintiff is that, reduced to its lowest terms, the complaint is for the recovery of money loaned to the defendant. It is indeed competent to establish by parol testimony that money was borrowed no matter for what purpose it was to be applied; but that is not all the complaint the excerpt from which has been quoted. We find in the first place it states that the parties to this action entered into an agreement to purchase the interest of Fry in certain mining claims. This is a material allegation to be proved by what the statute requires as competent testimony. Section 5132, L. O. L., says:

"All mining claims, whether quartz or placer, shall be real estate, and the owner of the possessory right thereto shall have a legal estate therein within the meaning of section 325."

This last reference is to the procedure for the recovery of real estate by what is commonly known as an action of ejectment. Section 5134, as it stood at the time of the transaction in question, declares:

"All conveyances of mining claims, or of interests therein, either quartz or placer, shall be subject to the provisions governing transfers and mortgages of other realty. * * *"

Further, section 804 is here set down:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Again in section 808 we find this:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be

received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * * 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein. * * *

By the pleading, the advance of the money was a mere incident of an executory contract for the purchase of real property, and was one of the things to be done by the plaintiff. The agreement, as stated in the complaint, contemplated that the result of the transaction when performed was to confer an estate in land upon the defendant. No writing whatever was produced showing a contract by these parties to purchase or by Fry to sell the latter's interest in the mines. Neither was there any instrument tending to show that any estate in the property was conveyed to the defendant. In point of law he has nothing to show that he has any title to or interest in the realty mentioned. Within the meaning of the extracts from the statutes, there was no competent proof that the defendant agreed to buy or that he participated in the purchase of the property. Yet all this is alleged as the basis of plaintiff's demand.

Passing this, however, we find from the record that six persons, of whom the parties to this action were two and Fry a third, had possession of a mine under a written contract to purchase the same, having paid a portion of the price. The plaintiff here had advanced to Fry his part of the initial payment, and had taken his note on that account for \$500. After a time Fry became dissatisfied and wished to retire from the venture. According to the plaintiff, in his oral testimony, McDonald urged him to give up to Fry his note and take over that interest. The last that was said between McDonald and plaintiff before surrendering the note was this, quoting from the latter's testimony narrated in the bill of exceptions:

"And he said, 'Go see Fry to-morrow, and let him out, and I will assume one-half interest, so we won't lose this money, otherwise you will have to lose it.' I says, 'Just as you say, if you say you will assume it I will go and get it,' and he says, 'Yes, go on.' I says, 'Well, Bill, if that is what you mean, I will go at it, and lets settle it.'"

The plaintiff's further declaration as a witness is that he went to see Fry, surrendered the note, and took from him the following writing:

"Grants Pass, Ore., March 2, 1914.

"To Whom It may Concern:

"This is to certify that B. F. Fry, the undersigned, has by these presents sold to W. A. Hinderliter for the sum of four hundred dollars in hand paid sell and convey all of my one-sixth (1/6) interest in the Afterthought Group of Mining claims, situated in Jackson county, state of Oregon; the said W. A. Hinderliter also releases the said B. F. Fry from all obli-

gations that may have accrued against said Afterthought mining claims to date.

"Dated this 2d day of March, 1914.

[Seal] B. F. Fry.

"Witness: F. G. Roper."

He also expressly says that he never gave the defendant any writing showing that the latter had any interest in the property, and that he never even showed him the assignment which he took from Fry. It is plain that no money ever passed between the parties. The statute of frauds and that relating to the creation of an interest in real property are not satisfied by oral testimony as applied to the allegations of the complaint about contracting to buy the property and the subsequent actual purchase of the Fry interest.

[4] Moreover, on the merits, the plaintiff shows that he did not perform the agreement which he alleges, namely, that in which both parties should join in the purchase of the claims. On the contrary, the writing which he took from Fry without reference to its legal competency shows that whatever passed was to the plaintiff individually. To affirm the judgment would be to require the defendant to pay for something which he never received, but which the plaintiff took entirely to himself.

The judgment is reversed, and the cause remanded to the circuit court, with directions to enter a judgment of nonsuit in favor of the defendant.

HETRICK et al. v. GERLINGER MOTOR CAR CO.

(Supreme Court of Oregon. April 10, 1917.)

1. APPEAL AND ERROR ~~§~~889(2) — ASSIGNMENT OF ERROR—COMPLAINT—AMENDMENT.

Where error is not assigned to the order of the lower court in permitting matter to be set up in a supplemental complaint which should have been pleaded by way of amendment to the original complaint, the appellate court will treat such supplemental complaint as an amendment of the original complaint properly allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3621.]

2. EQUITY ~~§~~40—RETAINING JURISDICTION—AWARD OF DAMAGES.

As a suit to rescind a contract for the purchase of an article and to cancel a note given on account of the purchase price and recover damages is cognizable in equity, when it later appears that the note has been negotiated, as such facts were not known to the plaintiff when he brought the suit, equity will retain the suit for the purpose of awarding plaintiffs the money damages to which they are entitled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 115.]

3. EVIDENCE ~~§~~434(11) — PAROL EVIDENCE — VARYING WRITTEN CONTRACT.

In view of L. O. L. § 713, providing that when the terms of an agreement have been reduced to writing it is considered as containing all those terms except "(2) where the validity of the agreement is the fact in dispute," in a suit to rescind a contract for the purchase of a

motor truck, to cancel a promissory note given on account of the purchase price and to recover damages, a provision in the memorandum of sale that "it is understood by the parties hereto that there are no understandings or agreements verbal or otherwise other than those printed or written hereon" did not preclude testimony on the part of the plaintiffs to prove the alleged misrepresentations in reliance on which the truck was purchased, since they are not seeking to modify the written contract in any respect, but are contending that there was no contract because of the fraud perpetrated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014.]

4. SALES — 126(1)—VALIDITY—MISREPRESENTATIONS.

Where a motor truck was purchased February 3d and suit was brought March 20th for rescission of the contract of purchase, and in the few weeks intervening between these dates the buyers twice returned the truck to the seller on the seller's promises to repair the truck and make it good, and the buyers complained continually that the car was unsatisfactory, and when finally apprised of the history of the truck promptly disaffirmed and brought suit, they were not barred of their remedy under the rule that where a person has been induced through fraud to execute a contract in order to avail himself of this defense, he should act promptly upon the discovery of the deception.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315.]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by M. Hetrick and another, copartners in business as Hetrick & Cline, against the Gerlinger Motor Car Company. Decree for plaintiffs after reference to a jury, and defendant appeals. Affirmed.

This is a suit brought by M. Hetrick and W. M. Cline, partners as Hetrick & Cline, to rescind a contract for the purchase of a motor truck, to cancel a promissory note given on account of the purchase price and to recover damages. It is alleged that on February 3, 1915, plaintiffs purchased from the defendant the motor truck in question at an agreed price of \$2,500, \$100 was paid in cash, and plaintiffs gave the defendant their negotiable promissory note in the sum of \$2,400, payable in monthly installments of \$200 each. It is alleged that the purchase was induced by fraudulent representations, to the effect that the "truck was practically new," that the "tires on the said truck were the original tires first placed on the said truck," and that the car "had not been run more than five hundred miles" prior to its purchase by plaintiffs. The complaint charges that in truth and in fact the truck had been run more than 4,000 miles; that its engine was worn to such an extent as to be valueless; that the original tires placed on the truck had been worn out; and that the tires which were on it at the time of plaintiffs' purchase were new tires which had replaced the original ones. It is alleged that the false representations were made with the intent to deceive plaintiffs, and that the plaintiffs pur-

chased in reliance on them, to their injury. Subsequent to the bringing of this suit plaintiffs learned that the defendant had negotiated their promissory note to one Seymour H. Bell, who was a bona fide purchaser thereof. They thereupon filed a supplemental complaint, alleging this fact and a payment which they had been obliged to make to Bell. Because of the allegations of the supplemental complaint plaintiffs ask for no further relief, except a money judgment against the defendant. The defendant denied all the allegations of the complaint and the supplemental complaint, except the purchase of the truck and the terms of the payment therefor. It was affirmatively alleged in the answer that plaintiffs had an adequate remedy at law; that plaintiffs had ratified the representations, if any, by retaining the truck in their possession and having it repaired; and that plaintiffs were thoroughly advised of the condition of the truck at the time of their purchase. It was further alleged that the contract of sale was in writing, and that it had been entered into after a thorough examination and test of the truck. The reply denied the affirmative allegations of the answer. The trial court, sitting in equity, elected to refer the controversy to a jury, which found a verdict for the plaintiffs. A decree was entered on this verdict, and the defendant appeals.

Maurice W. Seltz, of Portland, for appellant. W. T. Slater, of Portland (Manning, Slater & Leonard, of Portland, on the brief), for respondents.

MCCAMANT, J. (after stating the facts as above). [1] It is true, as contended by the defendant, that the matter set up in the supplemental complaint should have been pleaded by way of amendment to the original complaint; but error is not assigned on the order of the lower court permitting the supplemental complaint to be filed. We will therefore treat it as an amendment of the original pleading, properly allowed.

It would serve no useful purpose to state in this opinion the evidence on the subject of the fraud. It strongly preponderates in favor of plaintiffs, and convincingly proves the allegations of the complaint. It is proper to add that the evidence does not connect Mr. Edward E. Gerlinger, the general manager of defendant, with the fraudulent representations.

[2] The defendant contends that the decree should be reversed because there is an adequate remedy at law. The original complaint stated a cause of suit cognizable in equity, as plaintiffs were entitled to the cancellation of their note, assuming that defendant still held it. This note having passed into the hands of an innocent purchaser prior to the bringing of the suit, it is contended that there was no ground on which

equity could try out the controversy, although plaintiffs were in ignorance of the negotiation of the note at the time when they brought their suit. It is true, as the defendant contends, that equity will not take jurisdiction merely because the suit is based on fraud. If the remedy at law be adequate, the parties will ordinarily be relegated to a court of law. It has been repeatedly held in this jurisdiction that in case plaintiff fails to prove his allegations on which alone the equitable jurisdiction is predicated, a court of equity will not award him a money judgment. *Ming Yue v. Coos Bay R. R. Co.*, 24 Or. 392, 33 Pac. 641; *Stemmer v. Scottish Co.*, 33 Or. 65, 49 Pac. 588, 53 Pac. 498; *Denny v. McCown*, 34 Or. 47, 53, 54 Pac. 952; *Multnomah Co. v. Portland Cracker Co.*, 49 Or. 345, 352, 90 Pac. 155. These were all cases in which the plaintiff had never had an equitable cause of suit and in which he was chargeable with notice that his remedy was at law. The case at bar is distinguishable from the cases above cited, in that these plaintiffs without question had a remedy in equity prior to the negotiation of their promissory note. They brought the suit in ignorance of such negotiation, and without notice of any facts sufficient to put them on inquiry with reference thereto. There is authority to the effect that an equitable suit brought under such circumstances will be retained for the purpose of awarding plaintiffs the money damages to which they are entitled, whenever the act of the defendant has created a situation which makes distinctively equitable relief impracticable. In 1 Pom. Eq. Jur. (3d Ed.) § 237, the rule is stated as follows:

"If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such, for example, as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages."

The foregoing rule is supported by *Milkman v. Ordway*, 106 Mass. 232, and *Cole v. Metzinger*, 96 Wis. 559, 577, 71 N. W. 75. We believe the rule to be a sound one, and that the decree is not open to objection on this ground. We are the more ready to follow these authorities in the case at bar because the defendant has had a trial by jury, and because the evidence is so clear that no trier could be apt to come to a different conclusion from that reached by the jury and the lower court.

[3] At the time of the purchase a memorandum of sale was signed by the plaintiffs and also by Fred W. West, as manager of the

defendant, which contained the following language:

"It is understood by the parties hereto that there are no understandings or agreements, verbal or otherwise, other than those printed or written hereon."

It is contended that because of this circumstance it is not competent for the plaintiffs to prove the misrepresentations in reliance on which the truck was purchased. On this branch of the case the defendant relies on *Equitable Co. v. Biggers*, 121 Ga. 381, 382, 49 S. E. 271. In the Georgia case the contract signed by the parties contained the following language:

"This sale is made under inducements and representations herein expressed and no others."

The court held that this language precluded testimony on the part of the defendant of contemporaneous representations which were false and fraudulent. The agreement in the case at bar is distinguishable from that of the Georgia case, in that it makes no mention of inducements and representations. The agreement in the instant case specifies merely that there are no understandings or agreements except those expressed in the contract. If plaintiffs in the case at bar were seeking to charge the defendant with warranties, their proof might be excluded as in contradiction of the written contract. But plaintiffs are not seeking to modify the written contract in any respect. They are contending that there was no contract because of the fraud perpetrated. The rule applicable is statutory in this jurisdiction. Section 713, L. O. L., is as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
"2. Where the validity of the agreement is the fact in dispute."

In the case at bar the validity of the agreement is the fact in dispute, and it was competent for plaintiffs to offer evidence in support of their allegations, going to the ultimate fact that the minds of the parties never met because of the fraud of the defendant in the respects pointed out in the complaint. Our conclusion on this branch of the case is supported by the recent decision of *Bouchet v. Oregon Co.*, 78 Or. 230, 236, 152 Pac. 888, where under a state of facts closely akin to those in this case the same rule was announced, supported, however, by different reasoning.

[4] It is also contended that the plaintiffs are barred of their remedy by retaining the truck in their possession and making use of it in their business.

"It is the general rule that any person who has been induced through fraud to execute a contract of any kind, in order to avail himself of that defense, should act promptly upon the

discovery of the deception." *Waymire v. Shipley*, 52 Or. 464, 474, 97 Pac. 807, 811.

This rule is well established, but the facts do not bring this case within its operation. The truck was purchased February 3, 1915; this suit was brought March 20, 1915. In the few weeks intervening between these dates the plaintiffs twice returned the truck to the defendant on the defendant's promises to repair it, and whatever delay took place in the repudiation of the contract was induced by the defendant's promises to repair the truck and to make it good. Plaintiffs complained continually that the car was unsatisfactory and when finally apprised of the history of the truck they promptly disaffirmed and brought this suit.

The decree of the lower court is affirmed.

MCBRIDE, C. J., and BURNETT and BEAN, JJ., concur.

In re BARKER.

(Supreme Court of Oregon. April 10, 1917.)

1. SPENDTHRIFTS — CONTRACTS FOR NECESSARIES — LIABILITY OF ESTATE.

L. O. L. § 1324, provides that, if a guardian shall be appointed, all contracts, excepting for necessities, made by such spendthrift, shall be void. Section 1326 provides that a guardian so appointed shall have care and custody of person of ward and management of all his estate, etc. Section 1327 requires guardian to pay all just debts due from ward out of ward's estate. A guardian of a spendthrift provided him with sufficient money each month to pay for necessities. The ward purchased from petitioner articles of food which he consumed, but did not pay for, having squandered money furnished by the guardian. *Held*, that furnishing ward with money was not equivalent to furnishing him with necessities, and that estate of ward was liable to petitioner for food furnished; the ward having under the circumstances power to contract for necessities.

[Ed. Note.—For other cases, see Spendthrifts, Cent. Dig. § 18.]

2. COURTS — APPEALABLE ORDER OR DECREE — REJECTION OF CLAIM BY COUNTY COURT.

An order of the county court rejecting a claim against a spendthrift's estate is appealable in view of L. O. L. § 945, providing that provisions of chapter 5, tit. 7 (§§ 548-560), relating to appeals, are intended to apply to judgments and decrees of the county courts in all cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 603.]

3. COURTS — CIRCUIT COURT — POWERS ON APPEAL FROM COUNTY COURT.

Under L. O. L. § 559, providing that upon an appeal to the circuit court the manner of proceeding thereafter is the same as if the action had been commenced in such court, but if the appeal is from a decree of county court, the appellate court may give a final decree in the cause or matter, the circuit court may enter judgment for claimant on appeal from an order of county court rejecting claim against estate of a spendthrift.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 603.]

4. APPEAL AND ERROR — EXTENT OF REVIEW — EXECUTION ISSUED BY CLERK OF COURT.

Where the judgment of the circuit court on appeal does not order execution to issue, the promulgation of such writ under L. O. L. § 213, providing that the party in whose favor a judgment is entered may at any time after entry have a writ of execution, and section 215, requiring clerk to issue such writ, is not a judicial function subject to review on appeal from judgment of circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4270, 4289-4292.]

Department 1. Appeal from Circuit Court, Multnomah County; O. U. Gantenbein, Judge.

In the matter of the claim of Wascher Bros. against the estate of W. C. Barker, a spendthrift. From a decree of the circuit court on appeal reversing an order of the county court rejecting the claim, the guardian appeals. Affirmed.

It appears by the record that the county court of Multnomah county appointed a guardian for William C. Barker, having adjudged him to be a spendthrift. The petitioners, doing business as grocers under the firm name of Wascher Bros., presented a petition to the county court in which they averred:

"That between the 28th day of November, 1914, and the 20th day of September, 1915, said W. C. Barker did purchase of and from the petitioner herein and his brother, F. W. Wascher, copartners, doing business as Wascher Bros., goods, wares, and merchandise of the agreed price and reasonable value of \$473.90, and paid on account thereof the sum of \$321.25, leaving a balance due of \$152.35; that said goods, wares, and merchandise were family necessities and were used by the defendant in and about the maintenance of his home."

They further stated that they had presented their claim to the guardian, who refused it on the ground that his ward was a spendthrift without capacity to contract any obligation whatsoever. They alleged in effect that the groceries furnished were necessities required for the ward's sustenance, and that he is possessed of considerable estate with an income in excess of \$350 per month. They prayed for an order of the county court compelling the guardian to pay the alleged indebtedness. The court, however, denied the petition. On an appeal to the circuit court that tribunal heard the agreed statement of facts and additional testimony, made findings of fact to the effect that the goods furnished were necessities, gave the petitioners a judgment against the ward for the balance of account amounting to \$152.71, and as a further conclusion of law held "that the plaintiff do have execution on demand." The judgment in fact entered was substantially that the plaintiffs have and recover from the defendant Barker the sum of \$152.71, together with costs and disbursements herein without ordering execution. It is stated in the abstract that subsequently the petitioners issued execution on the judgment and placed it in the hands of the sheriff of Multnomah county; that an appeal was taken and a

supersedeas bond filed; that afterwards the petitioners filed their undertaking notwithstanding the appeal and proceeded with the execution; and that the sheriff made a return showing that he had realized the full amount of the judgment by the sale of an automobile belonging to the ward. There is no official record before us, however, disclosing anything about the proceedings after judgment. An appeal has been taken on behalf of the estate of the spendthrift.

Lynn B. Coovert, of Portland (E. E. Coovert, of Portland, on the brief), for appellant. Elmon A. Geneste, of Portland (Clark & Geneste, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Referring to the guardianship of a spendthrift, it is said in section 1324, L. O. L.:

"If a guardian shall be appointed on such application, all contracts, excepting for necessities, and all gifts, sales, or transfer of real or personal estate made by such spendthrift, after such filing of the complaint in the county clerk's office, and before the termination of the guardianship, shall be null and void."

In section 1326, L. O. L., it is provided thus:

"Every guardian so appointed for a spendthrift shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged. * * *"

Under section 1327, every guardian is required to—

"pay all just debts due from his ward out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as provided by law."

[1] Under the assignments of error it is contended that the articles furnished Barker were not necessities, and that the claim for the same was not valid, as against the estate of the spendthrift. The circuit court found that the goods were received and used by Barker in and about the maintenance of his home, and that they were family necessities. The agreed statement of facts and the testimony received in addition thereto convinces us that this finding was justified. There seems to be but little contest over the fact that the goods were groceries, consisting of articles of food used by the spendthrift. The contention against the decree is that the guardian had placed in the hands of his ward each month ample funds with which he could have supplied himself with what was requisite for his sustenance, and hence that the food which the petitioners furnished him and which he actually consumed, but did not pay for in full, were not necessities. Some old precedents from other states have been cited which apparently support that argument, but they do not seem to be applicable to our statute. Section 1326, L. O. L., confers upon the guardian the management of all his ward's estate, and the following section directs him to pay all just debts due from his ward. To deliver into the latter's hands,

therefore, the funds of his estate is at war with the general scheme of guardianship. If the guardian is to manage all the ward's property, as the statute says he must, it is a violation of his duty to commit the control of any considerable portion of it to the spendthrift himself. In good reason he that hath discretion to manage his own property hath no need of a guardian. The very cause for appointing a custodian for the estate of a profligate person is that he is dissipating it, and that therefore it is necessary to take from him all authority over it. It seems from the record that, instead of applying to his actual necessities the allowance given to him by his guardian, Barker took counsel of his propensities rather than of good judgment and squandered the money, failing to pay in full for the necessities which the petitioners furnished him. Although he may have wasted his allowance in riotous living, still it was imperative for him to live, and, under section 1326, supra, he was entitled to contract for what was requisite to that end; it being within the exception to the general rule declaring all agreements, gifts, sales, or transfers of property to be utterly void. To declare that furnishing him money which he ought to have expended in payment for the essentials furnished, but otherwise wasted, would take from his food, for instance, its character as a necessity, and would be to say that the payment of his just debts could be prevented by a void act. It is true enough that, if the guardian or any one else had in fact provided for his needs in quantity and quality suitable to his income and station in life, anything in addition thereto would not be a necessity; but supplying him money with opportunity to waste it as he chooses is not equivalent to a delivery of what is requisite for his sustenance. He is either qualified to manage his estate or he is not. His competency is not apportionable. He may contract for necessities under the statute, but if he does not pay for them his estate must respond. The only way to escape this result is for the guardian having the care of the ward to furnish him with such things or cause them to be directly provided for him, and not intrust money for that purpose to the spendthrift himself.

[2, 3] It is next urged in the brief for the appellant that:

"The court erred in entering any judgment for claimant, even though the claim was for necessities; it being an appeal from a rejected claim by the county court. All the circuit court could do would be to approve the claim and send it back to the probate court as an approved claim, to be paid in due course of administration."

In support of this argument much reliance is placed upon *Sturgis v. Sturgis*, 51 Or. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724, note. In that case a spendthrift under guardianship desired to marry a wife, but his guardian refused to consent, whereupon he with his betrothed went into another state, was there married, and re-

turned to Oregon. In the course of events the wife began a suit against the spendthrift husband for a divorce, making the guardian a party defendant so as to subject the husband's estate to the payment of alimony. After hearing upon affidavit the court ordered that the defendants pay to the clerk thereof \$150 as suit money and \$50 as temporary alimony each month during the pendency of the litigation. The guardian appealed, and this court held that the judgment against him was erroneous, that the order of the circuit court merely established a liability against the ward, but that it could be enforced against his estate only through the process of the county court in granting a license to the guardian to sell realty if the personal property of the ward was insufficient to pay the debt.

We may well doubt, as a general principle, that a court which has jurisdiction to render a judgment or decree has not the authority to enforce it. Indeed, it is said in section 983:

"When jurisdiction is, by the organic law of this state, or by this Code or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

It is not necessary, however, to further criticize *Sturgis v. Sturgis*, supra. In section 936, L. O. L., we find:

"The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate, * * * (3) to direct and control the conduct and settle the accounts of executors, administrators, and guardians."

It proceeds in a manner analogous to the conduct of a suit in equity as distinguished from an action at law, and its decisions are embodied in the form of orders and decrees. Section 1135, L. O. L. These are subject to the right of appeal to the circuit court under section 945, L. O. L. It is provided in section 559 as follows:

"The decision of the appellate court shall be given and enforced as provided in this section: * * *

(3) Upon an appeal to the circuit court, the manner of proceeding thereafter is the same as if the action or suit had been commenced in such court; but if the appeal be from a decree of the county court, the appellate court may give a final decree in the cause or matter, to be enforced as a decree of such court, or such decree as may be proper, and direct that the cause or matter be remitted to the court below for further proceedings in accordance therewith. * * *

Writing about this section in *Re Plunkett's Estate*, 33 Or. 414, 417, 54 Pac. 152, 153, Mr. Justice Wolverton laid down the rule thus:

"A trial de novo precludes the idea of a direction to the lower court to retry the issues upon which it has once passed, and which stand for trial in the circuit court on the appeal, as the effect of such a proceeding would be to grant a new trial, which is subject-matter for the court of original jurisdiction only. By intentment of subdivision 3, supra, the decree of the circuit court becomes final upon the matter in hand, which it may enforce through its own process, or direct that it be remitted to the county court, with directions to take such other action in the premises as may seem proper, but always in harmony with the decrees of the circuit court. It does not contemplate an affirmance or reversal for errors that may appear of record, but a final adjudication touching the matter thus brought on for hearing, which may be enforced as a decree of that court, or, if remitted, controls the future proceedings of the county court."

The *Sturgis Case* was one of original jurisdiction in the circuit court. The case in hand was treated by that court on appeal. In its character as an appellate tribunal it had power to carry into effects its own decree under section 559, L. O. L., describing how the decision on appeal may be enforced. There was ample authority for an execution on the decree rendered, because it was that of the circuit court sitting as an appellate tribunal.

[4] Another answer to the contention of the appellant on this subject is that, where an execution is not ordered by the terms of the judgment itself, the promulgation of such writ is not a judicial act. Under section 213:

"The party in whose favor a judgment is given, which requires the payment of money, * * * may at any time after the entry thereof have a writ of execution issued for its enforcement, as provided in this chapter."

By section 215 the clerk is required to issue the writ and direct it to the sheriff. Hence it is not a judicial function in any sense of the word, but purely ministerial at the request of a party. This court does not review such acts, but only judgments or decrees, as provided by section 548, L. O. L. We have nothing to do with the means by which the payment of a judgment may be enforced. If the wrong process for collection has been employed, the grievance must be worked out by some other procedure than by an appeal from the judgment or decree upon which it is based. These considerations lead to an affirmance of the decree of the circuit court.

McBRIDE, O. J., and MOORE and BENSON, JJ., concur.

BRYANT v. PACIFIC ELECTRIC RY. CO.
(L. A. 3778.)

(Supreme Court of California. April 4, 1917.
Rehearing Denied May 3, 1917.)

1. NEGLIGENCE ¶93(3)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

The mere fact that plaintiff was riding in an automobile driven by his 29 year old son does not impute to the plaintiff the negligence of his son.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 150.]

2. NEGLIGENCE ¶93(3)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

Nor does the added circumstance that both persons were employed by or interested in the same corporation necessarily impute the son's negligence to the plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 150.]

3. NEGLIGENCE ¶93(1)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

If the occupant of an automobile exercises control over the driver or possesses power of control, the negligence of the driver is imputable to him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148.]

4. NEGLIGENCE ¶93(1) — IMPUTED NEGLIGENCE.

In order that there be such joint undertaking, it is not sufficient merely that the passenger or occupant indicate the route or destination, and the circumstances must show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession thereof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148.]

5. NEGLIGENCE ¶90—IMPUTED NEGLIGENCE.

Under Civ. Code, § 1714, providing that every one is responsible for an injury occasioned to another by his want of ordinary care except so far as the latter has brought the injury upon himself, in order that the negligence of one person may be imputed to another, they must stand in such relation of privity that the maxim, "Qui facit per alium facit per se," applies.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 138-140.]

6. NEGLIGENCE ¶138(30)—IMPUTED NEGLIGENCE—QUESTION FOR JURY.

Evidence held to make it a jury question whether plaintiff, riding an automobile driven by his 29 year old son, was chargeable with imputed negligence of the son.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 350-352.]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by G. L. Bryant against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff was granted a new trial, and defendant appeals. Affirmed.

J. W. McKinley, Frank Karr, R. C. Gortner, E. E. Morris, and A. W. Ashburn, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

LAWLOR, J. G. L. Bryant brought this action to recover damages for personal in-

juries alleged to have been caused by one of the defendant's electric cars colliding with an automobile in which he was riding. At the time of the accident the plaintiff's son was driving the machine. A trial was held before a jury which resulted in a verdict for the defendant, but, on motion by the plaintiff, a new trial was granted "solely on the ground that the court erred in instructing the jury that negligence of the driver of the automobile, if any, was to be imputed to the plaintiff." The defendant appeals from this order.

That the court did so instruct the jury is not questioned. One of the pertinent instructions, for instance, reads:

"The actions of the said driver of the said automobile, the son of the plaintiff herein, are in law the actions of the plaintiff in this case; that is to say, if the said driver of said automobile, the son of plaintiff, was guilty of negligence, such negligence is imputable to the said plaintiff, and is a bar to this case, if it contributed directly or proximately to the collision between the said car and the said automobile."

Again:

"If you find from the evidence that the said driver of said automobile was guilty of negligence in swerving upon or entering upon the said railroad tracks, * * * then no recovery can be had in this action."

These and other instructions of like effect were given to the jury at the request of the defendant, and indicate the theory upon which it based its defense and upon which the court tried the case. In addition, the following special interrogatory was submitted to the jury wherein all distinction between the independent contributory negligence of the plaintiff and that of the driver is wholly ignored:

"Was the plaintiff or his son driving the automobile guilty of negligence, which contributed proximately, in any degree, to the collision between the street car and the automobile?"

The answer was "Yes." Clearly, if under the evidence adduced at the trial the negligence of the son is not to be imputed to the plaintiff as a matter of law, the order granting the new trial was proper and must be affirmed.

The automobile in which the plaintiff was riding at the time of the accident was owned by the Bryant Upholstery & Furniture Company, "a close corporation, consisting of the Bryant family, father, mother, and son, mostly, which held the controlling interest." The plaintiff was president of the corporation, and his son the secretary and manager. The corporation used the automobile in its business in delivering goods and going to various houses in the city and collecting furniture to be upholstered. According to the evidence, "instead of having the expense of keeping the automobile up town," it was always kept in the barn at the plaintiff's residence. At this residence the plaintiff lived with his wife and son. On the day of the accident, at closing time, it became neces-

sary to make a delivery for the corporation on the east side of the city, which was on a detour and not a direct line to the garage where the machine was kept. The plaintiff and his wife were at the place of business, and, together with the son driving the automobile, made the delivery. On their way home the plaintiff rode on a box placed on the rear of the automobile and steadied himself by turning a little to the side and holding to the back of the front seat. His wife rode on the front seat at the left of the son. There was evidence submitted by the plaintiff:

"That the plaintiff had no control or direction mechanically in the driving or management of said automobile at the time of said accident, but the same was under the full control and direction mechanically of the plaintiff's son, the said Leslie G. Bryant, who was 29 years of age and an experienced driver of automobiles."

Other evidence was to the effect:

"That the father, mother, and son were driving home to supper; that the father was not paying any fare; that the father and mother and son were simply going toward home as a family, and the son was driving wherever the father, mother, and son wanted to go."

While thus driving south on Moneta avenue in the city of Los Angeles, and approaching West Fortieth place, the car was driven on to the south-going track of the defendant's railroad, where it was suddenly overtaken from the rear by a "beach car," a car larger than an ordinary street car, which was traveling "at a tremendous rate of speed." In the collision which resulted plaintiff received the injuries complained of.

[1] This court has but recently reiterated the well-settled rule that a guest or passenger in a vehicle driven or operated by another is not ordinarily bound by the negligence of the driver or operator. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460. In that case the negligence of a person operating a motorcycle was held not to be imputed as matter of law to his brother, who was riding as his guest on the rear seat. The case at bar presents a somewhat different question. But first it may be observed that the mere relationship of the plaintiff and his son cannot, as suggested, take the case out of the rule. *Board of Commissioners v. Mutchler*, 137 Ind. 140, 36 N. E. 534.

[2] Nor does the added circumstance that both persons were employed by or interested in the same corporation necessarily alter the situation. In *Siever v. Pittsburgh, etc., Ry. Co.*, 252 Pa. 1, 97 Atl. 116, it was held that the negligence of a street car conductor in causing a collision with a railroad train could not be imputed to the motorman "merely because they were working together on the same car" so as to prevent his recovery in an action brought against the railroad company. In *McBride v. Des Moines City Ry. Co.*, 134 Iowa, 398, 109 N. W. 618, the negligence of a driver of a hose wagon was held not to be imputable to another member of the fire department who was riding with him at the

time of a collision with the defendant's street car. In *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597, 78 S. W. 70, the fact that plaintiff's son was engaged in helping to deliver ice along with the driver of an ice wagon at the time of the accident was held not to constitute such a relation as to make the negligence of the driver the negligence of the son. This is further illustrated by *Johnston v. Delano* (Iowa) 154 N. W. 1013. In that case it was held that, even though the plaintiff's employé negligently drove a team into collision with one of the defendant's trains, it constituted no defense to an action brought by plaintiff to recover for the death of his minor son, who was riding with the employé as a helper at the time of the accident. These authorities are in accord with the cases in this state, and to this extent the reasoning of *Thorogood v. Bryan*, 8 C. B. 115, does not apply. See *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. The family relation, or the business association, therefore, does not of itself identify the plaintiff with the driver so as to impute to him the latter's alleged contributory negligence.

[3, 4] The rule is otherwise, however, if the occupant of the machine exercised control over the driver thereof, or, in the eyes of the law, may be said to possess such power of control. Illustrations of the application of this doctrine are found in cases where the parties are engaged in a common or joint enterprise. Ruling Case Law, after referring to the different rules as to whether negligence may be imputed to a guest or passenger in an automobile, says:

"There seems to be no difference of opinion as to the rule that, when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking." Volume 2, p. 1206, § 43.

But in order that there be such a joint undertaking it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it.

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management." *St. Louis, etc., Ry. Co. v. Bell* (Okla.) 159 Pac. 336; *Atwood v. Utah Light, etc., Ry. Co.*, 44 Utah, 366, 140 Pac. 137; *Cotton v. Willmar, etc., Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935.

In the case first cited, which arose out of a collision of a street car with an automobile in which the deceased was riding with a number of lady friends, the court, upon a careful consideration of the authorities, said:

"Assuming that the trip was a 'joy ride,' as contended, it was not a joint or common undertaking."

Martindale v. Oregon Short Line Ry. Co. (Utah) 160 Pac. 275, and *Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494, are recent cases of similar import. A case of a joint or common undertaking, however, is *Van Horn v. Simpson*, 35 S. D. 640, 153 N. W. 888. In that case the court held that, where the evidence showed that the occupant of an automobile was a partner of the driver and owner thereof, and was at the time of the accident engaged with his partner, the driver, in the prosecution of copartnership business, both parties were joint participants in the alleged negligence. Likewise in *Washington & C. O. Ry. v. Zell's Adm'r*, 118 Va. 755, 88 S. E. 309, the deceased and another person took an automobile trip in a machine which the deceased, according to his custom, put in readiness for the trip, and both participated in running it. The machine was owned by the deceased's companion. It was properly held that the parties were engaged in a joint enterprise or adventure; for the right of control of either person over the other is readily apparent.

That all the authorities do not require evidence of the exercise of such control to establish a joint enterprise is quite true. Thus *Berry's Law of Automobiles* (2d Ed.) § 322, points out that in many cases where the doctrine of imputed negligence has been applied the relation between such persons, while somewhat similar to that of master and servant, as a matter of fact "lacks the essential element of that relation of control."

"Neither," he continues, "has control of the details by means of which the common purpose is executed. Hence the only theory on which one may be charged with the negligence of another is that each is engaged in the performance of the plans which all have agreed upon and which are as personal to one as to another. It is a sort of partnership, as it were."

Such a case is *Wentworth v. Town of Waterbury* (Vt.) 96 Atl. 334, where apparently the only basis for the imputation of the negligence of the driver of the automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake.

[5] In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114:

"There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or

of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies."

Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care "except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (Italics ours.)

[6] It is clear, therefore, that the jury should have been permitted to pass upon the question of fact as to whether the plaintiff exercised or had the right of exercising control over the son in driving the automobile home at the time of the collision. Had it been properly instructed, it may have found that the son, as manager of the Bryant Upholstery & Furniture Company, had full and absolute control over the movements of the machine and recognized as his superior only the corporation, and then only such orders as might be given by its officers when acting in their official capacity. This, of course, is not a case where the corporate entity may be disregarded. As far as the plaintiff's right of control existed at the time of the accident, the jury may have concluded that it, in fact, extended no further than that control common to guests or passengers for hire. There was evidence that the son was an adult person and an experienced driver of automobiles, and the jury may have found the fact to be that he was in all respects an independent agent. The machine, it should be repeated, belonged to the corporation. It may be conceded that the plaintiff and his son were jointly interested in the conduct of the business of the corporation. But it does not necessarily follow that they possessed a joint or community interest in the matter of driving the automobile. These and other questions of similar import involve matters of fact for the jury to determine in the light of the principles of law we have enunciated.

The order granting the new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

McDOUGALD, City and County Treasurer, v. LILIENTHAL et al. (S. F. 6790.)

(Supreme Court of California. March 26, 1917. Rehearing Denied April 23, 1917.)

1. TAXATION §864 — INHERITANCE TAX — STATUTE.

Inheritance Tax Law 1905 (St. 1905, p. 341) § 1, defining the property for whose transfer by act or by operation of law a tax is imposed, imposes a tax (1) upon all property passing by will or by the intestate laws of the state, and (2) upon all property of a nonresident, which,

regardless of its mode of transfer or succession, shall be within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1679.]

2. TAXATION § 867(1) — INHERITANCE TAX — PROPERTY WITHIN STATE — PROBATE PROCEEDINGS.

The imposition, under Inheritance Tax Law 1905, § 1, of an inheritance tax upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state, is not dependent upon any proceedings in probate, ancillary or otherwise, had within the state; the state having exercised its unquestioned power to tax property within its territorial limits and jurisdiction without regard to such proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1681.]

3. TAXATION § 867(2) — INHERITANCE TAX — OWNERSHIP OF PROPERTY IN STATE — CORPORATE STOCK.

Ownership by a New York decedent of a portion of the capital stock of a California corporation, which ownership was evidenced by certificates of stock located in the state of New York, was ownership of property within California within the Inheritance Tax Law, since stock in a domestic corporation is subject to the tax at the corporation's domicile, though decedent was a nonresident, regardless of the place where the certificates may be kept.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1682.]

4. DESCENT AND DISTRIBUTION § 5 — LAW OF DOMICILE — PERSONALTY.

The law of a decedent's domicile controls the disposition of his personal property, where the law at the location of the property is not in conflict.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19-22.]

5. JUDGMENT § 822(3) — EFFECT OF DECREE OF DISTRIBUTION IN OTHER STATE.

Under the full faith and credit clause of the Constitution of the United States (U. S. Const. art. 4, § 1), the decree of distribution of a New York decedent's property in the probate court of New York does not preclude the right of the state of California to levy an inheritance tax on shares of stock in a California corporation owned by decedent, since the full faith and credit clause does not impose any limitation on the sovereign right of a state to tax property within it, including the right to impose an inheritance tax.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1500.]

Department 2. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Petition by John E. McDougald, as Treasurer of the City and County of San Francisco, State of California, against Alice M. Lillenthal and another, for the exaction of an inheritance tax. From a judgment for defendants, plaintiff appeals. Reversed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (U. S. Webb and Albert H. Elliott, both of San Francisco, of counsel), for appellant. Lillenthal, McKinstry & Raymond, of San Francisco, for respondents.

HENSHAW, J. Albert Lillenthal, a non-resident of this state and a resident of the state of New York, died intestate in the city

and state of New York. At the time of his death he was the owner of 1,386 shares of the capital stock of the Lillenthal Company, a California corporation, having its principal place of business in the city and county of San Francisco. The certificates representing his ownership in the capital stock of the corporation were, at the time of the decedent's death, in the city of New York. This property was distributed in probate proceedings by the courts of the state of New York, and these shares were distributed to the respondents upon this appeal, who are, respectively, one the widow, the other the son, of the deceased. The inheritance tax imposed through the succession of ownership of this stock under the laws of the state of New York was duly paid. No probate proceedings upon the estate of the deceased have been had in the state of California. The inheritance tax law of 1905 (Stats. 1905, p. 341) is the California law which was in force at the time of the death of the decedent. The treasurer of the city and county of San Francisco, appellant herein, filed a petition as contemplated by the law looking to the exaction of a tax upon this personal property under our law. The respondents herein answered, hearing was had, and the court gave judgment against the treasurer's contention. From that judgment this appeal is taken.

Section 1 of the act of 1905 is the section defining the property for whose transfer by act or by operation of law a tax is imposed. The construction of this section gives rise to the principal controversy between these parties. The section, in so far as it is here necessary to quote it, provides as follows:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state * * * shall be and is subject to a tax hereinafter provided for. * * *

Respondents' interpretation of this language, which was adopted by the trial court, is that the state has imposed this tax only on "all property which shall pass, by will or by the intestate laws of this state"; that in the succeeding part of the sentence, grammatically and by necessary construction (since this tax proceeding is admittedly one in invitum), the words "which property" have direct reference to and in their meaning are limited by the opening words of the act; that, consequently, the state has declared its intention to tax only property which shall pass by will or by the intestate laws of this state, which property, if the property of a resident, shall be taxed wherever situated, but which property, if the property of a non-resident, shall not be taxed unless situated in this state. As the property here under consideration is unquestionably personal property, and as it did not pass to these respondents

either by will or by the intestate laws of this state (propositions which may not be controverted), it is not subject to the tax here sought to be imposed. Such is respondents' position.

[1, 2] Indisputably, if respondents' construction of the section is sound, the conclusion drawn from that construction is unanswerable. But with that construction we cannot agree. It may be at once conceded that the language lacks the clearness which should be found in every law, and especially in a law imposing the burden of a tax. But it is taken bodily from the statute of New York, and had been construed by the highest court of that state before its adoption into the law of this state, and the meaning given to it was, in effect, that the grammatical construction of the sentence was faulty and that it meant to impose a tax, first, upon all property passing by will or by the intestate laws of this state, and, second, upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state. Such is not only the interpretation of the highest court of New York, but is likewise the interpretation of the highest court of Illinois under its statute identical in this respect with our own. *People v. Griffith*, 245 Ill. 582, 92 N. E. 313. The declaration of this court in *Estate of Kennedy*, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, to the effect that the language in the first lines of the section "pass by will or by the intestate laws of this state" means to pass by virtue and effect of the law of this state governing testacy or intestacy, is, of course, perfectly sound. But this court was not there called upon to review the language of the whole section. It was dealing with the much narrower question, namely, whether a homestead set apart by the probate court constituted property passing by will or by the intestate laws. The unescapable conclusion that our law designs to tax all of the property of a nonresident deceased, which is within the state, carries with it the additional determination that the imposition of this tax is in no wise dependent upon any proceedings in probate, ancillary or otherwise, had within the state. Without regard to such proceedings, the state has exercised its unquestioned power to tax property, within its territorial limits and jurisdiction, over which it has extended the protection of its laws.

We are thus brought to the second and subordinate question, namely: is the property, within the meaning of our inheritance tax law, within the state? The familiar maxim *mobilia sequuntur personam* is one, it may not be questioned, which the state in its taxing laws may modify or reverse. In the case of the statute under consideration it is declared that all the property of a nonresident

within the state shall be subject to the tax. It has (section 28) defined property very broadly to include real and personal property and interests therein.

[3] Our next consideration is whether this ownership by the deceased of a portion of the capital stock of a California corporation, which ownership was evidenced by printed and written certificates, which certificates in turn were in the state of New York, is of property within this state. Of this our own decisions as well as those of other jurisdictions remove all doubt. The proposition is thus stated in 37 Cyc. 1562, subd. "b":

"Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a nonresident and this without regard to the place where the certificate may be kept."

To the same effect are our own cases of *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90; *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027; *Matter of James*, 144 N. Y. 6, 38 N. E. 961; *Estate of Bronson*, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632; *Estate of Fitch*, 160 N. Y. 87, 54 N. E. 701; *Palmer's Estate*, 183 N. Y. 238, 76 N. E. 16; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Gardiner v. Carter*, 74 N. H. 507; *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593; *Morrow v. Gould*, 145 Iowa, 1, 123 N. W. 743, 25 L. R. A. (N. S.) 384.

[4, 5] It is finally contended that under the full faith and credit clause of the Constitution of the United States the decree of distribution in the probate court of New York precludes the right of the state to tax this property, and in support thereof is cited *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95. It may be conceded that the law of the domicile controls the disposition of personal property, where the law of the place of the location of the property is not in conflict therewith. But we do not understand that the full faith and credit clause imposes any limitation upon the sovereign right of a state to tax any and all property within it, nor is this right we think for a moment denied by respondents. This general right to tax includes the right to impose a tax on succession known as an inheritance tax, and the effect of our law is that those to whom the property has gone by virtue of the distribution awarded by the courts of New York cannot take full title to and enjoyment of their property until payment of the tax imposed by the state of California, in which state the property is located.

The judgment appealed from is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

HALL v. HALL et ux. (S. F. 7135.)

(Supreme Court of California. March 29, 1917.)

1. HUSBAND AND WIFE §333(9)—ALIENATING HUSBAND'S AFFECTIONS—SUFFICIENCY OF EVIDENCE.

Plaintiff's testimony regarding minor differences with her husband's parents held not to sustain a verdict against them for alienating the husband's affections, where plaintiff had abandoned her husband and it did not appear his affection for her had ceased.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

2. HUSBAND AND WIFE §333(9)—ALIENATING HUSBAND'S AFFECTIONS—SUFFICIENCY OF EVIDENCE.

To establish willful alienation of a husband's affections by his parents, the proof must be extremely high, since it is not lightly inferred that a parent's conduct toward a child is prompted by malicious motives.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

3. HUSBAND AND WIFE §333(1)—ALIENATING HUSBAND'S AFFECTIONS.

In action against parents for alienating a son's affections from his wife, it is presumed the parents acted for the best interest of their child.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Cecile B. Hall against William Hall and Lucy Hall, his wife. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Judgment and order reversed.

Chas. M. Cassin and James L. Atteridge, both of San Jose, for appellants. Beggs & McComish and H. C. Jones, all of San Jose, and C. C. Houck, of Santa Cruz, for respondents.

HENSHAW, J. Plaintiff sued defendants, who are respectively the father and mother of her husband, to recover damages for the alienation by them of her husband's affections from her. The charge was that:

"The defendants willfully, wrongfully, wickedly, unjustly and maliciously contriving and intending to injure plaintiff and deprive her of the affection, support, comfort, fellowship, society, aid and assistance of plaintiff's husband, * * * alienated and destroyed the affection of said Robert Hall, the husband of this plaintiff, for this plaintiff, * * * and did willfully, illegally and maliciously entice, abduct and persuade said Robert Hall from plaintiff, whereby plaintiff has wholly lost and has been deprived of the assistance, comfort, fellowship, society, aid and support of said Robert Hall."

Trial was had before a jury, which returned its verdict in favor of plaintiff in the sum of \$10,000. From the judgment and from the order of the court denying their motion for a new trial, defendants appeal.

[1-3] Upon appeal their principal effort is directed to the contention that the evidence is wholly insufficient to justify the verdict,

and this effort, it may be said at the outset, is wholly successful. Seldom, indeed, is it that a reviewing court is called upon to consider a verdict such as this, whose evidentiary foundation is airy nothingness, not even the baseless fabric of a vision.

Plaintiff and her husband, Robert Hall, were married in Los Gatos, Santa Clara county, in November, 1906. At the time of their marriage the husband was about 26 years of age, the wife a few years younger. Her parents were living in Los Gatos, so were his. He seems to have been an only child. His father and mother had been married more than 50 years, and at the time of the trial of this action the father was 75 years of age and the mother 68 years of age. They owned their own home. They had some property. They were frugal, and the old wife did all of the household work. The narration which follows is that of the plaintiff. Following their marriage in the latter part of November, she and her husband went to San Jose. Her husband's parents came to them and begged them to come and live with them in Los Gatos, Mr. Hall saying that his wife would teach the bride economy. Apparently the wife had no means; the husband was earning about \$75 a month. The newly married couple went to Los Gatos and began housekeeping in rooms not far from the home of the elder Halls. They were visited quite frequently by the latter; old Mrs. Hall urging that the young people come and live with them, saying that the cost of living was high and they could live more cheaply together. They did not comply with the Halls' request, however, but continued to live as they had been doing until the husband went into the nearby mountains under employment as a wood chopper and the wife went to live at her parents' home. During this time, when the husband was free from his mountain labors, he returned to and lived with his wife. One painful incident occurred during this time. The husband and wife were making a call upon his parents. The mother was urging that they should come there to live. Robert said that he did not think they would.

"Then she began screaming and raving about me; that I was trying to keep Robert away from her. They put her to bed and worked with her for some three hours. She insisted that Robert stay all night with her, and as I was not wanted I started home, and after I started I discovered I had not the key, and I came back to get the key, and Robert came on home with me."

Plaintiff is a school teacher, and obtained a position as such to teach a country school distant from the city of San Luis Obispo about 30 miles. Her school term began in July and ended in November. Her husband went with her to the city of San Luis Obispo, and for his own improvement took a course in a polytechnical school there situated, while his wife went to the country to teach. Every week, usually on Friday afternoon, he

rode his bicycle 30 miles to be with her over the week's end. While there she took from her husband's suit case and read certain letters written to him by his father. She was permitted to give secondary evidence as to the contents of these letters. She said that in them her husband's father accused her of being "wasteful and extravagant" and "a hindrance to Robert's spiritual development"; that he ought to separate from her; that the letters often contained the quotation, "Be not unequally yoked with unbelievers." He urged his son to "take the paper route by all means for \$20 a month, but do not let Cecile know how much you are getting, and once in a while in case of absolute necessity I will slip in a little." The letters told her husband to keep her there teaching, "that would be a good lesson in economy for her." Another letter said:

"Let Cecile come on home, and I will meet you in San Luis, and together we will take a trip in Madera county; but don't let Cecile know I am coming. You will know how to manage that."

It is pertinent here to add that the father denies having written, and the son denies having received, letters of such import. Certain trips made by father and son together are complained of by plaintiff, as for example she persistently calls a trip which her husband and his father made to Los Angeles as their "wedding trip." The explanation of these trips is that the father was earnestly seeking to establish the son in some profitable business, and his wife was unwilling to go on these trips with them. In December, 1907, they returned from San Luis Obispo to Los Gatos and took up their abode in the home of defendants. Plaintiff was pregnant. As the date of her confinement approached, she told her mother-in-law that she expected the arrival of the little grandchild, and the mother-in-law "sat back in her chair with utter scorn and disgust on her face and never said one word." She asked her mother-in-law if she might stay in her home during the period of her confinement and convalescence, and her mother-in-law replied, "Yes; you may stay here, but you must not be a trouble to me." The aged mother-in-law's account of this interview was that she looked forward to the birth of her grandchild with great interest; that she told her daughter-in-law that she could stay there if she desired, "but there are some things I cannot do for you." So the daughter-in-law went to a sanitarium where she was confined. On leaving the sanitarium, about the middle of July, 1908, she did not return to the Halls, where her husband still was, but went to her mother's, where she remained until in August, 1908, she and her husband moved to San Jose. There they resided until June, 1909. The defendants visited them not infrequently, and her father-in-law paid at least in part for the furniture in their San Jose home. In June, 1909, they returned to Los Gatos, moved by

considerations of the baby's health. The husband continued in his employment in San Jose and went back and forth on the inter-urban cars. They lived in their own home. The principal complaint of the conduct of the husband during this time is that, returning to Los Gatos from San Jose, he usually went first and directly to the home of his parents and spent some time there before returning to his own. Sometimes he took his supper there. The explanation is that the son spent his time helping his aged father and mother in the work about the place, and that when he took supper with them it was because he preferred to do this rather than to get his own supper at home, as frequently he was obliged to do because of his wife's absence at her mother's home. Their residence in Los Gatos continued until January, 1911. During that period of time between 1909 and 1911 plaintiff asked the Halls at sundry times many questions. She asked Mr. Hall, Sr.:

"Why two months after we were married he suggested to my husband that I married him for his money, thus poisoning his mind against me. Mr. Hall's reply was, 'Well, what do you think we thought you married him for? People call me a millionaire and people are after my money. What else do you think I thought you married him for?'"

But elsewhere she testifies that the elder Halls hailed her marriage to their son with great delight. Again she asked Mr. Hall:

"Why he suggested to Robert that we were not mated constantly by suggesting to him we were not mated? He said he didn't think we were mated and he considered it his duty to separate two people who were not mated. Again I asked Mr. Hall why he was a party to offering me \$1,000 in March, 1907, to leave my husband and telling me I could go as a missionary if I wanted to. Mr. Hall's answer was—coolly sat back and said he supposed it was because they wanted me to go, and Mrs. Hall said, 'Do you think we wanted you to go without anything?'"

There is more to like effect, all of equal inconsequence, and the defendants deny that such conversations ever were had.

The separation between the plaintiff and her husband came as indicated in January, 1911. During all of their married life, as the evidence discloses, he had neither neglected his wife nor been unkind to her in any way. He did not drink. His absences from home were only those upon the short business trips made with his father, or when his labors called him away, or when he stopped at his parents' home to help them before returning to his own. He contributed all of his earnings to the support of his wife and child. He seems to have indulged his wife in every way, and when the separation came, which was in fact her abandonment of him, he "told her to take her own way. I let her have her own way all the time." In January, 1911, she sold the furniture in their home, took this money, and with her child departed, leaving her husband weeping in the house. To the sum which she received from the furniture he added \$20. He went to

his parents' home. She stayed two weeks in the nearby town of Campbells and then went to Capitola, a summer resort on Monterey bay, and remained there until the middle of the summer. She returned from Capitola to Los Gatos, and in September secured a position as school teacher in the county of Fresno. She went there and taught until the following May. While at Capitola she wrote to her husband, telling him where she was, and he came down to see her for the purpose of effecting a reconciliation. He met with no success. Upon another occasion he asked her to join him and his father in the town of Morgan Hill, where it was proposed to look at ranch property with a view to settling the young people. She went, remained with her husband one or two nights, but soon left, as "I wanted to get back to Capitola to attend a meeting of the Young Women's Christian Association that was shortly to convene down there." A second time her husband visited her at Capitola, but left when she told him that her father was coming to the house. Her parents disliked her husband very much, and she did not want them to know that she communicated with him. She went to Fresno and did not let her husband know where she had gone, nor for many months was he able to learn, notwithstanding his efforts to locate her. She testifies that she did not want him to know, and for explanation justifying her conduct says that it was because her husband "said he would shoot the county full of holes. Now, do you wonder that I didn't want him to know?" She wrote to her husband but once while she was in Fresno, and returned from there to Los Gatos in May, 1912. She immediately began to take steps looking to a divorce and to securing money from her husband, which money, of course, would come from his parents, as it is not asserted that he had anything other than his earning capacity. She planned to use this money to build a home. Some sort of tentative arrangement seems to have been entered into by which she was to receive a thousand dollars. In one of these letters she writes to her husband as follows:

"These are my terms: (1) The guardianship of Lawrence; (2) the payment to me of the thousand dollars you once offered me, not for my own use this time, but for Lawrence's care. Has it ever occurred to you that you could be arrested for felony for not having given anything for Lawrence's support for over a year?"

The greater part of the year to which reference is here made was the period when she had taken the child, had abandoned her husband, and had even concealed from him her whereabouts. The Halls seemingly thought that this thousand dollars, as under the mother's declaration it was to go for the maintenance of the child, would better be paid in monthly installments, and this called forth from the wife a letter, from which the following extracts are taken:

"You seem to think you have the power to make or unmake terms as you see fit, and I have nothing to say, but only accept. Let me say right here that I am not going to do anything of the kind. * * * Those days when I took Lawrence on the beach (at Santa Cruz) to see you were the most miserable days I ever put in, and so was the whole time. If you hadn't spent so much time crying, and if I hadn't felt sorry, I should never have stood it for a minute. Then you would keep saying there was no other way but a divorce, so you could start all over again, and if I didn't start proceedings you would. To support what I previously said about the stay in Santa Cruz being a most unpleasant vacation, Lawrence and I did not go home, but we went to Capitola and had a real vacation. * * * My sister-in-law got \$5,000 damages, and didn't half try, and the \$1,000 is beginning to look mighty little to me. I might just tell you that a prominent business man in this town has hired the best lawyer in San Jose for me, and he is now consulting with Mr. Jones. * * * I said to them this afternoon that if you would live up to your part of the agreement and pay \$1,000 in addition to the \$500 already paid, I would live up to mine. That \$1,000 was not to be paid in monthly pay'ts. Nothing was said about such an arrangement. If you feel free to go back on your word I shall feel free to act accordingly. Furthermore, it was to be in my name."

Certain other facts here merit notice. She charges that the malign influence of her husband's parents was exercised upon him immediately after the marriage and continuously from that time on. Yet she had no differences, no wordy quarrels with the senior Halls during the six months that she lived in their house. Before she went there to live, it will be remembered, she had been teaching school in San Luis Obispo county, and it was while there she read the letters from Mr. Hall, her versions of which have been given. Yet she writes to "Dear Mother Hall" a chatty and affectionate letter which closes with, "Lovingly yours." When she abandoned her husband in 1911, she wrote to him that:

"I want to love you again, but it just seems as though I am groping blindly in the dark trying to find something on which to base that love."

In no one of her letters is there even a suggestion that the unhappiness which darkened their marital relations was occasioned either because of the loss of the husband's love for her or by reason of the pernicious activities of these defendants directed to that end. One of these letters to her husband, dated October, 1912, contains this sentence:

"Robert, I believe just between you and me that our folks, while not meaning to be, are hindering rather than helping us. I say this with all regard to them for they do not realize it, but we ought to realize it and rise above it."

Her explanation of this sentence, written after all of these difficulties, is neither satisfactory nor illuminating. Notwithstanding the fact that she testifies that her parents disliked her husband, she insists that the language "our folks" had exclusive reference to his parents. For the rest, she asserts that this declaration had nothing to do with the "willful, wrongful, wicked and malicious" efforts which her parents-in-law were, she

charges, persistently making in their effort to destroy her husband's affection for her. One other episode calls for narration. In 1912 the senior Halls with their son Robert had gone to Santa Cruz and were there living together. This plaintiff, returning from Fresno county to Los Gatos, discovered this fact. She filed her complaint for a divorce in Santa Cruz county. After so filing it, she herself went to Santa Cruz county. She accepted her husband's invitation to come to his home, which was also the home of his parents, and there spent one or more nights with him. While they were at the dinner table, her husband was served with the complaint and summons in her suit for divorce. After that she again visited her husband at his parents' home, upon this occasion Mrs. Hall, Sr., being present. She was not at home on the occasion of the dinner table episode. Mrs. Hall saw her son with his arm around the plaintiff's waist. According to plaintiff, her mother-in-law screamed and said, "They will be reconciled again and my troubles will all begin over." The senior Mrs. Hall's explanation is that she thought and declared that such conduct upon the part of a woman was not proper in contemplation of the fact that she was prosecuting an action for divorce against the man who was embracing her.

This ends a fairly complete résumé of the evidence in the case, saving that it should be added that upon its trial, while the wife admitted her loss of affection for her husband, he declared his continued love and devotion to her. It is quite plain that if plaintiff had brought this action because of the alienation of her affections from her husband it would stand, so far as the evidence at least goes, upon a much firmer basis than does the one which actually she did bring. For here is a case where, without hesitation, it may be said that the evidence fails to show either an attempt to alienate the husband's affections or any success for that attempt, if it were actually made. It would be a work of supererogation to dwell at length upon the governing law of cases such as this. It is sufficient to state it briefly, with due reference to the authorities, when at once the utter inadequacy of this evidence will be apparent, if it has not already become so. Actions for damages against parents for the alienation of the affections of their married child from his or her spouse are frequent in the law, and the principles governing the introduction of evidence and the weight to be given it are equally well settled. Having in contemplation the natural solicitude of the parent for its child, and the well-nigh universal experience of mankind that parents in their conduct toward their children are actuated by high and disinterested motives, involving the sacrifice of their own interests for the welfare of the child, it is not to be lightly inferred that the language or conduct of such a parent toward a child is

prompted by evil and malicious motives. Therefore to establish such willful and malicious alienation "the measure of proof must be extremely high." *Beisel v. Gerlach*, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516. Says Chief Justice Kent in *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196:

"If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest. * * * A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum, * * * and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father, than against a stranger."

But "every legal presumption is that the parent acted for the best interest of the child." *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. Quite like the present case in its facts is that of *Busenbark v. Busenbark*, 150 Iowa, 7, 129 N. W. 332, where, after setting forth at great length, as has been done here, the annoying interference of the parents-in-law, the court said:

"The incidents which are described as above set forth in plaintiff's testimony appear to us as very commonplace. They may have been unwise and lacking in delicacy and tenderness, but there is nothing to indicate that they were otherwise than the natural expressions of solicitude of this mother-in-law. Parents often annoy their children with advice, good and bad. The good is often quite as annoying as the bad. This mother-in-law seems to have fought the battle of thrift in a certain way, and she was quite sure that it was the only safe way."

And without amplifying these quotations reference may be made to *Codoni v. Donati*, 6 Cal. App. 83, 91 Pac. 423; *Cripe v. Cripe*, 170 Cal. 91, 148 Pac. 520; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 836; *Pollock v. Pollock*, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; *Fronk v. Fronk*, 159 Mo. App. 543, 141 S. W. 697; *Park v. Park*, 40 Colo. 354, 91 Pac. 830.

The jury after it retired to deliberate upon its verdict came into court seeking further light upon the law, as shown by the following questions asked of the judge:

"Question by a juror: The question is, Judge, in the event we should award damages, will that be protecting the child; should we award damages would there be compensation, protection for the child; would the child be sure of protection? That may be entirely foreign to what we are expected to do, but the argument came up."

"Another juror: That may be foreign to what we are asked to come here for, but we seem to want to know about it."

"Another juror: There has been considerable argument. Some of the jurors argue one way, some another, and the question came up, provided any damages were awarded to the plain-

tiff, would the boy be protected by the court in any respect? The supposition was that probably the plaintiff might marry and the boy would lose any protection which we might accord him."

This transcript from the record affords the only understandable reason for the verdict given. It is but another exemplification of the power which some juries assume of adjusting, without regard to the evidence or issues, the finances of the litigants in accordance with their views. It is another case like that of *Driscoll v. Market St. Cable Ry. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203, where, as this court said:

"A jury catches at a mere semblance or pretense of evidence for the purpose of simply equalizing financial conditions by taking money from one party and giving it to the other without legal cause."

But in this case, no more than in that, has this great, and to the jurors most inexpensive, generosity the sanction of the law.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

JACOBI et al. v. BUILDERS' REALTY CO. (S. F. 7127.)

(Supreme Court of California. March 27, 1917.
Rehearing Denied April 26, 1917.)

1. CARRIERS \Leftrightarrow 288—ELEVATORS.

The use in an apartment house, without warning and protection against the attending perils, of an automatic elevator for the transportation of passengers, when it is in the experimental stage of development and not suitable for such purpose, constitutes negligence, though the appliance is the latest achievement of mechanical and scientific skill, particularly where the owner was chargeable with knowledge of the defects in the construction and operation of the elevator.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1188.]

2. CARRIERS \Leftrightarrow 328(1)—ELEVATOR ACCIDENT—CONTRIBUTORY NEGLIGENCE.

That a person using a defective automatic elevator installed in an apartment house opened the door or stepped through the open doorway into the elevator shaft without looking to see that the cage was in place, did not constitute contributory negligence precluding recovery for her death, where the customary use of the elevator warranted her in believing that the door could not be opened unless the cage was in place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1367.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Mignon Jacobi and others against the Builders' Realty Company. Verdict for defendant, new trial granted, and defendant appeals. Affirmed.

Denson, Cooley & Denson, Stanley Moore, and Geo. K. Ford, all of San Francisco, for

appellant. Joseph Bien and Abram M. Marks, both of San Francisco, for respondents.

HENSHAW, J. Plaintiffs as heirs at law of Annie Jacobson, deceased, brought their action to recover damages for her death, alleged to have been occasioned through the defendant's negligence. Trial was had before a jury, which returned its verdict for the defendant. Plaintiffs moved for a new trial, which motion the court granted. This appeal is taken from the order so doing.

Appellant urges two propositions: The first, that the court erred in granting the motion because the evidence conclusively shows that defendant was not negligent; second, that the court erred because the evidence conclusively establishes that the deceased met her death through her own negligence; that the negligence of the deceased was either the sole negligence established in the case, or at the least was contributory negligence, barring the right of recovery.

The unquestioned facts are that the defendant owned and maintained an apartment house in the city and county of San Francisco. The deceased frequently visited friends residing in this apartment house. For the use of the tenants, their visitors and guests the defendant maintained an elevator in this house of a type known as a "full automatic elevator." This elevator was without attendant, and was operated exclusively by the passengers. One desiring to use the elevator stood in front of a closed door opening on the elevator shaft and pressed a button in the door casing. This pressure made an electrical connection, causing the elevator cage to ascend or descend and stop at the given floor. Its presence there unlocked the door, which the intending passenger then opened and stepped into the cage; closing the door behind him he pressed a button corresponding to the floor to which he desired to go, and, through a second electrical connection, thus made the cage move to the indicated floor. As it started on its journey the door of the floor upon which it was departing again was automatically locked. The door at any floor could not be opened unless the cage was present at that floor, nor, upon the other hand, would the cage when at a floor move unless the door fronting it was closed. Such in theory was the operation of this elevator, and in theory, therefore, it was an extremely safe appliance. In practice, however, it failed to measure up to this. In point of operation it not infrequently happened that the cage would move when a door was opened or on the jar. The evidence in the case went to show that at least a part of this trouble was due to an inherent structural defect in the appliance; that another part of the trouble resulted from the fact that the elevator frequently got out of order

and repair, it being in evidence that this occurred as often as once or twice a week.

[1] There was no eyewitness to the immediate circumstances attending the death of Mrs. Jacobson. Mrs. Harris, the housekeeper, who was in the office on the ground floor of the building, saw Mrs. Jacobson pass in front of her toward the elevator. Subsequently she heard a slight scream. Mrs. Jacobson had fallen down the elevator shaft, and was found dead in the basement. The elevator cage was several floors above. Touching the absence of negligence on its part, appellant argues that the elevator which it had installed and was maintaining was as perfect an elevator as could be constructed under the then condition of electrical knowledge and science; that it was not an insurer of the safety of the passengers using the elevator, and having furnished the best possible appliance it had completely fulfilled its legal duty, and it is said that "it will certainly not be contended that the use of an automatic elevator is negligence." But the contrary of this is the well-established law. If the appliance, though it be the last achievement of mechanical and scientific skill, is not a suitable appliance to be used in the transportation of passengers, to employ it for that purpose is negligence. The law does not contemplate that such appliances, in the experimental stage of their development, may be used to the peril of the life and limb of those who may be invited to employ them, at least without adequate warning and protection against the perils attending such employment. Specifically, as to this elevator, there was no attendant, nor even any sign to warn a passenger of this defect either in its construction or operation, or both. No person using it was informed that a door which was presumed to be tightly locked unless the cage was at its floor could be opened when it was not there. Ignorant of this, persons intending to use the elevator came to rely, and to a certain extent were entitled to rely, upon the fact that if they could open the door at all it would be because the cage was there. The evidence leaves no doubt but that this was the precise situation upon the occasion of this fatal accident. Mrs. Jacobson, familiar with the use of the elevator, in all probability found the door wholly closed or ajar. It opened to her touch, and assuming, by virtue of this fact, that the cage was there, she stepped forward and met her death. Since knowledge of the defects in construction or in operation, or both, was not only chargeable against this defendant, but was actually possessed by it, it is too plain for discussion that in inviting tenants and their guests to use such a contrivance it was sheer negligence not at the same time to have adequately warned and protected them against dangers necessarily attendant upon the use of the elevator under

this defective faulty construction or lack of repair. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

[2] Under its second proposition appellant contends that the negligence of the deceased is established by virtue of the fact that if on opening the door she had used her eyesight, as she was in duty bound to do, she would have perceived that the cage was not there, and that it was therefore contributory negligence upon her part to have made the fatal step. We have hereinbefore sufficiently outlined the course of conduct which the deceased doubtless pursued, and also the conditions which prompted her to that course of conduct. It has thus been made to appear, and indeed the positive evidence is to that effect, that people, using such an elevator and finding that in general practice when such an elevator was operating properly a door could not be opened unless the cage was at that floor, had come to rely, in determining the presence or absence of the cage, upon their ability or inability to open the door. The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked or be convicted of negligence, presents a question of reasonable argument before a jury, but one which cannot be resolved against plaintiffs as matter of law. The language of the Supreme Court of New York is here appropriate:

"An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination." *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 656.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

HICKS v. CHRISTESON. (S. F. 7894.)

(Supreme Court of California. March 28, 1917.
Rehearing Denied April 26, 1917.)

1. BROKERS §41 — PRINCIPAL'S RATIFICATION OF ACTS—WHAT CONSTITUTES.

Where a broker authorized to sell land wrote his principal that he had made a tentative contract on different terms regarding deferred payments, a reply accepting the change did not ratify the broker's act in making an option, instead of a sale, contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 41.]

2. VENDOR AND PURCHASER ¶18(1) — "OPTION"—DEFINITION.

An option is a sale, not of property, but of a right to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.]

For other definitions, see Words and Phrases, First and Second Series, Option.]

3. VENDOR AND PURCHASER ¶18(3) — EXERCISE OF OPTION—WHAT CONSTITUTES.

An optionee's letter to the owner's broker, requesting that he have deeds ready for delivery upon part payment of the purchase price and execution of notes for the remainder, is not an exercise of the option where no promise to pay the purchase price is made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.]

4. BROKERS ¶52 — COMPENSATION — SUFFICIENCY OF SERVICES.

An owner's broker has not earned his commission unless an intending purchaser has made a binding contract, or has offered to the owner, and not merely to the broker, to make such an agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 78.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by E. G. Hicks, doing business under the name and style of the Texas Coast Land Company, against A. Christeson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Judgment and order reversed.

Knight & Heggerty and Wm. M. Madden, all of San Francisco, for appellant. Byrne & Lamson, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was one by which plaintiff sought to recover \$893.90 as damages for defendant's failure to carry into effect an alleged agreement for the sale of real property located in Texas. It was the contention of respondent that defendant was bound under the terms of a written contract of employment to pay to him the amount sued for, by reason of Christeson's failure to carry out an arrangement negotiated by plaintiff for the sale of the property to one McCrory. The date of the original contract between the parties to this action was December 4, 1907. On that day defendant signed a writing, by the terms of which he appointed plaintiff his agent to procure a purchaser, and to enter into a contract to sell 1,365 acres of land in the "Edward Beaty League" in the state of Texas. The agreement was mailed to plaintiff at Victoria, Tex., and was delivered, accepted, and signed by him there. By this writing defendant appointed plaintiff his exclusive agent for 12 months to sell the land at \$4 per acre net to the vendor, and (to quote directly from the instrument)—

"thereafter until said agency is by me terminated in writing with full authority to execute a

contract for the sale of said land in accordance herewith in my name and behalf. 1/3 of the amounts to be received by us for said land shall be paid in cash, and the balance 2/3 within 1, 2 and 3 years shall be secured by the vendor's lien 7% interest in the warranty deed to said land to be executed as soon as purchaser is found and to recite as consideration therein such amount as said agent shall designate."

The other parts of the contract had reference to the furnishing of an abstract of title, and to other matters which need not be discussed here.

After entering into the said contract, the plaintiff, on May 23, 1908, executed an agreement signed by himself and one W. W. McCrory, wherein it was provided that in consideration of \$333 1/2 paid by McCrory to plaintiff the former should have the option from the date of the agreement to November 1, 1908, to purchase the property upon the following terms: \$1.50 cash per acre and notes in the sum of \$3 per acre, bearing interest at 7 per cent. and secured by a vendor's lien. These notes were to provide for the payment of the balance of the purchase price in three equal sums two, three, and four years after date. The amount paid on the execution of the option agreement was to apply on the purchase price if the option should be exercised, and plaintiff as the agent of Christeson promised to convey the land to McCrory, or to whomsoever he might name by a good and sufficient deed of warranty in the event of the exercise of the option. This contract also provided for the tender of a deed or deeds from Christeson to McCrory upon compliance with the terms of the sale. The writing itself was not sent to Mr. Christeson, but he was notified by a letter dated May 27, 1908, that Mr. Hicks had made a "tentative" contract with some person. The letter contained the following sentence:

"He is to pay one-third cash, and give vendor lien notes for the balance, payable in equal payments on the deferred in 2, 3 and 4 years. That is, you will receive \$1 per acre cash, and \$3 per acre in notes."

On June 10, 1908, a letter was written by Christeson to Hicks informing him that Sarah A. Christeson had owned a half interest in the land for 3 years, but undertaking to get her agreement, signature, and acknowledgment to the deed at the proper time if the sale were made. Answering the part of the letter from Hicks to the effect that the latter's commission would be 50 cents per acre, the defendant wrote:

"I observe, in this connection, you indicate that the warranty deed is to recite a consideration of \$5 per acre, which I take to mean that you are selling the land for \$5. If so and your commission being 50 cents, while of course I agreed to accept \$4 to me net, but under the circumstances don't you think it would be about fair to divide the other half dollar, giving me 25 cents, or rather \$4.25 per acre, and you retaining the balance? The payment of \$1 down of course is satisfactory, and is in accordance with previous understanding, the balance to be covered by vendor lien notes, payable in two,

three and four years, and if sale is made you can have deed drawn, and send to me for signature and execution."

On September 21, 1908, A. Christeson wrote advising Mr. Hicks that he had transferred all of his interest in the land to Sarah A. Christeson, formerly his wife. "Of course," wrote defendant, "any further negotiations in regard to this land will have to be carried on with her."

[1, 2] Appellant calls attention to the fact that the contract of option itself was never sent to him for his inspection, and he attacks the court's finding that there had been a ratification of the optional agreement. We agree with appellant that no such ratification ever took place. There was nothing in the letter of respondent to Christeson dated June 10, 1908 (upon which the court based its conclusion that Christeson had consented to a modification of the original contract), by which Christeson authorized or ratified any option by which the land might be held out of the market and subjected to the whim of any prospective purchaser. The only effect of that letter was to enlarge the authority of the agent with reference to the deferred payments. The writer did not give him further power to accept an agreement different in its essence from the contract for the sale of Christeson's land which he was empowered to execute. He was not informed by the agent regarding the name of the other party to the "tentative contract," or the payment for the option, or the arrangement that, upon default of the option holder, such sum should be forfeited not to Christeson, but to Hicks, and unless we can say that these were matters which, under the original contract of agency, were left to the discretion of Hicks, we must hold that the option was not binding upon Christeson. The agreement which is the fountain head of any authority possessed by plaintiff gave him the right to contract for a sale. An option is by no means a sale of property, but is the sale of a right to purchase. *Dreyfus v. Richardson*, 20 Cal. App. 800-806, 130 Pac. 161; *Pehl v. Fanton*, 17 Cal. App. 247, 119 Pac. 400—cases which this court approved by declining to review the decisions. Therefore, if we seek to justify the court's finding upon the letter written by the vendor to his agent, we see that there was no meeting of the minds of Hicks and Christeson except upon the one question of the modification of the terms of the sale.

[3, 4] But respondent insists that he furnished a buyer who was able, ready, and willing to purchase the land on the terms proposed, and that he is therefore entitled to his commission. The most complete answer to this contention is found in the fact that so far as the evidence shows McCrory never agreed to purchase the property upon the terms of the option. Since a contract for the sale of real property must be in writing (section 1624, subd. 5, Civ. Code), it must follow, says appellant, that McCrory's election

to purchase, if of any value, must have been expressed in writing. The writing upon which reliance is placed by respondent is a letter by McCrory to him. This was undated, but according to the writer's testimony was mailed about the month of September, 1908. There was no pretense that McCrory ever dealt directly with Christeson, and although the former testified that he had orally informed Hicks that he intended to exercise his option, he did not give the details of any conversation; therefore, even if we were to hold that the court might have based the finding of election to purchase upon oral testimony, the strongest evidence which was offered on that subject was in the language of the letter of McCrory to Hicks, and that language did not bind McCrory to take the land. The pertinent parts of the letter are as follows:

"I am inclosing you herein deed to be signed by A. Christeson and Sarah Christeson also the notes to be signed by me. * * * Under our agreement I have until November 1st to close up the deal, but as Mr. Christeson is sometimes away from home, hard to hear from, etc., I will I think be able to get the matter closed up before that time. I am sending the deed and notes along now with the idea that they will be back here by October 1st. You can instruct Mr. Christeson to send the deed properly executed by himself and Sarah Christeson to the Allen National Bank of Edna, Edna, Texas, with instructions to deliver same to me upon my signing the inclosed notes and paying to his credit the sum of \$1,355, and to your credit the sum of \$677.50, less the forfeit money already deposited with you. * * * I have had the abstract made, and it runs about 35 pages of typewritten matter. The affair that you sent me was no abstract at all. * * * I have dropped the matter of having the line through the brush run out, as it is about two miles long, and all very thick timber, and the fact is that you can hardly get help to do this work among the ticks and in the heat, so I have drawn the deed for the acreage shown by the old surveys, to wit, 1,355 acres. I think Mr. Christeson is under his contract with you to furnish an abstract, so I will expect him to pay for the abstract, as the matter he sent was no abstract at all, and would be of no use at all to me in case of sale, and I have to furnish abstract."

This letter still leaves the matter within the option and caprice of McCrory. He does not say in this letter that he elects to exercise his option, nor that he will purchase, nor that he will sign the notes and pay the money. The deed was not drawn for 1,88½ acres, the area specified in the contract between Hicks and Christeson, but for a smaller tract of land, and he seeks to charge Christeson with the expense of preparing an abstract which the latter had never ordered. There was nothing in the option requiring the deposit of a deed in escrow in Texas or elsewhere, and the prospective vendee could not arbitrarily read such a requirement into the contract, select the place or escrow, and then complain that the other party to the option had violated the agreement. It is evident that if Christeson had complied with all of the terms of the letter of McCrory to his agent, and McCrory had failed to com-

plete the transaction by signing the notes and paying the money, Christeson would have been without a cause of action for specific performance of a contract of sale. His only recourse would have been against Hicks for the amount which McCrory had deposited with the latter as a consideration for the option. Unless an intending purchaser has entered into a contract binding him to buy the property, or has offered to the vendor and not merely to the broker to make such an agreement, the broker has not earned his commission. *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200; *Mott v. Minor*, 11 Cal. App. 774-779, 106 Pac. 244; *Douglas v. Spangenberg*, 23 Cal. App. 294-296, 137 Pac. 1103; *Massie v. Chatom*, 163 Cal. 772-776, 127 Pac. 56. It is not pretended that an offer of any sort was made to Christeson personally, and the letter to Hicks was nothing more than a proposal for a change in the terms of the option. It follows that even if we give to the optional agreement all of the force accorded to it by the learned superior court, we must reverse the judgment because the proof fails to show any binding contract for the sale of Christeson's land. This conclusion makes it unnecessary to consider any of the other assignments of error, except the plea of the statute of limitations.

Appellant contended that the cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The original complaint concededly was filed within the statutory time, and although the amended complaint was prepared after the expiration of the period limited by the statute, we are satisfied that both pleadings relate to the same cause of action.

The judgment and order are reversed.

We concur: HENSHAW, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; LAWLOR, J.

LANGFORD et al. v. SAN DIEGO ELECTRIC RY. CO. (L. A. 3805.)

(Supreme Court of California. March 31, 1917.
Rehearing Denied April 30, 1917.)

1. APPEAL AND ERROR ⇨1064(1)—REVIEW—PREJUDICIAL ERROR.

Where on the whole record the evidence is in such conflict as to have supported a verdict for either party, any substantial error in the trial or in the instructions defining the relative rights of the parties must be regarded as prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

2. TRIAL ⇨251(8)—INSTRUCTIONS—ISSUES—OPERATION OF STREET RAILROADS.

In action for injuries to automobile passengers when struck by a street car, instruction that it was the duty of the street railway to employ competent and careful persons and of the motorman to exercise proper care to avoid accidents, and defendant would be liable for

any injuries proximately caused by its failure in such respects, and refusal of instructions that the plaintiff did not complain that the motorman was incompetent, and the only question was his due care on the premises, were error; the competency of the motorman not being an issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593.]

3. TRIAL ⇨296(3)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

The vice of the instruction given was not remedied by the concluding words that "defendant would be liable for any injury proximately caused by its failure in such respects."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

4. STREET RAILROADS ⇨118(1)—OPERATION—PERSONAL INJURIES—SCOPE OF INQUIRY.

In action for personal injuries when defendant's street car collided with an automobile, defendant was entitled to have inquiry limited to conduct of motorman at the time, and not his general capacity.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258, 259.]

5. APPEAL AND ERROR ⇨1170(1)—REVERSAL—DISREGARD OF ERROR.

Where the court on appeal cannot say that in the absence of the errors committed the verdict would have been the same, it cannot, even under Const. art. 6, § 4½, disregard the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540.]

6. STREET RAILROADS ⇨81(1)—OPERATION—COLLISION—DUTIES OF MOTORMAN.

It is the duty of the motorman on a street car to exercise ordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172, 173.]

7. STREET RAILROADS ⇨85(3)—OPERATION—COLLISIONS—RIGHTS OF DRIVERS.

An automobile driver, when the street is impassable, has the right to drive upon the street car track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195.]

8. MUNICIPAL CORPORATIONS ⇨703(1)—STREETS—USE FOR TRAVEL.

San Diego ordinance requiring every driver of a vehicle to travel on the right side of the street as near the right-hand curb as possible does not prohibit the use of the left-hand side of the street under all circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509.]

9. STREET RAILROADS ⇨117(26)—COLLISIONS—QUESTIONS FOR JURY.

Evidence held to present question for jury whether automobile driver was negligent in attempting to pass on left of street car when the street was undergoing repairs.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 250, 255.]

10. STREET RAILROADS ⇨110(2)—OPERATION—COLLISIONS—LAST CLEAR CHANCE DOCTRINE—PLEADING.

The facts showing the applicability of the last clear chance rule need not be alleged in the complaint.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224.]

11. STREET RAILROADS ⇨118(2)—TRIAL ⇨194(16)—COLLISIONS—INJURIES TO PERSONS—INSTRUCTION—CHARGE ON FACTS.

In action for injuries to passengers in an automobile when struck by a street car, an instruction, that street cars with proper appliances are easily stopped, was misleading, in-

definite in using the words "easily stopped," and objectionable as a charge on a fact.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 280, 261; *Trial*, Cent. Dig. § 466.]

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Ada Cooper Langford and husband against the San Diego Electric Railway Company. Judgment for plaintiffs and order denying new trial, and defendant appeals. Reversed.

Read G. Dillworth, of Coronado, and E. Swift Torrance, of San Diego, for appellant. Adam Thompson, of San Diego, for respondents.

SLOSS, J. The plaintiffs are husband and wife. They brought this action to recover damages for injuries received by the wife in a collision between an automobile in which the plaintiffs were riding and a street car belonging to the defendant company. There was a trial by jury, resulting in a verdict and judgment for \$5,000 in favor of the plaintiffs. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The points raised by the appellant turn principally upon the court's instructions to the jury. To understand these questions, their discussion should be preceded by a brief statement of the facts.

The defendant operates a double-track line of electric street railway on Washington street and other streets in the city of San Diego. Washington street runs east and west. Among the streets intersecting it are Falcon, Goldfinch, and Hawk streets. Falcon street is the most easterly of these, the next street to the west being Goldfinch street, and Hawk street the one next beyond. The accident resulting in Mrs. Langford's injury occurred on the evening of March 13, 1913, at the intersection of Washington and Goldfinch streets. The pavement of Washington street was being repaired, and the only part of the street that was passable was that occupied by the tracks of the railroad company, including a space of two feet in width on either side, beyond the outer rails. The automobile was driven by Norton Langford, the husband. He was coming easterly on Washington street. As Langford crossed Hawk street, an east-bound car of the defendant was running on the southerly track, a short distance ahead of him. He followed on the southerly track, until the car came to a stop at or near the intersection of Goldfinch street. There is a sharp conflict over what took place then. Langford's testimony was, in effect, that the street car stopped some distance west of Goldfinch street to take on passengers; that in order to avoid the delays which would be imposed upon him by the frequent stops of the street car, if he remained behind it, he turned out to the left or north track, with the intention of passing

around the east-bound car, and getting in front of it. The street car started again as he got abreast of it, and, as Langford drew up, the motorman increased the speed of the street car. About this time Langford saw a west-bound car ahead of him on the northerly track, at a distance of one or two blocks. Concluding that he would not be able to get ahead of the east-bound car, and cross to the southerly track in front of it before the approaching west-bound car would be upon him, Langford stopped his automobile with the intention of falling in to the right behind the east-bound car. This brought his automobile to a standstill upon the north track, about the middle of the intersection of Goldfinch and Washington streets. Before he was able to get his machine out of that position, the west-bound street car ran into him.

[1] The complaint charged that the collision was caused by the careless, negligent, and unskillful running of the car by the defendant's servants. The answer denied negligence, and alleged that the collision was caused by the negligence of Langford in turning onto the northerly track at a time when the west-bound car was so close that a collision was inevitable. The evidence offered by the defendant tended to support these claims. There was ample and substantial testimony from which the jury might well have concluded that the west-bound car was very near the intersection of Goldfinch street when Langford drove his automobile onto the northerly track, and that the motorman driving said car was not, and could not have been, aware of Langford's presence on the north track in time to enable him to stop the street car. The appellant does not claim, and we do not suggest, that the evidence was not sufficient to support the verdict of the jury. Upon the whole record, however, there is room for serious doubt whether responsibility for the accident in reality rested upon Langford or upon the defendant. Under these circumstances, any substantial error, if such there was, in the instructions defining the relative rights and obligations of the driver of the automobile and the person in charge of the street car, must be regarded as prejudicial.

[2] Among other instructions, the court gave the following:

"You are further instructed that it is and was the duty of the defendant corporation to employ competent and careful persons to manage its street cars, and that it was and is the duty of the motorman in charge of the street cars of the defendant to exercise proper care, and keep a proper lookout, in order to avoid, if possible, all accidents and injury, and the defendant would be liable for any injury proximately caused by its failure in these respects."

The court refused to comply with the defendant's request to instruct the jury:

"Plaintiffs do not here complain that the motorman on defendant's west-bound street car was incompetent or inexperienced, and the only question for you to consider with reference to

him is whether on the occasion of the accident he acted with the care and prudence which a reasonably prudent man under the circumstances would have exercised."

The appellant assigns as error the giving of the one and the refusal to give the other instruction. These assignments are well taken. The question of the competency or incompetency of the motorman was not an issue, nor could it have been made an issue, in the case. The great weight of authority supports the rule that in actions of this kind the competency of the person claimed to have acted negligently, or his reputation for care, is not a subject of inquiry. The decisions in this state are definitely in accord with this view. In *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 564, 47 Pac. 452, the court said, in dealing with this question:

"Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duty. The question was: Did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question therefore was: What was the conduct of the servant at the time? And this was to be unembarrassed by any consideration of his general qualifications."

In the earlier case of *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207, the court had declared the same rule, although it was there applied to a somewhat different state of facts. Quoting from 2 *Thompson on Negligence*, p. 804, the court said, in the *Towle* Case, that:

"The principle is that the question whether a person was at a given time in the exercise of due care is to be resolved upon evidence of what took place at the time, and not upon evidence of the general character he may sustain."

See, also, *Spear v. United Railroads*, 16 Cal. App. 637, 117 Pac. 956; *Carr v. Stern*, 17 Cal. App. 397, 120 Pac. 35; *Minot v. Snavelly*, 172 Fed. 212, 97 C. C. A. 30, 19 Ann. Cas. 996.

[3, 4] Under instruction 13, the jury was authorized to hold the defendant liable because it had employed an incompetent motorman, even though the evidence of the facts surrounding the accident may not have been sufficient, in and of itself, to show that the motorman had failed to exercise due care. The vice of the instruction is not remedied by the concluding words that "defendant would be liable for any injury proximately caused by its failure in these respects." The argument is that the mere employment of an incompetent motorman could not proximately cause the injury, if the motorman was not negligent on the particular occasion. But the answer to this suggestion is that the natural effect of testimony of incompetency is

to lead the jury to infer that the person whose conduct is in question failed to act properly at the time and in the very matter under investigation. *Wigmore on Evidence*, § 65. The error is emphasized by the court's refusal to give the instruction requested by the appellant. The requested charge was designed to limit the jury, on the question of the defendant's negligence, to an examination of the conduct of the motorman at the very time in controversy. As we have seen, the defendant was entitled to have the inquiry so limited.

[5] If there had been no evidence bearing upon the question of the motorman's competency, these errors might, perhaps, be regarded as of little moment. But the bill of exceptions contains an explicit statement that the motorman, when testifying as a witness, was dull, slow, and hesitating; that he showed a lack of knowledge of the appliances used on the car; and that "the jury might readily have drawn the conclusion from his manner of testifying, and his appearance on the witness stand, that he was incompetent to serve as a motorman at the time of the collision." As we have already said, the evidence left the true cause of the accident in great doubt. We cannot say that, if this instruction had not been given, the jury ought, nevertheless, to have found in favor of the plaintiffs. We cannot even, after a careful review of the evidence, say that the jury, under proper instructions, would probably have reached a conclusion in favor of the plaintiffs. Under these circumstances, we would not be justified, even under the liberal provisions of section 4½ of article 6 of the Constitution, in disregarding the error and denying a new trial.

[6] As a guide to the further proceedings which must be had, we may refer briefly to some criticisms directed by the appellant against the remaining instructions of the court. We are not, in this, to be understood to hold that the objections which we find to be good would alone justify a reversal. Instruction 14 states that it is the duty of drivers of street cars to have their power under control, and so use the control "as to avoid injury whenever possible." The words "whenever possible" put too stringent an obligation upon the operator of the car. His duty is to exercise ordinary care, and the court so instructed the jury, in other parts of its charge. It would be well, upon another trial, to obviate possible confusion by modifying instruction 14.

[7] We think there was no substantial error in instructions 12, 15, and 17, regarding the right of the driver of the automobile to drive upon the part of the street occupied by the street car track. It is true, generally, and more especially where, as here, the portion of the street beyond the tracks is not passable, that the driver of any vehicle has the right (always subject to the duty to exercise due care) to drive on the part

of the street occupied by the street car rails. The appellant's complaint seems to be based on the proposition that it was negligent for the plaintiff to drive onto the left-hand track. But this subject was covered by other instructions, and was not involved in the instructions now under consideration.

[8, 9] A point is made of an ordinance of the city of San Diego, providing that every person driving a vehicle on any street shall "on all occasions when it is practicable so to do, travel on the right side of such street, and as near the right-hand curb thereof as possible." The ordinance was not intended to prohibit the use of the left-hand side of the street under all circumstances. The only part of the street that was passable was that occupied by the tracks. There was no way for the plaintiffs to pass the east-bound car except by going to the left of it. In a certain sense it was "practicable" for them to remain behind that car, stopping whenever it stopped, and being delayed by it as long as it remained upon the portion of Washington street that was undergoing repairs. But we do not think that the ordinance should be given so strict an interpretation. Whether it was reasonable, under the circumstances, to hold the driver of an automobile to this inconvenient mode of travel, was, we think, a question for the jury. They may well have concluded that it was not "practicable" for Langford to keep on the right of the road where, by so doing, he would be unduly blocked in his progress.

[10] Complaint is made of the action of the court in instructing the jury upon the last clear chance doctrine. It is exceedingly doubtful whether there was any evidence to which these instructions were applicable. We do not, however, express any definite view on this point, as the evidence may be different upon another trial. We do not agree with the appellant's contention that facts showing the applicability of the "last clear chance" rule must be alleged in the complaint. The appellant relies upon *Esrey v. Southern Pacific Co.*, 88 Cal. 399, 406, 26 Pac. 211. The decision did not turn upon the question of pleading, and what is said in the opinion on this point is little more than a passing intimation. On the second appeal in the same case (*Esrey v. Southern Pacific Co.*, 103 Cal. 541, 546, 37 Pac. 500), the court seemed to view with doubt the suggestion, made on the first appeal, that the complaint should have charged that the defendant acted willfully and wantonly, but was compelled to accept it as binding under the "law of the case" rule. Well-considered cases in other jurisdictions hold that the plaintiff may rely upon the last clear chance doctrine where he has made proper allegation that his injury was caused by the defendant's want of reasonable care, and the defendant has denied this allegation. *Nathan v. Railway*,

118 N. C. 1066, 24 S. E. 511; *Crowley v. B. C., etc., Ry. Co.*, 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918. As was said in the North Carolina case:

"In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by defendant that the contributory negligence of the plaintiff was the cause, necessarily involves the question whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty."

[11] Instruction No. 19, given at the request of the plaintiffs, contained the statement that "street cars with proper appliances are easily stopped." This declaration should have been omitted. In the first place, it involves a charge upon a matter of fact. Next, it was misleading, in that it suggested to the jury that the sufficiency of the appliances on defendant's cars was involved, whereas no such question was presented by the pleadings or the evidence. Still further, the words "easily stopped" are too uncertain to furnish a standard of any value. One person might think that a car was "easily stopped" if it could be stopped within 40 feet, while another might think it could not be easily stopped unless brought to a standstill after running 10 or 15 feet.

Some other instructions are criticized; but we think that, on a reading of the charge as a whole, the objectionable matter pointed out by the appellant is not such as to have caused any material misunderstanding on the part of the jury.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

In re SEILER'S ESTATE. (S. F. 8189.)
(Supreme Court of California. March 5, 1917.)

APPEAL AND ERROR ~~845~~(1)—TIMELY APPEAL.

Although Code Civ. Proc. § 1715, provides that an appeal must be taken within 60 days, an appeal from an order admitting a will to probate is timely if taken within 30 days after determination of a motion for a new trial in view of section 989 as amended in 1915 (St. 1915, p. 206), providing that if proceedings are pending for a new trial the time for appeal from the judgment shall not expire until 30 days after entry of the order for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the Estate of Paul Seiler, deceased. Motion to dismiss an appeal from an order admitting a will to probate. Motion denied.

J. B. Pemberton and A. G. Kazebeer, both of San Francisco, for appellant Louise Malone. Cullinan & Hickey, Wilson & Haines, Hugh K. McKevitt, and Theo. Bell, all of San Francisco, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from an order admitting a will to probate on the ground that the appeal was not taken within the time allowed by law. It was not taken within 60 days after the date of the entry of the order (section 1715, Code Civ. Proc.), but it was taken within 30 days after a motion for a new trial duly made was determined (section 939, Code Civ. Proc.).

The court is of the opinion that the provision of section 939, Code of Civil Procedure, as amended in 1915 (St. 1915, p. 205), providing that if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until 30 days after entry in the trial court of the order determining the motion for a new trial or other termination in the trial court of the proceedings upon such motion, is applicable in the matter of an appeal from an order admitting a will to probate, and for that reason the motion to dismiss the appeal is denied.

KLOSTER v. HAWN. (Civ. 1905.)

(District Court of Appeal, First District, California. Feb. 27, 1917.)

1. LANDLORD AND TENANT §322—CROPPING CONTRACTS—CONSTRUCTION—ACTS OF PARTIES.

Regardless of exact terms of a cropping contract, the trial court will not be put in error for interpreting it in accordance with the acts of the parties in making a number of partial settlements.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357.]

2. APPEAL AND ERROR §1032(2)—BURDEN OF SHOWING ERROR—REJECTION OF EVIDENCE.

Plaintiff and defendant were landlord and tenant on share-cropping lease. The landlord sued in unlawful entry and detainer and later for recovery of money received by the tenant for the crops. The actions were tried together, and the tenant cross-complained for money and labor in cropping the land. Plaintiff sought to show that he had ordered a surveyor to check over the land and determine what work defendant did, and also to introduce testimony of the surveyor as to what he found. The surveyor's maps were admitted, but his testimony and that of plaintiff were excluded in rebuttal, plaintiff having gone into the matter on direct examination. The record fails to show that the evidence rejected would have added anything shown by the maps, nor does it show the issues in the unlawful detainer action. *Held*, that such showing does not sustain plaintiff's burden of proving error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4043, 4049.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Jules Kloster against C. W. Hawn, wherein defendant filed a cross-com-

plaint. Judgment for defendant, and plaintiff appeals. *Affirmed*.

L. N. Barber and F. W. Docker, both of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondent.

LENNON, P. J. This is an appeal by the plaintiff from a judgment in the defendant's favor for the sum of \$340 and costs upon his answer and cross-complaint.

The record discloses the following facts: During the years from 1913 to 1915, inclusive, the plaintiff and defendant stood in the relation of landlord and tenant with respect to a certain tract of land in Fresno county, which the defendant was to work on shares under a cropping lease. During the close of the latter year the plaintiff commenced an action in unlawful detainer for the ouster of the defendant from the land. The defendant apparently appeared and answered in that action, and, issues being thus made up, the cause was ready for trial. In the meantime the plaintiff commenced the present action against the defendant for the recovery of money alleged to have been received by the latter for the plaintiff's use and benefit from the sale of certain crops raised upon the land. The defendant appeared in that action with an answer and cross-complaint for money expended in plowing and checking the land in question upon an oral agreement with the defendant providing for the extent and compensation of such work. Plaintiff answered said cross-complaint, admitting the making of an oral agreement with the defendant for the leveling, checking, plowing, and seeding of certain portions of the land in question, but denying that its terms were those alleged by the defendant, and averring that the defendant had not performed or completed the performance of his part of said agreement. The issues in this action having been thus made up, both of said causes came on for trial, whereupon it was stipulated by counsel for the respective parties that the two causes should be tried together. The court permitted this to be done, and upon such dual trial the plaintiff apparently took the laboring oar, and undertook to testify upon his examination with respect to the amount of leveling and checking of the land which the defendant had done during the years in question, and also as to the various transactions between the defendant and himself relating to said agreement and its performance, and also as to the settlements made from time to time as the products of the land were sold and their proceeds divided. The defendant also testified as to the terms of the oral agreement between the parties, with respect to the leveling, checking, and cultivation of the land, and the application from time to time of the moneys realized from the disposition of its crops.

The court found from the evidence before it that there was a balance due the defendant of \$340, and rendered its judgment accordingly. Plaintiff appeals.

Appellant's first contention is that the evidence is insufficient to sustain the findings of the court in the particular respect that it fails to show that the defendant had so far completed the work of leveling and checking the land in question, according to the terms of the oral agreement between the parties, as to be entitled to recover the amount awarded him, and that in respect to his cross-complaint for the value of such work, his action was prematurely brought.

[1] From a reading of the whole record we are unable to say, however, that the court was in error in reaching the conclusion arrived at by it. Whatever may have been the precise terms of the original oral understanding between the parties as to the extent to which the work of the defendant in leveling and checking the whole of the land, or even the whole or any part of one or more of its several lots, should proceed before he was entitled to be paid for such work, the record does show that the parties by their conduct in making their settlements from time to time, as the products of the land were sold, placed their own construction upon the contract in suit, which in effect was that the defendant was to be paid from time to time a specified sum per acre for the work actually done by him, regardless of whether or not the whole or any part of said work had been completed. We are not, therefore, prepared to say that the trial court was in error in interpreting the contract in suit in keeping with the conduct of the parties thereto. Nor can we say from the record before us that the sum awarded to the defendant was not justified by the evidence adduced upon the whole case.

[2] The next and final contention of the plaintiff is that the court erred in its refusal to permit him to testify in rebuttal as to his having ordered a surveyor to make a survey of the land for the purpose of showing the amount of leveling and checking done by the defendant, and was also in error in refusing to permit the surveyor to testify as to what work his survey showed to have been done by the defendant. Had this case been tried alone there could be no doubt that the ruling of the trial court in refusing to permit the introduction of this offered evidence upon the objection that it was not rebuttal would be error. It was clearly in proper rebuttal of the defendant's evidence in support of his cross-complaint in this action; but whether it was prejudicial error sufficient to require a reversal of the judgment is another question. The only matter to which the plaintiff was called in rebuttal was as to his having ordered the survey. This would seem to be rather immaterial, for whether or not the

plaintiff had ordered the survey would not affect the integrity or value of the survey or of the surveyor's testimony regarding it had he been allowed to so testify. The material error, if any, lay in the refusal of the court to permit the testimony of the surveyor to be given; but in this respect the record shows that the surveyor, when called as a witness by plaintiff, did testify without objection to the extent of identifying the maps which he had made purporting to show the amount of leveling and checking which had been done by the defendant upon the land. These maps were then offered and admitted in evidence; and it was after these were before the court that the objection was for the first time made and sustained to the questions asked of the surveyor as to the leveling and checking of the land. The maps are not before us; and we are therefore unable to say that the evidence of the surveyor, if presented, would have added anything to what had already been shown upon the face of his map. The burden was upon the appellant to affirmatively show reversible error of the court in its ruling in respect to this matter; and we cannot say that such error appears in the absence of some affirmative showing or claim that the testimony of the surveyor would have added anything to that which had been already exemplified on the face of his maps. Aside from this, however, there is no record here as to what the issues were in the action for unlawful detainer, and in which it may well be that the evidence above offered would not have been proper rebuttal. It does appear, however, that upon the trial the plaintiff did assume to testify in chief as to the deficiencies in the defendant's work. The trial court, with the record of both cases before it, held that the plaintiff, having gone into the matter in chief, should have exhausted his proofs. In view of the state of the record we are unable to say that in so doing the court abused the discretion with which by the Code it is invested as to the order of proof in the dual trial before it.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

PIERCE v. EMPLOYERS' INDEMNITY EXCH. et al. (Civ. 2303.)

(District Court of Appeal, Second District, California. Feb. 27, 1917.)

1. COURTS \S 212 — DISTRICT COURT OF APPEAL—JURISDICTION.

In an action at law wherein the amount of the demand was less than \$2,000, the appeal should have been taken to District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 511, 513-515.]

2. COURTS ⇐212—COURT WITHOUT JURISDICTION—POWER TO MAKE ORDERS—STATUTE.

Const. art. 6, § 4, defining the appellate jurisdiction of the Supreme Court and of the District Courts of Appeal, and providing that no appeal to either of such courts shall be dismissed because not taken to the proper court, but the cause shall be transferred to the proper court on just terms, does not give to the court to which an appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders except the order of transfer, and, though the Supreme Court may transfer any case from a District Court of Appeal to the Supreme Court, until it has made such order of transfer it is without jurisdiction over cases in which the Constitution provides that appeal shall be taken to a District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513-515.]

3. APPEAL AND ERROR ⇐773(2)—FAILURE TO FILE OPENING BRIEF—DISMISSAL.

Where the time for filing appellant's opening brief had expired when notice of motion to dismiss was served and filed, respondent is entitled to dismissal as called for by her motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 8108.]

Action by Ita Pierce against the Employers' Indemnity Exchange and another. From a judgment for plaintiff, the named defendant appealed to the Supreme Court, which transferred to the District Court of Appeal, and plaintiff moves to dismiss. Motion to dismiss granted.

Oliver O. Clark, George M. Pierson, and Claud B. Andrews, all of Los Angeles, for appellant. Ingall W. Bull and Fleming & Woodard, all of Los Angeles, for respondents.

PER CURIAM. [1] This was an action at law in which the amount of the demand was less than \$2,000, and the appeal should have been taken to this court. Nevertheless the defendant Employers' Indemnity Exchange appealed to the Supreme Court, and filed its transcript with the clerk of that court on the 19th day of December, 1916. By order of February 6, 1917, the Supreme Court transferred the case to this court; the transfer being made on jurisdictional grounds. No brief having been filed on behalf of the appellant, the respondent Pierce, on February 8, 1917, served and filed notice of motion to dismiss, stating, among other grounds of motion, that appellant had not filed its brief or points and authorities within 30 days from the time of filing the transcript. More than 30 days after the transcript was filed, and before the transfer of the case to this court, the Chief Justice of the Supreme Court signed an order extending appellant's time for filing points and authorities until the 19th day of February, 1917; and on the 19th day of February, 1917, the presiding justice of this court signed an order which was entered in the minutes, extending appellant's time for the same purpose for a further period of fifteen days. Without doubt the order obtained from the

Chief Justice of the Supreme Court was inadvertently made by him without having his attention called to the fact that the appeals had been taken to the wrong court. Section 4 of article 6 of the Constitution, after defining the appellate jurisdiction of the Supreme Court and of the District Courts of Appeal, states that no appeal to either of those courts shall be dismissed for the reason only that the same was not taken to the proper court, "but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

[2] It has never been held that this saving clause of the Constitution gives to the court to which the appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders, in such a case, except the order of transfer. It is true that the Supreme Court may transfer any case from a District Court of Appeal to the Supreme Court; but, until it has made such order of transfer, it is without jurisdiction over cases in which the Constitution provides that the appeals shall be taken to a District Court of Appeal. The appellant cannot by its own mistake confer jurisdiction contrary to the Constitution. The order made by the presiding justice of this court extending the time of appellant for filing its opening brief was made without knowledge that respondent had served and filed a notice of motion to dismiss the appeals, and would not have been made if that fact had been called to his attention. That order, therefore, is revoked.

[3] As the time for filing appellant's opening brief had expired on the 8th day of February, when the notice of motion to dismiss was served and filed, respondent is entitled to a dismissal as called for by her motion. The rule to this effect has been settled by several decisions, among which are *Barnhart v. Conley*, 17 Cal. App. 280, 119 Pac. 200; *McCabe v. Healey*, 139 Cal. 80, 72 Pac. 359; *Coats v. Coats*, 146 Cal. 443, 80 Pac. 694.

Respondent's motion to dismiss the appeals is granted.

CHAMBERS et al. v. BELMORE LAND & WATER CO. (Civ. 2219.)

(District Court of Appeal, Second District, California. Feb. 24, 1917.)

1. LANDLORD AND TENANT ⇐159(2)—LEASES—BREACH OF CONTRACT—EVIDENCE.

In an action against a landlord for breach of an agreement in a lease contract to construct headgates to enable the tenant to irrigate the land, evidence held to warrant a finding that the landlord's failure to construct such headgates was the proximate cause of the damage sustained by the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 611.]

2. LANDLORD AND TENANT §159(2)—DEFENSES—DILIGENCE.

Where the failure of the landlord to construct headgates enabling lessees to irrigate land caused a crop failure on a large portion of the land planted, the lessees cannot be denied recovery on the ground that they should have constructed the headgates themselves, it appearing that such gates would have cost upwards of \$2,000, for in such case the lessees had the right to rely on the landlord's agreement, and the case does not fall within the rule warranting denial of damages where one injured might have prevented the injury by reasonable diligence and slight expense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 611.]

3. NEW TRIAL §102(2)—RIGHT TO—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence which was almost wholly cumulative, particularly where it appeared that the unsuccessful party by the exercise of reasonable diligence could have procured such evidence at trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 211.]

4. COURTS §91(1)—DECISIONS—PRECEDENTS.

The last decision of a court of last resort, though inconsistent with an earlier decision, is deemed to establish the law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by B. L. Chambers and another against the Belmore Land & Water Company, a corporation. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Barstow, Beach & Rohe, of Los Angeles, for appellant. Drew Pruitt and H. G. Redwine, both of Los Angeles, for respondents.

SHAW, J. The subject of this action is defendant's alleged liability for damages due to its breach of the terms of a contract of lease made to plaintiffs. Upon trial judgment was entered in favor of plaintiffs, from which, and an order denying its motion for a new trial, defendant appeals.

[1] The evidence tended to establish the following facts: Defendant was the owner of a large tract of land in Fresno county, which it leased, for the growing of grain thereon, to plaintiffs, who agreed to pay defendant as rental therefor one-fifth of the crop grown thereon during the season of 1912. The land was located in an arid zone, by reason of which fact it was necessary in the growing of crops thereon to irrigate the same. The source of supply of water for such irrigation was two streams known as Silver creek and Panoche creek, having their sources in the mountains, and which as a rule during the rain and flood seasons afforded a supply of water, which, however, varied from year to year, depending upon the precipitation of moisture upon the watershed tributary to said creeks. In order to utilize the

waters of the creeks for irrigating the land, it was necessary to construct a dam across the streams whereby to divert the water therefrom into a main canal, by means whereof and lateral ditches connected with said main canal, it was distributed over the land. The lease contained provisions as follows:

"It is agreed by party of the first part (defendant), that he shall construct a dam across the Silver creek and Panoche creek on or before December 20, 1911, and to place headgates at different points of turnouts. It is agreed by party of the second part (plaintiffs), that he shall use all water from Silver creek and Panoche creek diligently, which means, as long as water can be had in heads of one hundred inches or more, and that it shall be turned either upon the land farmed by said second party, or upon other land owned by party of the first part. It is further agreed on part of party of the second part (plaintiffs), that he shall keep said dam and gates in repair and that he will attend said dam in person or by reliable party during heavy rains."

Plaintiffs entered upon the land and in the winter of 1911 and 1912 plowed and prepared about 800 acres thereof for grain, which they seeded to barley, and also reconstructed and cleaned the lateral ditches extending throughout the tract for use in irrigating the grain. Defendant constructed the dam across said streams, completing the same some time in February and prior to there being sufficient rainfall to affect the flow of water in the creeks, but at all times neglected and refused to construct the headgates which it agreed to install in the main canal for the purpose of diverting water therefrom into the lateral ditches, the cost of which would have been about \$2,000. It appears there was little rainfall upon the watershed tributary to said creeks during the winter, but that about March 1st there was a storm as a result of which the creeks were filled with water for a period of about 50 hours, during which time plaintiffs, as best they could without the headgates, and with a sufficient force of men and by means of dirt dams constructed in the main canal, irrigated about 100 acres of the barley which they had planted. It further appears that, had defendant complied with its agreement to put in the headgates in the main canal as promised, the flow of waters in said creek during said 50 hours could have been used to properly irrigate at least 400 acres of said barley, and that for want of the headgates it was impossible for plaintiffs to control the water and conduct it upon the land, as a result of which at least three-fourths of the water which might have been used for irrigation with the headgates installed was lost and dissipated. The conclusion of the court was that, notwithstanding the light seasonal rainfall, the flow of water in said creeks, had headgates been put in as agreed upon, would have enabled plaintiffs to irrigate 400 acres of the barley instead of 100, and that the 100 acres produced 15 sacks of 110 pounds each per acre, which,

after paying the rent reserved in said lease, gave plaintiffs 12 sacks of barley per acre; and that said 300 acres additional, had they been irrigated, would have produced a like number of sacks per acre, the market value of which, after paying all expenses connected therewith, would have been \$6,078.55.

While admitting its breach of the contract to install the headgates, appellant insists that such breach of the contract was not the proximate cause of the damage found to have been sustained by plaintiffs. Says appellant:

"The record shows there were many steps between the headgates and the actual securing of a crop of barley."

It appears, however, that plaintiffs, relying upon defendant's promise, took every step required of them in the plowing, seeding, use of the water available for irrigation, and growing of a crop upon the land, and that, owing to the fact that the flow of water in said streams during the season of 1912 continued for only 50 hours, it was impossible by the use of dirt dams to irrigate more than 100 acres of land, whereas with the headgates installed, which would have permitted control of the flow of water, 400 acres could have been irrigated during said time. Nor is there any ground for claiming that the lack of irrigation of the crop was due to plaintiffs' failure to care for the irrigating system, since there is ample evidence to the contrary. The situation is explained by the testimony of one of plaintiffs' witnesses who, in referring to extra work done, stated:

"If we had had the headgates and the turnouts, we would not need to have done this extra work. We made some of the dams before the water started and some afterwards; we had one in when the water first came, and we had to go up the ditch and turn it out into No. 6, and we had to turn it also to get it in No. 7. We had to go to the dam (a distance of four miles) and turn the water out of the main canal, go back down, put this mud dam in, and go up to the canal again and turn the water in there again and let it come down. A large part of the time during that 50 hours the water ran we had to turn it down the creek in order to put in the mud dams."

In our opinion, it is apparent from the evidence that, whatever might have been done in preceding years when for a long period of time the streams afforded a continuous flow of flood waters, the flow of water therein for a period of 50 hours only during the month of March, 1912, was insufficient to irrigate more than 100 acres of the land without the headgates called for by the contract; and that, had these gates been installed, the flow of water, as found by the court, was adequate to irrigate 400 acres. Hence the proximate cause of failure of the crop on the 300 acres of land was want of irrigation, due directly and solely to defendant's neglect to install headgates in the main canal by means of which the water diverted from the creeks could, with the force of men employed, have been controlled, and, through the lateral

ditches constructed therefor by plaintiffs, properly distributed over the land.

[2] Conceding the damage sustained to have been due to defendant's breach of the contract, appellant nevertheless insists that plaintiffs should themselves have constructed and installed the headgates; in support of which contention it cites the case of *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073, to the effect that in a case of this character, where the party injured could with reasonable diligence and slight expense have prevented the injury, the measure of damage sustained is limited to the reasonable cost of doing that which would have prevented the injury. To the same effect is 1 *Sutherland on Damages* (3d Ed.) § 88, where it is said:

"Where the damages that would otherwise result from a wrong of this sort can be reduced by reasonable diligence and at slight expense upon the part of the party injured, the measure of damages, in case the injured party willfully and negligently fails to use the diligence or incur the expense, is not the serious consequences which actually and naturally result from the deprivation, but is limited to the reasonable expense which would be necessary to prevent further loss."

In the *Mabb Case*, plaintiffs could have prevented damage to the extent of nearly \$3,000 by the payment of \$30 wrongfully exacted by the defendant therein as a condition of supplying water for irrigation. While applicable to the facts in that case, the rule has no application to the circumstances in the case at bar. Plaintiffs had the right to assume that defendant would, prior to the need therefor, construct the headgates in accordance with its agreement. Moreover, if there was a slight rainfall only, the headgates would have been useless and of no avail to plaintiffs. The cost was not slight, but, as shown by the evidence, the expense of installing the same would have been some \$2,000. The conditions existing and cost of the improvement render the rule to which we have referred inapplicable to the case.

[3] One of the grounds for a new trial was newly discovered evidence, in support of which defendant filed several affidavits. An examination of these not only shows that the alleged newly discovered evidence was touching issues presented by the pleadings, but almost wholly cumulative. Moreover, it appears that defendant by the exercise of reasonable diligence could have obtained the testimony of such witnesses for use at the trial. The issues being tendered by the pleadings, it was the duty of defendant to make such preparation to meet the same as it deemed advisable; and the fact that it expected plaintiffs to produce said witnesses is no excuse for its failure to have produced them.

There is no merit in the contention that the court failed to find upon material issues; and the claim that there was a settlement between the parties which, as to plaintiffs' claim for damages, constituted an accord and satisfaction, is groundless.

[4] The court in ascertaining and determining the damages sustained by plaintiffs followed the rule laid down in *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, which conceding it to be in conflict with that of *Crow v. San Joaquin, etc., Co.*, 130 Cal. 314, 62 Pac. 562, 1058, cited by appellant, must nevertheless, since it is later in point of time, be deemed the law upon the subject.

In our opinion, the appeal is without merit, and the judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

RICHMOND DREDGING CO. v. INDUSTRIAL ACCIDENT COMMISSION
et al. (Civ. 2095.)

(District Court of Appeal, First District, California. Feb. 26, 1917.)

MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION ACT—AWARD ON CONFLICTING EVIDENCE.

Where the Industrial Accident Commission made its award of compensation to an injured servant on a fairly substantial conflict in circumstantial evidence, the appellate court cannot interfere with the award, though the circumstantial evidence affords strong reasons in support of a conclusion contrary to that which the commission reached.

Petition for certiorari, by the Richmond Dredging Company against the Industrial Accident Commission and Resto Sulaver, to annul an award of the commission. Writ dismissed, and award affirmed.

Bedman & Alexander, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent Industrial Accident Commission. O. Harold Caulfield, for respondent Sulaver.

PER CURIAM. The petitioner, in support of its contention that the award made by the Industrial Accident Commission in this case should be annulled, argues that the evidence points all one way, viz. against the conclusion arrived at by the commission, and that there is no evidence in the record upon which its award can be based.

We are of the opinion, however, that there is a conflict in the circumstantial evidence upon which this award is founded; and while we feel that the commission might with propriety have reached a conclusion diametrically opposed to the one arrived at by it, and probably would have found stronger reasons in support thereof in the circumstantial evidence relied upon by the petitioner, nevertheless, having made its finding upon what we conceive to be a fairly substantial conflict in such evidence, we do not see how we can interfere with the award, and for that reason the writ is dismissed and the award affirmed.

SUHR v. METCALFE et al. (Civ. 1621.)

(District Court of Appeal, Third District, California. Feb. 21, 1917. Rehearing Denied March 23, 1917. Denied by Supreme Court April 19, 1917.)

1. ASSIGNMENTS §94—RIGHTS OF ASSIGNEE — NOTICE OF DEFENSES — PAYMENT UNDER BUILDING CONTRACT.

The assignment of the last payment due a building contractor puts the assignee, independently of any statute, on inquiry as to the condition on which the payment was to be made to the contractor, and gives the assignee no rights against the owner greater than the contractor himself would have had, especially where the assignee consented in writing that a portion of such payment might be withheld to meet claims against the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165.]

2. SET-OFF AND COUNTERCLAIM §49(1) — "THING IN ACTION" — STATUTE — RIGHT TO SET OFF.

An assignment of the last payment due under a building contract made before the payment was due is an assignment of a "thing in action" within Code Civ. Proc. § 368, providing that an action by the assignee of a thing in action is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 107.]

For other definitions, see Words and Phrases, First and Second Series, Thing in Action.]

3. EVIDENCE §450(7) — PAROL EVIDENCE — EXPLANATION OF CONTRACT—UNAMBIGUOUS PROVISIONS.

Under Civ. Code, § 1638, providing that the language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity, and section 1639, providing that, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, parol evidence is inadmissible to show that a supplementary contract whereby a building contractor, in consideration of the owner's note acknowledged satisfaction in full for all extras due and agreed to deliver the building on completion, clear of any charge of any character whatever, including architect's charges, referred only to charges for the extras, since the provision clearly includes charges for work done under the original contract as well as the extras, and that provision is not an absurdity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071.]

4. EVIDENCE §384 — PAROL EVIDENCE — CONSTRUCTION OF CONTRACT — EXTRINSIC CIRCUMSTANCES.

Civ. Code, § 1647, permitting explanation of a contract by reference to the circumstances under which it was executed and the matter to which it relates does not permit parol testimony to vary the express terms of a written instrument.

5. APPEAL AND ERROR §1050(1)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

In an action by an assignee to recover the last payment for a building which the owner claimed the right to withhold to pay certain charges against the building, including architect's fees, error in admitting parol testimony that the builder's agreement to deliver free of charges was limited to charges for extras was prejudicial where the architect made no charge in connection with the extras.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. NOVATION §6—BUILDING CONTRACT—ORDER BY CONTRACTOR—ACCEPTANCE BY OWNER.

Where a building contractor gave a subcontractor an order on the owner which the latter accepted, there was a novation by which the liability of both the original contractor and the owner became fixed so that neither the contractor nor his assignee could recover that amount from the owner.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6.]

7. ASSIGNMENTS §57—BUILDING CONTRACT—WITHHOLDING PAYMENT—NOTICE OF ADVERSE CLAIMS.

An order on the owner given by the contractor to a subcontractor and by the latter presented to the owner for acceptance is sufficient notice to the owner within Code Civ. Proc. § 1184, to entitle the owner to withhold the amount of the order from the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116-120.]

8. PRINCIPAL AND AGENT §170(2)—UNAUTHORIZED ACTS OF AGENT—RATIFICATION BY PRINCIPAL.

Where the agent for an owner accepted for her an order drawn by the principal contractor in favor of a subcontractor, that acceptance, if unauthorized, was ratified where the owner was advised of the agent's action and accepted it thinking it all right.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 639, 640.]

9. CONTRACTS §300(2)—DELAY IN PERFORMANCE—EXCUSE—BUILDING CONTRACT—STATUTE.

Civ. Code, § 1511, providing that the want of performance or any delay therein is excused when performance is prevented or delayed by the act of the creditor or by operation of law, by an irresistible human cause or public enemy, or when the debtor is induced to make it by any act of the creditor naturally intending to have that effect, does not excuse the delay in performance of a building contract because of an agreement between the contractor and owner for extra work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1376, 1380, 1381.]

10. CONTRACTS §300(1)—DELAY IN PERFORMANCE—EXCUSE—ACTS OF OWNER—STORM.

Where a building contract provided that the time during which work was delayed by the owner or by stormy weather should be added to the time fixed for completion, but that no allowance should be made unless a written demand for additional time was presented to the owners by the contractor within 24 hours after the cause for such delay has accrued, delay is not excused by acts of the owner or his architect or by a storm where no demand for additional time was made by the contractor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372, 1373, 1376, 1379-1381.]

11. CONTRACTS §300(1)—DELAY IN PERFORMANCE—EXCUSE—STREET IMPROVEMENTS.

Street improvements by municipal authorities do not excuse delay in completing a building unless it rendered performance of the contract practically impossible; mere difficulty or unexpected expense not being sufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372, 1373, 1376, 1379-1381.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. F. Suhr, Jr., against the Western Mortgage & Guaranty Company to recover certain mortgage certificates, in which Eva Metcalfe and another were substituted as defendants after the original defendant delivered the certificates into court. Judgment for the plaintiff, and the substituted defendants appeal. Reversed.

Luther Elkins and R. P. Henshall, both of San Francisco, for appellants. Louis H. Brownstone and J. J. Lermen, both of San Francisco, for respondent.

BURNETT, J. The action was in claim and delivery for the recovery of certain first mortgage 6 per cent. certificates of the face value of \$11,500. The original defendant was the Western Mortgage & Guaranty Company, a corporation. Upon affidavit of the president of said company that the Metcalfes claimed to be the owners of said property and had made a demand for its possession, the court made an order directing the guaranty company to deliver said certificates to the clerk of the court, and that Eva and George Metcalfe be substituted as parties defendant in the place of said company.

The answer of said defendants sets forth the considerations which we are called upon to determine. Therein by suitable averment it appears: (1) That on or about the 2d day of April, 1912, the defendants entered into a building contract with the Mutual Construction Company for the construction by the latter of a hotel upon the lot of defendants on Geary street between Mason and Taylor, in San Francisco, for the sum of \$141,350. It was agreed that \$90,000 of that sum should be payable in certificates of the Western Mortgage & Guaranty Company, which were to be secured by a first lien upon said real property, and that \$22,500 of the face value of said certificates should be retained by the defendants and not delivered to the contractor until 35 days after the completion of the building; (2) that Righetti & Headman, architects, were employed by the defendants to draw the plans and specifications for the building and to superintend its erection for the customary fee of 5 per cent. of the contract price, and that it was agreed between the Mutual Construction Company and defendants that said company would pay said fee; (3) it was stipulated that the building should be completed within ten calendar months from and after March 1, 1912, and that if the same should not be so completed the defendants should be entitled to damages from said construction company, not as a penalty, but as liquidated damages, the sum of \$50 for each day the building remained uncompleted, and that on or about December 12, 1912, the contractor further agreed to deliver the said building free and clear of all charges and liens whatever, including any liens for architects' fees.

Then follows the specification of the particulars in which the contractor failed to keep its agreement: (a) It failed to pay the balance of the fee of the architects in the sum of \$4,587.50, and it is averred that said Righetti & Headman claimed and asserted and have in fact a valid and subsisting mechanics' lien against said real property for this sum; (b) on June 9, 1913, the Mutual Construction Company was indebted to the Citizens' Construction Company for work and labor performed and materials furnished on said building as subcontractor in the sum of \$2,124.80 and that said contractors gave an order on said defendants for said sum, which order was accepted on or about June 9, 1913, and that defendants are now indebted to said subcontractor in said sum; (c) the contractor failed to complete said building until four months after the time fixed in the contract, and that thereby defendants suffered a loss of rent and were damaged in the sum of \$8,000; (d) at the time of the acceptance of the building it was uncompleted, and that for the purpose of securing its completion it was agreed that the defendants should retain the sum of \$500 until the completion thereof.

It further appears that the \$11,500 in face value of said certificates referred to in the complaint were part of the \$22,500 final payment due 35 days after the completion of the building, and that the plaintiff at the time he acquired his alleged ownership of the certificates had full knowledge and notice of these rights, counterclaims, and offsets, and, furthermore, that on or about August 2, 1913, and after a knowledge and notice of all these facts, the plaintiff agreed to the retention by the Western Mortgage & Guaranty Company, the original defendant, of all these certificates until the performance by the Mutual Construction Company of all its covenants and agreements, including the payment of the demands above set forth.

The general findings and the judgment were in favor of plaintiff. As to the special defenses the court found that the Mutual Construction Company did not agree to deliver the hotel building to the defendants Metcalfe free and clear of all liens and charges, including a lien for architects' fees; that said company had not failed to carry out its contract with the exception that certain work on the ground floor of the building had been omitted pursuant to agreement, and for this work \$500 of the \$22,500 worth of certificates was ordered to be retained by the clerk until the building was finally completed. As to the claim of the Citizens' Construction Company it was found that at the time said order of June 9, 1913, was given there was nothing due to the Mutual Construction Company from the defendants Metcalfe, for the reason that said company had previously assigned and transferred to plaintiff all sums of money due to it from the defendants, and that at the time of the presentation of this order

to defendants they had notice of this prior assignment, and as to the acceptance of said order it was found that the attorneys who had indorsed upon the order the acceptance had no authority to accept the same for the defendants.

[1] It can hardly be disputed that the rights of plaintiff as assignee of the Mutual Construction Company are no other or greater than those of said company, the contractor, and that, if the aforesaid defenses are sound and decisive as against said company, they may be urged with equal propriety and effectiveness against the claim of plaintiff. In other words, it seems plain that plaintiff by reason of the assignment is entitled to all the rights and is subject to all the liabilities of the Mutual Construction Company growing out of and based upon said building contract.

[2] Indeed, the assignment, as far as the present controversy is concerned, related to "a thing in action," since the last payment was not due when plaintiff succeeded to the rights of the contractor, and section 368 of the Code of Civil Procedure is in point:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity."

Besides, it is clear from the record that plaintiff had notice, or at least was put upon inquiry, as to the conditional liability of the contractor, and therefore he cannot shield himself from the obligations of the contract. Again, on August 2, 1913, plaintiff consented in writing that the Western Mortgage & Guaranty Company should hold \$12,500 of the said final payment under the contract for the protection of the defendants against these claims, and he cannot now repudiate his agreement.

In dismissing this point it may be said, indeed, that if the final payment supposed to be reserved for the protection of the owner can be so readily disposed of regardless of his rights, a building contract affords no obstacle to the facile and convenient perpetration of fraud against the property holder. But the fact must be, independent of any statutory provision, that the assignment itself of such claim demands an inquiry upon the part of the assignee to determine the conditions of future payments. To these alleged defenses, applicable to plaintiff as to the contractor, we therefore devote some attention.

[3] It is admitted that, on December 12, 1913, an agreement was entered into by the contractor and the defendants in the form of a letter as follows (letter head of Mutual Construction Company):

"San Francisco, Cal. Dec. 12/12.

"Mr. George Metcalfe and Mrs. Eva Metcalfe, San Francisco—Dear Sir and Madam:

In consideration of the execution and delivery to us this day of your note for the sum of fourteen thousand six hundred and eighty-six (14686) dollars, secured by a third mortgage on your property on Geary street we hereby acknowledge satisfaction in full for all extras due us upon the building constructed upon the lot on Geary street and we further agree to deliver said building to you upon the completion thereof clear of any charge of any character whatever, also including architect. * * *

"Yours very truly,

"Mutual Construction Co.,

"[Corporate Seal.]

"Per [Signed] S. L. Hansbrough, Secretary."

The question in dispute is as to the force and effect of the clause we have italicized. It is not claimed that by reason of fraud, accident, or mistake there was any failure to express the intention of either of the parties, but upon the contention that said terms are ambiguous parol evidence was admitted to show what was understood by the adopted form of expression. In that respect we feel entirely satisfied that error was committed. The language appears to us plain and unequivocal, and in this case if it is to be varied by parol no reason can be advanced why the same practice should not be permitted in any instance where parties have reduced their agreements to writing. How in concise phraseology it could be more clearly declared that the building when complete should be free from such a burden as the lien in question we are at a loss to understand. It was to be clear of any charge of any character whatever. This comprehensive language would necessarily include a lien for the architects' fees, but the company was not satisfied to let it rest at that, but has shown conclusively by specific mention that it had particularly in view a burden that might be imposed by reason of the architects' charge. The familiar sections of the Code cited by respondent do not, in our opinion, lend any support to his contention. The language herein seems to be clear and explicit and not to involve an absurdity, and therefore, within the purview of section 1638 of the Civil Code, said language should govern the interpretation of the agreement. Manifestly the agreement to turn over the building free from any liens does not involve an absurdity or even anything unusual or extraordinary, and, since the said conditions concur, the succeeding section of the Code (1639) would limit and confine to the writing itself the inquiry as to the intention of the parties.

[4] Section 1647, permitting explanation of a contract by reference to the circumstances under which it is executed and the matter to which it relates, may be of aid in many instances where it is apparent something needs explanation, but it cannot be extended to the point of permitting parol testimony to vary the express terms of a written instrument.

[5] If we are right in this position it would not be disputed that the error was prejudicial, for the reason that the parol evidence was offered and received for the purpose of

showing that the intention was to relieve the building and the owners of any lien or burden for the possible charge of the architects for the extra work put upon the building, and the proof is that there was no charge whatever for said services.

While the said provision seems to us so certain as to preclude parol testimony to determine its meaning, there is force in the other consideration suggested by appellants that, if there be any uncertainty in the language, it should be interpreted most strongly against the party who caused the uncertainty to exist, that is, the contractor, who fits the position both of promisor and the person who prepared the contract. Section 1654, Civ. Code.

[6] We agree with appellants in their contention as to the claim of the Citizens' Construction Company. There is no dispute that the order for their payment was given by the Mutual Construction Company. We think it equally plain that it was accepted by appellants. If so, there was, in effect, a new contract, a novation, the substitution of one creditor for another. By that order the Mutual Construction Company authorized appellants to pay to said Citizens' Company, out of said 35 days' payment, the sum of \$2,124.80, and when the order was accepted the liability and obligation of both became fixed. Neither could thereafter question it, and if the Mutual Construction Company were the plaintiff herein, there could be no doubt that defendants could set up said amount as an offset to the claim made to the said deferred payment. For reasons already stated, we think respondent, as assignee, is equally bound with the contractor, and that said offset may be urged against him.

[7] If we are right in the view that the assignee occupies the same position as would his assignor, then, of course, there is no force in the claim that it was necessary to have a notice to withhold given to the architect or owner as provided in section 1184 of the Code of Civil Procedure. But as to that appellants point out sufficient facts to show a substantial compliance with the requirement of that provision. The written recognition by the Mutual Construction Company of its obligation to the Citizens' Construction Company as made and directed to the owners on June 9, 1913, should be held equivalent to the notice provided by said statute, and the record shows that at that time the said Citizens' Company had a right to file a lien for the amount of its claim. The statute itself provides that:

"No such notice shall be invalid by reason of any defect in form provided it is sufficient to inform the owner of the substantial matter herein provided."

As stated by appellants:

"In the present case the Citizens' Construction Company notified the owner of its claim, for it presented the contractor's recognition of its validity and its amount, vouched for by the contractor and itself. It presented this claim

to the owner and asked him to accept and pay it."

This was probably even more than the statute requires. It was at least equivalent to the notice contemplated by the law.

[8] It is contended that the court was justified in finding that this order was not accepted by Eva Metcalfe, the owner. There is no doubt, however, that Mr. Brandon, who was the attorney for Mrs. Metcalfe, accepted this order for her on June 9, 1913. He seems to have been representing her in all these matters, and although he had no express authority to sign the acceptance, it would not seem unreasonable to conclude that his authority was broad enough to cover such act. As to this also it may be suggested that respondent, standing in the shoes of the Mutual Construction Company, assumes rather a questionable attitude in denying the authority of the attorney who was recognized and treated by said company as the qualified agent of appellants. If the owner were disputing the authority of the attorney a very different situation would be presented. However, granting the want of authority, as claimed, it cannot be disputed that the unauthorized act of the attorney might be ratified by the principal and in this case there can be no doubt that it was so ratified. Mrs. Metcalfe's testimony was:

"I was advised of the execution of this paper, Defendant's Exhibit F, by Mr. Brandon on or about June or July. I accepted it and thought it was all right."

This was a sufficient ratification within the teaching of *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243, and *Porter v. Lassen County, etc., Co.*, 127 Cal. 261, 59 Pac. 563.

Besides, as before indicated, this particular claim was covered by the letter of plaintiff of August 2, 1913, which was agreed to by Mrs. Metcalfe and the Mutual Construction Company. This appears clear enough from the testimony in the record, and we see no reason why the contract of these parties should not be enforced.

As to the damages claimed for the failure to complete the building within the time specified, we think the delay has not been entirely excused or justified and that said delay did operate to the detriment of defendants. It is claimed that the extra work consumed about 90 days, and that this was covered by a contract between the Metcalfes and the Mutual executed on December 12, 1913, "just 18 days before the defendants claim that the building should have been actually completed." The amount of the extra work was \$14,686, and a third mortgage was given in payment of this. Respondent says:

"It would be strange, indeed, if the defendants in this case were to be permitted to order \$14,000 worth of extra work within 18 days prior to the time that the contract was to be completed and expect the same to be finished without allowing additional time."

But it appears that when this agreement was made the extra work had already been done, so the argument is not persuasive.

[9] To determine whether the extra work would excuse delay, we must look to the statute and to the agreement of the parties. The particular law in point is section 1511 of the Civil Code, as follows:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

"2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

"3. When the debtor is induced not to make it, by any act of the creditor intended or naturally intending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

[10] The case does not seem to fall within any of these subdivisions. It is, however, covered by the contract of the parties. Extra work involves an act of the owners and a modification of the contract. In subdivision 3 thereof it provided that:

"The time during which the contractor is delayed in said work by the acts of the owners or by the acts of God, which the contractor could not reasonably have foreseen and provided for, or by stormy weather which prevents the work, or by any strikes by employees or labor organizations, shall be added to the aforesaid time for completion; but no such allowance shall be made unless a written demand for additional time with the amount thereof approximately stated and the reasons for such demand given is presented to the owners by the contractor within twenty-four hours after the cause for such delay has accrued."

Then section 9 specifically provides for "alterations, deviations in, additions to, or omissions from" the plans and specifications, and declares that "the same shall in no way affect or make void the contract," except that the additional cost was to be added to the contract price. The extras therefore fall within said subdivision 3 and in order to claim an extension of time it was incumbent upon the contractor to make demand, which was not done.

In *McGinley v. Hardy*, 18 Cal. 116, there was a modification of the contract, but the case is different from this, in that there was no agreement that written demand should be made for extension of time, and the court very properly held that the new contract operated to extend the time for completion of the building.

We can see no reason why it was not competent for the parties to provide in their contract for an exclusive method by which the time could be extended as to this particular feature, nor do we see anything in the way of giving effect to such agreement.

The mistakes of the architect, we think,

also fall under said subdivision 3. He was the agent of the owner, and his mistakes were therefore those of the latter. We think also that the interference by rain falls within said subdivision.

[11] It is at least doubtful whether the claim that a period of 80 days should be allowed because of the condition of Geary street is tenable. The court found that the delay was by reason of the act of the municipal authorities. We are not pointed to any evidence in the record that sustains the finding. It does not seem to be included among the facts of which the court may take judicial knowledge. No doubt, the municipal authorities were engaged at the time in constructing a railroad on said street and the proof was easily available, but it should have been produced. Probably through inadvertence it was not offered. As to whether such action of the municipal authorities would excuse the delay, we think the correct test is declared in *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29, to the effect that it rests upon the consideration whether it rendered performance practically impossible, and in that connection it is said that mere difficulty or unusual or unexpected expense would not excuse the contractor. It is, in our opinion, a close question whether there is sufficient evidence to sustain the conclusion that the condition of said street rendered the performance of the contract "practically impossible," but as the evidence may be different upon another trial, we refrain from passing upon the point.

We think the judgment and order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

LINCOLN v. PACIFIC ELECTRIC RY. CO. (Civ. 2199.)

(District Court of Appeal, Second District, California. Feb. 24, 1917. Rehearing Denied March 27, 1917; Denied by Supreme Court April 23, 1917.)

1. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS—EVIDENCE TO SUPPORT.

The findings, when there is any evidence tending to support them, will not be disturbed, though the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981.]

2. MASTER AND SERVANT §281(9) — SERVANT'S INJURY—CONTRIBUTORY NEGLIGENCE—OPERATION OF STREET RAILROAD—DISREGARDING SIGNAL.

In a motorman's action for personal injury, evidence held sufficient to warrant jury in believing that plaintiff did not drive interurban car into an open switch causing collision with another car in disregard of switch lamp signals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 993, 996.]

3. MASTER AND SERVANT §145 — RULES — CONSTRUCTION—"UNDER FULL CONTROL AND PREPARED TO STOP."

Street railway company's rule that "trains must approach all meeting and passing points under full control and prepared to stop" meant control and preparation appropriate to probable emergencies; the purpose of rule being to avoid accidents.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288.]

For other definitions, see Words and Phrases, First and Second Series, Under Full Control.]

4. MASTER AND SERVANT §281(9) — SERVANT'S INJURY—CONTRIBUTORY NEGLIGENCE—OPERATION OF STREET RAILROAD—VIOLATION OF RULES—SPEED.

In motorman's action for personal injury, evidence held sufficient to warrant jury in believing that plaintiff did not approach switch in disregard of company's rules as to speed, requiring trains to approach meeting and passing points "under full control and prepared to stop."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 993, 996.]

5. MASTER AND SERVANT §238(4)—SERVANT'S INJURY—CONTRIBUTORY NEGLIGENCE—OPERATION OF STREET RAILROAD—MISTAKE IN JUDGMENT.

Where jury might have believed that a motorman's failure to stop car before running into an open switch was due only to a mistake in judgment, in using the reverse before applying the air brake, they were justified in holding him not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681.]

6. NEGLIGENCE §98—COMPARATIVE NEGLIGENCE—OPERATION OF STREET RAILROADS—STATUTE.

The fact that motorman negligently failed to stop his car before running into an open switch, colliding with another car, would not require a verdict against him in his action for personal injuries, if jury believed his negligence slight in comparison with employer's negligence, in view of St. 1911, p. 796, providing that employe's contributory negligence shall not bar a recovery for personal injury where his negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished in proportion to employe's contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165.]

7. APPEAL AND ERROR §932(1)—REVIEW—PRESUMPTION—INSTRUCTIONS.

Where instructions as to assessing an employe's damages for personal injuries in proportion to his contributory negligence as provided by St. 1911, p. 796, are not complained of, it will be assumed that jury properly assessed damages, making due allowance in accordance with the facts found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782.]

8. APPEAL AND ERROR §1048(6)—HARMLESS ERROR—CROSS-EXAMINATION.

In a motorman's action for personal injury, refusal to allow defendant's cross-examination of plaintiff, "There is no way to account for it [running into open switch when lights signified it closed], is there?" was harmless, in view of further testimony elicited, which covered all matters which would probably have been developed upon answer to the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Verne H. Lincoln against the Pacific Electric Railway Company. Defendant appeals from judgment for plaintiff and from order denying new trial. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. John S. Steely and Jones & Evans, all of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein an employé of an interurban electric railway company seeks to recover damages for personal injuries alleged to have been sustained by the negligence of the employer. The defendant denied all allegations of negligence, and as a separate defense alleged contributory negligence on the part of the plaintiff. The defendant has appealed from a judgment in favor of the plaintiff and from an order denying its motion for a new trial.

The accident occurred at Long Beach, Cal., on February 6, 1913, at about 6:10 p. m. Plaintiff was, and had been for several years, a motorman of the defendant, running trains upon its line between Los Angeles and Long Beach. American avenue is a double avenue of the city of Long Beach, lying on the east and west sides respectively of a private right of way of the defendant company. On that right of way defendant has double tracks running north and south. At a point between Fifteenth and Fourteenth streets a curved track leads from the south-bound main track of defendant, swinging gradually southwesterly into Fourteenth street. In addition to its interurban cars, the defendant operated local cars, called the Willowville cars, and it was the custom to run Willowville cars into the curve above mentioned so as to allow the through trains south-bound to pass them on the main line. On the evening in question a Willowville car was running southward, followed by a three-car train of which plaintiff, Lincoln, was the motorman. The crew of the local car consisted of the motorman, Lysaght, and the conductor, Jesse Dunn.

At the point of divergence of the curved track from the south-bound main track and on the west side of the tracks, there was a switch stand on which was established a switch which was operated by a lever for the purpose of opening and closing the switch, which when opened gave access from the main tracks to the curved track. The switch was operated by a hand lever, and a part of the apparatus consisted of devices for signaling. These devices consisted of colored lights and also of flat sheets of metal called wings. When the switch was closed and locked and the main line in order, the white wings were perpendicular to the main track, and the red wings were parallel to the main track, green lights alone showing. When the switch was open for a train to take the

siding, the red wings were perpendicular to the main track, and the white wings parallel thereto, red lights alone showing. In throwing the switch the top part of the switch would move through an angle of 90 degrees. The rules and regulations of the transportation department of the defendant company then in force were well known to the above-named employés, Lincoln and Dunn. Subdivision B of article 142 of those rules was as follows:

"After a regular train clears the main track and switches are properly set for the main track, the conductor must step to the side of the track opposite the switch stand until after the opposing train has passed, keeping his hand lantern at night in full view of the approaching train, but giving no proceed signal."

Rule 112 was as follows:

"Trainmen must not accept a proceed signal as against fixed signals, until they are fully informed of the situation and know they are protected. When fixed signals are in operation, trainmen must not give proceed signals against them."

On the occasion in question, in order to let a through train from Los Angeles pass a local car, the crew of the local car stopped at the switch between Fifteenth and Fourteenth streets. It was the duty of Dunn, conductor of the local car, to operate the switch for the passing of these cars. Dunn stepped to the ground, holding in his hand a red and a white lantern. He gave to the motorman of the through train, Lincoln, a signal with his red lantern requiring Lincoln to stop or slow down until the local car should have been taken out of the way. Dunn then went forward on the ground to the switch to open it so that his local car might get off the main line. The lamp of the switch stand then showed a green light northward and southward in conformity with a closed switch. Dunn opened the switch and the signals changed accordingly. The Willowville car proceeded and entered the switch, going ahead therein until its rear stood at the curb line between the railroad right of way and the westerly division of American avenue, about 138 feet from the switch point. Conductor Dunn, his local car having entered the switch, should then have thrown the handle of the switch westward again to close the switch, which would have caused the red light to disappear on the switch lamp and the green light to throw its rays northward toward the approaching through train. Both parties contend and the evidence tends to show that Dunn did not completely close the switch, but the parties do not agree upon the fact as to what Dunn actually did do. Appellant contends that Dunn left the switch entirely open in front of the through train, and that he closed it to cover up his fault immediately after the through train had passed into the curved track and the accident had happened. Respondent contends that Dunn closed the switch in front of the through train at least so far as to change the red light to green,

and that the through train got into the curve in spite thereof. At any rate, it is the fact that the train swung into the curve without cutting, bruising, or marking either of the switch points or any of the rails, and crashed into the rear end of the Willowville local car, whereby the plaintiff was injured.

Immediately behind the three-car train which had just entirely passed into the curved track, the switch was found set for the main track and with the green light showing properly northward and southward. Dunn, the conductor of the local car, denied that he had so set the switch after the collision. Two witnesses testified that they saw the light change its north and south rays from red to green immediately behind the train. Counsel in their briefs agree as to what were the respective theories upon which the case was tried. Respondent's theory is that Conductor Dunn left the switch partly open so that the flange of the right-hand front wheel of the first car engaged with the west point of the switch, which extends northerly $1\frac{1}{4}$ inches farther than the east point of the switch, and threw the switch instantly fully open and thus allowed the train to swing into the curve without derailment. Appellant's theory is that Conductor Dunn left the switch entirely open, and the respondent brought his train into the curve against a red light and into an open switch.

[1] Appellant concedes, of course, the rule that this court will not disregard a finding of fact by the trial court, or the implied finding of a jury, that is supported by evidence tending to support such finding, and that, if the evidence is conflicting, the finding based thereon will not be disturbed. But appellant contends that the physical facts shown, and against which there is no evidence, compel the conclusion that the plaintiff was guilty of contributory negligence directly and proximately causing the accident. Under this general contention counsel for appellant urge four propositions: (1) That plaintiff was negligent in driving his train toward and into the switch, in disregard of the danger indicated by the lamp thereon, and the company's rules concerning same; (2) that plaintiff was negligent in approaching the switch point not under control, prepared to stop, as required by the rules of the company; (3) that if plaintiff approached said switch under full control, prepared to stop, then he negligently failed to stop within the distance intervening; (4) that the evidence is insufficient to establish any negligence against defendant, except in the failure of Dunn to close the switch, and plaintiff was equally negligent in that event.

[2] 1. The evidence is sufficient to support the implied finding against defendant on the first proposition. The plaintiff did not run into an open switch, with a red signal displayed against him. But it is argued that the switch could not have been entirely closed; for then the train would have re-

mained on the main line. Let this be admitted. Then it is said by appellant's counsel that it is inconceivable that the switch could have been sufficiently open to have allowed the train to enter it, without a corresponding misdirection of the rays of the lamp signal; that to run toward a signal imperfectly displayed is as such negligence as to run against a full red light. In this connection out attention is directed to rule 125 of the company:

"A signal imperfectly displayed * * * must be regarded as a stop signal."

In accordance with this rule the court instructed the jury that, if they believed from the evidence that as the plaintiff approached the switch stand the lamp signal thereon was imperfectly displayed, such imperfectly displayed signal or absence of signal was then and there, according to said rule, a stop signal, requiring plaintiff to stop his train before reaching the switch, and that a violation of that rule by the plaintiff would constitute negligence. To find a verdict for the plaintiff under this instruction, the jury must have believed from the evidence that the signal was not imperfectly displayed. Is the evidence of the physical facts so far beyond doubt that this finding could not be true? Appellant relies upon the evidence which shows the construction and mode of operation of the switch, and certain photographs which were taken on April 23, 1913, which show the appearance of the switch and its signals in three positions, to wit, when the switch is open, when the switch is closed, and when the switch is half open, and contends that from that evidence the flange of the front right-hand wheel, which would touch the switch first, could not have passed to the right of the point of the switch rail, unless there was an opening of at least one inch at the switch point, which obviously could not be done without affecting the position of the switch lamp and causing its lights to become imperfectly displayed. These facts are relied upon to overcome the testimony of the several witnesses who testified that as the train approached the switch the green light was fully displayed; the contention being that it was physically impossible for this testimony to be true. But there are facts which impair the conclusiveness of this argument. Conductor Dunn, in describing what he did after his Willowville car had gone beyond the switch, said:

"Then I picked up the switch lever and swung it around and threw it down, and looked up at the light, and it was green, and I stepped across the track and gave the high ball. I could not say whether I locked that switch when I threw it back or not, nor could I say whether I lowered the lever all the way down over the dog or not. After Mr. Lincoln answered me by two toots, his train came on down the line and took the switch without any warning."

Lee Higgins was conductor of the front car of the three-car train. He had been conductor on the Willowville line some time before

the time of this accident and had operated the switch referred to herein; it having then the same system of locks and keys as at the time of the accident. He testified:

"That the points of the switch do open, the one opening on the west and the other on the east closing, when the lever is begun to be moved, just begun to be moved, and yet the sign shows green."

There thus appears to be some testimony, which the jury was entitled to believe that the red light would not necessarily begin to show instantly at the beginning of the motion of the lever which was closing the switch, and that the accident may have been caused by failure of Dunn to effectually close and fasten down the switch towards which plaintiff's train was moving. It is therefore entirely conceivable that on account of the jarring of the train immediately before it reached the switch, or from some other cause, the switch opened enough to throw the train over to the curved track, and yet that the plaintiff would never have seen anything in the signal contradicting its first message to him indicating that the switch was safely closed.

[3, 4] 2. Rule 146 was as follows:

"Trains must approach all * * * meeting and passing points, under full control, and prepared to stop."

There is no exactly prescribed definition of the conditions amounting to full control, nor of the precise limitations of a preparation to stop. These elements would differ according to the machinery and weight and length of trains or cars, and according to local conditions of tracks and grades. Of course, it means a control and a preparation appropriate to the probable emergencies, and has for its purpose the avoiding of accidents. The plaintiff testified:

That when the Willowville car stopped, to go over to the curved track, his train was running at the rate of 1 or 2 miles per hour, and was 1,000 feet behind the local car. Then when the train advanced, he picked up speed. "I was going when I struck the switch about 12 to 15 miles an hour; 15 miles would put it to the limit." At that time "I had no electricity on at all." "The Willowville car was then standing at the curb line, between the right of way and the street, with the back end of it at that point, which is 138½ feet in a straight line from the switch stand. Going at 12 or 15 miles an hour, it would be impossible to stop a three-car train in that distance."

Plaintiff's testimony as to speed of his train on arriving at the switch was confirmed by numerous witnesses. Counsel for appellant call attention to the fact that six expert motormen testified that even at 15 miles an hour this train could have been stopped in 50 to 75 feet. There is no other evidence to the contrary, other than plaintiff's testimony showing how he used the stopping devices, and that nevertheless he failed to stop within the distance required to avoid the collision. The testimony of those motormen may favor appellant with respect to the next proposition which we are to discuss, but it really confirms the verdict

as to the present question; for it entitled the jury to find that plaintiff had his train under full control and prepared to stop, if they believed that his speed did not exceed 15 miles per hour.

[5] 3. Then why did the plaintiff not stop his train in time to avoid the collision? His failure to do so is urged by appellant as establishing beyond doubt the contributory negligence of the plaintiff. In discussing this proposition we will assume that plaintiff had complied with the rule above stated, and that he came to the switch with his train under full control and prepared to stop. If this were not so, the plaintiff would have been negligent; for in view of the purpose of that rule it would be entirely beyond reason to hold that a properly managed train, if under full control and prepared to stop, would meet the emergency which this train faced, by running 138 feet into the rear of a loaded car, and going 35 feet further after the collision, before the train stopped.

What, then, was the defect in management which caused this train to go on as far as it did go? The train was equipped with devices for reversing the current through the motors, and also was equipped with air brakes. There is no claim that any of these were defective or insufficient. It follows as the night the day, that something was wrong with the plaintiff's management of the machinery committed to his care. His testimony was:

That when he reached the switch he felt the car raise up and bump, like it had struck something, and immediately he realized that something was wrong, as his train went in on the siding. "The second I felt the jar or raising up, I reversed the current to check the train as quick as I could, and I held it there until I felt the train begin to go ahead again, and it felt like the breakers went out, and I then turned on the emergency brake. I figured that was the quickest way to check the train. * * * If it gets too heavy a charge—for instance, reversing the train—the breakers are put on there expressly to keep the motors from being burned up; and it felt like when I reversed it that it went out; and just the minute I felt the resets or breakers had begun to go, I put it in the emergency, as I thought that was the quickest way to stop the train." "I did all that was possible to stop the train, and I did not stop it until the collision came." "I put on the air as soon as I felt the train give way to the breakers or it felt like the breakers were gone."

All of the six motormen who said that a train of the kind in question and operating under the stated conditions could be stopped within 80 feet or less specified that this would be done by using the air brakes. A train moving at the rate of 12 miles per hour will travel 138 feet in about eight seconds. There is no statement in evidence showing how much time was consumed by the plaintiff in using the "reverse" before he applied the air brakes. Assuming, since the testimony on the point is not contradicted, that the train must have stopped within 80 feet after the air brakes were applied, and remember-

ing that even when retarded by the collision the train did not stop until it had traveled 173 feet from the switch, it must be true that the plaintiff traveled 93 feet and used up five seconds of his precious time before he applied the air brakes. But, although defendant's witnesses declared that by full and instant use of the air brakes the train could have been stopped within 80 feet, they admitted a high degree of efficiency in the method of stopping a train, in emergencies, by reversing the current, a process which also reverses the direction of motion of the car wheels. It was admitted by one of these men, who had been employed as an instructor for the motormen that the motormen were sometimes instructed to use the reverse, in emergencies, "under certain conditions," to stop trains; also, "after applying the power and finding the power would not stop it, then applying the air under those conditions, he could do nothing else." Under the testimony, the jury may have believed that it was a mistake of judgment for the plaintiff to have tried the effect of the "reverse" before using the air brakes, and yet that this error did not amount to negligence.

[8, 7] And even if the jury found that the plaintiff was negligent, this fact did not necessarily require that the verdict be in favor of the defendant. At the time when this accident occurred there was in force a statute which changed in important respects the law relating to the liability of employers for injuries sustained by their employes while engaged in the line of duty of their employment. In section 1 of that act we find:

That in actions to recover damages for personal injuries thus sustained, "in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employe." Stats. 1911, p. 793.

The court instructed the jury in accordance with these provisions of the statute, and it is not suggested that there was any error in the instructions given. It is entirely inconsistent with the verdict that, although the jury might have attached the taint of negligence to the conduct of the plaintiff, yet that under the evidence they believed that his negligence was slight, and that the negligence of the defendant "was gross, in comparison." If so, it is to be presumed that in assessing damages the jury made due allowance in accordance with the facts found and as required by the statute.

4. The fourth point is that, if the defendant was negligent by reason of the failure of Dunn to close the switch, then the plaintiff was equally negligent. For reasons which are made apparent by what we have said in

discussing the other points considered, this court cannot say that the plaintiff was "equally negligent" with the defendant. The evidence was such that the jury's finding upon the facts must be accepted as final.

[8] On cross-examination of the plaintiff, after the plaintiff had testified that as he approached the switch the light signal facing him was green, he said:

"And then as I came along, going 10 or 15 miles an hour, my entire train entered that switch. I do not account for it at all."

Defendant's attorney then asked:

"There is no way to account for it, is there?"

Plaintiff's attorney objected to this question as improper cross-examination and calling for a conclusion of the witness, and the objection was sustained. Appellant suggests that the witness had testified as to his long experience as a motorman, as to speed, stopping of trains, interpretation of signals, and so on, and contends that it was error to refuse permission to ask him how he could account for the fact that the train entered the switch. While the objection might very well have been overruled, we do not think that the defendant was seriously prejudiced by the contrary ruling. The further testimony elicited on the same cross-examination seems to have covered all of the matters which probably would have been developed by or followed upon an answer to the above quoted question. Several other alleged errors in rulings upon evidence are pointed out by appellant, but in their relation to the record they seem even less important than the objection which we have discussed.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

GOLDSTONE v. COLUMBIA LIFE & TRUST CO. (Civ. 1637.)

(District Court of Appeal, Third District, California. Feb. 27, 1917. Rehearing Denied by Supreme Court April 26, 1917.)

1. INSURANCE ~~§~~ 94—LIFE INSURANCE—LIABILITY OF INSURER—STATUTE.

Pol. Code, § 633, provides that no person shall act as the agent or solicitor of any insurance company in the state until he has filed with commissioner a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor, and providing also for the issuance by said commissioner of a license to such agent. *Held*, that a life insurance company, by its violation of the statute, may not absolve itself from liability on an insurance contract that it has authorized or ratified, though the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute; such statutory provisions as to agents do not change the rule of law as to principal and agent between the insurer and the policy holder, and the insurer, attempting to evade such statute, is nevertheless bound to a policy holder as though the statute had been complied with.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 124.]

2. INSURANCE — 74 — LIFE INSURANCE — AUTHORITY OF AGENT.

Where the general agent of a life insurance company requested L. to act as the company's agent in certain territory, but was informed by L. that he could not do so on account of his connection with another company, and the general agent proposed that the contract should be made in the name of L.'s wife, and that L. should be the active man in obtaining the business, which was done, L. was authorized by the insurance company to solicit life insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 98, 100.]

3. INSURANCE — 655(2) — LIFE INSURANCE — ACTION ON POLICY — EVIDENCE.

In an action on a life insurance policy, insurer setting up false answers of insured to questions material to the risk, and plaintiff claiming that such answers were falsely written in the application by the agent of the insurer, the trial court was technically in error in sustaining objection to the questions on the matter asked of the agent, who was not the agent of the company in full compliance with Pol. Code, § 633.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1685.]

4. INSURANCE — 112 — LIFE INSURANCE — DUTY TO READ POLICY — ADOPTION OF AGENT'S FRAUDULENT ACT.

Where agent of life insurance company wrote false answers material to risk into insured's application, after delivery of the policy to insured it was the latter's duty to notify the insurance company of the fraud that had been attempted by the agent, and, by silence, he fraudulently approved of the agent's fraudulent act, and became responsible for it, so that the company was not liable on the policy, since it was insured's duty to read the policy upon delivery, and the court, in an action on it, must assume that he did so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134.]

5. INSURANCE — 142 — LIFE INSURANCE — REPUDIATION OF AGENT'S FRAUD — DUTY OF INSURED.

Where the holder of a life policy containing false statements material to the risk fraudulently inserted in the application by the agent died within four months without repudiating the agent's fraud to the insurer, such delay was fatal to recovery; it being the duty of the insured to act promptly.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 263, 264.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Beatrice Goldstone against the Columbia Life & Trust Company, a corporation. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Albert Jacoby, of San Francisco, for appellant. Wood, Montague & Hunt, of Portland, Or., and Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

BURNETT, J. By direction of the court and on motion of respondent a verdict in favor of the company was rendered by a jury, and the appeal is from a judgment entered thereon.

Plaintiff, widow of one Jacob Goldstone, brought the action as beneficiary named in a

life insurance policy issued by respondent to said Jacob Goldstone on September 26, 1913. It appears that one of the conditions of the policy was as follows:

"This contract of insurance is made in consideration of the application for this policy, a copy of which is hereto attached, and which application is hereby made a part of this contract."

In said application, signed by said Goldstone appears this covenant:

"I hereby agree that the statements herein contained, together with the statements made by me to the medical examiner and contained in part 2 of this application, are hereby warranted to be true, full, and correct as facts, and that this application, together with the policy which may be issued, shall constitute the contract between me and the company."

It is the claim of respondent, fully set up in its answer, that, in violation of said agreement and for the purpose of defrauding the company, the insured gave false answers to certain questions that were material to the risk, and that therefore the company was relieved of any liability under said policy. On the other hand, appellant contended at the trial that the answers were written in by an agent of the company without the knowledge or connivance of the insured, and therefore the insurer cannot take advantage of its own wrong, but is charged with the same responsibility as though the answers were true.

The questions were as follows:

(1) "Have you ever applied to any company or society or order for insurance without receiving a policy or certificate of the exact kind, rate, and amount applied for, or for reinstatement of a lapsed policy or certificate without being reinstated?" and (2) "Is any negotiation or application for other insurance now pending or contemplated?"

Each question was answered in the negative, whereas, admittedly, the truth is that on September 22, 1902, Goldstone had made an ineffectual application for life insurance to the Northwestern Mutual Life Insurance Company of Milwaukee; likewise, in November, 1903, to the Guardian Life Insurance Company of New York; similarly, in August, 1913, to the Equitable Life Assurance Society of the United States; also to the New York Life Insurance Company, in August, 1902, and another to the same company in 1905; furthermore, in July, 1913, he made another application to the said New York Life Insurance Company, which application was still pending at the time the application herein concerned was made.

In pursuance of her contention plaintiff called as a witness one S. J. Levy from whose testimony it appears that he solicited from said Goldstone the said insurance; that he was the duly authorized agent of the said New York Life Insurance Company and had issued to him, pursuant to section 633 of the Political Code of this state, as such agent, a power of attorney; that prior to his interview with Goldstone he was visited at his office at 14 Montgomery street, San Fran-

cisco, by one B. F. Bernsten, then the acknowledged and admitted general agent of defendant for the state of California; that said Bernsten requested Levy to act as the agent of respondent in and around the territory of San Francisco, but was informed by the latter that he could not do so on account of his connection with the New York Life, a competing company, whereupon Bernsten, in order to get around and evade the law, proposed as follows:

"Well, make the contract in the name of your wife, make her the agent, and you can be the active man in obtaining the business whatever it is."

Levy continued:

"Under those circumstances, we entered into an agreement whereby the business was to be solicited by myself, but Mrs. Levy was to be known as the agent, in order not to conflict with the contract that I had with the New York Life Insurance Company."

Mrs. Levy was thereupon appointed such agent, and Mr. Levy, in accordance with his agreement with Bernsten, proceeded to solicit, procure, and write insurance for the defendant company, and among others he approached Goldstone, submitted to him for his signature said application for insurance, collected the premium, and subsequently delivered the policy in question to said deceased. Appellant then attempted to show by said witness that he wrote in the answers to said questions without the knowledge of the insured, but the court sustained an objection, and it was not permitted. The ruling was based upon the court's understanding of the force and effect of said section 633 of the Political Code, providing that:

"No person shall in this state act as the agent or solicitor of any insurance company doing business in this state until he has produced to the commissioner, and filed with him, a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor"

—and providing also for the issuance by said commissioner of a license to such agent. The court, in holding that the case falls within said section, declared that it was enacted to the end that, if a broker or anybody else comes to one selling life insurance, there may be a safe way for the one solicited to find out whether the company is authorized to do business in the state, and also whether the solicitor is authorized to solicit insurance, and the court seemed to be of the opinion that no one acting as an agent could bind the company unless he was so commissioned, and that a person dealing with a solicitor not so authorized does so at his peril.

[1] Said section, no doubt, was enacted for the protection of the public as well as of the insurance companies, and its provisions, of course, should be complied with. No company should knowingly fail to regard its requirement, nor should any person assume to act as agent or solicitor without said power of attorney and said license. However, as far as the company is concerned, we do not

understand that by its violation of said statute it may absolve itself from liability for a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. The reasonable rule, we think, and one sustained by the authorities is that such statutory provisions as to agents do not change the rule of law as to principal and agent between the company and the policy holder, and that the company attempting to evade such statute is nevertheless bound to its policy holders, as though the statute had been complied with.

[2, 3] We think also that there is justification in the record for the contention that said S. J. Levy was authorized by the company to solicit said insurance, and also that his act in so doing was subsequently ratified. It would follow that the court was technically in error in sustaining the objection to the questions asked of the witness. It would seem almost incredible that one of some standing, as Levy must have been would be guilty of such reprehensible and even despicable conduct as to attempt deliberately the perpetration of a fraud upon the company and the deceased, but we must assume that his answers, if given, would have presented such a situation.

However, we need not go into that at length; as, notwithstanding such error, under the admitted facts, it must be held, we think, that the law demands the verdict that was rendered.

[4] As already seen, the policy was immediately delivered to Goldstone. It was his duty to read it, and we must assume that he did so. Long v. Newman, 10 Cal. App. 430, 102 Pac. 534. He knew, therefore, that his application as well as the certificate of the physician, each of which was an integral part of the policy and the consideration therefor, contained two material and vital statements that were false. His legal and moral duty was then to notify the company of the fraud that had been attempted. By his silence he virtually approved of the fraudulent act of the agent and became responsible for it. By his conduct he made Levy his agent as well as the agent of the company, and the forfeiture of the policy is the price of his folly. If he had pursued the course required by good conscience the company might have excused the misrepresentation, but, of course, that is merely problematical. He could at least have secured a return of the premium paid, but by his acquiescence he denied himself any relief from the wicked act of the agent of the company.

This feature of the case is covered by the decision of the Supreme Court in Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51, wherein one Graff, a soliciting agent for defendant, solicited the insurance from plaintiff, who was very deaf, as was well known to said Graff. The application for the pol-

icy was filled out by Graff, and, without being signed or read to or by plaintiff, was sent to the general agent of defendant. It contained a warranty to the effect that plaintiff was neither partially nor totally deaf. A policy was issued by the defendant and sent to plaintiff through the mail. In reversing the case the court said:

"By accepting and retaining the contract without objection plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms."

Many cases are therein cited in support of the principle. We call specific attention to only two of them. One is the familiar case of *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, wherein the court, through Mr. Justice Field, said:

"There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided."

In *Quinlan v. Providence, etc., Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, it is said:

"In determining the question of liability in this case it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey. The conditions and limitations were a part of the contract, and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy."

Nor do we think there is any force in the contention that the *Madsen Case* should not be considered controlling for the reason that therein the agent was a mere soliciting agent and the time during which the policy was in possession of the insured was a period of several years. *S. J. Levy* was no more than a soliciting agent here. At least, he had no authority to waive warranties for the company, and was therefore in no better position in that respect than a soliciting agent. This question of the authority of an agent to waive conditions is learnedly discussed in *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670, and we need not further consider it.

[5] As to the time, a delay of four months in repudiating the fraud is as fatal as a delay of four years. It is the duty of the insured to act promptly. He cannot speculate with death. It is, of course, always imminent, and at any moment it may claim even the most robust. The situation of the insured and the nature of the contract made it his imperative duty to act immediately.

The importance of such speedy action is certainly emphasized by the circumstance of his death within a little less than four months from the time the policy was issued. In the absence of any claim that the delay was caused by any act of respondent or that it was unavoidable for any reason, we consider it fatal to a recovery.

The cases generally seem to take it for granted that the insured must act with great promptness in such contingency. We may refer specifically to only one, decided by the Supreme Court of Wisconsin, *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, reported with an exhaustive note in 67 L. R. A. 706, wherein a similar question was involved. Therein it was held that:

"If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same."

And it was further held that the "reasonable time" began to run when he received the policy, and that a delay of four months and a half before moving to rescind is too long a time.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

FOLEY v. CITY OF OAKLAND. (Civ. 1950.)

(District Court of Appeal, First District, California. Feb. 28, 1917. Rehearing Denied March 29, 1917; Denied by Supreme Court April 26, 1917.)

1. MUNICIPAL CORPORATIONS — 126 — OFFICERS — COUNCIL'S POWER TO ABOLISH.

The act of a city council in abolishing an office is an exercise of legislative power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 298-300.]

2. MUNICIPAL CORPORATIONS — 191 — OFFICERS — COUNCIL'S POWER OF REMOVAL — CHARTER.

One appointed assistant sanitary inspector under city of Oakland ordinance could be removed by ordinance abolishing the office, the council being empowered by Charter, § 31 (St. 1911, p. 1551), to discontinue offices, and section 39, providing that council shall be vested with all powers of legislation "adequate to a complete system of local government," and the charter not limiting that power; and section 80, providing that persons employed by the city on September 1, 1910, may retain their employment subject to reclassification by the civil service board unless removed for cause, or because the

civil service board determines "that their employment by the city is unnecessary," did not deprive the city council of authority to abolish the office itself.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 764.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by J. G. Foley, against the City of Oakland. Judgment for plaintiff, and defendant appeals. Reversed.

Paul C. Morf, City Atty., and W. H. O'Brien, Deputy City Atty., both of Oakland, for appellant. Charles A. Beardsley, of Oakland, for respondent.

KERRIGAN, J. This is an appeal by the defendant from an adverse judgment. The case involves the proper construction of certain provisions of the charter of the city of Oakland.

[1, 2] The facts of the case may be summarized as follows: The city of Oakland is a municipal corporation governed by a freeholders' charter (Stats. 1911, pt. 2, p. 1551). The health department is under the direction of a commission of public health and safety. Ordinance No. 350 N. S. created the position, among others, of assistant sanitary inspector in that department. The plaintiff was in the employ of the city on September 1, 1910, and was appointed to said office of assistant sanitary inspector. On July 20, 1915, said ordinance was repealed by Ordinance No. 885 N. S. with the consequent abolition of the position held by the plaintiff. Section 31 of the charter (found at page 1575 of the Statutes of 1911) provides:

"The council shall have the power by ordinance to create, consolidate and discontinue offices, deputyships, assistantships and employments other than those prescribed in this charter * * * and also the method by which * * * such office, deputyship, assistantship or employment * * * shall be declared vacant."

Section 39 of the charter (Stats. 1911, p. 1577) reads:

"The council shall be the governing body of the municipality. It shall exercise the corporate powers of the city, and, subject to the express limitations of this charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the state."

The act of a city council in abolishing an office is an exercise of legislative power. *Downey v. State*, 160 Ind. 578, 582, 67 N. E. 450; 5 R. C. L. 614. There is no express provision in the charter limiting the legislative power of the council to create or abolish offices or positions other than that contained in that part of section 31 above quoted; in fact it is not contended that the city council has not the general power to create and abolish clerkships and offices. Respondent's position is based on the latter part of section 80 of said charter (Stats. 1911, p. 1605), which sec-

tion, after enumerating the employees of the city excepted from the civil service provisions of that act, reads:

"Provided, that persons employed by the city * * * on September 1, 1910, may retain their employment under the city, subject to classification and reclassification by the civil service board without further examination, unless removed for cause, or unless it shall be determined by the civil service board that their employment by the city is unnecessary."

Respondent argues that, while the city council may have the general power to abolish offices, such power, under the above-noticed portion of section 80, is vested in the civil service board so far as those persons are concerned who were in the employment of the municipality on September 1, 1910.

We think this position cannot be maintained. The civil service board is given power to determine that an employee is unnecessary, and it may perhaps remove him and leave the office vacant, but still existing; but the provision of the charter conferring this power falls far short of depriving the city council of its authority to abolish the office itself. On September 1, 1910, the date referred to in section 80 of the charter, the board of freeholders were engaged in framing the present organic act; and doubtless it was deemed expedient not only to give the persons who were at that time in the employ of the municipality civil service standing without examination, but also to subject them to removal only for cause or upon a showing that their employment was unnecessary, instead of leaving them, as are other civil service employees, subject to removal by the heads of the different departments of the city, with a right to appeal to the civil service board. But the charter did not go farther in this behalf; and section 80 thereof does not give to the civil service board the power to abolish offices, such power being lodged only in the council.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

PLEASANT VALLEY HOTEL CO. v. HENDERSON. (Civ. 1955.)

(District Court of Appeal, First District, California. Feb. 24, 1917. Rehearing Denied by Supreme Court April 23, 1917.)

LIMITATION OF ACTIONS §46(1)—CONTRACTS—RATIFICATION OF TRANSACTIONS.

Where corporate directors in January, 1912, borrowed money from the corporation agreeing to repay it when certain purposes should be accomplished, and those purposes were accomplished in April, 1913, at which time each of the two directors was charged with one-half the loan on the books of the corporation, the corporation may maintain an action for such sum in November, 1914; for, as the corporation ratified the transaction in April, 1913, the cause of action did not accrue until then, and the two-

year period prescribed by Code Civ. Proc. § 339, subd. 1, had not expired in November, 1914.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240, 251, 253.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by the Pleasant Valley Hotel Company, a corporation, against E. A. Henderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. C. K. Bonestell, of Fresno, for respondent.

KERRIGAN, J. This is an appeal by defendant from an adverse judgment. The question for determination in this case is as to whether or not, of the several causes of action alleged in the complaint, the demand therein set forth for \$1,000 was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

The record shows that the action was commenced on November 19, 1914; that on January 6, 1912, defendant and one George F. Patterson, who were directors of the Pleasant Valley Investment Company, plaintiff's assignor, borrowed from that company \$2,000 for certain purposes, and agreed to repay the same when those purposes should be accomplished; that those purposes were accomplished so far as they could be in April, 1913, at which time, in compliance with their agreement, each was charged on the books of the company with \$1,000, and that at that time each agreed to pay to the investment company such sum; that George F. Patterson paid the money so borrowed by him; but that the defendant has failed and neglected to repay the amount so charged against him.

Assuming that the circumstances under which the \$2,000 were obtained from the Pleasant Valley Investment Company stamped the transaction as a conversion of the funds of that company, still the company could waive the conversion, and, repudiating the action of defendant and Patterson, could perhaps have brought an action immediately for money had and received. However that may be, it appears from the record that the Pleasant Valley Investment Company elected to ratify in detail the transaction as negotiated by those directors; it chose to adopt their acts as its own, to regard them as valid, and to enforce the performance of the obligations arising therefrom. Therefore the statute of limitations did not commence to run against the plaintiff's cause of action on January 6, 1912, the time the money was obtained by defendant and Patterson, but from the time the obligation to repay was fixed, to wit, in April, 1913. The action therefore, having been filed in November, 1914, was brought before it was barred by the statute. Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

JOHNSON v. JOHNSON et al. (Civ. 1615.)

(District Court of Appeal, Second District, California. Feb. 26, 1917.)

1. HUSBAND AND WIFE § 270(10)—FINDINGS TO SUPPORT—FRAUDULENT CONVEYANCE OF COMMUNITY PROPERTY.

A wife, suing her husband for separate support and maintenance, and joining certain of his relatives on the theory that they had, by means of a fraudulent conspiracy with him, acquired certain real estate alleged to be community property, was not entitled to a decree against the grantees, there being no finding of fraud and the evidence showing that they had paid full value and consideration for the conveyance of the property by the husband to them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 983.]

2. HUSBAND AND WIFE § 801—COMMUNITY PROPERTY—FRAUDULENT CONVEYANCE BY HUSBAND—JUDGMENT FOR WIFE FOR ATTORNEY'S FEES.

If there was fraud in the husband's conveyance to his relatives, there was no authority, statutory or otherwise, under which the court was warranted in rendering judgment against the grantees for \$150 attorney's fees in favor of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1099.]

3. HUSBAND AND WIFE § 267(1)—COMMUNITY PROPERTY—DECREE FOR SUPPORT AND MAINTENANCE—MARITAL RELATION.

A decree for permanent support and maintenance in favor of a wife did not affect the marital relation, and until such relation is dissolved, the husband is entitled to control the community property, with absolute power of disposition other than testamentary, though, without the wife's written consent, he cannot make a gift or conveyance without valuable consideration under Civ. Code, § 172.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929, 980, 986.]

4. HUSBAND AND WIFE § 286—WIFE'S SUIT FOR SEPARATE MAINTENANCE—EFFECT.

The purpose of a wife's suit for separate maintenance is specifically to enforce her husband's general duty by directing him to make certain definite payments at regular intervals for her support, and, subject to such provision, the relations of the parties to each other and the community estate is the same as if no such action had been brought or an award made.

5. HUSBAND AND WIFE § 299(1)—SUIT FOR SEPARATE MAINTENANCE—COMMUNITY PROPERTY—JUDGMENT.

In a wife's suit against her husband for permanent support and maintenance, wherein she joined some of his relatives on the theory that, by means of a fraudulent conspiracy, they had acquired certain community realty, where the court found that a trust company should be appointed trustee of half the amount of the community estate, to receive and disburse the same on the wife's order, the judgment giving such fund to the wife absolutely, and without limitation, was improper.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1094.]

6. HUSBAND AND WIFE § 298½—SEPARATE MAINTENANCE—FINDINGS.

In a wife's suit for separate maintenance and support, wherein she joined her husband's relatives on the theory that he had fraudulently

conveyed certain community realty to them, defendants were entitled to findings on issues presented by their answer.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1091, 1092.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Sarah Johnson against Nels Johnson and others. From a judgment for plaintiff, defendants appeal. Reversed.

I. Henry Harris, of Los Angeles (Charles A. Bank, of Los Angeles, of counsel), for appellants. J. H. Ryckman, of Los Angeles, Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff, without asking for a divorce, sought a decree awarding her permanent support and maintenance, as provided in section 137, Civil Code. Upon the theory that they had, by means of a fraudulent conspiracy with her husband, acquired certain real estate alleged to be community property of the couple, and thus deprived her of her interest therein, she joined as defendants with him his father and mother, Frank and Beda Johnson, and his brother, Bayard Johnson. Plaintiff obtained a judgment, from which all of the defendants appeal upon a record presented in accordance with sections 953, 953a, and 953b, Code of Civil Procedure.

By the decree it was adjudged that plaintiff, Sarah Johnson, do have and recover of and from defendants Beda Johnson, Frank Johnson, and Bayard Johnson the sum of \$1,787.50, together with attorney's fees of \$150, which sum of \$1,787.50 the court adjudged to be one-half of the proceeds of the community property so conveyed by Nels Johnson. It was further adjudged that Nels Johnson pay to plaintiff the sum of \$20 per month as an allowance for the support and maintenance of Frances Johnson, the minor child of plaintiff and her husband. As stated, the theory of the complaint as to the defendants other than the husband was that they had, by means of fraud, acquired community property of plaintiff and her husband.

[1] Waiving any question as to the sufficiency of the allegations of fraud, as to which, however, we entertain grave doubt, there is no finding of fraud on the part of any of the defendants; nor is there any evidence whatsoever tending in the slightest degree to justify a finding that would warrant a judgment such as that here rendered against defendants Frank, Beda, and Bayard Johnson. For aught that appears in the findings to the contrary, they paid full value in consideration of the conveyance of the property so made by Nels Johnson to them, and the evidence without substantial contradiction shows the payment of such consideration. Briefly stated, the evidence shows that after his marriage Nels Johnson obtained a

contract for the purchase of a lot at the price of \$1,800. In making the first payment he borrowed \$500 from his father, which sum he paid thereon at the execution of the contract. Of the deferred payments \$750 was paid out of his earnings after marriage. Being unable to keep up the payments and being largely indebted to his father, he, in payment of such indebtedness and \$150 cash at the time paid to him by his father, conveyed the property to his mother, who paid the balance of \$550 due upon the contract for the purchase thereof and took a deed to the property, which she afterwards conveyed to her son Bayard Johnson for \$2,500, and he, under an arrangement with his father, conveyed it in exchange for an equity in other property which was subject to a mortgage of \$7,500. The court found this equity to be of the value of \$4,125 which, after deducting the \$550 paid by Beda Johnson, left \$3,575, all of which the court declared to be community property of plaintiff and her husband. It thus appears that, at most, \$1,250 represented the community interest in the lot, and since it is conceded that Beda Johnson in acquiring the deed thereto paid \$550 of the purchase price, it would appear in any event that she was entitled to such proportionate share of the \$4,125 as her payment bore to the purchase price of the lot. In her complaint plaintiff alleged that the first payment of \$500 made upon the contract of purchase was paid out of the separate funds of Nels Johnson. If her allegation be accepted as true, then only \$750 paid in the purchase of the lot constituted community funds.

[2] Assuming the existence of fraud, we know of no authority, statutory or otherwise, under which the court was warranted in rendering the judgment against defendants other than Nels Johnson for the sum of \$150 attorney's fees.

[3] Moreover, the decree did not affect the marital relation (*McKay on Community Property*, § 410; *Kusel v. Kusel*, 147 Cal. 57, 81 Pac. 295), and until dissolved, the husband was entitled to the control of the community property, with absolute power of disposition other than testamentary, provided that without the written consent of the wife he could not make a gift thereof or convey the same without a valuable consideration (Civ. Code, § 172), and we know of no principle of law under which a wife without obtaining a divorce can be awarded one-half of the community estate. The case of *Cummings v. Cummings*, 14 Pac. 562, was an action for divorce wherein the plaintiff, alleging that the husband had conveyed community property with the intent on the part of both the grantor and grantee to defraud plaintiff of her rights therein, sought a decree annulling the same and awarding her a one-half interest therein. It was there held that an action to set aside a conveyance of community

property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. In support thereof the court cited the case of Greiner v. Greiner, 58 Cal. 115, where it was likewise held (quoting from the syllabus):

"A wife cannot maintain an action while the marriage bond exists, to set aside a transfer of the common property, made by the husband for the purpose of defrauding her."

See, also, Van Maren v. Johnson, 15 Cal. 312; Kusel v. Kusel, supra; Tibbetts v. Fore, 70 Cal. 245, 11 Pac. 648; Valensin v. Valensin (C. C.) 28 Fed. 602.

[4] The purpose of the suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals for the wife's support. Subject to such provision, their relations to each other and to the community estate is precisely the same as though no such action had been brought or an award made. The status of the parties may be restored by reconciliation, in which case the necessity for the separate maintenance would terminate. Notwithstanding this fact, however, or other conditions which might be mentioned, a judgment of this character would give to the wife one-half of the community property.

[5] Another objection made to the judgment, which seems to be well founded, is that the court found that the Title Insurance & Trust Company should be appointed as trustee of one-half of the amount of the community estate, to receive and disburse the same upon plaintiff's order, but in the conclusions of law, as well as in the judgment, the court gave said fund to plaintiff absolutely and without any limitation thereon. It is not awarded as maintenance, but the judgment awards it to plaintiff absolutely, to be dissipated, given away, lost in speculation, or used in any manner which her fancy or whims might dictate.

[6] The answer of defendants alleged that in a former action brought by plaintiff against Nels Johnson for divorce, a trial of which was had, the matters alleged in this action had been adjudicated and determined by the court, wherein the divorce was denied, but an order was made under section 136 of the Civil Code, allowing plaintiff \$25 per month for maintenance. The answer also alleged that defendant Frank Johnson had loaned to defendant Nels Johnson the sum of \$500 for the purpose and used by the latter in making the initial payment upon the contract for the purchase of said lot. The court made no finding as to either of these issues tendered. Clearly, defendants were entitled to findings upon both issues.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; JAMES, J.

MATCHETTE et al. v. CALIFORNIA FRUIT CANNERS' ASS'N. (Civ. 1933.)

(District Court of Appeal, First District, California, March 3, 1917. Rehearing Denied April 2, 1917; Denied by Supreme Court April 30, 1917.)

1. MASTER AND SERVANT §101, 102(8)—MASTER'S DUTY TO FURNISH SAFE WORKING PLACE—ORDINARY CARE.

An employer's duty to furnish employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173.]

2. MASTER AND SERVANT §233(3) — SERVANT'S INJURY — CONTRIBUTORY NEGLIGENCE — CHOICE OF WORKING PLACE.

When an employé chooses a dangerous method of work instead of a safe way provided and is injured, he is guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 745.]

3. NEGLIGENCE §136(22) — ACTION FOR BRAKEMAN'S DEATH — CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.

A brakeman killed while switching cars in yards of defendant canning company who unnecessarily stood between platform and track, it being impossible to stand there during passage of a large box car, and he being experienced with this particular case, held guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 324.]

4. NEGLIGENCE §56(1)—ACTION FOR BRAKEMAN'S DEATH—VIOLATION OF CONTRACT BETWEEN RAILROAD AND DEFENDANT.

In action for brakeman's death from being crushed between railway track and platform, it was immaterial that defendant canning company had not complied with contract with railroad prescribing distance to be left between platform and track, where the space actually existing was only a few inches less, and evidence showing that the accident might have occurred in any event.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Zanona Matchette and another against the California Fruit Canners' Association. Defendant appeals from judgment for plaintiffs and from order denying new trial. Reversed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. Preston & Preston and Barrett & Thomas, all of San Francisco, for respondents.

KERRIGAN, J. Charles C. Matchette, a brakeman in the employ of the harbor commissioners of the state of California on its belt line railroad in the city and county of San Francisco, met his death while in the performance of his duties as a member of a switching crew on the premises of the defendant, the California Fruit Canners' Association. This action was brought by his widow and minor daughter to recover damages

for his death, which is alleged to have been caused by the negligence of the defendant. The jury rendered a verdict in favor of the plaintiffs and against the defendant for the sum of \$5,000, and from the judgment and from an order denying a new trial, the defendant appeals.

The first contention of the appellant is that the evidence fails to establish that any duty owed to the deceased by the appellant was left unperformed, or that it was guilty of any negligence whatever, but that, on the contrary, the evidence affirmatively shows that the death of Matchette resulted from his own negligence. From the correctness of this contention we see no escape.

The record discloses the following facts: The defendant at the time of the injury complained of owned and maintained certain buildings situated in San Francisco which it used in the operation of its business of canning fruit and for warehouse purposes. Between these buildings was a space of some 72 feet or thereabouts upon which were constructed two spur tracks from the Belt Line Railroad owned and operated by the state of California. These spur tracks were standard gauge, and their length on defendant's property was approximately 210 feet. At the point where these tracks entered the defendant's property they were built on a curve, the curve continuing a distance of some 120 feet, from which point the tracks ran straight for a like distance upon said property. Parallel to the track throughout its entire length and on the westerly side of the cannery building there had been erected a platform, varying in width from the point where the track was straight to the place of the accident, and the edge of which was about 4 feet 8 inches from the outer rail of the easterly spur track. The tracks were laid upon a trestle about 14 feet high, which rested upon the basement of the building, and the platform was about 3 feet 6 or 7 inches above the level of the track. On the morning of February 23, 1911, the day of the accident, the switching crew of which deceased was a member had switched one car onto the westerly spur track on defendant's premises, and then pulled their train back into Beach street, which bounds the south side of defendant's plant, and switched a large box car loaded with cans upon the easterly spur track. The switching equipment of the railroad consisted of an engine and a flat car called a traller. The crew was composed of the engineer and fireman, two switchmen, and a foreman. The deceased was one of the switchmen, and it was his duty on this occasion to spot the car that was being delivered; that is, to put it at a place on defendant's spur track indicated by the foreman. When the train which caused the accident was being backed in it consisted of an engine, next the traller, and the box car that was being delivered. The traller had a running board at one end, up-

on which the other switchman, Conway by name, took a position where he could receive and transmit to the fireman or engineer the signals given by the deceased. In the performance of his duties deceased took a position against the platform before mentioned and as the train came in over the easterly spur track and swung on the curve the middle of the large box car struck him and pressed him against the edge of the platform, causing his death. The evidence conclusively shows that the deceased had been in the railroad business for a number of years and was an experienced brakeman; that at the time of the accident he had been employed on the belt line road for several months as a member of the switching crew and had been upon the defendant's premises many times before, and that he had on former occasions been accustomed to deliver large box cars, such as the one that crushed him, upon this identical spur. The evidence further shows that the position which the deceased took was not necessary for the performance of his duties. The engine was in such a position that he could not signal directly to the engine crew, and it was his business only to instruct his fellow switchman who was on the traller, and who in turn would pass on the signal to the engine crew. There was no object to be served by his lying upon the ground, the chief purpose of a switchman taking such a position being to couple or uncouple cars, or to give signals directly to the engine crew or throw switches, none of which acts were required of the deceased at this time, Conway being there for that purpose. The duty of deceased was merely to spot the car. In the performance of that duty he had free choice of positions where he could have stood, he could have stood upon the platform, or he could have signaled from the side or end of the car, or he could have stood between the tracks.

Under these circumstances it is argued by the appellant that the deceased selected a place of obvious danger to perform his duties; that he knew, or ought to have known, that while a space of less than 5 feet between the outer rail and the form on a curved track might leave room enough in case of a flat car, when a large car with additional overhang such as caused his death was being switched in it was impossible for a man to stand there and avoid being struck by the car.

[1] The duty of an employer to furnish an employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose. Deceased was placed upon defendant's premises under an invitation. It was the defendant's duty to use reasonable care in providing a reasonably safe place for decedent to work. As far as the evidence shows, it fully discharged that duty. Deceased was an employé of the belt line railroad, and under the con-

his superiors. The appellant could not instruct him as to the manner in which he should do his work. The deceased had assisted in bringing up the car which crushed him, knew its dimensions and was an experienced brakeman, and he had a free choice as to where he should stand to spot from, and he chose a place of obvious danger. The location by defendant of the permanent structures necessary and convenient to accommodate its business near the tracks did not of itself constitute a danger; and even assuming that it did, it was obvious to the deceased, who, as we have said, was an experienced railroad man.

[2] The recent case of *Hontz v. San Pedro, etc., R. R. Co.*, 161 Pac. 971, is, in our opinion, on all fours with the case at bar. There the deceased was an experienced brakeman, and while a member of a switching crew engaged in moving cars in the lumber yard of the defendant company was killed. Over a spur track in the lumber yard there was a drawbridge which was raised to an upright position when switching was in progress. At times when raised the drawbridge sagged and leaned a trifle over a pit. This fact constituted no peril when flat cars only were being handled, but it brought the bridge close to the side of box cars. The bridge at the time of the accident was raised, and it leaned slightly toward the track. Decedent knew the position of the bridge, but for some unexplained reason in broad daylight, and without any necessity for so doing, he started to climb the ladder on the side of a moving box car, and before reaching the top came into collision with the bridge and was killed. Mr. Justice Henshaw, in delivering the opinion of the court, said:

"It is a universal principle that, when a safe way has been provided for an employé for the performance of an act, and another and dangerous way exists, if the employé chooses to take the dangerous way and is injured, he is guilty of contributory negligence as matter of law."

[3] It is argued by plaintiffs, however, that the questions of negligence and contributory negligence were for the jury, and that, as those questions were resolved in plaintiffs' favor, this court should not disturb the verdict and the judgment based thereon. The case last cited effectively disposes of this contention also, for it is there said:

"But if, in cases such as this, it is to be said that the question of contributory negligence is one of fact, it is extremely difficult to conceive of a case where it could be one of law."

This statement of the law is applicable with equal force to the present case; for the facts and conditions upon which the question arises are identical. Here, although the distance between a car of ordinary size and the platform was not great, still it was perhaps sufficient for a brakeman using great care to stand there, but when large cars were switched in he could not do so without being struck; and, as before stated, the deceased

was familiar with the premises, experienced, and had switched in like cars before, at which times he spotted from other positions. The entire evidence thus shows conclusively that the deceased was killed through his own negligence.

[4] Untenable also is the contention of the plaintiffs that the defendant created a trap by failing to comply with the terms of a contract it had entered into with the Southern Pacific Railroad Company, under which the track was built, which in part provided that defendant was not to erect or maintain a platform nearer to the track than 4 feet 8 inches. The rights of the parties hereto, as the trial court correctly instructed the jury, are in no manner measured by or dependent upon such contract. The obvious purpose of the provision in that contract was to leave a space that would accommodate large cars; and even if the provision had been complied with, the space would have been increased but a few inches, and the danger, for aught the evidence shows, would have been equally great, because any person who stood between the car and the platform when large cars were switched in was certain in any case to be struck.

In view of the conclusion we have thus reached it becomes unnecessary to notice the question of the proximate cause of the injury and further questions presented by the briefs.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE ex rel. LYONS v. McALEER.
(Civ. 2106.)

(District Court of Appeal, Second District, California. March 1, 1917. Rehearing Denied by Supreme Court April 30, 1917.)

1. ELECTIONS ~~§~~ 51—OFFICERS—TRANSFER OF OFFICER.

Where the civil service commission failed to obey the mandatory provision of Charter of Los Angeles County, art. 9, § 34, whereby it was not only authorized, but required, to prescribe a general rule pursuant to which all transfers from one position to a similar position in the same class and grade should be made, there was no law in the charter or elsewhere authorizing such a transfer, and the act of the commission in attempting to transfer a deputy county clerk to the office of registrar of voters did not vest him with any title to the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

2. ELECTIONS ~~§~~ 51—OFFICERS—REGISTRAR OF VOTERS.

The registrar of voters is an appointive county officer, and, the office not being in the unclassified service named in Charter of Los Angeles County, art. 9, § 33, appointment to it must, as required by express provision of section 11, subd. 1, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with the

general rule prescribed by the commission for the creation of such eligible list.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

3. ELECTIONS — 51—OFFICERS—TRANSFER BY CIVIL SERVICE COMMISSION.

The office of registrar of voters of the county of Los Angeles being an independent office, as distinct and separate from that of county clerk as that of auditor or recorder, and being specified by the charter as an office to be filled by appointment to be made by the board of supervisors from the eligible list, it could not, under the pretense that it was of like grade and class of that of deputy clerk, be filled by act of the civil service commission under guise of transferring such clerk to such independent office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Proceedings in the nature of quo warranto by the People of the State of California, on the relation of David B. Lyons, against Thomas McAleer. From a judgment for respondent, relator appeals. Reversed, and trial court directed to enter judgment on the findings in favor of relator.

U. S. Webb, Atty. Gen., and John Beardsley and A. B. Shaw, Jr., both of Los Angeles (David Evans, of Los Angeles, of counsel), for appellant. W. J. Ford, Percy V. Hammon, and Oscar Lawler, all of Los Angeles, for respondent.

SHAW, J. The subject of this proceeding, in the nature of quo warranto brought in the superior court of Los Angeles county at the relation of David B. Lyons, is the title to the office registrar of voters of Los Angeles county. Upon the trial in the court below judgment was entered declaring the respondent, Thomas McAleer, entitled to the office, and that the relator, David B. Lyons, had no right thereto, from which judgment the plaintiff has appealed.

The facts out of which the proceeding arose are as follows: Pursuant to the provisions of section 7½ of article 11 of the Constitution, the electors of the county of Los Angeles duly adopted a charter for the government of said county, which upon being approved by the Legislature and as provided therein, took effect on June 2, 1913. Among other offices created by the charter and which the board of supervisors was authorized to fill by appointment was that of "registrar of voters." While the charter, save as to services to be rendered in connection with petitions for the recall of officials as provided in article 11 thereof, is silent as to the duties of the official holding such position, we may assume that they are identical with those which were imposed upon the county clerk by general laws, and for the performance of which such clerk was allowed a deputy in charge of the registration department at a salary of \$150 per month (section 4230, Pol. Code), which position, as such deputy in

charge of said department, McAleer as the duly appointed, qualified, and acting deputy, had held from the date of his appointment on June 2, 1911. By subdivision 1 of section 11 of the county charter the board of supervisors is authorized to appoint the registrar of voters, the appointment of whom (since the incumbent does not fall with the unclassified service hereinafter referred to) must, as provided by said section, be made from the eligible civil service list submitted to said board by the civil service board created by section 30 of article IX of the charter, which subdivision 1 of section 11 also provides that the board of supervisors shall by ordinance fix his compensation. Section 33 of the charter divides the civil service of the county into the unclassified and classified service, and provides that the classified service shall include all positions now existing or hereafter created, excepting certain positions mentioned as belonging to the unclassified service, which, however, does not include the registrar of voters; that being included in the classified service. Section 34 of said article IX provides that the civil service commission, consisting of three members to be appointed by the board of supervisors (section 30), "shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law," which rules, among other things designated in 16 subheads, shall provide:

"1. For the classification of all positions in the classified service. 2. For open, competitive examinations to test the relative fitness of applicants for such positions. 3. For public advertisement of all examinations. 4. For the creation of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in examination. * * * 6. For the appointment of one of the three persons standing highest on the appropriate lists. * * * 10. For transfer from one position to a similar position in the same class and grade. * * * 11. For promotion based on competitive examination and records of efficiency, character, conduct and seniority. * * * An advancement in rank or an increase in salary beyond the limit fixed for the grade by the rules shall constitute promotion. Whenever practicable vacancies shall be filled by promotion. * * * 16. For the adoption and amendment of rules only after public notice and hearing"

—followed by the provision that:

"The commission shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be necessary and proper for the enforcement of this article."

Section 37 provides that:

"All persons in the county or township service holding positions in the classified service as established by this article, at the time it takes effect, whether holding by election or by appointment, and who shall have been in such service for the six months next preceding shall hold their positions until discharged, reduced, promoted or transferred in accordance with the provisions of this article."

Section 38 provides that:

"The auditor shall not approve any salary or compensation for services to any person holding or performing the duties of a position in the

classified service, unless the pay roll or account for such salary or compensation shall bear the certificate of the commission that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this article and of the rules established thereunder."

It is further provided by section 50, which relates to the recall of officials and specifies certain duties in connection therewith to be performed by the registrar of voters, that:

"Until such time as the board of supervisors shall appoint a registrar of voters under the provisions of this charter, the powers and duties by this section conferred upon the registrar of voters shall be exercised and performed by the county clerk."

On June 2, 1913, the day the charter became operative, the board of supervisors by ordinance fixed the salary of the registrar of voters at \$150 per month.

No rules whatever were adopted by the commission until January 1, 1914. On October 15, 1913, the county clerk of Los Angeles county addressed a communication to the civil service commission, recommending that Mr. McAleer be transferred to the position of registrar of voters, which communication, on October 16, 1913, was transmitted to the board of supervisors, together with a letter from the civil service commission stating that:

"This commission holds that under the civil service provisions of the charter it may authorize the transfer of Mr. McAleer upon recommendation of the board of supervisors, and that, in the event the board fails to recommend the transfer, then the position should be filled by open competitive examination."

On October 27th the board of supervisors made an order authorizing the transfer of McAleer from the position as deputy county clerk in charge of registration department to the office of registrar of voters; and on November 4, 1913, the civil service commission, as shown by its minutes, made an order as follows:

"Upon the joint request of the county board of supervisors and county clerk Lelande, the transfer of Thomas McAleer from service as registration clerk, in the office of the county clerk, to the office of registrar of voters, was authorized."

It thus appears that, in the absence of rules which the commission was by section 34 to prescribe and enforce for the classified service, and without any competitive examination therefor, Thomas McAleer, who was a deputy county clerk in charge of the registration department, was by the civil service commission transferred therefrom to the newly created office of registrar of voters. The recommendation of the county clerk that such transfer be made is entitled to no weight whatsoever; neither did the order of the board of supervisors authorizing the making of the transfer confer any power upon the commission to make the same. We must therefore, in order to sustain the action of the commission, look for some provision of the charter which empowered it to make the transfer. By subdivision 10 of section 34

the commission was not only authorized, but required, to prescribe rules under which it might make transfers from one position to a similar position in the same class and grade. Assuming, but not holding, that the office of registrar of voters created by the charter was in the same class and grade as that of deputy county clerk in charge of the registration department, nevertheless, until adopted, there was no rule having the force and effect of law under which such transfer could be made. The provision of the charter was not self-executing, but contemplated the adoption of a rule having the force and effect of law to make it operative, and the power to enact such legislation was delegated to the civil service commission. In other words, the charter, which may be termed the organic law of the county, conferred upon the civil service commission the power to enact a law for the transfers designated in subdivision 10 of section 34; but until such legislation there was no law authorizing the commission to take any action in such cases. Counsel for respondent insist that the jurisdiction of the commission to make the transfer did not depend upon the adoption of such rule; that in making the transfer it had the same power to act in the absence of the rule as though it had been made. In support of this contention they direct our attention to section 3 of article XII of the charter of San Francisco, which provides:

"The commissioners shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals, and in accordance with its provisions may from time to time make changes in the existing rules."

In construing this provision (*Cook v. Civil Service Commission*, 160 Cal. 589, 117 Pac 663), the Supreme Court said:

"The section of the charter requiring the adoption of general rules for examinations, etc., by the commissioners, expressed, not a mandatory, but a directory, admonition. There is nothing in the language of the act which makes the adoption of such rules a jurisdictional prerequisite to the holding of examinations by the board. These rules were merely 'to carry out the purposes of this article,' i. e., those relating to civil service. The rules were to be a part of the scheme of testing the fitness of candidates for promotion, but the right to examine candidates was not made to depend upon the adoption of these general rules. * * * The commissioners' failure to pass general rules, and the errors, if any, in establishing the possible percentages in the awarding of credits, were not matters of judicial fibre, and in no wise affected the jurisdiction of the commission."

In that case, which was a proceeding in certiorari, the question involved was the power of the board to hold a competitive examination in the absence of general rules authorized by the section of the San Francisco charter. In the case at bar no competitive examination was held; nor was there any observance of the civil service scheme adopted, which was clearly intended to prevent transfers or appointment to office, other than in accordance with rules which the commission in express terms was required to

adopt. Moreover, the provision of the San Francisco charter which the Supreme Court was called upon to construe in the case referred to was almost identical with the provision in the Los Angeles charter which provides that:

"The commission (in its discretion) shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be deemed necessary and proper for the enforcement of this article."

[1] The commission failed and neglected to obey the mandatory provision of section 34, whereby it was not only authorized, but required, to prescribe a general rule under and pursuant to which all transfers should be made. Until such rule was adopted there was no law in the charter or elsewhere authorizing the purported transfer; hence the act of the civil service commission was without authority, arbitrary, and insufficient to vest in McAleer any right or title to the office. While it is true, as claimed by respondent, that the commission, under subdivision 1 of section 34, was authorized to make a rule providing for the classification of all positions in the classified service, it does not follow that said commission, by making the transfer on November 4, 1913, legally adjudged the position of deputy county clerk in charge of the registration department was in the same class and grade as that of registrar of voters, for the reason that, since the commission had adopted no rule for the classification of positions in the classified service, which includes the office of registrar of voters, there was no law under and pursuant to which the commission could determine said positions to be in the same class and grade. To sustain respondent's position would remove all limitations upon the power of the commission to make transfers, and, in the absence of general rules for guidance, leave it free to act arbitrarily in each particular case, thus nullifying the purpose for which the civil service provision was adopted.

[2] The registrar of voters, as we have seen, is an appointive county officer (section 14), and since it is not in the unclassified service named in section 33, the appointment to the office must, as required by the express provision of subdivision 1 of section 11, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with a general rule prescribed by the commission for the creation of such eligible list. Subdivision 4, § 34.

[3] In our opinion, the office of registrar of voters was an independent office, as distinct and separate from that of county clerk as is that of auditor or recorder, and since it is specified as one of the offices to be filled by appointment to be made by the board of supervisors from the eligible list, it could not, under the pretense that it was of a like

grade and class with that of deputy county clerk, be filled by act of the commission under the guise of transferring such deputy clerk to such independent and distinct office. To hold otherwise would violate the plain import of the language contained in the charter and be subversive of the purpose which the electors had in adopting the provision.

The claim of relator, Lyons, to the office is based upon the following proceedings: On November 20, 1914, pursuant to an order of the civil service commission, an examination was held in accordance with rules theretofore adopted for the purpose of filling the office of registrar of voters. As a result of this examination Lyons was rated highest, and, with others, placed on the list of those eligible for appointment to said office. On January 6, 1915, the commission certified to the board of supervisors the names of Lyons and two other persons standing highest, as shown by said examination, any one of whom was eligible for appointment to the office, and on August 10, 1915, the board of supervisors duly appointed Lyons as registrar of voters. Upon receiving a certificate of his appointment to the office, he duly qualified as such official and demanded from McAleer, the incumbent, possession of the office, books, and equipment, with which demand McAleer refused to comply. The action of the commission in holding the examination, certifying to the board of supervisors the list of eligibles for appointment, and the action of said board of supervisors in appointing Lyons seems to have been had and taken in strict accordance with the provisions of the charter, from which we conclude that McAleer had no right or title to the office, and that David B. Lyons was entitled to the same. And since the facts upon which our conclusion is reached appear from the findings, the judgment in favor of McAleer is not only reversed, but upon the going down of the remittitur the trial court is directed to enter judgment upon the findings in favor of David B. Lyons.

We concur: CONREY, P. J.; JAMES, J.

CHENOWETH v. CHAMBERS, State Controller. (Civ. 1644.)

(District Court of Appeal, Third District, California. Feb. 27, 1917. Rehearing Denied by Supreme Court April 26, 1917.)

1. STATUTES \S 188—CONSTRUCTION—GENERAL RULES.

Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 206, 267, 276.]

2. OFFICERS \S 30—INCUMBENCY OF TWO OFFICES—STATUTES—CONSTRUCTION—"TERM."

Const. art. 4, § 19, providing that no legislator shall during the term for which he shall

have been elected hold or accept any office, trust, or employment under the state, became effective December 21, 1916. Petitioner was elected as representative for the term beginning January, 1915, and ending January 8, 1917, but resigned on December 19th to accept another office. *Held*, that the word "term" referred to the period for which the petitioner was elected, and not merely to his incumbency, so that petitioner did not evade such provision by resignation.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 37-43.

For other definitions, see *Words and Phrases*, First and Second Series, Term.]

3. OFFICERS — INCUMBENCY OF TWO OFFICES — STATUTES — CONSTRUCTION — "SHALL."

Such provision, though it employs the words "who shall be elected," does not have a wholly prospective effect as to the time of election of the assemblymen, since the word "shall" neither legally nor grammatically denotes mere futurity, but conveys the idea of obligation.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 22, 23.

For other definitions, see *Words and Phrases*, First and Second Series, Shall.]

4. OFFICERS — INCUMBENCY OF TWO OFFICES — STATUTES — CONSTRUCTION.

Nor does the expression "during the term for which he shall have been elected" imperatively demand construction so as to apply only to assemblymen elected after passage of the amendment.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 22, 23.]

Mandamus by Walter W. Chenoweth against John S. Chambers, as Controller of the State. Writ denied.

Garret W. McEnerney and A. F. Burke, both of San Francisco, and Downey, Pullen & Downey, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Petitioner seeks the writ of mandate to compel respondent to issue his warrant for the payment of a portion of petitioner's salary. Petitioner was elected a member of the assembly for the Fourteenth assembly district at the general election of November 3, 1914. His term of office began on the first Monday after the 1st day of January, 1915, and ended, by operation of law, on January 8, 1917. He duly qualified as such assemblyman and performed his duties as a member of the assembly at the Forty-First regular session thereof, and also at the special session held in January, 1916. He resigned his office as assemblyman on December 19, 1916, and his resignation was duly accepted by the Governor. He had previously, but since his election as assemblyman, been appointed auditor of the state board of prison directors, and served in that capacity during the entire month of December at the Folsom state prison. He was paid for his services prior to December 19, 1916, but was denied a warrant for the balance of that month's services.

The action of the controller is based upon

amended section 19, art. 4, of the Constitution, which took effect December 21, 1916, and reads as follows:

"No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people."

"It is the contention of the petitioner," reads his brief, "that the amendment is inapplicable to him for two reasons: (1) The amendment is prospective only in its operation, and therefore does not affect senators or members of the assembly who, like the petitioner, were elected before the amendment took effect; and (2) the petitioner had ceased to be a 'member of the assembly' before the amendment took effect, and therefore at no time during the operation of the amendment was within the subject matter of the amendment or affected by it."

Section 19 of article 4 formerly provided that:

"No senator or [assemblyman] shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state which shall have been created, or the emoluments of which have been increased, during such term, except such offices as may be filled by election by the people."

The amended section is much more sweeping than its progenitor, for it applies to all offices, other than elective offices, and forbids the holding or accepting by a senator or assemblyman of any office, trust, or employment under this state "during the term for which he shall have been elected." The purpose of the amendment, as stated by one of its proponents in the official argument addressed to the electors, was to bring the Constitution into harmony with the American theory of government that "those who execute the laws should not be the same individuals as those who make the laws," and for the further reason "that a legislator who is holding a position on the state pay roll is too apt to allow the wishes of the one responsible for his appointment to decide the manner in which his vote shall be cast. A man in such a position is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator."

The question here is: Was it intended to apply to petitioner whose term of office began before the adoption of the amendment and had not expired at the time it went into effect? And, if so intended, could he evade its operation by resigning before the amendment took effect?

[1] We may safely accept as rules of construction what was said in *Smith v. Union Oil Co.*, 166 Cal. 217, 135 Pac. 966, cited by petitioner:

"Where the words of a statute are not ambiguous and their effect is not absurd, the court cannot give it other than its plain meaning, although it may appear probable that a different object was in the mind of the Legislature."

No question arises here as to what the people desired to accomplish by adopting this amendment. Its object is plain enough and is manifest on its face.

[2] The word "term," used in the section, refers, we think, to the period for which the petitioner was elected, and not merely to his incumbency. *Rice v. National City*, 132 Cal. 354, 64 Pac. 580. When we speak of the "term" for which an officer has been elected, we mean the period of time fixed by statute during which he may serve, and not to the time he may happen to serve. Said the court, in *Ellis v. Lennon*, 86 Mich. 468, 49 N. W. 308:

"The term for which respondent was elected is clearly defined by the charter, and the language 'the term for which he was elected' has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility, and excludes a construction which would have attached in the absence of that language."

In the instant case the statute fixed the term of petitioner's office as assemblyman.

We need not consider the effect of petitioner's resignation prior to the going into effect of the amendment. If the section applies to a senator or assemblyman whose term of office had not expired on December 21, 1916, we do not think that petitioner succeeded in evading its force by his resignation prior to December 21st; for the section deals with a fixed period of time, to wit, the "term" of the officer, and not to the period of his incumbency.

The House of Representatives of the state of Maine submitted certain questions to the Supreme Court of that state, but the interrogatories did not reach the court until after the Legislature had adjourned. For this and other reasons a majority of the court declined to respond to the request. Three of the judges dissented from this refusal, and, in answer to one of the interrogatories, said:

"The Constitution in terms (article 4, pt. 3, § 10) prohibits the appointment of a senator or representative, during the term for which he shall have been elected, to any civil office of profit under this state, which shall have been created or the emoluments of which increased during such term; i. e., the term for which he was elected. As to such officers the appointment itself is prohibited, and the prohibition continues, not only while the member retains his seat in the Legislature, but continues until the expiration of the term for which he was elected. He cannot, therefore, be appointed to such office during that term, even though he has resigned his seat in the Legislature." Advisory opinion to Governor, 49 Fla. 269, 39 South. 63; *Ellis v. Lennon*, 86 Mich. 468, 49 N. W. 308; *People ex rel. Sherwood v. State Board of Commissioners*, 129 N. Y. 360, 29 N. E. 355.

[3] Respondent concedes that the amendment was not intended to nor does it operate retroactively. His contention is that it should be given prospective effect from and after December 21, 1916. There is no disagreement among counsel as to the fact that the amendment went into effect on that date. Petitioner's contention is that it was intended to apply only to senators and assemblymen thereafter to be elected, and that this is made manifest by the language employed; that the amendment speaks only in terms of

futurity; that it disqualifies only those "who shall be elected, and further provides that the disqualification shall operate only during the term for which they shall have been elected"; thus "expressly and in two ways indicates the intention of the framers that it should have a prospective operation only." This interpretation means that senators chosen when petitioner was elected are not disqualified for two years from and after the first Monday in the year 1917. If the amendment had been proposed by the Legislature, a possible inference might arise that the members did not intend to disqualify themselves. The amendment, however, was proposed by the people at large, through the initiative, and we may safely assume what was common knowledge that it was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated. The amendment had its origin in a spirit for reform that permeated the state and was intended to cure what the people believed to be a present existing evil, and not merely one likely to arise in the future. Did they so express their intent as to make it imperative on the court, under accepted rules of construction, to hold, as is now contended, that "grammatically (and hence legally) the amendment is limited in its operation to such senators and assemblymen as shall be elected after it takes effect"?

The stress of the argument requiring us so to hold rests upon the presumption that the grammatical construction of the language "during the term for which he shall have been elected" compels the conclusion that "the prohibition is expressed in terms of simple futurity, and the class of officers to be affected is grammatically limited to such as should be elected after the amendment becomes operative." It is urged that "the verbs are all in the future tense"; that the word "shall" the simple future; that the class of senators and assemblymen to which the act shall apply "is expressed in the future perfect tense as senators or assemblymen who shall have been elected"; that in employing the future perfect tense the amendment limits its application to senators and assemblymen who shall be elected after the amendment takes effect.

We are quite satisfied that the word "shall" where first used lends no force to petitioner's contention. Neither legally nor grammatically does it denote mere futurity. It is used here as a word of command, in accordance with the Constitution, that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise." Const. art. 1. In Fernald's Working Grammar of the English Language, p. 141, the distinction between "shall" and "will" is pointed out, and the author says the difference between these two auxiliaries "in the expression of future action or state is one requiring careful study." The author states

that primarily "shall" denotes obligation. "In the first person it simply denotes future fact. In the second and third person the idea of obligation remains, and is felt to be imposed by the person speaking; hence, you 'shall' or 'they shall' means, I will compel you or them to act. * * * Consequently you (he or they) shall, expresses command or necessity, never simple future action." In the amendment the word "shall" must be read in connection with its context. "No senator or member of assembly shall," etc., which is a command that senators and assemblymen shall not hold or accept any office. There is here no suggestion of futurity. The language is imperative and is directed to every member of the Legislature in the present tense. We do not think that the word "shall" where first used in the provision conveys the idea of futurity at all. On the contrary, it carries with it an implication which should aid us in giving the proper construction to what follows.

[4] The expression "during the term for which he shall have been elected" presents a question of more difficulty. In a strictly grammatical sense the phrase, standing alone, conveys the idea of futurity. Reading the section in its entirety, it does not appear to us imperatively to demand a construction contrary to what we have the right to assume the electors, in voting on the amendment, understood to be its purpose and the class of officers to whom it was intended to apply. The phrase or its equivalent is frequently found in statutes and Constitutions, and the cases show that it is applied to past as well as to future acts or conditions. As was said, in *Norris v. Sullivan*, 47 Conn. 474:

"The words 'shall have levied' are susceptible of both past and future application; they furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute."

Respondent points out that such expressions are so frequently found in statutes that the Code of Wisconsin (section 4972) established the following among other rules of construction:

"1. The words 'shall have been' include past and future cases."

In a Missouri statute with respect to the time of commencing an action, there was a proviso:

"That if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a nonsuit, * * * such plaintiff may commence a new action," etc. *Rev. St. 1899, § 2868, amended by Laws 1906, 138.*

This statute was before the court in *Clark v. al. v. Kansas City, etc.*, R. R., 219 Mo. 524, 18 S. W. 40, and it was there contended that the grammatical construction of the statute made it inapplicable to actions commenced before its passage. We venture to quote at some length from the opinion, which seems

to us not only sound law, but good, ordinary common sense:

"Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. 'Expressum facit cessare tacitum.' We must not interpret where there is no need of it. * * *

"Therefore, if the law says that it is to operate only upon cases to be brought thereafter, if it in terms excludes pending cases, then we have nothing to do but to enforce it. Attending to that view, we do not read the statute as contended by counsel for the respondent. Its use of the future form of the verb 'commence,' as developed in the phrase 'shall have been commenced,' in correct usage in the discourse of good writers and speakers, includes the past as well as the future. That phraseology in a statute has been held by the Supreme Court of Connecticut to be 'susceptible of both past and future application; they [the words] furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute.' * * *

"Our own statute on construction (R. S. 1899, § 4160) requires that 'words and phrases shall be taken in their plain or ordinary and usual sense.' With that rule in mind, let us illustrate: If a rule were bulletined on a given Tuesday by the headmaster in charge of teaching grammar in a school, as follows: 'No pupil shall be whipped twice for a mistake which shall have been made in parsing'—would any boy in the school take the rule to apply only to future mistakes in parsing? Could he not well plead the rule (with high hope of its allowance) if his mistake and one flogging occurred on the Monday prior and another flogging was threatened on the Wednesday subsequent to the rule for the same mistake? Or if C, a plantation owner, is building barns and writes his overseer: 'Paint all barns red that shall have been commenced'—would B, his overseer, take that command to mean that only barns commenced after the order should be painted red? Nay, if a very stickler for grammatical precision—a John Horne Tooke, a Lindley Murray, or a Dr. Marsh—should make a New Year's rule for his self-guidance, viz.: 'If my reading of any book shall have been commenced, I will finish it'—would he construe his own rule not to include *Anatomy of Melancholy*, or the *Decline and Fall*, put in reading on the prior Christmas?

"We may presume all legislators grammarians, but that presumption would not drive us to the conclusion that they meant only future action when they wrote 'shall have been commenced.'"

Section 19, art. 5, of the Constitution was amended in 1908 and relates to the compensation of state officers. It reads:

"The Governor * * * and surveyor general shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected, which compensation is hereby fixed for the following officers, as follows: * * * Such compensation to be in full for all services by them respectively rendered in any official capacity or employment whatsoever during their respective terms of office: Provided, however, that the Legislature may, by law, diminish the compensation of any or all of such officers, but in no case shall have the power to increase the same above the sums hereby fixed by this Constitution."

The salaries of the officers named were materially increased by the amendment. It went into effect November 3, 1908. Kingsbury, the then surveyor general, demanded of

the controller a warrant for the unpaid balance due him for the month of November, 1908, calculated at the rate fixed for his salary as surveyor general by the amendment. His demand was denied, and he brought mandate in this court, reported in the case entitled *Kingsbury v. Nye*, 9 Cal. App. 574, 99 Pac. 985. Both parties seek support in this case. The point now under discussion was distinctly raised, and it was contended by respondent:

"The amendment must be deemed to have a prospective operation and to apply to the offices enumerated, upon the expiration of the terms of the present incumbents, and not before."

In reply we said:

"The point made that the rule requiring that the amendment be given a prospective effect necessarily postpones its operation until after the present terms expire, and that any other view would be to give a retroactive effect to the amendment, we think, cannot be sustained. The amendment, as we apply it, is in no sense given a retroactive operation; it is simply given force from and after its ratification, and it operates prospectively thenceforward. If, as we have held, the amendment took effect upon its ratification, and operated, as respondent admits, prospectively, we know of no authority for holding that its operation must be postponed until the terms of the incumbents have expired."

The rules of grammar were not invoked in that case. The decision favorable to petitioner turned largely on the view we took that the inhibition to the increasing of salaries was addressed to the Legislature. Said the court:

"The amendment under review having gone into operation from the date of its adoption, it must be given effect thenceforward, unless we can say that some restriction has been put upon its operation, either by the terms of the amendment or by implication derived from the terms so used. We can find nothing in any of the terms, and nothing is claimed to be found therein, except the provision as to the increase or diminution of the compensation, which we hold was addressed to the Legislature alone. Had such intention dwelt in the minds of the proponents of the amendment, it would have been easy and simple to restrict its effect and withhold its benefits from present incumbents."

The case is not directly in point, but it must be admitted that the value of the decision would be greatly impaired if the strict rule of grammar now urged should be held to prevail instead of the more reasonable rule of construction adopted by the courts.

Petitioner cites many cases in support of his contention where the word "shall" is used or verbs are expressed in the future perfect tense. For example:

A statute conferred certain rights upon a person who had paid an assessment in the event that such assessment "shall be set aside, altered or reduced," and it was held:

"That such assessments only should be embraced as should be vacated, altered, or reduced after the act took effect." *City of Elizabeth v. Hill*, 39 N. J. Law, 555.

A statute provided that:

"Whenever a married man shall be deserted by his wife, or a married woman shall be deserted by her husband, for the space of one year, * * * he or she may bring an action," etc. *Laws 1874, c. 66, § 1.*

An action was brought July 21, 1874, alleging desertion July 17, 1873. The court held that the language of the statute evidenced an intention that it should have a prospective operation only. *Giles v. Giles*, 22 Minn. 348.

A statute read:

"All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record either at law or in equity," etc. *Laws 1891, p. 246.*

The court held the statute to apply only to judgments entered subsequently to the passage of the act. *Jones v. Stockgrowers' Nat. Bank*, 17 Colo. App. 79, 67 Pac. 177.

Section 5, art. 6, of the California Constitution of 1879 provided that:

"All actions for the recovery of the possession of * * * real estate shall be commenced in the county," etc.

It was held in *Gurnee v. Superior Court*, 58 Cal. 88, that:

"Neither in its language nor in its spirit does it apply to actions already commenced."

These cases are cited as examples of the simple future tense. Aside from the element of futurity said to influence the decisions, it seems to us that the character of the statutes and the purposes contemplated by them would have required that they be given a prospective operation unless a contrary intention was made clearly to appear. Take, for example, the Minnesota case, giving an action where the husband or wife, as the case may be, "shall be deserted for the space of one year." Obviously it would violate the rules of construction to give such a statute a retroactive operation. So also it may be said of a Michigan statute (cited as an example of the future perfect tense) giving the court power to grant a divorce when the defendant "shall have become an habitual drunkard." *Comp. Laws 1857, § 3227.* The court, in reversing the judgment granting the wife a divorce, said:

"To bring the case within the fair intention of this statute, we think the defendant must have become an habitual drunkard after the marriage."

The evidence was that the habits of the husband with respect to drink were substantially the same prior to his marriage, and that the complainant was well aware of this when she married him. *Porritt v. Porritt*, 16 Mich. 140. Another example given as showing the weight accorded to grammatical construction is the case of *State v. Boyd*, 21 Wis. 210. The section of the Constitution of Wisconsin is quite similar to section 19, art. 4, of our Constitution before its amendment in 1916. The relator was elected to an office existing previously to his being chosen a member of the Legislature. The emoluments of the office had not been increased when he was elected to it, but were increased by a subsequent enactment while he was a member of the Legislature, but subsequent to his

election to the office of county judge. The Constitution provided:

"No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected." Const. art. 4, § 12.

The court said:

That, according to the most natural grammatical construction of the provision, it "only forbids a member of the Legislature, while such member, from being appointed or elected to any civil office which shall have been previously created, or the emoluments of which shall have been previously increased, during the term for which he was elected."

It was said arguendo:

"The future perfect tense is used—an office 'which shall have been created, or the emoluments of which shall have been increased,' etc.—indicating a future action done and completed before the appointment or election, the other future action to which it refers."

The writer of the opinion stated:

That this construction is not the one he was at first disposed to place upon the provision; that it seemed to him "that the purity and fidelity of the representative, as well as of the public interest, would be most effectually secured by excluding those persons from office who had been concerned in creating it or rendering it more lucrative. But the author of the Constitution did deem it expedient to adopt such a rule of disqualification, and a much more restricted one has found its place in that instrument."

We are not quite sure but that the learned justice's first impressions would have led to a safer solution than was finally reached. However, the question there was as to Boyd's right to an office which he held when elected a member of the Legislature, and rules of construction, perhaps, would not have justified ousting him from that office under a provision which plainly provided that the office to which he was forbidden to be elected or appointed was an office created during the term he was serving in the Legislature, and not an office to which he was previously elected. The court said that the case was "not within the language of the provision, according to its most natural grammatical construction." But suppose Boyd had been elected to and was holding a civil office after (i. e., during the term for which) he had been elected a member of the Legislature; a different case would have arisen. And it is just such a different case as is presented by the amendment we are considering—no member of the assembly shall, during the term for which he shall have been elected, hold or accept any office. Under the old section the disqualification came about by his participating in the creation of the office or the increase of its emoluments. Under the new section he is forbidden to hold or accept any office during the term for which he shall have been elected. His participation in creating the office is no longer the evil to guard against. The evil intended to be combated by the amendment was the

holding or accepting by members of the Legislature any office under this state during the term of office as such members. No possible reason can be suggested why the amendment did not operate upon every member of the Legislature at the moment it took effect. Nor can any good reason be given why its operation should be limited to members only who shall have been elected after December 21, 1916, since without question the mischief which it was designed to remedy was present and quite as menacing as it would be two or four years thereafter, and since the class upon whom it was to operate was the same on that date as it would be at some future date. That it was so intended when submitted to the people there can be no doubt, and we do not think the language used to express that intention compels us, under settled canons of construction, to nullify that intention, or would justify its nullification.

Respondent cites several cases illustrative of the fact that expressions in statutes in the future perfect tense are not necessarily required to be given a strictly grammatical interpretation. One of these examples is found in *Lane v. Lane* (Q. B.), reported in volume 65 N. S. Law Journal Reports (1896) p. 63. The statute involved was section 4 of the Married Woman Act, 1895, reading as follows:

"Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section 43 of the Offenses against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or willfully neglecting to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction * * * for an order or orders under this act."

The act took effect January 1, 1896. The wife applied to the justices of Glamorgan-shire for an order under said section, alleging the persistent cruelty of her husband. All the acts complained of were committed previous to January 1, 1896. The justices held that the section was not retrospective in its effect and they had no jurisdiction. The wife appealed. Reversing and remanding the case there were separate opinions of the judges. The president, Sir F. H. Jeune, said:

"But upon the language of the section and the reason of the thing the matter seems to be extremely clear. The words 'shall have been' are hardly ambiguous; in my view, they deal with all offenses, past and future (considered with regard to the date of the act), and not only to future offenses."

Justice Barnes said:

"Looking at the wording of the section and at the whole act, the question seems free from any doubt, and in my judgment the language used in section 4 is not at all ambiguous. It seems

quite clear to me that the expression 'any married woman whose husband shall have been guilty of persistent cruelty to her may apply,' etc., deals with all cases of persistent cruelty which have happened prior to the decision of the court."

They not only looked to the language employed, but also "to the reason of the thing."

The case of *Queen v. The Inhabitants of Christ-Church*, reported in *Law Journal* 1849, Michaelmas Term, 12 Victoria, p. 28, is cited. There the court was considering a statute providing, among other things, that a pauper who "shall have resided" within the parish for a period of five years fixed by the statute shall thereafter be irremovable. The controversy arose in an attempt of St. John's parish to deport one Mary Sweeny and her four children to the parish of Christ-Church. The order of removal was sustained, Lord Denman delivering the opinion. We cannot give his reasoning in full. Referring to the statute, he said:

"The word 'shall' denotes rather the happening of the event, on which the exception is to apply, within the time assumed to have been before computed, than the future relation of such event to the time when the statute passed. It denotes the subjunctive mood rather than the future time."

He stated:

That the claim that there is a presumption against a retrospective statute being intended "is founded on a misconception. The statute is prospective only. Its direct operation is only on removals; after it has passed it does not alter existing rights in respect of completed removals. A space of time is an essential ingre-

dient in the case to which it applies, and this space of time may consist in part of time passed before the statute passed, as is the case with statutes in limitation and prescription, but they are not therefore classed with the retrospective statutes."

A Minnesota statute which provided:

"That every dwelling house or other building, for the construction, erection or repairs of which any person shall have a claim for materials furnished or services rendered, shall, with the land," etc., "be subject." Pub. St. 1849-1858, c. 86, § 14.

In *Mason & Craig v. Heyward*, 5 Minn. 74 (Gil. 55), the court said:

"The words 'shall have a claim' mean and refer to the time of the passage of the act, and subsequently, and comprehend claims of such nature existing when the act was passed."

Further reference to cases seems unnecessary. The future form of verbs is so frequently used by writers of statutes and Constitutions and literary productions to include the past as well as the future that we must regard it as correct usage.

We do not think that the amendment is couched in such language as to make it impossible or unreasonable for us to hold, without violating settled rules of construction, that it was intended to apply to a member of the Legislature whose term began before December 21, 1916, and did not terminate until after that date.

The writ is denied.

We concur: HART, J; BURNETT, J.

IVES v. SANGUINETTI. (No. 1532.)

(Supreme Court of Arizona. April 18, 1917.)

1. MORTGAGES ⇐496 — VACATION—DISCRETION.

Where trial of a mortgage foreclosure suit had been repeatedly set and reset for a period of six months to suit the convenience of defendant, another mortgagee, and trial was had on the last day of the period of redemption from such other mortgagee's foreclosure, refusal of the trial court to vacate the judgment because of defendant mortgagee's alleged unavoidable absence from the trial was not reversible as a clear abuse of discretion.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1457-1468.]

2. JUDGMENT ⇐323—AMENDMENT—NOTICE.

A judgment should not be amended without notice to parties affected, either in the form of an order to show cause when done of the court's own motion, or, when asked for by party, upon notice with a proper showing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 622.]

3. APPEAL AND ERROR ⇐914(1)—PRESUMPTION—RECORD.

On appeal from a judgment claimed to have been modified without notice, such lack of notice will not be presumed from mere silence of the record on that point; for the presumption is that the trial court proceeded according to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3696.]

4. APPEAL AND ERROR ⇐708 — OBJECTION BELOW—LACK OF NOTICE.

The objection that a judgment was modified without notice to appellant cannot be raised on appeal from the modified judgment only, where the record does not affirmatively show such lack of notice; but in such case appellant should move to set the amended judgment aside for lack of notice, show the lack of notice by affidavits, and appeal from an order denying his application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2948.]

5. APPEAL AND ERROR ⇐1170(13)—REVERSAL.

The constitutional prohibition of reversal for technical errors prevents reversing an amended judgment because of lack of notice of such amendment to a party affected, where the amendment was made according to the truth and justice of the case, and did not prejudice appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4545.]

6. MORTGAGES ⇐494—FORECLOSURE BY ACTION—DECREE—VALIDITY—DEFINITENESS OF DESCRIPTION.

A decree of foreclosure of "all the right, title," etc., of a named person in the described premises is not a nullity for uncertainty or indefiniteness of the description of the interest foreclosed, although such indefiniteness may be important to the purchaser at the sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1441-1445.]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by El. F. Sanguinetti against Eugene S. Ives. From judgment for plaintiff and from a later modified judgment for

plaintiff, and from an order denying defendant's motion to set aside the first judgment, defendant appeals. Affirmed.

Eugene S. Ives, of Tucson, in pro. per. Wupperman & Wupperman and Thomas D. Molloy, all of Yuma, for appellee.

FRANKLIN, C. J. The appellant foreclosed a mortgage on lot 4 in block 15 and lot 1, block 21, of the town of Yuma. In this action the appellee was made a party defendant, served with process, and answered. The appellee held a mortgage on the property of all the right, title, and interest of one Henry Levy to secure an indebtedness of \$850. This latter mortgage the appellant claimed in his action was subsequent and subordinate to the lien of appellant's mortgage. Before appellant got his judgment of foreclosure he, for some reason, dismissed the action as to appellee, and appellee's rights were not adjudicated. It appears that the mortgage of appellee was dated and recorded in June, 1912, and the mortgage of appellant was dated and recorded in the following November. A sale of the property was made under appellant's judgment, the time for redemption expiring on December 18, 1915.

In January, 1915, the appellee commenced an action to foreclose the lien of his mortgage, in which action appellant was made a party defendant, served with process, and answered, in which action the issue was made as to the priority of the respective mortgages. This case was at issue and ready for trial in March, 1915. Relative to setting the case for trial the vacation of such orders and postponement of the trial at request of appellant to suit his convenience, the record shows the following:

"June 7, 1915, that this cause was set for trial on June 14, 1915, by the court. June 14, 1915, this cause ordered continued by the court until called up by counsel.

"June 21, 1915, on the motion of counsel for plaintiff this cause was set for trial on July 3, 1915, and clerk ordered to notify defendant Eugene S. Ives.

"June 30, 1915, according to stipulation between counsel for plaintiff and defendant, Eugene S. Ives, the order setting cause for trial on July 3, 1915, was vacated, and it was further stipulated that this cause be set for trial on September 2, 1915.

"July 31, 1915, the order fixing September 2, 1915, for trial of this cause was vacated, and this cause was set for trial on September 16, 1915.

"September 13, 1915, the order fixing September 16, 1915, for trial of this cause was vacated, and this cause was set for trial on October 12, 1915.

"October 5, 1915, the order fixing October 12, 1915, for trial of this cause was vacated.

"December 6, 1915, on motion of counsel for plaintiff, this cause was set for trial on December 11, 1915, at 10 o'clock a. m.

"December 11, 1915, 10 o'clock a. m., the cause was continued until 2 p. m. same day.

"December 11, 1915, 2 o'clock p. m., this cause was continued until 10 o'clock a. m., Monday, December 13, 1915."

In appellee's suit he sought, following the terms of his mortgage, to foreclose the lien thereof on "all the right, title, claim, and demand, whether in possession or expectancy, of the defendant Henry Levy of, in, and to all" of said above described property. Such was the prayer of the complaint. In his complaint, however, he made this statement: "And plaintiff is informed that the interest of the defendant Henry Levy in and to the above-described property is 440/4589 of the whole thereof." The court gave judgment foreclosing appellee's mortgage, subordinating the lien of appellant's mortgage to that of appellee. In its judgment the court recited:

"The lands and premises directed to be sold by this decree are described as follows, to wit: The 440/4589 of the whole of all of lot 4 in block 15 and all of lot 1 in block 21, of the city of Yuma, Yuma county, state of Arizona, according to White's survey, the same being the interest, right, title and claim of the defendant Henry Levy in and to all of the above-described property."

After the limitation of time within which a motion to set aside a judgment may be made under section 590, Revised Statutes 1913, but within the period of six months within which a party may be relieved from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, under section 600, Id., the appellant moved to set aside the judgment on the ground of his inadvertence or excusable neglect in not attending the trial of the cause, and that he had a meritorious defense to the action if given another opportunity to present it. The motion was supported by affidavits on the part of appellant showing great press of professional engagements which diverted his attention and prevented his attendance at the trial. The affidavits were controverted by the appellee.

Upon the showing made the court denied the motion to set aside the judgment, but at the same time modified the judgment by striking therefrom these words in the last paragraph thereof, to wit:

"The 440/4589 of the whole of all of lot 4 in block 15 and all of lot 1 in block 21, of the city of Yuma, Yuma county, state of Arizona, according to White's survey, the same being the interest, right, title, and claim of the defendant Henry Levy in and to all of the above-described property"

—and inserting in lieu thereof the following words:

"All the right, title, interest, claim, and demand, whether in possession or expectancy of the defendant Henry Levy, of, in, and to all of lot 4 in block 15, and all of lot 1, block 21, of the town of Yuma, Yuma county, state of Arizona, according to White's survey."

The judgment was rendered December 13, 1915, and the modification thereof made on March 28, 1916.

The appeal is from the judgment rendered on the 13th day of December, 1915, and from the modified judgment rendered on the

28th day of March, 1916, and also from the order denying appellant's motion to set aside the judgment rendered on December 13, 1915.

[1] The motion to set aside the judgment is made under section 600, Revised Statutes 1913. It may be extremely doubtful if the provisions of that section have any application to cases other than those in which a judgment has been taken by default. Here there was no default, the appellee simply failing and neglecting to attend the trial and present his defense. This neglect he seeks to excuse. It is not necessary, however, in this case to determine the suggested questions of practice as to whether the motion to set aside the judgment under the circumstances here must be made within the time limited by section 590 of the Code or may be made within the time presented by section 600 of the Code. Neither is it necessary to go into the particulars which the appellant pressed upon the attention of the court to excuse his neglect in not attending at the trial. Considering that it is not improper for a party, when his cause is at issue, to press for as early a trial as the circumstances of the case will permit, but such action being highly proper and beneficial and to be reasonably encouraged, and that for a period of six months the trial of the cause was repeatedly set and reset and postponements had to suit the convenience of appellant, and the trial was not had until the very last day of the redemption period, it does not appear that appellee was at all unreasonable in insisting upon the trial of his case under such circumstances, and we do not feel that there is anything in this record which would justify this court in overriding the discretion exercised by the superior court as of a clear case of abuse of that discretion.

In the case of *Copper King of Arizona v. Johnson*, 9 Ariz. 71, 76 Pac. 595, the court said:

"Circumstances often surround the setting and trial of a case, properly cognizable by the trial judge, which may not always appear in the record, and which may properly have an influence in the determination of a motion of this character. The appellate court should therefore, in its review of such action, recognize that such matters must rest largely in the sound discretion of the trial court, and upon such review should not disturb such action and the exercise of such discretion unless it clearly appears that such discretion has been abused."

The rule was again clearly stated by this court in the case of *Beebe v. Farish*, 14 Ariz. 231, 127 Pac. 715, as follows:

"The question as to whether the judgment should be vacated and set aside was one addressed to the sound discretion of the trial court, and his familiarity with the record and the facts in connection with the long delay in bringing the case to trial, and the different continuances, no doubt, entered into his consideration of the motion to vacate, and we do not feel that we should hold his action was an abuse of discretion. 'A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and consequently will not be

disturbed on appeal unless it is plain that its discretion has been abused.' 23 Cyc. 805; *Copper King of Arizona v. Johnson*, 9 Ariz. 67, 76 Pac. 594."

[2, 3] Appellant claims that the judgment ought to be reversed because he had no notice of any motion or application for a modification. The court ought not to have amended the judgment without notice. Using the language of Mr. Freeman in his work on Judgments (3d Ed.) § 72:

"That impartiality which ought to distinguish the proceedings of all judicial tribunals requires that no matter be considered by any court without giving both parties a full and fair opportunity to be heard. In regard to the amendment of judgments, the authorities fully sustain the view that the courts will not act upon an *ex parte* application."

Our Code fully indicates that such action should be predicated upon notice and an opportunity to be heard. It therefore ought to be the rule of every court cautiously observed not to act in these matters without notice either in the form of an order to show cause when done of the court's own motion, or, when asked for by a party, upon notice with a proper showing. Conceding that the amendment here should not be made in an *ex parte* application, as observed in the case of *Schmidt v. Gilson*, 14 Wis. 558:

"But we cannot assume that the opposite party had no notice of it. Certainly if such a notice had been given it would not become a part of the record. The record is silent upon this point, and the presumption is that the circuit court, in ordering the judgment to be amended, proceeded according to law. If in fact no notice was given, the party aggrieved should have taken steps to set the amended judgment aside for that reason, and then appealed from the order denying his application. He could then have shown by affidavit that he had no notice of the amendment. But as the case now stands it is very obvious that we cannot assume that the proper notice of the amendment was not given."

[4, 5] Appellant took no steps to have the amended judgment set aside. In the absence of such a motion and an appeal from the order denying the application, the want of notice cannot be urged to defeat the modification. In other words, want of notice cannot be raised on an appeal from the modified judgment only. It is made to appear that the motion of appellant to set aside the judgment as first rendered on December 13, 1915, was submitted on the briefs of the respective parties, and in the brief of appellee served on appellant the application for the modification was made. Aside from these questions of practice, we are not justified in reversing the judgment against the admonition of the Constitution that no cause shall be reversed for technical error in pleading or proceedings when upon the whole case substantial justice has been done. If it appears that the amendment was made according to the truth and justice of the case, and appellant is in no wise prejudiced thereby, then substantial justice has been done. Of course, the amendment would not be allowed to injuriously af-

fect the rights of innocent third parties whose rights may have attached before the amendment was made, but no such question is present.

Appellant, however, claims that the first judgment was error because there was no allegation in the complaint of any specific fractional interest of Henry Levy in the property in question and no evidence thereof, and that the allegations in the complaint as to the description of the mortgagor's interest are so indefinite and uncertain as not to support the amended judgment. Appellee's allegation that he was informed that the interest of Henry Levy consisted of $\frac{440}{4550}$ of said property may be treated as surplusage. The mortgage executed by Henry Levy purported to create a lien upon the property to the extent of all the right, title, interest, claim, and demand, whether in possession or expectancy of the mortgagor, in the property.

[6] In an action to recover land, the description of the particular interest sought to be recovered must necessarily be definite and certain and the rule somewhat strict, but this is an action to foreclose a mortgage lien to secure the payment of an indebtedness of \$850 and whether the mortgagor has a greater or lesser interest, or any mortgageable interest at all, is a hazard of the mortgagee. We know of no authority holding that one may not mortgage his interest in property unless he sets forth specifically the nature and extent of that interest, or that a judgment foreclosing a mortgage under such a general description is void. It may be possible that a complaint in foreclosure could be so framed as to warrant the court in proceeding to adjudicate the nature and extent of such interest, but that it is not done does not render the judgment void. The nature and extent of the interest may become a very interesting question to the purchaser at the sale, but we do not perceive it to be so pertinent to the question whether appellee is entitled to a judgment of foreclosure as to defeat the action unless the nature and extent of the mortgagor's interest is determined. The purchaser at the sale may meet with obstacles should he try to recover or be put into the possession of the alleged interest mortgaged, but we cannot pronounce the judgment a nullity for the reason that such interest is not determined and described with precision. In overruling *Crosby v. Dowd*, 61 Cal. 557, in an action to quiet title, and speaking of the description in a mortgage, judgment of foreclosure, and sheriff's deed, it is observed in *De Sepulveda v. Baugh*, 74 Cal. 488, 16 Pac. 223, 5 Am. St. Rep. 455, as follows:

"It simply does not come up to some ideal standard laid down by the courts as more convenient for them and their officers. The true rule would seem to be that the judgment is not void. That the purchaser must, however, rely upon the description, and if it be found so defective when tested by rules of evidence ordinarily applied to the subject that nothing can

be found, he will fail; otherwise he should recover."

Finding no reversible error in the record, the judgment and order must be affirmed.

It is so ordered.

ROSS, J., concurs.

CUNNINGHAM, J. (concurring specially). The appellee commenced this action to foreclose a mortgage made by Henry Levy, dated June 10, 1912. The appellant, Ives, is made a party defendant to the action because he is alleged to—

"have some interest or lien upon the said described property, but that such interest or lien, whatever it may be, if any, is subsequent and subordinate to the lien of the plaintiff as against the interest of the defendant Henry Levy of, in, and to the above-described property."

The defendant Ives, answering the complaint, says:

"This defendant admits that he claims to have an interest upon the property described in the said alleged mortgage, denies that such interest or lien is subsequent or subordinate to the alleged lien of the plaintiff, and alleges that this defendant is the owner of a mortgage upon the said premises to secure a note for the sum of \$30,000, and that said mortgage is prior to the alleged lien of the plaintiff, and that the said note and mortgage have been sued upon, and that a judgment has been entered by this court in favor of the plaintiff, decreeing a sale of the premises to secure the payment of the said judgment, and that said judgment and the mortgage upon which the same was entered are in all respects prior to the alleged claim of the plaintiff."

This pleading was duly verified and filed on March 15, 1915, and remained, uncontroverted, so on file in the cause on December 13, 1915, when the cause was finally tried.

The defendant assumed by his answer the position of a prior mortgagee or party having a prior lien, setting forth the nature of his said claim, and the plaintiff has not disputed the validity of the alleged prior incumbrance. In mortgage foreclosure the presence of a prior mortgagee or party having a prior lien may be dispensed with when the validity of the prior incumbrance is not disputed. *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312.

The only purpose of the defendant Ives in the case was to litigate and determine all of his supposed claims subsequent and subordinate to the plaintiff's asserted mortgage lien. The plaintiff's purpose in making defendant Ives a party was not for the purpose of determining Ives' prior and superior claims to the end that plaintiff could redeem the property from such claims. When the defendant set forth his claims and alleged under oath that such claims were prior and superior to plaintiff's alleged claim, and the plaintiff did not dispute the validity of the claim set forth in such verified pleading, the court was fully justified in treating the defendant's answer as conclusive both of the nature of the asserted claim and as a confession that he made no claims to the proper-

ty subsequent and subordinate to the asserted mortgage lien of the plaintiff. So considered, Ives' further presence in the cause became unnecessary to the foreclosure. The court would have been fully justified in dispensing with this defendant and in proceeding to dispose of the cause.

The situation remained unchanged on December 13, 1915, when the court tried the cause in the absence of defendant Ives. The plaintiff offered his testimony and offered testimony tending to show that the county records of mortgages contain the record of a mortgage in which Ives appears as the sole mortgagee; that such mortgage describes the premises described in plaintiff's mortgage; that the said mortgage of defendant Ives bears a date of execution and recording subsequent in point of time to plaintiff's mortgage. Such being the effect of all of the evidence relating to the matters affecting this appellant's claims, the court rendered its judgment against Henry Levy, and ordered a foreclosure of plaintiff's mortgage lien as prior to defendant's mortgage lien.

At a subsequent date the defendant Ives moved the court to open the judgment as a judgment by default, and to permit the defendant to make defense thereto. He accompanied his motion by an affidavit of merits, whereby he shows that his claim is founded upon an order of the court made in an estate proceeding duly had, whereby the court having the matter legally before it created defendant's lien at a time prior to the making of the plaintiff's mortgage; thereby again offering to set forth a right prior and superior to plaintiff's alleged right. The court denied the motion.

A prior mortgagee is not a necessary party in a suit by a junior mortgagee to foreclose, and in *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. 6, 28 L. Ed. 615, the petition of the prior mortgagee to intervene was held properly dismissed without prejudice. In all essential respects the motion of the prior mortgagee to be let into the case for the purpose of establishing the priority of his mortgage is the same in principle of law, with the motion to intervene. The court's denial of the defendant's motion is in effect the dismissal of an intervenor's petition because in this case the purpose in opening the judgment to the defendant Ives is to permit him to establish an alleged right in the premises superior in its nature to the rights of either the plaintiff mortgagee and the defendant mortgagor, under the mortgage the action was commenced to foreclose. Whether such matters may be introduced in an action rests in the sound legal discretion of the trial court, and the action taken will not be disturbed on appeal unless the record clearly discloses that such discretion has been abused.

If the trial court had granted the motion, and the defendant Ives had been allowed to assert the matters set forth in his affi-

davit of merits, and had established the facts there alleged to exist, the result would have been to change plaintiff's action from a statutory action of foreclosure to one for redemption from a prior mortgage lien and a foreclosure of such lien with the junior mortgage lien. Clearly the court did not abuse its discretion by refusing to open the judgment for the purposes urged by the defendant Ives.

The view I take of the matter is therefore that the plaintiff declined to join issue with the defendant's offer to litigate the question of priority of defendant's claims over plaintiff's mortgage, and the court treated the matter as one involving claims subsequent and subordinate to plaintiff's mortgage and determined the validity of such class of claims only. As a consequence I concur in the order affirming the judgment.

HOWARD et al. v. LUKE et al., Board of Sup'rs of Maricopa County. (No. 1518.)

(Supreme Court of Arizona. April 18, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—BOND ELECTION—VALIDITY.

While Civ. Code 1913, para. 2736, 2740, regulating elections for bond issues, must be substantially followed, mere irregularities in conducting the election or in the notice, returns, or canvass of the votes, will not invalidate an election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

2. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—CONTESTING BOND ELECTION—NECESSARY PARTIES DEFENDANT—SCHOOL BOND ELECTION.

In an action contesting the validity of a school bond election held by a school district, the school district, being the only party vitally interested, is a necessary party to the action.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

3. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—BOARD OF SUPERVISORS—DUTIES.

Under Civ. Code 1913, par. 2740, providing that the county board of supervisors shall issue school bonds, if it appears that such issue was approved at an election, the supervisors have only ministerial duties to perform and are not required to defend suits testing the legality of school bond elections.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

4. PARTIES ¶18, 29—NECESSARY—HOW DETERMINED.

Ordinarily, parties interested in the decision of the cause must be before the court on one side or the other.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 18, 24, 26, 41, 47-49, 51.]

5. PARTIES ¶75(2)—DEFECTS—WAIVER.

A defect of parties may be waived by proceeding to trial without objection unless the omitted party is indispensable to a conclusive determination of the controversy.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 115.]

6. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—COLLATERAL ATTACK—SCHOOL BOND ELECTION.

The validity of a school bond election held by a school district cannot be collaterally attacked in an action to enjoin the county board of supervisors from issuing bonds pursuant to such election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Frank L. Howard and others against Frank Luke and others, as members of the Board of Supervisors of Maricopa County, Ariz. Judgment for defendants, and plaintiffs appeal. Affirmed.

O. F. Ainsworth and I. J. Lipsohn, both of Phoenix, for appellants. Clyde M. Gandy, Co. Atty., of Phoenix, for appellees.

ROSS, J. This action was instituted by the plaintiffs-appellants to contest a school bond election held in school district No. 38, Maricopa county, Ariz., and to restrain the members of the county board of supervisors, who are the defendants-appellees, from issuing and selling the bonds so voted. The plaintiffs' right to prosecute the action is based upon their being property owners, taxpayers, and residents of said school district No. 38. They allege that the defendants, the members of the board of supervisors of Maricopa county, have been furnished by the board of trustees of school district No. 38 a certified copy of all the proceedings had in the matter of said election, wherein it was made to appear that a majority of the votes cast at said election were in favor of issuing such bonds and that said board of supervisors, acting thereon, had determined and ordered that the bonds of said school district in the sum of \$15,000 should be issued and were taking the legal and necessary steps for their sale. Plaintiffs further allege that the certified copy of the proceedings presented to the board of supervisors was not a true and correct statement of all of the proceedings; that the election was irregular and illegal, in that the law in several enumerated respects was not observed. In the view that we take of the case we do not deem it necessary to set forth here the various grounds upon which the election is asked to be declared ineffectual for the purpose for which it was held. The court issued a temporary restraining order, as prayed for, and at the trial heard evidence upon all of the issues tendered by the complaint. At the final hearing the temporary injunction was dissolved and judgment entered in favor of the defendants. The plaintiffs appealed from said judgment.

[1] The power and authority of boards of trustees of school districts to call elections for the purpose of deciding whether bonds in their districts shall be issued and sold for the purpose of raising money for purchasing

or leasing school lots or for building schoolhouses, and the notice to be given and the manner of holding such elections, are prescribed in sections 2736 to 2740, inclusive, Civil Code 1913. That school district No. 38, in voting bonds to build schoolhouses, was exercising the authority vested in it, is without question. It is plainly and explicitly granted this power. It being a creature of the statute and its powers and functions limited and prescribed by law, we think it is well settled that in voting bonds the terms and requirements of the statute must be substantially followed. That does not mean, however, that mere irregularities in the conduct of the election or in the notice or in the returns or canvass of the votes should make it void. Dillon on Municipal Corporations, vol. 1, § 374, says:

"It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election."

To the same effect is section 2202, vol. 5, McQuillin on Municipal Corporations; *Territory v. Board of Supervisors*, 2 Ariz. 248, 12 Pac. 730.

[2] But granting that irregularities may have occurred, or that there was fraud or open and flagrant violations of the law in the conduct of the election, we are puzzled to know how these things are germane as between the parties to this suit. These wrongs, if they exist, were committed by the school district through the judges of the election, or the trustees in calling and noticing the election or canvassing the returns of the election. None of these interested parties is before the court, either as plaintiff or defendant. School district No. 38 is the only party vitally interested in the issue tendered—the proposed bonds are its bonds. From the property within its boundaries the interest and principal of the bonds must be paid. Acting within the limits of the law, it may assume such obligations and if, in an endeavor to purchase lots or build schoolhouses, it is charged with illegal or fraudulent conduct, it certainly has the right to be heard in a court of proper jurisdiction on that question. The statute (section 2719, Civil Code) provides that a regularly organized school district shall be known by designated number, and in that name it may sue and be sued and hold and convey property for the use and benefit of the district. It is a quasi municipal corporation, organized for the purpose of local self-government and home rule in matters pertaining to the training and education of its youth. It certainly would be an anomaly in law if a school bond election held by a school district should be declared null and void in a court proceeding wherein the district was not made a party.

[3] The board of supervisors, under the law, have only a ministerial duty to perform. Paragraph 2740, Civil Code. They are not interested individually and but indiffer-

ently in their official capacity. The law does not place upon them the obligation of investigating an election and determining whether the law has been followed or not. They are required, when "all the proceedings had in the premises" make it appear that a majority of the votes cast at said election were in favor of issuing bonds, to issue the bonds. Neither their interest nor their official duty would compel them to make answer in a proceeding of this kind. They might refuse to defend or, if disposed, confess judgment—this without regard to the legality of the election. They are the agents of the school district in a very limited sense. They may issue the bonds, advertise and sell them, but they are not required to defend suits to test the legality of the election authorizing their issuance. In defending a suit of this kind they are mere volunteers in so far as the interest of the school district is concerned. *Atchison, T. & S. F. R. Co. v. Wilhelm*, 33 Kan. 206, 6 Pac. 273.

[4] It is not always an easy matter to determine who are proper parties, but if a party be indispensable it would seem a statement of the case would plainly show it. The rule is that:

"The parties interested in the decision of the cause must be before the court on one side or the other." *State ex rel. v. Sanderson*, 54 Mo. 203.

[5] A defect of parties, however, may be waived by proceeding to trial without objection, unless the party omitted is indispensable to a final and conclusive determination of the question in controversy. The rule in that regard is well stated in *Conway v. Sexton*, 243 Ill. 59, 90 N. E. 203, wherein it is said:

"In discussing the method of raising the question of the lack of parties in chancery proceedings in *Prentice v. Kimball*, 19 Ill. 320, 323, this court said: 'It is the usual and better practice, where the want of proper parties is apparent on the face of the bill, to take advantage of it by demurrer or motion to dismiss, or, if not patent, by plea or answer. Where the parties omitted are mere formal parties and not indispensable to a decision of the case upon its merits, it will be too late to make the objection at the hearing; but where the rights of the parties not before the court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, * * * the objection may be taken at the hearing, or on appeal, or on error. Courts will, ex officio, take notice of such omission and rule accordingly.' The following, among other authorities, sustain the rule laid down in the decision just quoted: *Spear v. Campbell*, 4 Scam. (Ill.) 424; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273; *Howell v. Foster*, 122 Ill. 276, 13 N. E. 527; *Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258; 7 Am. St. Rep. 350; *Johnson v. Huber*, 134 Ill. 511, 25 N. E. 790; *Bradley v. Gilbert*, 155 Ill. 154, 39 N. E. 593; *Chandler v. Ward*, 188 Ill. 322, 58 N. E. 919; *Dubs v. Egli*, 167 Ill. 514, 47 N. E. 766; *Abernathie v. Rich*, 229 Ill. 412, 82 N. E. 308." *Bittinger v. Bell*, 65 Ind. 445; *Bradley v. Gilbert*, 155 Ill. 154, 39 N. E. 593; section 975, *Spelling on Injunctions*.

[6] There is another insuperable difficulty in the plaintiffs' case when they undertake to attack the regularity and legality of the

school bond election without making school district No. 38 a party to the suit. If the school election here challenged as illegal is to be set aside, it must be by some direct proceeding. Its legality or regularity cannot be impugned or questioned collaterally. Its record of the election and the proceedings in connection therewith speak verity in all proceedings, except it be one brought directly to determine the question of its validity or correctness. In *Smallwood v. Newbern*, 90 N. C. 36, the situation was in many respects analogous to the present one, and the court there said:

"The proper authorities having ascertained that a majority of the qualified voters voted 'for schools,' their finding and decision in that respect, for the purposes of this action, is final and conclusive. Their decision cannot be assailed collaterally. If it could be done in this case, it could be done in another, and in every case, and indefinitely. It would lead to gross absurdity and endless confusion.

"The Legislature confided to the mayor and council the important duty of submitting the proposition mentioned to the voters of the city of Newbern, and, when they discharged that duty, their action in that respect was conclusive upon everybody as to the result of the vote, so long as it shall stand unreversed by a proper judgment or decree in an action brought for the purpose. *Simpson v. Commissioners*, 84 N. C. 158; *Norment v. Charlotte*, 85 N. C. 387; *Cain v. Commissioners*, 86 N. C. 8; *Block v. Commissioners* [of Bourbon County], 99 U. S. 686 [25 L. Ed. 491]."

See, also, *Bynum v. Commissioners*, 101 N. C. 412, 8 S. E. 136.

The predecessor of this court, in *Phoenix Water Co. v. Common Council*, 9 Ariz. 430, 84 Pac. 1095, in an action brought to restrain the city of Phoenix from issuing bonds for the purpose of constructing a system of waterworks in the city of Phoenix, wherein fraud and error in the election voting the bonds was alleged, stated the rule as follows:

"Moreover, the election having been held in compliance with the law, and the return thereof, lawful on its face, showing that those supporting the issue of the bonds had prevailed by the lawful majority, this return cannot collaterally be attacked for errors or frauds alleged to have occurred in the conduct of the election or in the registration preceding it. *Carroll County v. Smith*, 111 U. S. 560, 565, 4 Sup. Ct. 539, 28 L. Ed. 517; *Hamilton v. Carroll*, 82 Md. 326, 33 Atl. 648."

Whether the rule announced was applicable to the facts of that case or not, we have no doubt that it is applicable to the facts of this case.

We see no reason why the rule announced in local option cases should not be applied in this case. *Joyce on Intoxicating Liquors*, § 417, says:

"Where the result has been ascertained and declared by the proper officers or tribunal, it is conclusive until reversed by some superior tribunal and cannot be attacked collaterally."

In *State v. Emery*, 98 N. C. 768, 3 S. E. 810, it is said:

"The result of the election, as decided and proclaimed, is conclusive in any collateral proceeding. It is to be taken, *prima facie*, that every necessary requisite has been complied with.

All facts necessary to the validity of the election must be ascertained and determined, and, when proclaimed, must be final and conclusive, unless impeached or attacked in some direct proceeding."

Our school bond election law in all material ways is like that of California. The similarity suggests the probability that ours is a copy of the California law (sections 1880-1884, California Political Code) with such slight changes as to meet the different conditions existing in this state. There, as here, the election is called by the board of trustees of the school district and is held under their general superintendence. The proceedings of the election are certified by the school board to the board of supervisors, and, when it appears therefrom that the requisite number of votes were cast in favor of issuing bonds, it is made the duty of the board of supervisors to issue, advertise, and sell the bonds.

We find but one case reported in California where the exact question we have before us was involved. *People ex rel. Hart, Attorney General, v. Caruthers School District*, 102 Cal. 184, 36 Pac. 396. The court states the case before it in this language:

"The validity of an election held in Caruthers school district is here assailed, and a determination of the regularity of the proceedings under which such election was held is determinative of the case."

It will be noted that this action was brought directly against the school district.

We are not unmindful of the fact that in *Hicks v. Krigbaum*, 13 Ariz. 237, 108 Pac. 482, the court took jurisdiction of a case and decided it involving the validity of a school bond election in school district No. 2 of Cochise county without the district being made a party to the litigation. No mention of the questions we have discussed is made in that case, and we have no doubt that the attention of the court was not called to them and that they were not considered. We think it would be a dangerous precedent fraught with many evils, seen and unseen, to permit the rights of a school district to be adjudicated and determined without its being a party to the suit and also to allow collateral attacks upon its records and proceedings in the matter of school bond elections to be made in its absence from the record.

The judgment of the lower court is affirmed.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (concurring specially). I do not understand that the purpose of this action is to contest a school bond election held in school district No. 38 of Maricopa county. My understanding of the matter, derived from the pleadings, especially from the relief demanded, is that this is an equitable action by which the plaintiff taxpayer, in behalf of himself and all other taxpayers of the said school district similarly situated, is

seeking to restrain, by injunction, the board of supervisors of Maricopa county from issuing and selling said school district bonds in pursuance to a certificate of the board of trustees of said school district purporting to confer the power on such board of supervisors to issue and sell such bonds as provided by paragraph 2740, Civil Code of Arizona 1913.

Said statute provides that:

After an election has been duly held in the school district, pursuant to call on due notice, "on the seventh day after said election, * * * the returns having been made to the board of trustees, the board must meet and canvass said returns; if it appear that a majority of the votes cast at said election were in favor of issuing such bonds, then the board shall cause an entry of that fact to be made upon its minutes and shall certify to the board of supervisors of the county all the proceedings had in the premises, and thereupon said board of supervisors shall be and they are hereby authorized and directed to issue the bonds of such district, to the number and amount provided in such proceedings, payable out of the building fund of such district, naming the same, and the money shall be raised by taxation upon the taxable property in said district for the redemption of said bonds and the payment of the interest thereon. * * *

Paragraph 2741:

"The board of supervisors by an order entered upon its minutes, shall prescribe the form of said bonds, and of the interest coupons attached thereto, and must fix the time when the whole or any part of the principal of said bonds shall be payable, which shall not be more than twenty years from the date thereof."

The complaint shows that an election was held and the vote canvassed by the trustees at the time and place provided, and that the board of trustees did certify to the board of supervisors of the county that which the statute requires as "all the proceedings had in the premises"; but denies that the requisite proceedings were really, actually, and substantially had in the premises, of which certificate is made. Consequently, the board of supervisors are not authorized and directed to issue the bonds of such district, to the number and amount provided in the certificate returned for the reason the certificate is false, and the proceedings had in the premises were not such proceedings as are legally sufficient to confer the authority on the board of supervisors to contract for the school district and thereby fix a burden on the taxpayers of the district.

The election by the qualified voters of the district is not sufficient to create a liability, although all of the voters assent thereto. The liability is created by the board of supervisors on the authority of the school district duly conferred by substantially following the procedure laid down by the statutes for that purpose. The contract by which the obligation of the district arises is made between the district, by the board of supervisors legally authorized thereunto, and the purchaser of the bonds. No agency other than the board of supervisors can be lawfully authorized to issue bonds of a school district.

The district may not issue bonds without first invoking such agency. The board of supervisors cannot do so until duly authorized. Its authority is derived from "all the proceedings had in the premises"; that is, the proceedings had by the school district prescribed by law. The certificate of such proceedings had is sufficient upon which the board of supervisors may rely as evidence of the board's power to issue the bonds. The appellant taxpayer attacks this certificate as false, and his complaint is based upon the theory that the statute requires the prescribed things to be actually done to confer the power on the board of supervisors, and that the certificate to the effect that the required proceedings were had is not enough.

A court of equity certainly has the jurisdiction to go behind a false certificate and inquire into the proceedings certified, in order to determine whether the board of supervisors had the power to issue the bonds of the district and thereby fix an obligation on the taxpayers of the district. Of course, the absence of power to act is the most fatal of defects, and, if a court of equity may not inquire into the source of the power of an agency about to act in such public matters, then as a consequence the mere certificate of the board of trustees creates the bond liability without the interposition of the board of supervisors. Clearly this action was commenced to inquire into the power of the board of supervisors to issue the bonds of the school district, and enjoin the board of supervisors from doing an official act without the authority of law. If the act is performed, that is, if the board of supervisors are not restrained but proceed to issue the bonds of the school district, having no power to do so, irreparable injury will result to the taxpayers of the district. Necessarily, an inquiry by a court of equity into the power of the board of supervisors to fix a bonded liability upon the taxpayers of the district includes, as an incident to such inquiry, an investigation into the school district bond election, because, in the absence of such election resulting in favor of the issuance of the bonds, the board of supervisors would have absolutely no power to issue the bonds, notwithstanding the certificate of the board of trustees to the contrary. The jurisdiction of a court of equity is invoked in this action to inquire into the power of the board of supervisors to act in the premises, and such jurisdiction is not ousted because the inquiry invoked requires an investigation into a school district bond election. Such election is in effect the expression by the qualified electors of their individual desire with regard to the matter of assuming the bonded obligation. The inquiry extends only to the question whether a majority of such electors have fairly expressed a desire to assume the liability. This question may be determined in the absence of the school district as an en-

tity, the board of trustees as officers of the school district, and the members of the board of trustees as individuals. The election officers ceased to exist when their duties were performed. Neither the school district, the board of trustees of the district, nor the election board, have any future act in contemplation; hence a restraining order directed against them would be futile, and therefore unnecessary. Such parties are therefore not necessary parties to this action. They can be neither caused to act, nor restrained from acting. They have already acted, and the time for action by them has expired. When the board of trustees completed a canvass of the votes cast at the election and returned to the board of supervisors a certificate of "all the proceedings had in the premises," the entire matter was thereby placed before the board of supervisors, and under the law no agency had or has any right to do anything with regard to the matter of issuing bonds other than the board of supervisors. As a consequence, a court of equity, on a proper showing of the regularity of the certificate returned and the actual performance of the matters and things certified, will compel the board of supervisors to prepare the bonds, advertise for bids, and issue the bonds if acceptable and accepted bids are received therefor. On the other hand, if the acts leading up to the certificate are not performed in a manner substantially as required by the school district bonding statutes, a court of equity, upon being duly informed, will enjoin the board of supervisors from acting in accordance with a certificate shown to be a false certificate, for the reason the acts and not the certificate confer power requisite to sustain a school district bond issue.

I therefore dissent from the holding of the majority of this court: First, because I am clearly of the opinion this is not in any just sense an action instituted for the purpose of contesting a school district bond election; and, second, because in this injunction action neither the school district as an entity, nor the members of the board of trustees of the district, are necessary parties. In fact, I am of the opinion that to make the school district and trustees, or trustees, parties would be improper, and dismissible on motion.

On the merits, the record discloses substantial evidence in support of the judgment. The evidence as a whole tends to show that all of the proceedings had in the premises substantially conform to the requirements of the statutes in such matters; that the several acts certified to the board of supervisors were actually performed substantially in the manner, at the time, and by the persons, as required by law; and that a majority of the qualified district school electors of the school district fairly voted in favor of issuing the bonds of the district to the amount cer-

tified. Consequently, the board of supervisors is lawfully empowered to issue such district school bonds and bind thereby the taxable property within the district to redeem the same according to the terms and conditions of their sale.

For these reasons and others, I am of the opinion the judgment ought to be affirmed, and foreclose all future questions of the validity of the bonds, thereby administering complete justice in the premises.

LALLY v. CASH. (No. 1526.)

(Supreme Court of Arizona. April 18, 1917.)

1. WITNESSES \S 217—PRIVILEGED COMMUNICATIONS—EXTENT OF PRIVILEGE—CODEFENDANTS.

Even if evidence brought out on cross-examination of a defendant under Civ. Code 1913, par. 1680, as to examination of adverse party was concerning communications privileged as to him, such privilege could not extend to a codefendant, and such testimony would be permitted to stand as against such codefendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 780.]

2. WITNESSES \S 276—EXAMINATION OF ADVERSE PARTY—STATUTE.

Civ. Code 1913, par. 1680, providing for cross-examination of an adverse party, is a modification of the common-law rules of evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 976-978.]

3. WITNESSES \S 276—EXAMINATION OF ADVERSE PARTY.

An adverse interest is the test of the right to cross-examine a party to a suit under Civ. Code 1913, par. 1680, as to cross-examination of adverse party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 976-978.]

4. PARTIES \S 27 — WHO MAY BE JOINED — TORT ACTION.

One claiming damages in tort may join all or any number of the tort-feasors in the action as defendants.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 35.]

5. DISMISSAL AND NONSUIT \S 28—VOLUNTARY AS TO ONE OR MORE CODEFENDANTS—TORT ACTIONS.

Actions of tort being in their nature joint and several, plaintiff therein may, at any stage, enter a nolle prosequi, dismiss, or discontinue as to part of the defendants without discharging the rest.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 48, 48-59.]

6. LIBEL AND SLANDER \S 112(1)—EVIDENCE—SUFFICIENCY.

Evidence held not to show defendant's participation in either the composition or publication of an alleged libelous article.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 325-328, 330, 331, 341.]

7. EVIDENCE \S 76 — EXAMINATION OF ADVERSE PARTY—EVASIVE ANSWERS.

Where plaintiff endeavored to make out his case from cross-examination of a defendant under Civ. Code 1913, par. 1680, such defendant's conduct upon the witness stand and his studied evasion in answering questions, however objectionable, and although it might well have arouse-

ed the suspicion of the jury that he was not openly and frankly telling the truth, could not be substituted for positive evidence of the facts sought to be proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 96.]

8. SIGNATURES ¶4—BY HAND OF ANOTHER.

The fact that one's name is attached to a paper does not make it his act and deed, unless he put it there himself, or caused or permitted it to be put there by another.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. § 6.]

9. EVIDENCE ¶182 — DOCUMENTARY EVIDENCE—PRODUCTION—PRELIMINARY EVIDENCE—PROOF OF EXECUTION OF ORIGINAL.

That plaintiff had made written demand from defendants to produce the original of an alleged libelous article in court at the trial, as provided in Civ. Code 1913, par. 1760, did not relieve him from the obligation of proving that there was an original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 601-604.]

10. EVIDENCE ¶75 — DOCUMENTARY EVIDENCE—PRODUCTION—COMPELLING PRODUCTION—EFFECT OF FAILURE TO PRODUCE.

In a libel suit, it not having been shown that defendant composed the alleged libelous article or signed or published it, or that he ever was seen in possession of it, no unfavorable inferences should be indulged from the failure on his part to produce upon notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95.]

11. LIBEL AND SLANDER ¶101(3)—PUBLICATION OF LIBEL.

Damages to character being the basis of civil liability for libel, plaintiff must show that the alleged libelous article has been seen and read by some other person than himself; Pen. Code 1913, § 225, providing that in criminal libel it is enough that accused knowingly parted with the immediate custody of the libel under circumstances which might expose it to be seen or read by any other person than himself, not applying to civil liability.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 276.]

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Action by J. G. Cash against J. M. Lally and another. Plaintiff entered nonsuit as to the other defendant, and the named defendant appeals from a judgment against him. Reversed and remanded.

I. L. Quiat, of Morenci, and W. R. Chambers, of Safford, for appellant. E. V. Horton, of Clifton, and Stratton & Lynch, of Safford, for appellee.

ROSS, J. The appellee, who was the plaintiff below, instituted an action for damages against the appellant, Lally, and David E. Bronson, charging them with willfully and maliciously composing and publishing a certain libel of and concerning plaintiff by parting therewith and permitting the same to be seen and read by C. A. Jackson and various other persons. A verbatim copy of the alleged libelous article is set forth in the complaint. That it is unprivileged and libelous *per se* is unquestioned. The defendants answered the complaint by general denial. The

trial was before a jury. Plaintiff examined defendant Bronson upon the trial as if under cross-examination under the provisions of paragraph 1680, Civil Code 1913. During the course of the cross-examination of Bronson, concerning conversations or interviews that he had had with the county attorney and deputy county attorney of Greenlee county about the alleged libelous article, the defendants interposed objections to the relation of said conversations or interviews upon the ground that they were privileged communications. This objection was sustained by the trial court, whereupon the plaintiff entered a nonsuit as to defendant Bronson. The trial proceeded as against defendant Lally and Bronson's testimony was permitted to stand and, against the objection of defendant Lally, was considered by the jury. Plaintiff had a verdict and judgment for \$2,500.

[1] We think the objection to the privileged character of the communication between the county attorney and Bronson was obviated by the dismissal of the action as against Bronson, for, even should it be granted that it was privileged as between Bronson and the county attorney, it could by no means extend to appellant, Lally.

[2, 3] The statute (paragraph 1680, Civil Code) provides for the cross-examination of an adverse party. This is a modification of the common-law rules of evidence. An interested adverse party is always an unwilling and antagonistic witness. The effective way of eliciting facts bearing upon the question involved is by leading questions. That Bronson was an interested and adverse party is evidenced by his answer, as also by his testimony elicited upon his cross-examination. The test of the right to cross-examine a party to a suit under the statute is an adverse interest. *Suter v. Page*, 64 Minn. 444, 67 N. W. 67; *Moore v. May*, 117 Wis. 192, 94 N. W. 45. The danger of this rule being abused, as suggested by appellant, by making antagonistic witnesses nominal parties for the sole purpose of cross-examination, is more apparent than real. If such case should arise the trial court can and will take care of it. In this case it is clear that the appellee acted in entire good faith in making Bronson a defendant and also in his cross-examination.

[4, 5] One claiming damages in tort may join all or any number of the tort-feasors in the action as defendants. It was not essential, of course, that he make Bronson a defendant, nor, having made him a defendant, was it indispensable that he retain him as one. In 14 Cyc. 411, it is said:

"Actions of tort being in their nature joint and several, plaintiff in such an action may, at any stage of the cause, enter a *nolle prosequi*, dismiss, or discontinue as to a part of the defendants without discharging the rest."

[6, 7] It is contended by appellant that the court committed error in refusing to instruct

the jury to return a verdict in his favor, for the reason that there is no competent evidence in the record that in any way connects the appellant with the composition or publication of the alleged libelous article. A close and analytical review of the evidence impresses us with the truth of the appellant's contention. Giving the evidence all the consideration to which it is entitled, we think it falls short of showing that the appellant participated either in its composition or publication. The appellee, either from choice or necessity, chose to make out his case with the testimony of defendant Bronson, Deputy County Attorney Dave Ling, and C. A. Jackson, the last of whom he alleges in his complaint saw and read the libelous article. Bronson's testimony in regard to the alleged libelous article, when carefully read, does not positively, either directly or indirectly, connect appellant therewith, either as publisher or composer. His conduct upon the witness stand and his studied evasion in answering questions might well have aroused the suspicion of the jury that he was not openly and frankly telling the truth, but this action upon his part, however objectionable, cannot be substituted for positive evidence of the facts sought to be proved. His testimony is as follows:

"By Mr. Horton: Q. You are one of the parties defendant, are you not? A. I am. Q. You know Mr. J. M. Lally? A. I do. Q. Do you know Mr. J. G. Cash, the plaintiff? Did you know these parties on or about March 26, 1914? A. I did. Q. On or about that date did the defendant Mr. Lally bring an article to you and ask you to publish it, concerning the plaintiff, Mr. Cash? A. I do not remember. Q. Did he at any time about that time bring an article to you concerning Mr. Cash and ask you to publish it? A. I do not remember. Q. You do not remember? A. No, sir. Q. You do not remember anything about it, do you? Mr. Bronson? A. I believe not. Q. Mr. Bronson, do you remember on or about the 26th day of March, 1914, of Mr. Lally bringing you an article that is set out in this complaint, and he, in your office or print shop, in Clifton, signed this article, purporting to be the author of it, in the presence of C. A. Jackson, G. A. Sterling, and Miss Maud Gutch? A. Mr. Lally has brought me articles at different times. I cannot remember the particular ones or particular times. Q. Did he bring you an article on or about this time? A. He brings them every week, so he must have. Q. Did Mr. Lally, on or about the 26th day of March, 1914, bring you an article and ask you to publish it, concerning Mr. Cash? A. About what date? Q. On or about the 26th day of March, 1914, or during the week of that date? A. I do not remember. Q. Can you state that he did not bring you one? A. No, sir. Q. I will ask, Mr. Bronson, you know Mr. Dave Ling, do you not? A. I do. Q. I will ask you if you stated to him on Monday, on or about the 29th day of March, 1914, that Mr. Lally had brought you an article the week prior, concerning Mr. Cash and asked you to publish it? A. I don't think I ever had any such communication with Mr. Ling. Q. I will ask you if you didn't make that sort of statement to me some time during the week of March 26, 1914. A. I did discuss the subject with you. Q. Now, I will ask you this question, Mr. Bronson, and I will try to frame it so it will not be privileged: Did you, during the week of March 27, 1914—did Mr. Lally come to

you with an article concerning Mr. Cash and ask you to publish it, the article that you spoke to me about? A. Mr. Lally brought me articles every week. He very likely brought me one that week. Q. Now, Mr. Bronson, I will ask you to read that, and I will ask you if that isn't a copy of the article which you spoke to me about and which you testified that Mr. Lally brought you and asked you to publish? A. I could not say if that is the same article. Q. You cannot say that it is not the same article? A. No, I cannot. Q. Then you don't remember? A. I do not remember. I cannot remember the language. Q. The article which you spoke to me about and which Mr. Lally brought to you for publication, was it not similar to this? A. I could not say. I receive articles every week that I never use, and I don't pay any attention to them and don't keep them in mind. Q. Have you the original of this article in your possession? A. I have not. Q. Did you ever have it in your possession? A. I can say as I did before, I do not know whether that is the same article or not, or whether that is a correct copy or not. Q. Have you read this, Mr. Bronson? A. I looked at it. Q. I want you to read that. A. Is this the same article read in the complaint this morning? Q. Yes. A. Well, I heard that, and know what the substance of that is. Q. Do you remember ever having that article in your possession? A. No, sir; I cannot say I do. Q. Then you will not say that you have not had the original of this article in your possession? A. I do not think I have."

Bronson fails to state that appellant gave him the alleged libelous article. From his testimony it is reasonably certain that appellant was a regular weekly contributor to the paper being published by Bronson. When asked about the particular article in question, he does not admit or state that it was given to him by appellant. He refuses to identify the article in question as one given to him by appellant. He says: "I do not remember. I cannot remember the language." There is positive evidence that he had the article in his possession, although he denies it. The fact that appellant brought him articles every week and probably one about the 26th day of March is a circumstance which, when taken in connection with the appellant's signature being attached to this particular article, would tend to arouse suspicions that he gave Bronson the article in question. But, as we will hereafter show, there is no proof that it was the appellant's signature or that he was the author of the article. If there were any direct positive evidence, even though slight or of little weight, that appellant gave the article to Bronson, the verdict of the jury based thereon should not be disturbed. In this case there is no positive or direct evidence and but one circumstance—that is, appellant had given other copy to Bronson—upon which to base a conclusion that appellant gave this particular article to him.

Witness Jackson, when shown a typewritten copy of the article, testified that he had never seen it before; "that he had never read an article of similar import or anything like it"; that while his name appeared on the copy of the article as a witness, he did not remember appellant's signature. Wit-

ness Ling testified that he went to Bronson's printing establishment in Clifton and made a copy of the original article, the copy that was exhibited to the witnesses Bronson and Jackson. Looking at this evidence in its most favorable light, it fails to prove or tend to prove, except in the most nebulous way, that appellant permitted "the same to be seen and read by C. A. Jackson and various other persons," or that he composed the same.

[8, 9] Ling testified that the original was in Bronson's possession, and that he copied it. The copy made by him and introduced in evidence purported to have been composed by appellant; his name was attached to it. The appellant objected to the introduction of this copy because no "proper foundation for the introduction of secondary evidence had been laid," and its introduction over the objection is assigned as error. The only witness who testified that he saw the original was Ling. He did not testify that it was signed in the appellant's signature. The fact that appellant's name was attached to the paper did not make it his act and deed unless he put it there himself or caused or permitted it to be put there by another. Its genuineness or authenticity was not proved. That appellee had made written demand from appellant and Bronson to produce the article in court at the trial, as provided in paragraph 1760, Civil Code, did not relieve the appellee from the obligation of proving that there was an original.

"Before a party can be permitted to introduce secondary evidence of the contents of a written contract, deed, or other instrument stated to have been lost or destroyed, satisfactory proof must first be made of the former existence, proper execution, and genuineness of the instrument. The same requirements must be complied with before introducing secondary evidence of the contents of an instrument that is beyond the jurisdiction of the court." 17 Cyc. 536.

[10] It not having been shown by any evidence that the appellant composed the article or signed it or published it, or that he ever was seen in the possession of it, no unfavorable inferences should be indulged from the failure on his part to produce upon notice. The last known custodian of the original article as shown by the evidence was Bronson.

The giving of notice to the appellant to produce the original without any evidence whatever that it was in his possession is not a sufficient excuse for the introduction of the copy in evidence. Wigmore on Evidence, par. 1203, states the rule as follows:

"The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document, the object being to show a demand and refusal to produce. Hence the mere giving of notice or demand, without showing that the opponent had the document demanded, is of no avail."

[11] Appellant assigns the giving of the following instruction as error:

"To sustain the charge of publishing a libel it is not necessary that the words and things complained of should have been read or seen by

another. It is enough that the accused knowingly parted with the immediate custody of the libel under such circumstances which exposed it to be read or seen by any person other than himself."

This instruction is taken almost word for word from section 225 of the Penal Code. When applied to criminal libel, it is a correct exposition of the law. Damages to character, by reason of libel, is the basis of civil actions. If the libel is not seen by any one except the writer, even though he may have parted with it, it is inconceivable how damage to character would result. Because the party against whom a libel is directed may personally seek to punish the libeler and thereby commit a breach of the peace, the policy of the criminal law has declared:

"It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which might expose it to be read or seen by any other person than himself."

When, however, damage for defamation of character is sought, it is incumbent upon the plaintiff to show that the libelous article has been seen and read by some other person than himself. In *Yousling v. Dare*, 122 Iowa, 539, 98 N. W. 371, speaking through Justice McClain, the court said:

"On this question there seems to be no conflict in authorities. The cases, so far as our attention has been called to them, uniformly hold that, in a civil action for libel, the sending of a communication containing defamatory language directly to the person defamed, without any proof that, through the agency or in pursuance of the intention of the sender, it has come to the knowledge of any one else, does not show such publication as to render the sender liable in damages. *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936; *Spafts v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Fonville v. McNease*, Dud. (S. C.) 303, 31 Am. Dec. 556; *Odgers, Libel and Slander*, 150."

In the same case, speaking of the inapplicability of the rule of publication in criminal cases as fixed by statute, to civil actions for defamation of character, the court said:

"But we have never held a publication which is sufficient to charge one with criminal liability to be necessarily sufficient to show damage as a basis for civil liability. The difference between the criminal law and the law of torts in this respect is manifest. The act of publishing a libel may be criminal, for the reason that it provokes the person libeled to wrath, and tends to create a breach of the peace. 1 Bishop, New Crim. Law, par. 591(4); 2 McClain, Crim. Law, par. 1055. But in a civil action it is essential that some damage to the person libeled shall appear, either directly or by legal inference, and no such inference can be drawn from the communication of the libelous matter to the very person concerning whom the language was used."

The court committed error in giving the instruction complained of.

The judgment is reversed, and cause remanded for a new trial.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. I concur in the order reversing the judgment and directing a new

trial for the sole reason that the evidence in its entirety wholly fails to connect the appellant with preparation and publication of the libel. Consequently the lower court erred in refusing to direct a verdict for the appellant on the grounds of failure of proof.

I express no opinion with regards to the other questions urged.

DUNBAR v. CRONIN. (No. 1525.)

(Supreme Court of Arizona. April 18, 1917.)

1. CONSTITUTIONAL LAW — 58 — STATES — 46 — LEGISLATIVE POWERS — APPOINTMENT OF OFFICERS.

Acts 1915, c. 62, § 1, establishes a state library to be under the control of a board of curators to be appointed by the Governor, etc. Section 2 gives such boards full control and management of the library, and authority to appoint a law and legislative reference librarian, who shall hold office at the pleasure of the board, provided, however, that the board of curators are not empowered to appoint such librarian during incumbency of office of the librarian provided in section 3. Section 3 appoints the defendant the law and legislative reference librarian, and provides that he shall serve until his successor is appointed, unless otherwise provided by law. Sections 4-6 and 8 recite the duties of the librarian and the assistance he shall give to heads of departments and to the Legislature in preparing laws, etc. Const. art. 5, § 8, provides that if a vacancy in any office occurs from any cause, and no mode of filling it is pointed out either by the Constitution or by statute, the Governor of the state is empowered to fill the vacancy by appointment. Article 4, § 8, grants the legislative department the power to appoint its own officers. Const. art. 6, §§ 14, 17, grants to the Supreme Court authority to appoint a reporter and clerk of court. Article 11, § 3, provides for the appointment of three members of the state board of education. Section 5 provides for the appointment of regents of the University and governing boards of other state institutions. Article 22, § 18, provides for the appointment of a state examiner. Article 7, § 9, provides for an advisory vote of the people for United States Senator. *Held*, that as the power of appointment is primarily in the people, and as section 8 inferentially imposes the duty upon the Legislature in all cases where the Constitution does not provide for the filling of vacancies by provisions for filling them, the act creating the office of law and legislative reference librarian, and appointing the defendant thereto, does not violate any provision of the Constitution of the state either directly or by implication.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 86-88; States, Cent. Dig. § 51.]

2. STATES — 46 — LEGISLATIVE POWERS — APPOINTMENT OF OFFICERS.

Acts 1915, c. 62, creating the office of law and legislative reference librarian, and appointing defendant thereto, if not a proper exercise of the power of the Legislature to appoint officers in the absence of a provision in the Constitution for their appointment, was an exercise of its power to appoint its own officers, which, since the office is peculiarly identified or associated with the appointing power, as where it has to do with the functions and duties of the appointing power, whether it be judicial, legislative, or executive, the appointment properly belongs to that department.

[Ed. Note.—For other cases, see States, Cent. Dig. § 51.]

3. STATES — 46 — OFFICERS — APPOINTMENT — CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 1, subd. 3, provides that laws other than emergency measures do not become operative for 90 days after close of the session of the Legislature enacting the measure. Const. art. 5, § 7, provides that if any bill be not returned within 5 days after it shall have been presented to the Governor, such bill shall become a law in a like manner as if signed by the Governor, unless the Legislature by final adjournment prevents its return, in which case it shall be filed with his objections in the office of the secretary of the state within 10 days after such adjournment, or become the law as provided in this Constitution. Acts 1915, c. 62, was not approved by the Governor, and not vetoed, and the Governor did not file any objections to the same within 10 days after the final adjournment of the session on March 11, 1915. Defendant's official bond was executed and presented to the board of curators on April 2, 1915, and approved on the same day, and on the same day his bond, together with his oath of office, was filed with the secretary of state. *Held*, that as chapter 62 was a law on March 24, 1915, although it did not become operative until 90 days thereafter, the power of the Legislature to make the appointment being determined, the exercise of such power in advance of the law becoming operative was valid.

[Ed. Note.—For other cases, see States, Cent. Dig. § 51.]

4. STATES — 48 — OFFICERS — QUALIFICATION.

As Laws 1915, c. 62, although a law on March 24, 1915, did not become operative until 90 days thereafter, the board of curators appointed under the provisions of Civ. Code 1913, par. 4554, had not been superseded or displaced on April 2d, and had authority on that date to approve defendant's bond as legislative law and reference librarian under chapter 62.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 53.]

Cunningham, J., dissenting.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action in the nature of a writ of quo warranto by Mark Dunbar against Con P. Cronin. Judgment for defendant, and plaintiff appeals. Affirmed.

Kibbey, Bennett & Curtis, of Phoenix, for appellant. G. P. Bullard, of Phoenix, for appellee.

ROSS, J. This is an action in the nature of a writ of quo warranto brought to try the title to the office of state law and legislative reference librarian. The plaintiff-appellant claims title through appointment by the board of curators of the state library, and the defendant-appellee claims title by legislative appointment. A demurrer to the plaintiff-appellant's complaint was sustained by the trial court, and, he refusing and declining to amend his complaint, judgment was entered in favor of defendant-appellee, from which judgment this appeal is prosecuted.

[1, 2] Both the appellant and appellee claim title to the office by virtue of the provisions of chapter 62, entitled "An act establishing a state library, with a law and legislative reference bureau, providing for the appoint-

ment of a board of curators and librarian, defining their duties and making an appropriation therefor," passed at the second regular Session of the Legislature, effective June 10, 1915. That act, or so much thereof as we deem important and material to the decision of this case, we here set forth:

"Section 1. A state library is hereby established to be located at the state capitol, to be under the control and direction of a board of curators, consisting of three (3) members, to be appointed by the Governor, by and with the advice and consent of the Senate. They shall be so appointed that the term of one member shall expire January 1, 1917, one January 1, 1919, and one January 1, 1921. The successor of the first appointed member of the board of curators whose term expires January 1, 1917, and all subsequent incumbents of the said office, shall serve for six years, or until their successors are duly appointed and qualify.

"Sec. 2. The board of curators shall have full control and management of the library and all its departments and shall provide rules and regulations for the government thereof; shall elect a chairman who shall preside at all meetings and shall appoint a law and legislative reference librarian who shall act as secretary of the said board and hold office at the pleasure of the board: Provided, however, that said board of curators are not empowered to appoint said legislative reference librarian during the incumbency in office of the said librarian as provided in section 3 of this act.

"Sec. 3. Until otherwise provided by law Con P. Cronin is appointed legislative reference librarian, and shall serve until his successor is appointed. Any vacancy shall be filled by the board of curators.

"Sec. 4. There shall be maintained in the state library a legislative reference bureau for the use and information of the members of the Legislature, the heads of the several departments of state government, and such citizens of the state as may desire to consult the same.

"Sec. 5. The librarian shall prepare, and have available for use, check-lists and catalogues of Arizona law, and all the current legislation of Arizona and other states; lists of bills and resolutions presented in either branch of the Legislature; check-lists of the public documents of the state, including all reports issued by the several departments, boards and commission; digests of such public laws of this and other states as may be the best made available for legislative use; catalogues, files and clippings of newspapers, and of such other printed matter as may be proper for the use of the bureau. The librarian shall also, when requested by the Governor, heads of departments, or members of the Legislature, promptly procure available information, not on file in the bureau relating to pending legislation, and investigate the manner in which laws have operated in other states.

"Sec. 6. It shall be the duty of the librarian:

"(a) To keep and maintain at all times, in duplicate a loose leaf set of statutes, including all sections in force, arranged numerically, and in connection with each section, subsection or paragraph of a subsection to designate the titles and subtitles, under which the same is indexed, and to keep an alphabetical card index of all such titles and subtitles referring to such section, subsection or paragraph.

"(b) To keep and maintain, in duplicate, a loose leaf ledger of notes of court decisions and other matters, referring to any section, subsection or paragraph of the statutes, arranged numerically.

"(c) To supervise and attend to the preparation, printing and binding of a complete compilation of the statutes and index, or the stat-

utes, index and notes whenever ordered by the Legislature.

"(d) To supervise and attend to the preparation, printing and binding of such compilations of the particular sections or portions of the statutes as may be ordered by the head of any department of the state.

"(e) To formulate and prepare a definite plan for the order, classification, arrangement, indexing, printing and binding of the statutes and session laws, and between and during sessions of the Legislature to prepare and at the beginning of each session thereof to present to the committee of revision of each house, in such bill or bills as may be thought best, such consolidations, revisions or other matters relating to the statutes, or any portion thereof, as can be completed from time to time. * * *

"Sec. 8. The librarian shall neither oppose nor urge legislation, but shall, upon request, aid and assist the members of the Legislature, the Governor, and the heads of departments by advising as to bills and resolutions and drafting the same into proper form, and by furnishing to them the fullest information upon all matters in the scope of the bureau relating to their public duties. No employes of the bureau shall reveal to any person outside of the bureau the contents or nature of any matter not yet published, except with the consent of the person bringing such matters before the bureau. * * *

If the Legislature had the power to do so, it is very plain that it has appointed the appellee the law and legislative reference librarian "until otherwise provided by law," and it has, by express language, deprived the board of curators of the power "to appoint said legislative reference librarian during the incumbency in office" of the appellee.

As to the intent of the Legislature in this matter, there is no room for controversy. To say that the Legislature meant something else is to indict it of saying one thing and meaning another. The appellee's tenure of office, under the terms of this act, is determinable only by death, resignation, failure to perform the duties of the office, or willful misconduct therein, or by the Legislature. In any event the board of curators cannot remove the legislative appointee.

"It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." Section 366, Sutherland on Statutory Construction.

Indeed the appellant and appellee are in agreement as to the meaning intended by the Legislature, for the appellant in his brief says:

"* * * The Legislature provides that the board shall not exercise its power of appointment during the incumbency of an appointee of the Legislature thereafter named."

If other proof than the very plain language used in making the appointment of appellee were needed it might be mentioned that the Legislature, convened in January, 1917, passed an act appropriating the sum of \$500 to pay the expenses incurred by appellee in de-

fending his title to the office of librarian in this very suit. This not only evidences the intention of the members of the Legislature that he should not be removed by the board of curators, but it also may be considered as an expression of appreciation of the Legislature of benefits secured to it through the legislative bureau. The learned counsel for the appellant, however, does not question the intention of the Legislature to appoint the appellee to the office of state law and legislative reference librarian, and that his tenure should continue "until otherwise provided by law;" his principal contention being that the appointment "is invalid and ineffective for the reason that the appointment to an administrative office is not within the legislative power under the Constitution of the state." He makes other objections to the appointment, which we shall notice later on, but this is the principal one and the one toward which most of his very learned brief and argument are directed.

The appellant bases his contention that the Legislature is without power to appoint a librarian upon article 3 of the Constitution, which divides the powers of government into three departments, and declares that these departments shall be separate and distinct, and that no one of them shall exercise the powers properly belonging to either of the others. It is argued that an appointment to office is an executive function, and therefore properly belongs to the executive department. This position is a direct challenge of the constitutionality of the appointment by the Legislature. The matter of declaring this act unconstitutional is a very serious one, and not lightly to be considered. It is well settled that every reasonable presumption in favor of the validity of the appointment is to be indulged by the courts. If there is any doubt it has to be resolved in favor of its constitutionality.

What the courts have laid down as the rule in considering and passing upon the constitutionality of a law, involving, as it does, the question of power, applies here with all propriety, for in this case there is a direct challenge of the power of the Legislature to make the appointment under our Constitution. We should approach this question, therefore, with the same trepidation as if it involved the constitutionality of the very law creating the office of librarian. It involves the review by the judicial department of the action of another separate, independent, and co-ordinate department. The duties of the court, when confronted with such questions, are well set out in *State of Rhode Island v. District of Narragansett*, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295-298, as follows:

"The question of constitutionality is distinct from the question whether a statute, in its operation as a law, is likely to work well or ill, the latter question being a purely legislative question with which the courts have no concern. The

courts concede to state Legislatures a legislative power which is limited only by the Constitution, and they are therefore careful not to declare a statute unconstitutional until they are clear that it is so. They assume that the legislators, being bound by their oaths to support the Constitution, consider, when any act is proposed for passage, whether it can be constitutionally passed, and do not vote for the passage of it until every doubt has been quieted. In this view, a becoming deference to the Legislature inculcates caution. 'The question whether a law be void for its repugnancy to the Constitution,' says Chief Justice Marshall, 'is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.' *Fletcher v. Peck* (10 U. S.) 6 Oranch, 87, 128, 3 L. Ed. 162. The rule generally laid down is that statutes should be sustained, unless their unconstitutionality is clear beyond a reasonable doubt. A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained. *Cooley, Const. Lim.* 182, and cases cited. 'Before an act is declared to be unconstitutional it should clearly appear that it cannot be supported by any reasonable intentment or allowable presumption.' *People v. Orange Co.*, 17 N. Y. 235, 241. 'All intendment favor constitutionality,' *Crowley v. State*, 11 Or. 512 [6 Pac. 70]. 'Courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.' *Re Wellington*, 16 Pick. [Mass.] 87, 95 [23 Am. Dec. 631], per Shaw, Ch. J. 'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed,' says Justice Washington, 'to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.' *Ogden v. Saunders* (25 U. S.) 12 Wheat. 213, 270, 6 L. Ed. 606."

See, also, *Laird v. Sims*, 16 Ariz. 521, 147 Pac. 741, L. R. A. 1915F, 519; *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94.

Another and cognate proposition of law which we think is universally recognized as correct is this:

"The lawmaking power of the Legislature of a state is subject only to the limitations provided in the state and federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that under any rational view that may be taken of the statute, it is in positive conflict with some identical or designated provision of constitutional law. See *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *Wooten v. State*, 24 Fla. 335, 5 South. 39, 1 L. R. A. 819; *Duval County v. Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416." *Jacksonville v. Bowden*, 67 Fla. 181, 64 South. 769, L. R. A. 1916D, 913-917, Ann. Cas. 1915D, 99.

See, also, *Avery v. Pima County*, 7 Ariz. 26, 60 Pac. 702.

All powers of government primarily are lodged in the people. That is true with reference to the selection of their officers. They may, if they so choose, surrender this power to one department of state or some portion of it to each department of state, or they may retain it to be exercised directly by themselves. The legislative department is grant-

ed the power under the Constitution (article 4, § 8) to appoint its own officers. The judicial department (Supreme Court) may appoint a reporter for the decisions of that court and a clerk of the court. Article 6, §§ 14 and 17.

The people have reserved to themselves the right to choose all precinct, county, and state officers provided for in the Constitution, except three members of the state board of education (article 11, § 3), regents of the University and the governing boards of other state educational institutions (article 11, § 5), and a state examiner (article 22, § 18). Indeed they were so jealous of this power and right to select their own officers that they provided for an advisory vote of the people for United States Senator (article 7, § 9) quite a while before the federal Constitution was amended providing for the election of United States Senators by popular vote.

The only instances under the Constitution in which the power of appointment is made exclusively executive are the specific ones above enumerated, and such others as may occur when an office becomes vacant and the law or the Constitution has provided no mode for filling such vacancy. If a vacancy in any office occurs from any cause, and no mode of filling it is pointed out either by the Constitution or by statute, the Governor of the state is empowered to fill the vacancy by appointment. Section 8 of article 5 of the Constitution. This section inferentially imposes the duty upon the Legislature in all cases where the Constitution has not provided for the filling of vacancies of making provisions for filling them. The Legislature may not only provide a mode for filling a vacancy in office, but it may create offices when not prohibited by the Constitution and provide for the election of the officers by the people or for their appointment by a board or commission of their creation, or by the executive, or may itself make the appointment.

We think it is quite apparent that the framers of our Constitution and the people who adopted it treated and considered the right to select and choose their officers as a political question, and surrendered that right to the different departments of state only in so far as the inherent necessities and proprieties seemed to require it. Where the people have not provided for the manner of filling offices newly created, or vacancies in office, they have left to the Legislature, as their representatives, such duties. The rule, as we understand it, is as stated by Chief Justice Kane in *Riley v. State*, 43 Okl. 65, 141 Pac. 264:

"Generally the power to select officers of the state is not an exclusive function of either the executive, legislative, or judicial branches. Primarily, the power resides in the people, and they alone are authorized to say by what instrumentality the power may be exercised. In *re Decision of Justices, Election by Senate* (R. I.) 60 Atl. 555."

Or as stated in the Rhode Island case, wherein it was contended that the power of appointment to office was the exclusive function of the executive branch of the government:

"It is not so prescribed or treated by the Constitution; nor is it the general practice of this or the other states of the Union so to consider it. The power of selection of the officers of the commonwealth resides originally in the people. They may provide, by the Constitution which they adopt, how the power shall be exercised, or they may leave to the Legislature, as their representatives, to provide by law for the selection of such officers, by such instrumentality and in such manner as in their opinion will secure the best service to the public. *The power of appointment or selection to office is a function of either the executive, legislative, or judicial branch only when it is made so by law.*" (Italics ours.)

The courts that have adopted the views expressed above, although not always using the same reasoning, are the following: *Fox v. McDonald*, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122; *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *Ingard v. Barker*, 27 Idaho, 124, 147 Pac. 293; *Sinking Fund Com'rs v. George*, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. v. Bolger*, 128 Mich. 355, 87 N. W. 366; *State v. Irwin*, 5 Nev. 111; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128; *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *People v. Bennett*, 54 Barb. (N. Y.) 481; *Sturgis v. Spofford*, 45 N. Y. 446; *Cherry v. Burns*, 124 N. C. 761, 33 S. E. 136; *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138; *State v. Seymour*, 35 N. J. Law, 54; *State v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; *Biggs v. McBride*, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115.

In the note by the editor, Mr. Freeman, in the case of *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, in which he reviews many of the decisions of Supreme Courts, it is said:

"The truth is, that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the Legislature may, as the lawmaking power, when not restrained by the Constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may * * * designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the Legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary. The Legislature, unless inhibited by the Constitution, may exercise its power in either of three modes: (1) It may, by a statute, create an office, and name persons who are to fill it. *State v. Seymour*, 35 N. J. Law, 48; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311); *Mayor of Baltimore v. State*, 15 Md.

376 [74 Am. Dec. 572]. (2) It may by law create an office and provide that it shall be filled by election or appointment by the Legislature in joint convention assembled. *People v. Langdon*, 8 Cal. 1; *People v. Fitch*, 1 Cal. 536; and the principal case. (3) It may, after creating an office, provide that it may be filled by appointment made by any person, or by the members of a voluntary association, as by the members of the Chamber of Commerce and the presidents and vice presidents of the marine insurance companies of a certain city, or by the members of the board of underwriters of such city; nor is it necessary that the persons thus designated be citizens of the United States and authorized to vote as such. *Sturgis v. Spofford*, 45 N. Y. 446; *In re Bulger*, 45 Cal. 556."

The appellant contends that the appointment of appellee directly by the Legislature in the act creating the office of librarian is the exercise of a power prohibited by the Constitution. He relies upon the appointment made by the board of curators, an administrative or executive body. The board of curators is a creature of the Legislature. The contention of appellant amounts to this: That the Legislature may not itself appoint a librarian, but may create a board and delegate to it the power to appoint. Generally speaking whatever a principal may do he may cause to be done through his agent or representative. Surely an agent or representative, whose power to act is delegated to him by the principal, cannot do what the principal is forbidden to do. It would seem that if the board of curators, a body that has existence by reason of the legislative act, may lawfully make the appointment the Legislature itself has the right and power to make it. This proposition is correct in theory, and finds support in the decided cases. A review of the cases bearing upon the subject would seem to indicate a consensus of opinion that where the office is peculiarly identified or associated with the appointing power, as where it has to do with the functions and duties of the appointive power, whether it be judicial, legislative, or executive, the appointment properly belongs to that department.

The title of the office here in question is "law and legislative reference librarian." Section 2. Later in the same section and in section 3 the officer is referred to as "legislative reference librarian." In section 4 it is provided that "a legislative reference bureau for the use and information of the members of the Legislature * * *" shall be maintained in the state library. Thereafter the duties of the librarian are set forth, many of which consist in the assembling and collecting of laws and data necessary and suitable to the uses of, and in aid of, the members of the Legislature. It is made his duty to revise and codify any bills to be presented to the Legislature for the consideration of its members. "Upon request" he is required to "aid and assist the members of the Legislature," and to give advice and draft bills for the heads of departments of the state. In his message of February 3,

1913, to the Legislature, the Governor of the state, in speaking of the necessity of the establishment of a legislative reference bureau, among other things, said:

"It will save the time of the legislators, provide them with a fund of information they cannot otherwise acquire, make, for better, more workable and more uniform laws, prevent conflicts and repetitions, and keep the state in the forefront of progressive legislation."

Thus it would seem that the primary and dominating purpose of creating a legislative reference bureau was to give aid and assistance to the members of the Legislature as lawmakers of the state. The librarian in the performance of these special duties is in the employment of the Legislature as much so as any of the other numerous attachés of that department. His work differs from the other employes of the Legislature in that their labors are limited to the time that the Legislature is actually in session, whereas the librarian is employed not only during the sessions of the Legislature, but during its vacation. His work in connection with the reference bureau is characteristically of a legislative nature, and appertains to the legislative department. In that view of it the office is a legislative one, and not an executive one, and if the power of appointment depended upon that fact (which we do not concede), the Legislature was not only the proper authority to make the appointment, but it alone could make it.

The view that appointment to office is purely an executive function to be exercised only by the executive department of government is taken by only two states, so far as we have been able to discover. *Pratt v. Breckinridge*, 112 Ky. 12, 65 S. W. 136, 66 S. W. 403; *State v. Washburn*, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430. However, in the Kentucky case the court expressly excepts from the executive department the appointment of the state librarian. It said:

"It is not denied that the legislative department can appoint or elect an officer when the duties of the office appertain to that department. And in this is found whatever justification exists for the Legislature's election of the state librarian—an office which, without any violent stretch of construction, may be considered as appertaining to the legislative department."

See, also, *Sinking Fund Com'rs v. George*, supra.

In the Missouri case it is said:

"Courts and the General Assembly may appoint such officers or agencies as are necessary to the exercise of their own functions"

—a statement implying authority in the Legislature to appoint a legislative reference librarian.

Ohio, North Carolina, and Nebraska have constitutional provisions that prohibit the Legislature from exercising the appointive power, and the decisions in those courts can have no weight upon the question. *State v. Kennon*, 7 Ohio St. 546; *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *State v. Offill*, 74

Neb. 670, 105 N. W. 1099. Later an amendment of the North Carolina Constitution omitted the prohibition against the Legislature making appointments to office, and under the amended Constitution the courts of that state have decided that the function of appointment to office might be exercised by the General Assembly. *Cherry v. Burns*, 124 N. C. 761, 33 S. E. 136; *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138.

The decisions of the courts of Indiana may be said not to be authority for either side of the proposition, for they have decided it both ways. An examination of the cases make it evident that the decisions were more or less influenced by the peculiar wording of the Constitution of the state. In one case (*State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79) it is said.

"The Legislature of our state is prohibited from appointing to office except as in the Constitution expressly provided."

There is no such limitation upon the legislative power in our Constitution. The *Denny* Case, while denying the right of the Legislature to appoint officers for the city of Indianapolis, suggests that it could rightfully exercise the power to appoint a state librarian. This case was followed by *City of Evansville v. State*, 118 Ind. 427, 21 N. E. 267, 4 L. R. A. 93, *State v. Hyde*, 121 Ind. 20, 22 N. E. 644, and *State v. Peelle*, 121 Ind. 495, 22 N. E. 654. By that same court the right of the Legislature to appoint to office has been directly recognized. *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *French v. State*, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113; *Overshiner v. State*, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748, 83 Am. St. Rep. 187. We hold, therefore, following the great body of American law on that subject, that the act of the Legislature creating the office of state law and legislative reference librarian, and appointing the appellee thereto, does not violate any provision of the Constitution of the state; that there is no limitation in that instrument in direct terms or by implication upon the legislative power to do what is done in this act.

We might add that if we were inclined to adopt the reasoning of the courts of Kentucky and Missouri, still, under their reasoning, the duties and functions of the librarian appertaining largely to the lawmaking department, appellee's appointment by the Legislature would be authorized.

[3] The act appointing appellee to the office of state law and legislative reference librarian became a law on the 24th day of March, 1915. It was not an emergency measure, and therefore, under article 4, subdivision 3 of section 1 of the Constitution, did not become "operative for ninety days after the close of the session of the Legislature enacting such measure."

The appellee's official bond was executed and presented to the board of curators for

their approval on April 2, 1915, and by them approved on that day. On the same day his bond, together with his oath of office, was filed with the secretary of state. It is objected by the appellant that all these proceedings were premature and of no legal effect. His position is that the bond should have been approved and the oath of office taken after the 10th day of June, the day that the law became operative; that prior to that time there was no board of curators to approve his official bond, nor any office of librarian in existence. This bill was not approved by the Governor, neither was it vetoed. The Legislature, by its final adjournment, prevented its return to it, and the Governor, failing to file any objections to the same within 10 days after such adjournment, Sundays excepted, as provided in the Constitution (article 5, § 7), we think the act creating the office was a law from and after the tenth day from the date of adjournment of the Legislature, but inoperative as such until 90 days thereafter. The power of the Legislature to make the appointment being determined, we can see no objection to its exercise in advance of the law becoming operative. *People v. Inglis*, 161 Ill. 256, 43 N. E. 1103; *State v. Irwin*, 5 Nev. 111; *People v. Blanding*, 63 Cal. 333; *Mechem on Public Officers*, § 133.

[4] Appellee's bond was presented to and approved by the board of curators appointed under the provisions of section 4554, chapter 9, title 42, of the Civil Code of 1913, which board had not been superseded or displaced on April 2, 1915, when appellee's bond was approved.

The judgment of the lower court is affirmed.

FRANKLIN, C. J., concura.

CUNNINGHAM, J. (dissenting). This is an action in quo warranto, commenced by the appellant against the appellee to try the title to the office of law and legislative reference librarian. The office was created by an act, published as chapter 62, Regular Session of the Second State Legislature 1915, p. 134. The plaintiff was in form appointed to the office of said law and legislative reference librarian by the board of curators of the state library, at a regular meeting of the board on July 23, 1915. He qualified on July 24, 1915. He claims title to the office by reason of such appointment, and claims that the board in making the appointment acted within its authority conferred by section 2 of said chapter 62. Plaintiff demands the usual judgment of ouster and general relief.

The defendant demurs upon the grounds that insufficient facts are stated in the complaint to justify the relief demanded, or to state a cause of action. He demurred specially denying the power of the board of cu-

rators to make the appointment of a librarian, because at the time the appointment was attempted to be made, the said office was not vacant, but at said time this defendant alleges that he (defendant) was and still is "the lawful and legal incumbent of said office, * * * never having been removed therefrom by operation of law or otherwise," and as a consequence the attempted appointment of the plaintiff by the said board of curators was "illegal, unlawful, and unauthorized by any law of the state of Arizona, and was in direct contravention and violation of the provisions of said act of the state of Arizona," referring to the act by its title. The defendant denies the alleged usurpation and intrusion into the office and his alleged unlawful holding and exercising the duties of the office, and the unlawful exclusion of plaintiff therefrom, and asserts that defendant lawfully holds the office, and lawfully excludes the plaintiff therefrom. The defendant specially sets forth his right and title to the office by alleging facts which show him eligible to hold the same. His appointment thereto is set forth as follows:

"That under and by virtue of the provisions of an act of the Legislature of the state of Arizona, entitled 'An act establishing a state library with a law and legislative reference bureau, providing for the appointment of a board of curators and librarian, defining their duties and making an appropriation therefor.' * * * This defendant was appointed by the Legislature of the state of Arizona to the office of law and legislative reference librarian created by said act. * * * That on the 2d day of April, 1915"

—the defendant's official bond was approved and with his oath of office was filed. That the defendant assumed the office on the 10th day of June, 1915, and claims that he is the lawful incumbent from such date. He alleges:

"That under and by virtue of the provisions of section 3 of said act and law, * * * the term of office of this defendant extended to such time and period as might otherwise be provided by law. That subsequent to said act becoming a law there has not been, and is not now, enacted any law removing this defendant from said office of librarian created by said act. And that this defendant has never resigned from said office or been removed therefrom by operation of law, and that no vacancy has occurred in said office since defendant's appointment thereto by the Legislature of the state of Arizona."

Thereby founding his title to continue in the office upon a special law enacted in his individual favor, whereby he is given the exclusive privilege of holding the same.

The plaintiff demurred specially to the portions of the answer which attacks the legality of plaintiff's appointment by the board of curators, and demurs to that portion of defendant's answer setting forth defendant's appointment by the Legislature, and his right thereunder to continue in office after plaintiff's appointment under such special law. The court sustained the defendant's demurrers to plaintiff's complaint, and over-

ruled plaintiff's demurrers to defendant's answer. The plaintiff refused to amend. The court rendered judgment for the defendant, from which judgment plaintiff appeals.

The question of law presented by the record is whether on July 23, 1915, the board of curators were possessed of the power to remove the librarian then holding the office by appointment thereto by the Legislature of the state, made on the face of the act creating the office of librarian, and appoint the plaintiff as the successor in office to the legislative appointee so removed. The ruling of the lower court in effect denies the power of the board of curators to remove the legislative appointee and fill the office by an appointee of the board.

The parties on this appeal have devoted much time and labor discussing the question of the power of the Legislature to make the appointment of the defendant. I regard that controversy as a moot question in this case, for the reason the board of curators found the defendant in the full possession and enjoyment of the office when the board came into existence. The board did not nor could exist until chapter 62, Regular Session Laws of the Second Legislature 1915, p. 134, became operative. This law became operative on June 10, 1915, and defendant assumed possession of the office on June 10, 1915. Unless the board of curators possessed the legal power to remove the person found in the actual possession of the office, exercising the duties, and to appoint another to fill such office, then the appointment by the board of the plaintiff would confer no right on the plaintiff. It is the plaintiff's individual right that is primarily involved in this action. If the defendant's possession and exercise of the office was without legal sanction, the public right is affected, and the state is the real party in interest, but in the absence of a legal appointment of the plaintiff, his private rights are not affected, and he has no special interest in the matter which would give him the right to prosecute the action. In order that the plaintiff may prosecute this action in his own name, he must show that he has some special interest and right, other than the public right, which is denied him by the defendant.

The vital question in this action is whether the board of curators, by appointing the plaintiff, conferred upon plaintiff a better title to the office than the defendant had by reason of his legislative appointment. The question otherwise stated is whether the board of curators had the power to remove the legislative appointee on July 23, 1915, and appoint plaintiff to the office. We must therefore search the statute (chapter 62, supra) and determine therefrom the powers of the board of curators to remove a librarian found in office and to lawfully appoint a successor. Section 1 of said chapter 62 provides for the appointment of the members

of the board of curators of the state library, and defines their respective terms of office, and section 4 creates the legislative reference bureau. Section 2 provides:

"The board of curators shall have full control and management of the library and all its departments, and shall provide rules and regulations for the government thereof; shall elect a chairman who shall preside at all meetings and shall appoint a law and legislative reference librarian who shall act as secretary of the said board and hold office at the pleasure of the board: Provided, however, that said board of curators are not empowered to appoint said legislative reference librarian during the incumbency in office of the said librarian as provided in section 3 of this act.

"Sec. 3. Until otherwise provided by law Con P. Cronin is appointed legislative reference librarian, and shall serve until his successor is appointed. Any vacancy shall be filled by the board of curators."

The board of curators by the first portion of section 2 is expressly commanded to appoint the librarian, and the librarian so appointed by the board may hold such office only at the pleasure of the board appointing him. The language "shall hold office at the pleasure of the board," as used in section 2, clearly implies that the board of curators is given the power to remove the librarian in office at any time the board may deem proper. Such expression has reference to the board's power to remove the librarian, its secretary, in the course of performing its duties of full control and management of the library in all departments. The proviso on its face purports to withhold from the board of curators some of the powers granted by the enacting portion of the section, conditionally. The implied power of removing the librarian by the board is not expressly withheld. The power of appointment is conditionally withheld, and the condition specified is that such power may not be exercised "during the incumbency in office of the" librarian appointed by the Legislature, viz. Con P. Cronin. The expression "during the incumbency in office" is certainly a most indefinite expression of a period of time. Standing alone, it places no minimum nor maximum limit of time during which the power of the board of curators to appoint a librarian is withheld. The expression is not intended as one fixing the time of the incumbency of office of Con P. Cronin, but is intended as fixing by reference to something coming after, the period of time during which the board of curators' power of appointment is suspended. That period of time, so referred to, must be determined, not from the language of the proviso making the reference, but from the language coming after to which reference is made by the language of the proviso. If upon consulting the portion of the statute to which the reference is made, a time of "incumbency in office" is fixed, then while such period endures the power of the board of curators to appoint a librarian remains suspended. Section 3 is

expressly referred to as providing the period of incumbency in office during which period of time the appointive power of the board of curators remains suspended. The words "as provided in section 3 of this act" qualify the words "during the incumbency." and serve to limit the duration of the incumbency in office to the period of time such incumbency is limited by the provisions of section 3 of the act. Hence the effect of the proviso is to suspend the appointive power of the board of curators for the period of time set forth in section 3 of the act, during which the legislative appointee is given the right to enjoy the office.

Section 3 clearly deals with three subject-matters: First, with the matter of appointment of a legislative reference librarian; second, with the matter of the duration of the term of office of the librarian appointed; and, third, with the matter of the duties of the board of curators empowered by such board to fill any vacancies that occur in any of the offices provided for the state library. Most certainly the reference made in the proviso to section 2 is to the second subject-matter with which section 3 is dealing, viz. the matter of the duration of the term of office of the librarian appointed therein. In order to intelligently deal at the period of time the person appointed by section 3 may lawfully exercise the duties of the office we must understand the legislative intention in using the words "otherwise provided by law." Section 3 commences with this expression. The expression is certainly qualifying in its nature, it is a limitation upon the subject of appointment, or, is it a limitation upon the period of duration of the term of office? It is not a limitation upon both subjects. The expression qualifies the matter of appointment, then it means simply that the appointment of Con P. Cronin is made by legislative power, in the absence of legally constituted power, and until such as other legally constituted power comes into existence the Legislature assumes and does act in the premises. Consequently the expression "Con P. Cronin is appointed," etc. is clearly of the opinion the expression "otherwise provided by law" has reference to any law of the state which may not be in contemplation of becoming operative in the future, by the provisions of which manner and means are prescribed for the regular appointment of the law and legislative reference librarian. Consequently the expression qualifies the matter of appointment, the first subject-matter treated in section 3, and has no bearing whatever upon the second subject-matter treated in section 3.

The view I take of the record with reference to the matter of the appointment of Con P. Cronin by the Legislature is as above stated, and that it is a moot question in this case.

a consequence for the purposes of this case I regard the appointment of the defendant by the Legislature as legal at the time it was made. I am therefore not concerned with the matter of defendant's appointment, the first of the subject-matters treated in section 3, but I am concerned with the question of the power of the board of curators to remove the defendant from the office to which he was appointed by the Legislature. This question necessarily includes the question of the duration of the term of office of the legislative appointee, and therefore demands an inquiry into the legislative meaning of all of the language used in the statute affecting that matter. I have already considered the expression "during the incumbency in office" found in the proviso portion of section 2, and I have concluded that such expression refers to the matter of the duration of the defendant's term of office as fixed by section 3. It now remains to inquire into the question as the subject of the term of office is affected by section 3.

The only language found in section 3 in any manner bearing upon the matter of the duration of defendant's term of office is as follows: "And shall serve until his successor is appointed." This clear, plain, distinct language limiting Con P. Cronin's term of office to extend no longer than to the moment his successor is appointed cannot be misunderstood. The connection in which the limitation is used in section 3 impels such understanding of its meaning. "Con P. Cronin is appointed legislative reference librarian and shall serve until his successor is appointed," is the language used, and the connection in which the expression appears. Such language is the last, and therefore the latest expression of the legislative intent with regard to the duration of Con P. Cronin's term of office under his appointment to the office. The limitation immediately follows the granting words of appointment. They are most certainly words clearly limiting his term of office, and the limit placed on his term of office by the appointing power is, as it clearly, plainly, and distinctly says, the appointment of a successor brings to a close by operation of law, the term of office granted to Con P. Cronin by the Legislature.

The Legislature does not expressly indicate by whom Con P. Cronin's successor may be appointed. This was unnecessary, as the members of the Legislature must be presumed to have understood that the power of appointing the librarian was expressly granted to the board of curators to be exercised at the pleasure of the board. The Legislature must be presumed to have also known that the law would not go into effect for 90 days after the session finally adjourned, and that until the law did go into effect the board of curators could not be appointed, nor exercise a pleasure of appointing a secretary nor be in need of a secretary, but that other

departments of the state government were in need of the services of such officer. The Legislature evidently saw a necessity for the immediate need of a legislative reference librarian, and so made the appointment authorizing its appointee to perform the duties of the office until his successor is appointed by the board of curators provided by the same statute to come into existence at some future date. When the statute should become effective as a law, and thereafter, when the members of the board of curators should be appointed pursuant to such statute and qualify as such officers, electing a chairman—when all of these matters have transpired in pursuance to such act, thereupon the law provides for the appointment of a law and legislative reference librarian by the board of curators, by a designated authority other than by the Legislature. Consequently, until such law is effective and in operation, by the provisions of which the board of curators is empowered to exercise its duties, and in fact exercise its pleasure in the matter of appointing a secretary, the Legislature makes the appointment.

I am of the opinion that this expression, "during the incumbency in office," as used in the proviso on account of the proviso expressly referring to section 3 for information as to the meaning intended to be conveyed, means nothing more than that which is expressed in section 3 with regard to the ending of Cronin's term of office, viz. "until his successor is appointed." His successor is liable to be appointed by the board of curators at any time after the law is in operation and the pleasure of the board is exercised. No other meaning can be given the statute and retain the portion of section 2 which expressly grants to the board of curators the power to remove any librarian and appoint another at its pleasure. If the proviso takes away from section 2 these expressly granted powers, permanently, by all of the authorities the proviso is void, and the enacting portion of the statute is effective, notwithstanding the proviso to the contrary.

Another rule of statutory construction is applicable to this statute, viz.: The last expression of the Legislature is controlling in case of irreconcilable conflict. In this case the last expression of the Legislature with regard to the defendant's term of office is that he shall serve "until his successor is appointed." If the board of curators, after having been expressly empowered in section 2 to appoint a librarian, is suspended by the proviso "during the incumbency in office" of Con P. Cronin, and his term endures the remainder of his life, or until removal for cause, or until he voluntarily resigns, or until the Legislature removes him, as I understand the majority of this court holds as the clear, plain, distinct language of the act, then most certainly the hand that gave to

the board of curators the right to exercise its pleasure and remove the librarian, knew not what the other hand was doing, while at the same time the right given was taken away permanently. Why did the Legislature grant a right to the board of curators in one breath, and in the next take it away? Such a construction placed upon this statute is not a necessary construction. Another, and a better construction, may fairly be placed upon the statute, and thereby retain its provisions as I am constrained to believe was the legislative intent. I regard the rejection of plain statutory provisions as a dangerous and unwarranted action. Clearly the appointment of a librarian by the board necessarily removes the then incumbent. Consequently the enacting portion of section 2 fully empowered and empowers the board of curators to remove at its pleasure any person found in possession of the office at any time, without regard to the source of such person's title to the office. The board need have no excuse for removing the person so found in office, other than its pleasure, its preference that another person fill the office. The existence of such pleasure or preference is all that is legally necessary to fully warrant the board in removing an incumbent by the appointment of his successor. The appointment of a successor by the board of curators is all sufficient to evidence the board's pleasure in this respect, and work a removal of the incumbent. The appointment by such board confers the title to the office exclusively on its appointee.

Beyond any doubt the facts stated in plaintiff's complaint, and admitted by defendant's demurrer, are sufficient to set forth a cause of action, and establish plaintiff's right to the office.

If section 3 is given a construction by which the defendant is granted the exclusive right to enjoy the office indefinitely or until some future Legislature shall see fit and proper to declare his right to the office at an end, such construction would clearly mean that the defendant holds the office by a special grant during his life; that he has conferred upon him, granted to him, the special privilege of holding this particular office for life, and is specially granted immunity of removal therefrom by any power other than the Legislature enacting a special law for that purpose. Such is the effect of the defendant's contention, and if we sustain such

contention, we place such an interpretation upon section 3 of this chapter as will cause such section to come into direct conflict with subdivision 13 of section 19, article 4, state Constitution, whereby the Legislature is expressly prohibited from enacting any special law, "granting to any corporation, association, or individual any special or exclusive privileges, immunities, or franchises."

The appointment of an individual by name, and empowering the person so appointed to exercise the duties of a particular office named, is not such an act by the Legislature as may be dignified by the term "law." But, when the Legislature creates an office, and in direct connection with the law which creates the office appoints an incumbent therefor, and declares that the person so appointed shall not be removed from the office otherwise than by another act of the Legislature, to be passed at some future time, most certainly the Legislature has thereby granted to an individual a special privilege, and also granted to such individual immunity of removal until another special law is enacted. Such grants are nothing less than special laws, enacted in the particular case of the appointee, and are void, because prohibited. *Hunt v. Mohave County*, 18 Ariz. —, 162 Pac. 600.

Such construction as will cause the law to come into conflict with the Constitution should be rejected as beyond the legislative intent. Every law enacted must be presumed to have been enacted by the Legislature with the intention that it will become operative and beneficial. Certainly the granting of an office to an individual for life is contrary to our form of state government, and such grant is a violation of the spirit, if not the letter, of our Constitution.

I am clearly of the opinion that the granted power to the board of curators to remove any law and legislative reference librarian, by whomsoever appointed, remained with the board of curators on July 23, 1915, and that the power to remove Con P. Cronin by the appointment of his successor was clearly within the power of the board of curators.

As a consequence, I dissent from the order affirming the judgment. I am of the opinion that the judgment should be reversed, and the cause remanded, with instructions to overrule defendant's demurrers to plaintiff's complaint and sustain plaintiff's demurrer to defendant's answer.

GRADY COUNTY et al. v. CHICKASHA COTTON OIL CO.

STATE et al. v. SAME.

(Nos. 7837, 7913.)

(Supreme Court of Oklahoma. April 10, 1917.)

*(Syllabus by the Court.)*1. TAXATION \S 493(2) — ASSESSMENT — REVIEW—JURISDICTION—JUDGMENT OF COUNTY COURT—DISCOVERY OF OMITTED TAXABLE PROPERTY.

Neither the Supreme Court nor the district court have jurisdiction to review upon appeal or by petition in error an order or judgment of the county court made in a proceeding pending before said court upon appeal from the action of the county treasurer in proceedings instituted pursuant to the statutes governing the discovery of omitted taxable property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 877.]

2. CERTIORARI \S 28(2), 29—SCOPE OF REMEDY—JURISDICTION OF INFERIOR COURT—ERRORS OF LAW.

The common-law writ of certiorari as used in this jurisdiction brings up for review but one question, and that is whether the inferior tribunal or court kept within or exceeded the jurisdiction conferred upon it by law. It cannot be used to correct errors of law or fact committed by the inferior tribunal within the limits of its jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 41, 42.]

Original application by Grady County and others and the State of Oklahoma and others for a writ of certiorari to review the action of the County Treasurer of Grady County, the County Court of that County, and the District Court of the Fifteenth District Court Judicial District in the matter of a certain proceeding instituted on relation of the tax inquisitor of Grady County against the Chickasha Cotton Oil Company to assess its omitted property. Writ denied.

Jno. H. Venable, Co. Atty., of Chickasha, and A. K. Swan, Asst. Co. Atty., of Tulsa (J. P. Whittinghill, of Chickasha, of counsel), for plaintiffs in error. Keaton, Wells & Johnston, of Oklahoma City, and Bond, Melton & Melton, of Chickasha, for defendant in error.

KANE, J. This is an original application for a writ of certiorari for the purpose of reviewing the action of the county treasurer of Grady county, the county court of said county, and the district court of the Fifteenth district court judicial district, in the matter of a certain proceeding instituted on relation of the tax inquisitor of Grady county against the Chickasha Cotton Oil Company, in which it was sought to assess as omitted property the capital, surplus, and undivided profits of said company at its principal place of business in Grady county, after it had rendered for taxation in the various other counties where located the greater portion of its tangi-

ble property in the manner prescribed by law for the assessing of the property of natural persons. After a full hearing, the county treasurer found that inasmuch as the Chickasha Cotton Oil Company had rendered and assessed its property located in the several counties of the state of Oklahoma for taxation, where located, for the years covered by the complaint of the tax inquisitor, the capital stock of said corporation being invested in such properties and the moneyed capital of such corporation was not subject to assessment in Grady county. Wherefore it was ordered and adjudged that these proceedings be, and the same hereby are, dismissed with prejudice. Thereafter, and in due time, the county of Grady, on behalf of itself and the state of Oklahoma, school district of Grady county No. 1, and the city of Chickasha, served notice of appeal upon the respondent. Whereupon the entire record before the county treasurer of Grady county was filed by the tax ferret in the county court of Grady County. Thereafter the Chickasha Cotton Oil Company moved the county court to dismiss these proceedings, for the reason that said court has no jurisdiction of the parties, and no jurisdiction of the subject-matter involved, which motion was sustained by the county court and an order entered dismissing said proceeding for want of jurisdiction. Proceedings for a writ of certiorari were then commenced in the Supreme Court, wherein it was sought to review the proceedings and judgment of the county court, and also the proceedings of the county treasurer, which petition for a writ of certiorari was denied by this court on the 2d day of February, 1915, for want of proper parties defendant. *State v. Chickasha Cotton Oil Co.*, 45 Okl. 472, 146 Pac. 433. On the 13th day of November, 1914, the plaintiffs in error herein filed a petition for writ of error in the district court of the Fifteenth district court judicial district sitting for and in Grady county. Thereafter respondent moved said court to dismiss said petition for writ of error, for the reason that it is shown upon the face of said petition and the exhibits attached thereto and referred to therein that this court has no jurisdiction therein, which motion was sustained and the proceedings dismissed for want of jurisdiction.

[1] As to the question involved in cause No. 7913, wherein the action of the district court is sought to be reviewed, it is sufficient to say that it has been settled beyond peradventure in this jurisdiction that neither the Supreme Court nor the district court have jurisdiction to review upon appeal or by petition in error an order or judgment of the county court made in a proceeding pending before said court upon appeal from the action of the county treasurer in proceedings instituted pursuant to the statutes govern-

ing the discovery of omitted taxable property. This for the reason, as stated by the court, that there is no statute which authorizes an appeal in such proceedings from the county court to any other court. *Bd. County Com'rs of Kingfisher County v. Guaranty State Bank*, 27 Okl. 756, 117 Pac. 216; *Asher State Bank v. Bd. County Com'rs*, 31 Okl. 145, 120 Pac. 634; *State et al. v. Cawthorn's Estate*, 31 Okl. 560, 122 Pac. 522; *McAlester Trust Co. v. Watson, County Treas.*, 45 Okl. 607, 146 Pac. 586. In view of these cases, it follows, of course, that the district court was right in declining to review by appeal the action of the county treasurer and the county court.

[2] It is next contended on behalf of respondent that certiorari is not a proper remedy to compel a taxing officer to make an assessment or to review the correctness of a decision of an inferior court declining to take jurisdiction of the cause or proceeding. And this contention seems to be conceded by counsel for petitioner, unless this court overrules several of its former opinions, which, they say, are against the weight of authority. In *Baker v. Newton*, 22 Okl. 658, 98 Pac. 931, *In re Benedictine Fathers of Sacred Heart Mission*, 45 Okl. 362, 145 Pac. 494, *Tiger et al. v. Creek County et al.*, 45 Okl. 701, 146 Pac. 912, and *Parmenter v. Ray, County Judge*, 158 Pac. 1183, this court has held that the office of the writ of certiorari at common law is to bring up the record from an inferior court or tribunal to a superior court for investigation as to jurisdictional errors only. These cases state the rule to be that, whilst it is undoubtedly within the power of this court under the supervisory power conferred upon it by the Constitution to review by certiorari the jurisdictional errors of any inferior court or board in a case in which no appeal or proceeding in error would lie, still the writ will issue only for the purpose of correcting such wrong as may have been done the parties by reason of a judgment rendered without jurisdiction, or in excess of jurisdiction. Generally, the final judgment sustaining a writ of certiorari goes no further than to declare void such proceedings of an inferior tribunal as are beyond or in excess of its jurisdiction. It will be observed that the petitioner herein is not seeking to have the proceedings of the county treasurer or county court quashed or set aside because said tribunals have exceeded their jurisdiction, or for illegality in the mode of procedure, but are praying this court to require said inferior tribunals to take jurisdiction for the purpose of revising their conclusion on a question of law, and to make an assessment of certain personal property alleged to have been omitted during a series of preceding years. The county treasurer assumed jurisdiction of the cause, and, after

a full investigation, found in effect that the petitioner having formerly returned all of the tangible property for taxation, no duty remained for him to perform under the omitted property statute. As in making this ruling the treasurer neither acted without jurisdiction nor in excess thereof, clearly the case is not distinguishable from the former cases wherein the court has held that, where certiorari is the appropriate writ by which courts vested with a superintending control and supervision over all inferior boards or courts created by law review such proceedings or acts of the latter as are of a judicial nature, still the purpose of the writ is to determine whether such inferior tribunals have kept within or exceeded the power conferred upon them by law. As was held in one of those cases (*Parmenter v. Ray, County Judge*, supra): "The common-law writ of certiorari as used in this jurisdiction brings up for review but one question, and that is whether the inferior tribunal or court kept within or exceeded the jurisdiction conferred upon it by law. It cannot be used to correct error of law or fact committed by the inferior tribunal within the limits of its jurisdiction."

For the reasons stated, the writ is denied.

SHARP, C. J., and HARDY, TURNER, and THACKER, JJ., concur.

THOMAS v. HALSELL et al. (No. 7)
(Supreme Court of Oklahoma. April 10, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1009(4)—FINALITY—CONCLUSIVENESS.

In a suit in equity the Supreme Court cannot set aside the findings of fact of the trial court unless, after a consideration of the entire record, it appears that such findings are clearly against the weight of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3974.]

2. MORTGAGES §38(1)—DEED OR MORTGAGE—FINDINGS—SUFFICIENCY OF EVIDENCE.

Record examined, and held, that the findings of fact of the trial court are fairly sustained by the weight of the evidence.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 108.]

3. HUSBAND AND WIFE §183—WIFE'S SEPARATE PROPERTY—CONVEYANCE—CONSIDERATION.

Where by statute, as in this jurisdiction, a married woman may dispose of her separate property by deed the same as if she were a single woman, the discharge of her husband's debt on the sale of her separate property for sufficient consideration to support a conveyance of her separate real estate for that purpose.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 721, 942.]

4. COMPETENCY OF WITNESSES.

By statute in this state (section 5360, Laws 1910) the husband is incompetent to testify for or against his wife, except in transactions in which one acted as the

the other, or when they are joint parties and have a joint interest in the action.

5. WITNESSES **52(3)—COMPETENCY—HUSBAND AND WIFE.**

Record examined, and held, that in the circumstances of this case the trial court did not err in holding the husband to be an incompetent witness to testify for or against his wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 128, 417, 419, 424.]

Error from District Court, Okmulgee County; Ernest B. Hughes, Judge.

Statutory action in ejectment and suit to quiet title to a tract of land by Nellie Thomas against E. L. Halsell, in which the International Land Company was made a party defendant with leave to file a petition in intervention. Judgment for defendant International Land Company, and plaintiff brings error. Affirmed.

D. P. Farrell and Merwine & Newhouse, all of Okmulgee, for plaintiff in error. William M. Matthews, of Okmulgee, and Geo. S. Ramsey, of Muskogee, for defendants in error.

KANE, J. This was a statutory action in ejectment and suit to quiet the title to a certain tract of land, commenced by the plaintiff in error, plaintiff below, against one E. L. Halsell. Subsequent to the filing of the petition the International Land Company, a corporation, the defendant in error herein, was made a party defendant to the action and was given leave to file a petition in intervention. After various motions, answers and replies were filed by the plaintiff, defendant, and intervener, respectively, the issues were joined by the original petition of the plaintiff, the amended answers of the defendant and intervener, and the amended reply of the plaintiff. The principal issue of fact thus joined by the pleadings was whether a certain instrument executed by Nellie Thomas, the plaintiff, and her husband, Dave Thomas, to one Howard E. Bell, on the 11th day of March, 1905, which upon its face appeared to be a warranty deed conveying title in fee simple to the land in controversy, was not in fact a mortgage executed for the purpose of securing the payment of a loan of money made by Bell to Dave Thomas. The trial court made special findings of fact and conclusions of law as follows:

"That on the 11th day of March, 1905, the said Nellie Thomas and Dave Thomas, her husband, made, executed, and delivered to Howard E. Bell a warranty deed conveying the above-described plat of land. The court finds that the plaintiff herein did on that date sell and convey the fee-simple title to said land to the said Howard E. Bell, and finds that said deed is not a mortgage, and was not intended as a mortgage, but was intended to grant, transfer, and convey the title to said premises. The court finds that the defendant International Land Company is the owner in fee simple of said premises, and that it is a bona fide purchaser for value and without notice of the plaintiff's claim. The court finds the issues of fact against the plaintiff and that the equities are in favor

of the defendants. It is therefore ordered, adjudged, and decreed that the plaintiff take nothing herein, but the defendant International Land Company is hereby adjudged and decreed the owner of the above described premises."

It is to reverse this finding and judgment of the trial court that this proceeding in error was commenced.

[1, 2] From the foregoing brief statement it is obvious that the principal question at the threshold of this case is whether the finding of the trial court to the effect that the instrument signed by Nellie Thomas, and her husband was in fact intended for what it purports to be, a warranty deed, and not a mortgage, is clearly against the weight of the evidence. The rule in this jurisdiction is that in a suit in equity the Supreme Court on appeal is not at liberty to set aside the findings of fact of the trial court, unless, after consideration of the entire record, it appears that such findings are clearly against the weight of the evidence. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *Wimberly v. Winstock*, 46 Okl. 645, 149 Pac. 238; *Tucker v. Thraves*, 151 Pac. 598; *Smith v. Skelton*, 163 Pac. 268, not yet officially reported.

Briefly the testimony of the plaintiff was to the effect that she and her husband, who were both Creek freedmen, resided at or near Boynton, a small town a short distance from the city of Muskogee; that on the 11th day of March, 1905, they went by train from Boynton to the city of Muskogee, the husband paying the expenses of the trip; that after their arrival at Muskogee the husband went alone to the office of Howard E. Bell for the purpose of preparing for signature the instrument the plaintiff had previously agreed to execute; that when this instrument was ready for signature she was sent for by her husband, whereupon she immediately went to the office of Bell, where this instrument was presented to her by her husband, who asked her to sign it; that at first she did not wish to comply with his request, but upon his insistence that the instrument was only a mortgage she finally affixed her signature thereto by mark, being unable to read or write, and thereupon, accompanied by her husband, she went to the office of a Mr. Swanson, a notary public, where the execution of the instrument, in form a deed, was duly acknowledged. Whilst it is true that the testimony of the plaintiff in regard to the statements of her husband as to the instrument being a mortgage is corroborated by two other Creek freedmen, who were present in Bell's office when the instrument was executed, on the other hand, that she did not know the nature and effect of the instrument she really signed is strongly contradicted by many circumstances, which were developed at the trial, as well as by the direct evidence of at least one witness, Mr. Swanson, the notary public, who seems to be the only disinterested witness who testified. One of the

circumstances which, in our judgment, strongly tends to support the finding of the trial court is the long period of time which the plaintiff allowed to intervene between the execution of the instrument and the first assertion on her part that she intended to sign a mortgage, and not a warranty deed, as the instrument appears to be. It is undisputed that immediately after the execution of this instrument the grantee named therein entered into the possession of the premises, and that he, or his assigns, remained in undisturbed possession thereof until a short time before the commencement of this action. As we have seen, the deed was dated March 11, 1905, whilst this action was commenced on the 23d day of October, 1913, a period of nearly nine years. It seems almost inconceivable that the plaintiff would have continued to act toward this land as a stranger for the period of nine years, or more, if she did not fully understand that the effect of the Bell deed was to divest her of all her right, title, and interest therein. The record also discloses that just prior to the filing of this suit oil had been discovered in paying quantities on adjoining lands, and that it was subsequent to this latter date that the plaintiff first asserted her claim to the premises as against these defendants. Whilst it may be difficult to trace any well-defined correlation between these latter circumstances, yet they so often appear in such close proximity to each other in the cases of this class arising in the oil-producing portions of the state, as to at least render the point worthy of passing comment. The record before us contains all the evidence taken at the trial, but, as it is quite voluminous, no useful purpose would be subserved by setting it out in this opinion or commenting upon it at any great length. It is sufficient to say that we have examined it all very carefully, and weighed all the facts and circumstances, as in this class of cases it is our duty to do, and that, viewing it all in the light of the plaintiff's conduct toward the land for so many years, we are convinced that the finding of fact of the trial court as to the nature of the instrument signed by the plaintiff is fairly sustained by the weight of the evidence. As the defendant herein claims title through a chain of conveyances, of which the instrument we find to be a valid deed of warranty constitutes the initial link, it will be unnecessary to notice many of the remaining assignments of error presented for review by counsel for plaintiff, such as those involving the validity of certain of the intervening conveyances in the chain of title, the question of innocent purchaser, etc. Therefore we will confine ourselves to the review of the assignments of error which, if found to be well taken, would tend to work a reversal of the judgment rendered, notwithstanding the conclusion we have reached as to the nature of the instrument signed by the plaintiff and her husband on the 11th day of March, 1905.

[3] There is some contention to the effect that, inasmuch as the evidence shows that Dave Thomas, the husband of the plaintiff, received all the money that passed at the time the conveyance was executed, there was a failure of consideration which would render the transaction invalid. It is conceded that the land involved was the separate estate of the plaintiff, and the evidence shows that the instrument, whether deed or mortgage, was made for the purpose of raising funds to be used for extricating the husband from some financial difficulties in which he had become involved. Both the husband and wife were present at the time of the execution of the deed, and at the time of the payment of the purchase price, and, whilst this is not entirely clear, we will assume that Bell, the grantee, delivered the check to the husband, instead of the wife, and that he used the money for the purpose of paying off his own obligations, pursuant to his understanding with his wife. In jurisdictions having statutes similar to the Married Woman's Act (Stat. 1899, c. 49), in force in the Indian Territory at the time the deed to Bell was made, which permitted a married woman to dispose of her separate property by deed and contract for the sale of the same as if she were a feme sole, it is universally held that the discharge of her husband's debt is a sufficient consideration to support the wife's covenant of warranty, in the conveyance of her separate real estate made for that purpose. *Pratt Land Co. v. McClain*, 135 Ala. 452, 83 South. 185, 93 Am. St. Rep. 35; *Nichol v. Hays*, 20 Ind. App. 369, 50 N. E. 768; *Stone v. Montgomery*, 35 Miss. 83; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49.

[4, 5] The remaining assignment of error necessary to notice is to the effect that the trial court erred in not permitting the husband of the plaintiff to testify concerning the conversation between himself and his wife in Bell's office on the occasion of the execution of the deed dated March 11, 1905. By statute in this state (section 5050, Rev. Laws Okla. 1910) the husband is incompetent to testify for or against his wife, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action. As we understand the theory of counsel for plaintiff on this point, they do not claim that the husband acted as the agent of his wife concerning the transaction herein involved, or that husband and wife are joint parties and have a joint interest in the action, but they contend that the husband should have been permitted to testify because his testimony would have constituted a part of the *res gestæ* and would also have shown fraud. In support of this proposition they cite *Moeckel v. Helm et al.*, 134 Mo. 576, 36 S. W. 226, and *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580. From the latter case they quote as follows:

"The rule he invokes was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all of its protean manifestations. We shall therefore rule that the testimony of both husband and wife was ex necessitate competent as to their conversations, on two grounds, that those conversations were a part of the *res gestæ*, and on the foot of the fraud."

It does not appear that Missouri has a statute similar to ours disqualifying the husband or wife from testifying on each other's behalf; the question involved being whether a communication from the husband to the wife was admissible under the common law. In one of the Missouri cases at least, *Henry v. Sneed*, supra, the husband and wife were both parties plaintiff to the action. The Supreme Court held that in those circumstances where the representations made by the husband constituted the fraud upon which the action was founded the communication was admissible. If the plaintiff and her husband in the case at bar were joint parties to this action, then under our statute the evidence of the latter would have been admissible. But, inasmuch as our statute declares the husband to be an incompetent witness for the purpose of testifying for or against his wife, unless it is first shown that he acted as the agent of the wife, or is a joint party, and has a joint interest with her in the action, we do not feel warranted in the circumstances disclosed by the record in creating another exception to the statute by holding that the testimony of the husband was ex necessitate competent.

For the reasons stated, the judgment of the court below is affirmed.

SHARP, C. J., and HARDY, TURNER, and THACKER, JJ., concur.

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SOUTHERN NAT. BANK OF WYNNE-
WOOD v. WALLACE et al.
(No. 6196.)

(Supreme Court of Oklahoma. April 10, 1917.)

(Syllabus by the Court.)

1. CERTIORARI \Leftrightarrow 9—NATURE OF WRIT.

In this jurisdiction certiorari is not a writ of right but a discretionary writ which the courts, in the exercise of sound judicial discretion, grant or refuse, as justice may seem to require.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 15, 16.]

2. TAXATION \Leftrightarrow 493(1)—ASSESSMENTS—REVIEW—APPLICATION FOR WRIT—DENIAL.

Record examined, and held, that it does not present facts sufficient to justify the issuance of the writ for the purpose of preventing injustice.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876.]

Original application by the Southern National Bank of Wynnewood, Oklahoma, for

a writ of certiorari against W. R. Wallace and others. Writ denied.

Blanton & Andrews, of Pauls Valley, for plaintiff. Stuart, Cruce & Cruce, of Oklahoma City, for defendants.

KANE, J. This is an original application for a writ of certiorari for the purpose of reviewing the action of the county court of Garvin county in reviewing on appeal the action of the treasurer of said county in a proceeding commenced by C. W. Benedict, as special tax auditor of said county pursuant to section 7450, Rev. Laws Okl. 1910, which provides:

"Property that has been omitted from assessment since November 16, 1907, shall be listed and assessed for each year that it has been omitted and charged with the levy for that year. * * *"

Upon the trial which followed, the treasurer found in favor of the tax ferret, and thereupon the Southern National Bank gave notice of and prosecuted an appeal to the county court. In the county court the cause was tried upon an agreed statement of facts wherein, among other things, it was stipulated and agreed that certain shares of stock were underassessed and undervalued for the year 1908 \$11,000, and for the year 1909 \$19,000. Upon this agreed statement of facts, the court found that the plaintiff's shares of stock were underassessed and undervalued for the year 1908 \$11,000, and for the year 1909 \$19,000, and that the plaintiff should be charged with the taxes thereon. The purpose of this proceeding is to quash and set aside the judgment of the county court, upon two grounds, to wit: First, it is claimed that this is, in effect, an attempted reassessment of the capital stock of the plaintiff, and, as such, the county treasurer and county court were without jurisdiction to enter the orders complained of; second, that if it should be held that this proceeding was not an attempted reassessment of the property, still the assessment was void for the reason that it is an attempt to assess to the bank the value of its capital stock in contravention of section 5219, Revised Statutes of the United States (U. S. Comp. St. 1916, § 9784), prescribing the method by which national banks may be assessed.

[1] On the threshold of the case, counsel for respondents contend that apart from any question of whether this proceeding constitutes an attempted reassessment or a valid effort to assess omitted property, or whether the original assessment was beyond the jurisdiction of the state taxing authorities, the writ of certiorari being a discretionary writ, the plaintiff should be left in the condition in which it found itself at the close of the trial in the county court, for the reason that, according to its own admission, by undervaluation and underassessment it escaped

taxation during the years 1908 and 1909 upon taxable property not returned by it for taxation in the precise sums found against it by the county court in the proceeding here sought to be reviewed; and, inasmuch as the writ is prayed for for the sole purpose of enabling it to avoid the payment of taxes which, according to its own stipulation, it justly owes the state, granting the writ, instead of preventing injustice, would thwart justice. It seems to us that this contention is well taken. In 6 Cyc. 748, the rule is laid down as follows:

"Except where so made by statute, the writ of certiorari as used to correct the proceedings of inferior tribunals is not a writ of right, but issues only on special cause shown to the court to which application is made, and the court is vested with judicial discretion to grant or refuse the writ as justice may seem to require."

In *Re Benedictine Fathers of Sacred Heart Mission*, reported in 45 Okl. 358, 145 Pac. 494, we find an apt illustration of the application of the foregoing rule to proceedings similar to this. In that case a tax ferret sought to have listed and assessed, pursuant to the provisions of this section of the statute, certain property belonging to the Benedictine Fathers which, by section 6, art. 10, Williams' Const., was exempt. In that case the court followed the rule laid down in Cyc., supra, which Mr. Justice Bleakmore, who delivered the opinion for the court, after citing *Baker v. Newton*, 22 Okl. 658, 98 Pac. 931, to the effect that this court has the power to issue the common-law writ of certiorari, states as follows:

"The scope of a writ of certiorari was quite limited at common law; and is therefore likewise limited in this state; the proceedings upon the return are confined solely to the record of the lower court or tribunal, and the writ will issue only in cases where no appeal or proceeding in error lies, and, ordinarily, where the wrong or injury cannot otherwise be corrected. The purpose of the writ in all cases is to prevent injustice. It is not a writ of right, but is to be granted or not in the exercise of sound judicial discretion."

[2] If the purpose of the writ in all cases is to prevent injustice and is to be granted or not in the exercise of sound judicial discretion, then, in view of the stipulation as to the facts entered into by the petitioner, the writ prayed for herein surely should not be issued.

The second contention of the petitioner is to the effect that, inasmuch as the statutes of the state in force when these assessments were made provided in effect that all banks, state and national, shall be assessed upon the net value of their moneyed capital, surplus, and undivided profits, less the assessed valuation of any real estate owned by such corporation, etc., in so far as they relate to national banks, they are in conflict with section 5219, Revised Statutes of the United States; which provides, in effect, that neither the state nor any of its officers have au-

thority to tax national banks other than upon their shares and the real estate belonging to such banks. It does not seem to us that this question is available to the petitioner in this proceeding. The record before us shows that the bank submitted to the regular assessments actually made against it for the years 1908 and 1909, returning its property for assessment and taxation upon the forms required by the state statutes then in force prescribing the mode of listing and taxing the property of all banks, state and national, and actually paid the taxes thus assessed against it upon an undervalued basis. Having thus acquiesced in this mode of assessment and voluntarily returned certain property as taxable, the bank is not now in a position to insist that the mode of assessment employed against it is invalid, merely because it is called upon to pay taxes upon property which was returned by it as taxable upon the basis of its fair cash value. 8 Cyc. 787, 791, 794, and notes.

Moreover, whilst it is true generally that the power of a state to tax national banks is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank (*Owensboro Nat. Bank v. City of Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850), still an assessment of the shares of stock in the name of the bank is not necessarily fatal to the validity of the tax. It is well settled that the state, in taxing the shares of stock of national banks, may assess the same in solido to the bank, and require the bank as the agent of the shareholders to pay the tax upon the shares, and to retain the dividends belonging to the shareholders, or to sell their stock to reimburse said bank for any taxes so paid. This is the effect of sections 5950, 5953, Wilson's Rev. Stat. 1903; and such statutes have been upheld in *In re Assessment First Nat. Bank*, 160 Pac. 469; *Louisville First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *Aberdeen First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069.

It will be observed that the property involved in the case at bar consists of taxable shares of stock of the bank which it was agreed were underassessed and undervalued for taxation for the year 1908 \$11,000, and for the year 1909 \$19,000. As this is the precise property upon which taxes are required to be paid at its stipulated fair cash value, by the order of the county court, we are unable to perceive any just ground for the issuance of a writ of certiorari, which, we have seen, is not a writ of right, but a discretionary writ, which the courts grant or refuse as justice may seem to require.

For the reasons stated, the writ of certiorari is denied.

SHARP, C. J., and HARDY, TURNER, and THACKER, JJ., concur.

JONES v. JONES. (No. 8750.)

(Supreme Court of Oklahoma. April 10, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR \S 362(3)—AMENDMENT OF CROSS-PETITION IN ERROR—TIME.**

Where the original cross-petition in error, assigned as error the action of the court in overruling plaintiff's motion for a new trial, which motion contained as one of the grounds therefor that "the judgment of the trial court in finding the marriage between plaintiff and defendant was illegal and void is not sustained by sufficient evidence and is contrary to law," the petition in error may be amended after the expiration of the time in which such cross-appeal must be filed by adding an assignment that "the judgment of the court in finding the marriage between plaintiff and defendant illegal and void is not supported by sufficient evidence and is contrary to law."

2. MARRIAGE \S 40(11) — PRESUMPTION AND BURDEN OF PROOF.

The burden is upon the person who asserts the illegality of a marriage to prove such illegality, and, where a second marriage is shown as a fact, a strong presumption exists in favor of its legality, which is not overcome by mere proof of a prior marriage and that the wife had not obtained a divorce before her second marriage. The party attacking such second marriage has the burden of showing that neither party to the first marriage had obtained a divorce.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 68.]

3. DIVORCE \S 249(1)—DISPOSITION OF PROPERTY—ORDER OF COURT—STATUTE.

Section 4966, Rev. Laws 1910, authorizes the court, in any case where a divorce is refused, to make such order as may be proper, equitable, and just for the disposition and division of the property of the parties or either of them, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-703.]

Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action by Lulu Jones against Jason Jones for a divorce and alimony, in which defendant filed an answer and cross-petition. Petition dismissed, and marriage between the parties annulled, and a division of the property decreed between the parties, and from the decree of division defendant appeals, and from that, and from the dismissal of the petition and the annulment of the marriage, plaintiff brings error. Decree annulling the marriage contract reversed, and in all other things affirmed.

Blake & Hazlett, of Tulsa, for plaintiff in error. T. L. Blakemore, of Sapulpa, for defendant in error.

HARDY, J. Lulu Jones, as plaintiff, commenced this action against Jason Jones, as defendant, for a divorce and alimony. Defendant filed answer and cross-petition, in which he denied the allegations of plaintiff's petition, and, in addition to other matters, alleged that, at the time of the marriage be-

tween plaintiff and defendant, plaintiff was the lawful wife of one Lewis Morgan, and prayed an annulment of the pretended marriage between the parties on that ground. Upon a trial, the court found that plaintiff's prayer for divorce should be denied and dismissed her petition, and further found that the marriage between the parties was illegal and void because of plaintiff's prior marriage with said Morgan, and annulled and canceled the same and decreed a division of the property accumulated between the parties. From the decree dividing the property, defendant prosecutes an appeal, and plaintiff appeals from the decree denying her prayer for divorce and declaring the marriage contract null and void, and also appeals from the decree dividing the property.

[1] In her original cross-petition in error, plaintiff assigned, among other things, that the court erred in overruling her motion for a new trial. On January 20, 1917, she filed an amended petition in error, in which, by way of amendment to her original petition, it was assigned that the court erred in finding that the marriage of the plaintiff in error and defendant in error was illegal and void, and that said finding is not supported by sufficient evidence and is contrary to law. Motion is made to strike the amended petition in error for the reason that same was not filed within four months from the rendition of the order appealed from, that being the time fixed by statute in which appeals must be taken from judgments granting a decree of divorce. Section 4971, Rev. L. 1910. The original petition assigned error upon the order overruling the motion for a new trial, and this was sufficient to present for review all of the questions raised in the motion for a new trial. *Hodges v. Alexander*, 44 Okl. 598, 145 Pac. 809; *Rowsey v. Jameson et al.*, 149 Pac. 880. This assignment in the original petition in error was sufficient to present this question, as the motion for a new trial urged as one of the grounds therefor that the judgment of the court in finding that the marriage of the plaintiff and defendant was illegal and void is not sustained by sufficient evidence and is contrary to law. The amendment filed simply amounted to a formal assignment of a matter that was already embraced in the original petition and which might have been urged thereunder, and was simply an amendment as to form, and the motion to strike the amended petition in error is therefore overruled. *McConnell v. Cory*, 33 Okl. 607, 127 Pac. 259.

[2] Plaintiff urges that the decree annulling the marriage contract is not supported by the evidence. Counsel have not set out an abstract of the testimony in their briefs, nor have they indexed the record as required by the rules of the court, and the work of preparing an opinion in this case has been

attended with much more work than would have been required had counsel observed these rules, which are intended to lighten the labors of the court and expedite the disposition of business. Plaintiff and defendant were married in Bell county, Ky., in the month of May, 1903, and lived together as husband and wife until about November, 1915, when the separation occurred. No children were born to them. During the period of their cohabitation, by their joint efforts, they accumulated considerable property. Some years prior to her marriage with defendant, plaintiff had been married to one Lewis Morgan, from whom she separated about a year and a half or two years prior to the month of October, 1902. In October, 1902, a jury in the county court of Whitley county, Ky., found said Morgan to be insane, and on that date he was committed to an asylum for the insane at Lakeland, Ky., to which institution he was sent, where he died in 1906. Plaintiff testified that she never obtained a divorce from Lewis Morgan and did not know whether he had obtained one from her. Other witnesses testified that they had known Morgan intimately, and that, so far as they knew, he had never obtained a divorce from plaintiff, and that, had he obtained such divorce, they would have known it. At the time plaintiff and Morgan separated, they were living in Tennessee, and, immediately after the separation, both of them went to Whitley county, Ky., and established a residence which was maintained by each of them until Morgan was adjudged insane and sent to the asylum. Under the statutes of Kentucky, a residence of one year in that state is required before an action for divorce may be commenced. Ky. Stat. 1903, § 2120. It is conceded by both parties that approximately 1½ years elapsed between the time plaintiff and Morgan separated and the time that Morgan was adjudged insane. This would allow 6 months within which he could have secured a divorce under the laws of that state which must have been obtained, if obtained, by him in Whitley county. There is no proof that such a decree was not granted to Morgan in that county. Defendant insists that, plaintiff being a resident of such county, personal service must have been had upon her, and that she would have had knowledge thereof if a decree had been granted, and that a decree based upon service by publication would be void. We do not understand the law to be that a decree based upon service by publication is void, even though the party may have been a legal resident of the county at the time. It is not made to appear what the laws of Kentucky upon this point are, and, in the absence of such a showing, we will presume that they are the same as the laws of this state. *Steward v. Commonwealth Nat. Bank*, 29 Okl. 754, 119 Pac. 216. Our statute permits service by publication

where a person is a resident of the county and has left the state or departed from the county of his residence to avoid the service of summons or so conceals himself that summons cannot be served upon him. Rev. Laws 1910, § 4722. See, also, section 57, Ky. Codes 1906. In such cases, service by publication would be sufficient to support a decree. The burden is upon a person who asserts the illegality of a marriage to prove such illegality, and, where a second marriage is shown as a fact, a strong presumption exists in favor of its legality which is not overcome by mere proof of a prior marriage and that the wife had not obtained a divorce before her second marriage. The parties attacking such second marriage have the burden of proof to show that neither party to the first marriage had obtained a divorce. *Coachman v. Sims et al.*, 38 Okl. 536, 129 Pac. 845; *Clarkson et al. v. Washington et al.*, 38 Okl. 4, 131 Pac. 935; *Halle v. Hale*, 40 Okl. 101, 135 Pac. 1143; *Chanvey v. Whinnery*, 147 Pac. 1036; *James v. Adams*, 155 Pac. 1121; *Lewis et al. v. Lewis*, 158 Pac. 368.

In *Halle v. Hale*, plaintiff testified that she had never obtained a divorce from her first husband, but did not testify as to whether he obtained a divorce from her, and that by such divorce their marriage relations were dissolved. The defendant introduced depositions of the clerks of the circuit courts of three counties in Illinois and one county in Texas in which counties the plaintiff's former husband had at different times resided. The court held that this evidence did not establish that the counties named in the depositions were the only counties in which said former husband resided during said time, or that said courts were the only courts that had jurisdiction to grant him a divorce, and it was held that the trial court did not err in his finding to the effect that the presumption in favor of the last marriage had not been overcome.

In *Chanvey v. Whinnery*, 147 Pac. 1036, it was said:

"Every intendment of law is in favor of matrimony. The law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it, that such requirement is in force, even though it involve the proving a negative. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout and in every particular plainly to make the facts appear, against the constant pressure of this presumption, that it is illegal and void."

The evidence offered by defendant did not show that a decree was not granted in Whitley county, Ky., but does show a residence in that county by Morgan of at least 18 months prior to his having been adjudged insane, and that, after the requirement as to residence of the laws of that state had been satisfied, approximately six months elapsed during which time an action could have been

commenced by him and prosecuted to a decree, and the failure of defendant to prove that no decree had been rendered in the court in that county having jurisdiction of such proceedings does not meet the requirements of the rule above stated. It is said in this connection that, by their verdict adjudging Morgan to be insane, the jury found that he had been insane for some years prior thereto; but the effect of such a judgment as this has been determined by the Court of Appeals of Kentucky in the case of *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296, in which it was held that the finding by a jury in a lunacy case that insanity had existed for a period of years before the adjudication, and where the inquiry was confined to the condition of the insane person at the time of the inquest, that any adjudication as to his prior condition would not even raise a presumption that such was the condition of the person prior to that time, and such finding was entitled to very slight consideration.

Defendant says that, if this court is of the opinion that the finding of the trial court annulling the marriage contract is not supported by and is contrary to the evidence, he does not ask for any further relief, other than with respect to the division of the property, and that this court should leave the parties where it found them. The plaintiff states in her brief that, although confident she has sustained the allegations of her petition as to the grounds of divorce alleged by her, in view of the conflict in the evidence in material particulars, it could not be said that the judgment denying her a decree of divorce is against the preponderance of the evidence. Having determined that the decree annulling the marriage contract should be reversed, there is nothing left for further consideration except the respective claims of the parties with reference to the property.

[3] Defendant strenuously insists that, inasmuch as the marriage contract was void and the relation meretricious, plaintiff was not entitled to any portion of the property, although accumulated by their joint efforts. A discussion of this proposition is not necessary, as we have determined in favor of the validity of the marriage contract between the parties.

Section 4906, Rev. L. 1910, is as follows:

"When the parties appear to be in equal wrong the court may, in its discretion, refuse to grant a divorce, and in any such case or in any other case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance, and education of the children, and for the control and equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties."

Under this section, the court was possessed of ample authority to make an order of division as between the parties. Its author-

ity to make such order is not limited to cases where the parties appear to be in equal wrong, but it is expressly enacted that, "in any other case where a divorce is refused," the court may, for good cause shown, make such order as may be proper. That good cause was shown in this case we think cannot be successfully controverted. The property is admittedly the joint accumulation of the parties; they had been married a number of years, during which time they had lived together as husband and wife. Plaintiff is shown to have been an industrious and hard-working woman, performing not only the customary household work, but assisting defendant in his labors and in his business, assisting in the work of cultivating the crops, and in various ways helping him to accumulate the property.

In *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, the Supreme Court of Kansas, in construing section 643 of the Code of that state, which is very similar to section 4906, sustained the authority of the court to award a division of the property, although a divorce was denied, where the parties were in equal fault. The purpose of the statute seems clear. It would be manifestly unjust where parties, as here, had lived together a number of years, and by their joint efforts had accumulated considerable property, to permit one of the parties, upon a separation, to take possession of and keep all of their joint property and turn the other afoot, without any means of support or sustenance, except his or her own personal efforts, and deprive him of any and all interest in the property which they helped to acquire and in which they had an interest.

Was the distribution awarded by the court equitable and just under the circumstances? Plaintiff insists that she is entitled to one-half of the joint accumulation, while, on the other hand, the defendant denies her right to any portion of the property. The standard by which the trial court is to be governed is that the order must be equitable and just under the circumstances. Counsel have not pointed out to us any facts or circumstances or any evidence that would show the order of the trial court to be inequitable or unjust under the circumstances and call our attention to no authorities which determine as a matter of law that she is or is not entitled to any specific portion of the property. The portion which plaintiff was entitled to recover was left by the above statute to be determined by the trial court under all the facts and circumstances, and, having made such division, we are not prepared to say that it was not equitable and just under the circumstances.

That portion of the decree holding the marriage contract to be illegal and meretricious and canceling and annulling the same is reversed, and the judgment in all things else is affirmed. All the Justices concur.

SCHOOL DIST. NO. 19 et al. v. PARRISH.
(No. 8642.)

(Supreme Court of Oklahoma. April 10, 1917.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS ~~69~~—
LOCATION OF SCHOOLHOUSE—STATUTE.

The relocation of a schoolhouse in a school district containing a town or village qualified to vote at school district elections is governed by sections 13 and 15, art. 3, c. 219, Session Laws 1913.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 174.]

2. SCHOOLS AND SCHOOL DISTRICTS ~~69~~—
RELOCATION OF SCHOOLHOUSE—DUTY OF
DISTRICT BOARD.

If at a meeting of the voters of such district the voters by a two-thirds vote, in a district having a schoolhouse the value of which is less than \$500, determine to relocate the schoolhouse, it then becomes the duty of the board of said district to locate said schoolhouse at some point in said district in or adjoining such town or village.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 174.]

Error from District Court, Pawnee County; Conn Linn, Judge.

Suit in equity for an injunction by G. W. Parrish against School District No. 19, C. E. Davies, clerk, R. A. Johnson, director, and J. F. Russell, member. Judgment for plaintiff on the pleadings, and temporary injunction made permanent, and defendants bring error. Reversed, and cause remanded, with directions.

Redmond S. Cole, of Pawnee, for plaintiffs in error. F. C. Shoemaker, of Pawnee, for defendant in error.

KANE, J. This was a suit in equity, wherein the defendant in error, plaintiff below, prayed for a perpetual injunction against the plaintiffs in error, defendants below, enjoining them from condemning a certain part or parcel of his land for the purpose of locating a schoolhouse thereon. After the issues were made up, the plaintiff filed a motion for judgment upon the pleadings, which motion was sustained by the trial court; whereupon the temporary injunction theretofore issued was made permanent. It is to reverse this action of the trial court that this proceeding in error was commenced.

[1] The case below seems to have turned on the question whether the applicable provisions of the law empower the school board of the district, or the inhabitants thereof by vote, to choose the site for the relocation of a schoolhouse. In the case at bar it seems that one-third of the voters of school district No. 19 signed a petition for a special meeting for the purpose of determining the relocation of the schoolhouse in said district, and that at the election which was called by the district board pursuant to said petition the electors were provided with a ballot on which was written the words, "For removal of site,"

"Against removal of site." The election resulted in a vote of more than two-thirds being cast "For removal of site;" and that thereupon the school board selected a site on the land of the plaintiff, which adjoined the village of Skedee, situated within said district. The trial court sustained the motion for judgment on the pleadings, "for the reason that the qualified electors of said district, and not the board of directors thereof, are authorized to choose the new site." This conclusion, undoubtedly, is based upon the theory that the case is governed by section 9, art. 3, c. 219, Session Laws 1913, which provides:

"The inhabitants qualified to vote at a school meeting lawfully assembled shall have power: * * *

"Fourth. To designate by vote a site for the district schoolhouse: Provided, that the designation of a site for a district schoolhouse shall not be over one-half mile from the center of said district."

In this we think the court was in error. School district No. 19 appears to be a district containing a town or village qualified to vote in the school district election. In such districts the matter of determining the relocation of the schoolhouse is governed by section 15, art. 3, c. 219, Session Laws 1913, which provides:

"Upon the petition of one-third of the voters of any school district in Oklahoma, and in any district containing a town or village, qualified to vote at a school district election, the district board of said district shall call a meeting of the voters of said district at the schoolhouse therein in the manner provided by law for calling special meetings for the purpose of determining the relocation of the schoolhouse in said district. If at such meeting the voters of the district, by vote of two-thirds of the resident voters of the district voting, determine to relocate the schoolhouse in said district within the school district, the board of said district shall locate the schoolhouse at some point in said district in or adjoining such town or village."

[2] Construing the foregoing acts together, it seems quite apparent that in the first instance the power to designate the site for a schoolhouse is in the inhabitants qualified to vote, but in districts containing a town or village qualified to vote at a school district election, whilst the matter of determining whether there shall be a relocation of the schoolhouse is for the voters, the duty of locating the schoolhouse at a particular point in the district is for the board. Thus construed, there is no apparent conflict between these two sections. The former provides for the designation by vote of a site for the district schoolhouse in the first instance in all cases. The latter provides for the relocation of the schoolhouse in any district containing a town or village qualified to vote at a school district election. In the latter case the question is whether there shall be a relocation of the schoolhouse; and if this question is answered in the affirmative by vote of two-thirds of the resident voters of the district, then the board of said district shall locate said schoolhouse at some point

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Tate Brady, Geo. G. Bayne, G. N. Wright,
 J. O. Campbell, E. A. Ross, R. C. Brady, M.
 A. Devinna, Jr., E. M. Wright, and Brady-
 Wright Addition Company, a corporation,
 for the specific performance of a contract in
 writing growing out of the conveyance of
 certain lands situated in said county. The
 petition substantially states that: On July
 1, 1907, defendant James Nail was "then and
 there seized and possessed of" a certain
 tract of land described; that he entered into
 a contract with said defendant whereby he
 promised and agreed to sell and in ten days
 convey by warranty deed said lands to him
 for \$3,500—the said James Nail acknowl-
 edging receipt of \$100 as part payment of the
 purchase price, as shown by contract attach-
 ed to the petition as a part thereof; that
 pending the execution of said deed, on Au-
 gust 9, 1907, defendant Geo. G. Bayne fraud-
 ulently induced said James Nail to execute
 a deed to said lands to him for the consider-
 ation named in the contract between plaintiff
 and Nail; that on April 25, 1908, defendant
 G. N. Wright, with full knowledge of the
 fraud and the existence of the contract be-
 tween plaintiff and Nail, entered into a con-
 tract with Bayne to purchase said lands
 from him; that prior to the execution of
 said contract of conveyance by Bayne to
 Wright, defendants Wright and Tate Brady,
 then and there acting as the agent for his
 wife, R. C. Brady, and each acting as the
 agent of defendant Devinna, promised and
 agreed with plaintiff that they would divide
 equally with him any and all profits that
 might thereafter accrue from the sale of
 said premises, in consideration that plaintiff
 would refrain from any effort in the courts
 or otherwise to enforce his contract of sale
 with Nail; that plaintiff has faithfully kept
 such agreement; that defendants G. N.
 Wright and wife, E. M. Wright, Tate Brady
 and wife, R. C. Brady, and Devinna, con-
 spiring with each other to defraud plaintiff
 out of his share of the profits in the subse-
 quent sales of said premises, induced de-
 fendants Bayne to execute on September 1,
 1909, a deed to defendants Campbell and A.
 E. Ross, who, on March 10, 1910, transferred
 said premises to defendants R. C. Brady and
 Wright and M. A. Devinna; that said
 ents then proceeded to organize a
 and placed said premises, after
 platted into lots and blocks

tion more definite and certain was sustained, whereupon plaintiff was required "to state in his petition whether the defendant James Nail was on July 1, 1907, a citizen by blood of the Creek Nation of Indians, and whether the land described in the plaintiff's petition was a portion of the allotment of the said James Nail." To which plaintiff excepted, and, after electing to stand on his petition, defendants moved to dismiss the case, which was done; whereupon plaintiff brings the case here, and, in effect, assigns that the court abused its discretion in sustaining the motion.

And such was an abuse of discretion. Rev. Laws 1910, § 4770, provides that it is only "when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." There is no such claim here. Neither is it contended that the petition fails to state facts sufficient to constitute a cause of action. On the face of the petition the precise nature of the charges, in effect, is that plaintiff has a contract for the conveyance of land which he is entitled to have one of the defendants specifically perform, because, he says, the same was executed for a valuable consideration while that defendant was the owner and in possession of the land. The further charge is that, after the contract was made, but before the deed was executed, another defendant, by fraud, procured a deed to the land from the defendant named, and that it has come into the hands of certain other of the parties defendant by fraudulent mesne conveyances, who were disposing of it. The further charge is that he has been induced not to insist on his rights to a specific performance of his contract under promise of a share in the proceeds of the sale, which, he says, has not been performed and insists on as alternative relief in the event he is not entitled to a specific performance. There can be no question that the allegations are sufficiently definite and certain to make appear on the face of the petition the precise nature of the charge. When such is the state of the pleading, the motion will not lie. 31 Cyc. 645, says, apparent from a casual reading of the statute, that "the motion will lie only when the uncertainty and indefiniteness appears on the face of the pleading, and even then," says the same authority, "the granting of the motion lies in the discretion of the court." No further citation of authority is necessary to support a point so clear, but see *Bowers et al. v. Schuler*, 54 Minn. 99, 55 N. W. 817; *Todd v. Minneapolis & St. L. Ry. Co.*, 37 Minn. 358, 35 N. W. 5; *Lee v. Minneapolis & St. L. Ry. Co.*, 34 Minn. 225, 25 N. W. 399; *Johnson v. Wilcox, etc., Co.* (C. O.) 25 Fed. 373; *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102; *Hensley v. Furniture Co.*, 164 N. C. 148, 80 S. E. 154;

Brown v. So. Michigan R. Co., 6 Abb. Prac. (N. Y.) 237; *Multnomah County v. Willamette T. Co.*, 49 Or. 204, 89 Pac. 389.

But along came the court and sustained the motion, and required plaintiff not to make anything he had alleged more definite and certain, but to make certain additional allegations which, when made, would afford defendants an opportunity to demur. For, had plaintiff amended his petition, as required by the court, so as to show that the defendant Nail, on the date of the contract sought to be specifically performed, was a citizen by blood of the Creek Nation, and that the land in controversy was part of his allotment, it seems to have been defendants' intention to demur thereto on the ground that it disclosed the land to be restricted at that time and inalienable in the hands of the allottee.

In *Johnson v. Wilcox, etc., Co.*, supra, the court said, as here, that the complaint was not indefinite and uncertain, that its meaning was apparent, and that it stated a cause of action in language clear and explicit. Accordingly, the court overruled a motion to make more definite and certain which would require the complainant to set out a contract which would render the complaint demurrable for want of parties. In passing, the court said:

"Unquestionably it would be for the advantage of both parties, if there is a question of this kind, to have it settled in limine; but when the court is asked to compel the plaintiff to draw his complaint so that it will be demurrable, a very different proposition is presented."

In *Multnomah v. Willamette T. Co.*, supra, the court said:

"Where the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite by amendment (section 36, B. & C. Comp.); but this remedy is only applicable when the pleading contains a defective or vague statement of a good cause of action or defense, and is designed to cure such defects as appear upon the face of the pleading itself. It is not the province of the court on such a motion to require the pleader to state the evidence upon which he relies or amend his pleading for the purpose of enabling his adversary to demur. 6 Enc. Pl. & Pr. 275; *Johnson v. Wilcox Sewing Machine Co.* (C. C.) 25 Fed. 373. The motion here was not directed against vague or uncertain allegations of a pleading, but was to require the defendants to insert therein new and independent allegations prepared and framed by their adversary, and we know of no rule of law authorizing or sanctioning such a practice."

The practice was not only unauthorized, but the court abused its discretion in sustaining the motion and requiring plaintiff to amend as he did.

In *Hensley v. Furniture Co.*, supra, plaintiff sued the company in damages for personal injuries alleged to have been caused by its negligence. It seems the complaint, in effect, alleged that the injury for which plaintiff sued was covered by a policy of insurance issued to defendant by the Maryland Casualty Company, which was set up,

and for that reason the casualty company was also made a party defendant. Thereafter came the company, and in effect denied liability, and moved the court to require plaintiff to make his petition more definite and certain, and set forth, as the only contract of insurance existing between defendants' a certain policy which it made an exhibit to its affidavit; and the court required the amendment to be made, and plaintiff excepted and appealed. Had the amendment been made as directed, the casualty company would have escaped liability under the terms of the policy pleaded. In holding that the court abused its discretion in sustaining the motion to require the amendment, the court said:

"Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. 'Discernere per legem quid sit justum.' Osborn v. Bank, 9 Wheat. 738 [6 L. Ed. 204]. When applied to a court of justice, said Lord Mansfield, discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused. Jarrett v. Trunk Co., 142 N. C. 486 [55 S. E. 338]. * * * But in this case the learned judge, intending doubtless to enforce what appeared to him to be the legal rights of the defendant, went too far, and required the plaintiff to do something not within his power to require, and thereby transcended the limit of his jurisdiction"

—and vacated the action of the court complained of.

The cause is accordingly reversed and remanded, with directions to set aside the order complained of, and reinstated the case, with leave to defendants to plead. All the Justices concur.

TRUSTEES OF HORTON'S ESTATE v. SHERWIN. (No. 7202.)

(Supreme Court of Oklahoma. Feb. 13, 1917.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

1. DAMAGES §89(2)—MEASURE—BREACH OF CONTRACT.

The measure of damages for the breach of an obligation arising from contract, except where otherwise expressly provided, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291, 303-305.]

2. DAMAGES §89(2)—BREACH OF CONTRACT—REMOTE DAMAGES.

Where an action is founded upon the breach of a written contract to accept and pay for certain construction work, plaintiff is not entitled to recover exemplary damages, attorney's fees, and interest paid on money borrowed, as a result of the breach, to meet his obligations, as such are too remote.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 208.]

Error from County Court, Love County; J. H. Harp, Judge.

Suit by H. C. Sherwin against the trustees of the estate of Horace E. Horton, deceased, proprietors of the Chicago Bridge & Iron Works. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

E. D. Slough, of Ardmore, for plaintiffs in error. J. C. Graham and B. C. Logsdon, both of Marietta, for defendant in error.

TURNER, J. On April 7, 1914, defendant in error, H. C. Sherwin, sued "the trustees of the estate of Horace E. Horton, deceased, proprietors Chicago Bridge & Iron Works," in the county court of Love county, in damages for the breach of a contract in writing. The petition substantially states that, pursuant to their contract in writing, dated January 20, 1914, wherein defendant agreed to pay plaintiff \$5.94 per cubic yard to do certain concrete work and excavations necessary thereto in Marietta, plaintiff constructed 43½ yards of concrete, aggregating \$258.40, and excavated 80 cubic yards of earth, aggregating \$40; that the work was completed and tendered about March 1, 1914, at which time there was due and owing plaintiff \$298.40 under the contract; that thereupon defendant refused to accept or pay for the work and in so doing breached the contract with plaintiff so to do; that as a result of the breach, plaintiff was compelled to borrow money and pay interest thereon to meet his obligations and to employ counsel to bring this suit, all at a cost of \$52.50; that, in performing the contract, he had complied strictly with the plans and specifications prepared by defendant; and that the estimates for the work, when finished, were duly approved by the mayor of the city and the engineer in charge of the work, and duly forwarded to defendant, as required by the contract. But that, disregarding the contract, defendant refused to pay and, within seven days after the work was finished, injured, defaced, and destroyed the same to within about a foot of the bottom thereof, which was retained and used as a foundation of certain concrete work afterwards thereupon erected by defendant. By reason of all of which plaintiff was brought into public disrepute, contempt, and ridicule as a concrete worker, to his damage as a contractor \$500, in all, \$850.90, for which he prayed judgment. After demurrer to the third and fourth para-

graphs of the petition, wherein plaintiff sought to recover, as damages, \$52.50 for attorney's fees and interest on borrowed money and \$500 punitive damages, which was overruled, defendant answered, and, after a general denial, set up that the work tendered was not according to contract, but was so defective and unfit to serve the purpose for which it was intended that it had to be torn away and built over again by defendant, and, owing to delay, etc., at an expense of \$521.81, and prayed that plaintiff take nothing by his suit, and that defendant have judgment against him for \$125.41 and costs. Upon the issues thus joined there was trial to a jury, and judgment for plaintiff for \$507.40, and defendant brings the case here.

Although conflicting, as the evidence reasonably tended to prove that the contract was entered into as pleaded; that pursuant thereto, plaintiff in all things complied therewith by erecting four concrete piers about three feet square at the top of the ground, and about six feet square at the bottom, and extending into the ground some six feet, upon which it was the intention of the defendant to erect a steel tank as a water tower for the city of Marietta, the verdict of the jury, finding in his favor upon the issue that he had complied with his contract and was entitled to recover for the value of the work, will not be disturbed.

[1] But the court erred in overruling the demurrer to that paragraph of plaintiff's petition wherein he sought to recover interest he says he was compelled to pay on money borrowed to meet his obligations by reason of defendant's breach of the contract in failing to accept and pay for the work, and attorney's fees paid to bring this suit, in all \$52.50. Also, in overruling the demurrer to the paragraph of the petition wherein he sought to recover \$500 exemplary damages on account of said breach and the practical destruction of the work by defendant, which, he says, brought him into public disrepute, contempt, and ridicule as a concrete worker. This for the reason that said attorney's fees and interest on borrowed money are too remote, and unauthorized by any statute called to our attention. Besides, such do not fall within the purview of Rev. Laws 1910, § 2852, which reads:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

See *Southwestern, etc., Co. v. Stribling*, 18 Okl. 417, 89 Pac. 1129.

[2] As to plaintiff's right to recover exemplary damages, it is only for the breach of an obligation not arising from contract where

such right exists; not here, where a breach of an obligation arising from contract is counted on. Rev. Laws 1910, § 2851. In such an action exemplary damages cannot be recovered, in the absence of statute. In his latest excellent work on Contracts, Mr. Elliott, in volume 3, § 2124, says:

"As a general rule, there can be no recovery of exemplary damages for the breach of a contract, for this class of damages depends on the motive of the party sought to be charged with liability, and liability for breach of contract does not, ordinarily, concern itself with motives." 12 Am. & Eng. Enc. L. p. 20.

For the reasons stated, instructions 4 and 4½ are erroneous, as the error in ruling on the demurrer is carried into those instructions which permit a recovery on those paragraphs of the petition.

We are therefore of opinion that, while plaintiff was entitled to recover \$293.40, being the contract price of the work, the remainder of his recovery should be remitted, which, when done, the judgment may stand affirmed; otherwise, the cause is reversed and remanded for a new trial. Let the costs be equally divided between plaintiff and defendant. All the Justices concur.

HAYS v. SMITH. (No. 7412.)

(Supreme Court of Oklahoma. Dec. 5, 1916.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

1. CONTRACTS §71(3) — CONSIDERATION — FORBEARANCE.

Forbearance in the prosecution of an action is sufficient consideration for a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 319, 320.]

2. GUARANTY §7(1)—ACCEPTANCE—NOTICE.

A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9.]

3. BILLS AND NOTES §519—LIABILITY—EVIDENCE.

The evidence in this case examined, and it is held, that at the time John T. Hays executed the notes sued upon it was not his intention to simply guarantee the obligation, but to assume absolute liability therefor, and his liability upon said notes was not dependent upon anything else being done before he could be held liable therefor, but became his personal absolute obligations.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1802.]

Commissioners' Opinion, Division No. 3. Error from District Court, Kiowa County; Frank M. Bailey, Judge.

Action by James W. Smith against John T. Hays. Judgment for plaintiff, and defendant brings error. Affirmed.

James W. Smith, of Cordell, L. M. Keys, of Hobart, and Massingale & Duff, of Cordell, for plaintiff in error. J. W. Man-

sell, of Cordell, and Hays & Hughes, of Hobart, for defendant in error.

HOOKER, C. The notes sued upon here were executed by John T. Hays to James W. Smith under the following circumstances: One Mrs. McDaniel had procured in the district court of Washita county a judgment for \$2,000 alimony against her husband, who resided in Kiowa county, and the firm of Talbert & Hays was employed to aid in the collection of said judgment, which they did, and certain real estate was sold to satisfy said judgment, and at the sale thereof Mrs. McDaniel became the purchaser. She was unable to handle the property on account of prior liens thereon, so after some negotiations it was agreed that she should transfer her bid for said property and her judgment for alimony to James M. Hays, a brother of John T. Hays, for a consideration of \$1,000, —\$400 of which was then paid by him, and the balance thereof was to be paid to Mrs. McDaniel and James W. Smith after confirmation of the report of sale and upon delivery of the deed. John T. Hays guaranteed the payment of this money upon the part of his brother, James M. Hays. This sale was confirmed and the deed made to James M. Hays, and he acquired possession of the property, but he failed to pay the first mortgage lien or to complete the payment of the balance of the \$600 due Mrs. McDaniel and James W. Smith. Thereafter suit was filed to foreclose these first mortgage liens, and James W. Smith for Mrs. McDaniel and himself, filed an answer and cross-petition, wherein it was asserted that, by reason of the default in the payment of the aforesaid \$600, they had lien upon said property superior to the claim of James M. Hays. Thereupon John T. Hays, after negotiation with them, executed the notes sued upon here for the money due to them, and their action was dismissed and judgment entered therein acceptable to John T. Hays, and Mrs. McDaniel and James W. Smith thereupon released all claim to the property, and looked exclusively to these notes for their money.

[1] That forbearance in the prosecution of an action is a sufficient consideration for a contract cannot be questioned. See 9 Cyc. 338.

[2, 3] However, the consideration for these notes need not rest upon forbearance alone, for it is shown here that at the time the contract was made between Mrs. McDaniel and James M. Hays, the performance of the same was orally guaranteed by John T. Hays, and that when he executed these notes he was merely reducing to writing what he had prior thereto orally promised to do. That being true, the consideration involved in the original transaction was a sufficient consideration to support the execution and delivery of the notes sued upon here. Section 1031, Revised Laws of 1910, provides:

"A mere offer to guaranty is not binding, until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance."

The execution of these notes was not a mere offer of guaranty, but an absolute guaranty. At the time John T. Hays delivered the notes it was not his intention to simply guarantee an obligation, but he was assuming an absolute liability, and he expected to pay the notes according to their terms.

The only inquiry necessary to be made is whether or not the guaranty in question is absolute. Did the defendant know the extent of his liability at the time he executed and delivered these notes, or was there something to be done in order to advise him of the amount he would be required to pay? If he knew the extent of his liability and its limitations, his contract was absolute. If not, it was an offer to guarantee, which required an acceptance. The very nature of the contract and its attendant circumstances clearly show that he understood perfectly the full extent of his liability, and that his liability was not dependent upon anything else being done before he could be liable upon these notes. Plaintiff in error knew full well that he was expected to pay these notes, as his subsequent conduct and his repeated promises so to do indicate.

The question of attorney's fees claimed by the plaintiff in error was decided adversely to him; and, as there is evidence supporting the verdict of the jury, we cannot disturb the same here. The other positions urged by him are not tenable in this action. His liability is so clearly established by the evidence and by the law, as we view it, that errors complained of, if any, are harmless.

There being no error apparent to us in this record, this cause is affirmed.

PER CURIAM. Adopted in whole.

EVANS v. BURSON. (No. 8064.)

(Supreme Court of Oklahoma. Jan. 23, 1917.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

FRAUD ~~§~~ 28—RIGHT OF ACTION—FORBEARING COLLECTION OF DEBT.

A general creditor may not maintain an action against a third party for fraudulently inducing such creditor to forbear legal action to collect his debt.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 8, 26.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Jefferson County; Cham Jones, Judge.

Action by W. I. Burson against J. L. Evans. Judgment for plaintiff, and defendant appeals. Reversed.

Bridges & Vertrees, of Waurika, for plaintiff in error. J. H. Harper, of Waurika, for defendant in error.

BURFORD, C. Plaintiff, Burson, sued Evans to recover damages for fraudulent misrepresentations. The testimony on behalf of plaintiff tended to show that Evans was clerk of a public sale at which a horse belonging to Burson was sold at auction to one Smith. As Smith was leaving the grounds with the horse Burson caused inquiry to be made of Evans as to whether or not settlement had been made for the horse. Evans replied that it was all right; that Smith would settle. Later he represented that he would include the debt in a mortgage to the bank of which he was an officer, and thus secure Burson for the purchase price. Still later he represented to Burson that the price of the horse had been included in such mortgage, but it afterward developed that the mortgage did not secure the price of such horse. Meanwhile Smith sold the horse. Many of these facts were denied by the defendant, but for the purpose of this decision we assume them all to be true. It was alleged by the plaintiff that he believed the representations of Evans and was induced thereby to forbear any action to collect his debt, and that Smith was now insolvent. There was no proof of any intention on the part of Burson to sue or attach had no representation been made by Evans and no proof of Smith's insolvency, except what might be drawn from testimony that he had not paid Burson, and had not paid certain debts due other parties. Inasmuch, however, as no question of failure of proof in this particular regard is raised in the briefs, we treat it as waived. Defendant demurred to the evidence, and moved for an instructed verdict, and, being denied, duly excepted. The court submitted the cause to the jury upon the theory set out in the following instruction, to which defendant duly reserved exceptions:

"You are instructed, gentlemen of the jury, that if you find by a preponderance of the evidence that the defendant, Evans, falsely stated and represented to the plaintiff, Burson, after the sale of the horse in question, that he had included the indebtedness of the said Smith to Burson in a mortgage that he had taken from said Smith, or that the bank had taken from said Smith, and you further find that the plaintiff, Burson, believed said statement, relied and acted upon same, and that by virtue of relying on the same was deprived of the right and thereby prevented from proceeding against the said Smith, and recovering his property or the value thereof, then you are instructed that you should return a verdict for the plaintiff for the sum sued for."

It will be noted that this instruction eliminates any question as to Smith being induced to part with his property in the first instance by reason of any fraudulent misrepresentations by Evans, and, indeed, such is not alleged. It will be further noted that the court assumed that the damage resulting, if any, was the amount sued for, to wit, the

sale price of the horse. The result of such action, however, we are not required to consider.

Judgment being rendered for plaintiff for the full amount claimed, defendant brings the cause here for review.

The controlling question in the case is whether or not an action by a general creditor will lie against a third person for fraudulent misrepresentations inducing the plaintiff to refrain from legal action to collect his debt. With the exception of Pennsylvania, where the rule is otherwise, and a few decisions based upon peculiar states of fact, the courts with practical unanimity deny the right to maintain such an action. The reasons therefor are placed upon two grounds: First, that a general creditor has no such interest in any property of his debtor that will permit him to complain of a fraudulent disposition of such property or of a fraudulent inducement to the plaintiff, the result of which is to permit a disposition of debtor's property which places it beyond the creditor's reach. This is the doctrine of the Supreme Court of the United States, at least in so far as fraudulent aid to the debtor, in disposing of the property is concerned. *Adler et al. v. Fenton*, 24 How. 407, 16 L. Ed. 696. But the right of a judgment creditor against a municipality to recover damages against third persons for fraudulently preventing the collection of a tax to pay his judgment has been sustained. *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930.

The second reason given is that the damages sought to be recovered are too remote and contingent to admit of a judgment at law therefor. Thus in *Wellington v. Small*, 3 Cush. (Mass.) 145-149, 50 Am. Dec. 719, it was said:

"The uncertainty of the plaintiff's damage seems, of itself alone, to be a sufficient reason for his not recovering. In an action on the case *ex delicto*, the plaintiff must show injury and damage; and these must be shown as facts, by legal proofs, except in a few cases, where, by the rule of law, damage is presumed from the act complained of. * * * How could this plaintiff prove that he suffered any damage from the acts of the defendant, which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor, if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture."

And, we might add, what if the debtor resorted to the all too frequent practice of claiming as exempt the property sold him, and which was sought to be attached or levied upon in execution?

It would be of little value to go farther

into the authorities upon the general subject. They are collected and reviewed at great length in the note to *Field v. Siegel*, 99 Wis. 605, 75 N. W. 397, as reported in 47 L. R. A. 433. In our own court but two decisions touch upon the subject. In *Johnson Fife Hat Co. v. National Bank of Guthrie*, 4 Okl. 17, 44 Pac. 192, the president of the defendant bank had fraudulently conspired with certain merchants as a result of which they bought goods of plaintiff. These goods and others were sold by the bank upon a fictitious mortgage, and the proceeds divided between the bank and the merchants, leaving no assets to pay plaintiff's claim. A right of action against the bank retaining the proceeds of the fraudulent sale was sustained. But there the action was in conversion, and was upheld upon the theory that by reason of fraud title to the goods did not pass from plaintiffs, and that the bank, having sold the goods which in reality belonged to the plaintiffs, was guilty of a conversion thereof. The doctrine of the case is fully supported by the decision of the Supreme Court of the United States in *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106. See, also, *Work Bros. v. McCoy*, 87 Iowa, 217, 54 N. W. 140, to the same effect.

In *Security Bank v. Reger*, 151 Pac. 1170, not yet officially reported, it was alleged that the bank had conspired with a debtor to place a fraudulent mortgage upon his property, sell the same thereunder, divide the proceeds, and thereby deprive plaintiff of opportunity to collect his debt. Recovery was sought, not as for a conversion or upon the ground that plaintiff had fraudulently been induced to part with his property, but upon the ground that plaintiff had thereby been prevented from levying an attachment and collecting his debt. Recovery was denied, this court saying:

"A general creditor cannot maintain an action against a third party who fraudulently conspires with a debtor to accept a mortgage on the debtor's personal property and foreclose the same in order to hinder and delay such creditor in the collection of his debt; such damage being too remote, indefinite, and contingent to be the basis of an action."

This decision is sustained by many authorities some of which are cited therein, and is but a reiteration of the result reached by the Supreme Court of the United States in *Adler v. Fenton*, supra. Upon principle it is controlling here. A distinction is sought to be drawn in that in the *Reger* Case the fraudulent acts were wholly between the defendant and the debtor, while here the fraudulent misrepresentation was directed immediately to the creditor plaintiff. We see no difference in the result to be drawn or distinction upon which a right of recovery should be denied in the one case and affirmed in the other. Upon exactly similar states of fact, to wit, where the creditor was induced to withhold legal action by fraudulent misrepresentations made directly to such creditor, re-

covery was denied in *Bradley v. Fuller*, 118 Mass. 239, *Austin v. Barrows*, 41 Conn. 287-296, and *Graham v. Peale, Peacock & Kerr*, 173 Fed. 9, 97 C. C. A. 311. Some expressions in *N. Y. L. I. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187, and *Bowen v. Carter*, 124 Mass. 428, appear to be somewhat opposed to the views here expressed. These cases, however, are not closely in point upon the facts, and, considering the fact that in each state there are decisions upon similar states of fact in consonance with the general doctrine here adopted (see note 47 L. R. A. 433, supra), and especially in view of the decision of this court in *Security State Bank v. Reger*, supra, such decisions cannot be regarded as controlling.

It is to be regretted that a right of action in cases such as the present cannot be sustained, but, such right not being given by statute, nor in the ordinary course of the common law, it seems that it must lie with the Legislature to create the right of action and prescribe the measure of damages.

For the reasons given, the cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

EMPLOYEES' BUILDING & LOAN ASS'N v. CRAFTON et al. (No. 5064.)

(Supreme Court of Oklahoma. April 10, 1917.)

(Syllabus by the Court.)

LIS PENDENS § 25(3)—SUBROGATION § 26—MORTGAGES—FIRST MORTGAGE—PRIORITY.

While R. was the owner of the lots in controversy, he conveyed them to K., the wife of S., subject to a first mortgage to the loan company. She thereafter conveyed them to C., subject to that and also a second mortgage to W. Before K. parted with her title to the lots, one M. sued K., and her husband in debt, and made the first and second mortgagees parties defendant and established a lis pendens on the lots, and an equitable lien thereupon in favor of M., and they were sold on execution to M., subject to those mortgages in satisfaction of his judgment, whereupon a sheriff's deed therefor issued to him and he was placed in possession. Pending M.'s suit, and before judgment, but unknown to M., plaintiff loaned C. money to pay the first and second mortgages, which he did, and the same were satisfied of record, and took a third mortgage on the land for the amount. In a suit by plaintiff to foreclose its mortgage, held, that it was a volunteer and not entitled to be subrogated to the rights of the loan company in its mortgage, and, for the reason that plaintiff's mortgage was executed after M.'s action had established a lis pendens against the lots, the lien of that mortgage thereto did not attach so as to affect M.'s title subsequently acquired, that M., as purchaser under his judgment, took title thereto clear of plaintiff's mortgage, and that the trial court did right to so hold and cancel and remove the same as a cloud on M.'s title.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 50; *Subrogation*, Cent. Dig. § 67.]

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Suit by the Employees' Building & Loan Association against D. A. Crafton and Lizzie

Crafton, his wife, and Edward Hagener and A. S. Pace, in which G. W. Martin and the Oklahoma State Bank were made parties defendant. Judgment for plaintiff against the defendants Crafton and Hagener, and judgment for defendant Martin on his cross-petition, to which judgment plaintiff brings error. Affirmed.

Chas. H. Woods and Geo. M. Green, both of Oklahoma City, and Edward Howell, of Shawnee, for plaintiff in error. E. C. Standard, J. H. Wahl, and C. H. Eunis, all of Shawnee, for defendant in error Martin.

TURNER, J. On December 9, 1911, in the district court of Pottawatomie county, Employés' Building & Loan Association, plaintiff in error, sued D. A. Crafton and Lizzie, his wife, for a balance of \$760.05 due on their promissory note of \$1,000 and to foreclose a mortgage, providing for an attorney's fee, on lots 4 and 5 and 20 feet off the north side of lot 6, in block 1, in W. J. Riggs addition to the city of Shawnee, made, executed, and delivered by the Craftons to plaintiff July 29, 1908, to secure the payment thereof. Edward Hagener and A. S. Pace were alleged in the petition to be the successive owners of the equity of redemption, and G. W. Martin and the Oklahoma State Bank to claim some interest in the property inferior to that of plaintiff, and were made parties defendant and are defendants in error. Crafton and wife and Hagener defaulted; the bank disclaimed; Pace pleaded payment, and Martin filed an answer and cross-petition. After the issues were thus joined, there was trial to the court, and judgment for plaintiff and against the Craftons and Hagener for the amount claimed, which was decreed to be a lien upon the land prior to the rights of all the defendants, save Martin, and all of them except Martin were taxed with the costs of the foreclosure. As to Martin, the court, on trial of the issues joined between plaintiff and himself on his cross-petition, held him to be the owner and in possession of the lots in controversy, with title therein superior to that of any of the defendants and prior and superior to the mortgage lien sought to be foreclosed, and ordered, adjudged, and decreed that his title to the land be quieted, and that plaintiff's mortgage be canceled as a cloud upon his title. To which judgment on the cross-petition plaintiff excepted, and brings the case here.

The judgment upon the cross-petition is not contrary to the evidence, as contended. There is no dispute as to the facts. The evidence discloses that on September 27, 1906, one W. J. Riggs, being the owner of the land, by warranty deed conveyed the same to Kitty, the wife of C. W. Sutherland, subject to a mortgage of \$800, payable to Standard Savings & Loan Association. On March 14, 1908, Kitty, by a like deed, conveyed the land to the defendant D. A. Crafton, subject to

that mortgage, and, also to a second mortgage of \$300, payable to one Wyant. Before Kitty parted with the title to the land, to wit, on November 1, 1906, Martin sued the Sutherlands and said first and second mortgagees in the district court of Pottawatomie county, alleging that, on March 23, 1906, the Sutherlands had made, executed, and delivered to him their promissory note for \$121. due 30 days thereafter, and to secure the same executed a mortgage on lot 5 in block 6 in North Park addition to Shawnee; that they had no title to said lot, and did not intend to mortgage it, but thereby did intend to mortgage lot 6 in block 5, North Park addition, at that time owned by C. W. Sutherland; that thereafter they conveyed said lot 6 in block 5 to W. J. Riggs, who took title thereto in good faith, and received in exchange therefor a deed to lots 4 and 5 and 20 feet off the north side of lot 6, block 1, in W. J. Riggs addition to the city of Shawnee; that is, the land described in the mortgage sought to be foreclosed. The prayer of the petition was that plaintiff have judgment against the Sutherlands on the note, together with interest and attorney's fee, and that the amount thereof be declared an equitable lien on said lots 4 and 5 and 20 feet off the north end of lot 6, in block 1, and that the same be sold subject to the mortgage to the Standard Savings & Loan Association and the Wyant mortgage aforesaid. All of which was attempted to be and would have been done pursuant to a judgment duly rendered and entered by default against all the defendants, save Wyant, who was not served, dated December 22, 1906, had not the Sutherlands, on January 30, 1908, pursuant to their motion so to do, set the sale aside and answered, denying all the allegations in the petition save those of indebtedness which they admitted, but pleaded no defense thereto. And nothing further was done in the case until February 15, 1910, at which time a like judgment by default was again rendered and entered against them, whereupon it was again adjudged and decreed that plaintiff have judgment for \$129.40, together with interest and attorney's fees, that plaintiff was entitled to an equitable lien on the land, and that the same be sold to satisfy said debt, subject to the mortgages aforesaid. Pending the suit, to wit, on July 29, 1908, the Craftons, being then the owners of the land subject to the mortgages aforesaid, borrowed the amount of money evidenced by the mortgage sought to be foreclosed, and, unknown to Martin, with it paid and had released of record the mortgages; and when the land was sold, subject to the mortgages aforesaid, to satisfy Martin's judgment, and he had bid it in at the sale for \$700, and paid into court \$438.10, which was the amount of his bid, less the amount of his judgment and costs, and the sale was confirmed and a sheriff's deed issued pursuant thereto, and he was

put in possession of the land, this suit was brought.

It is plaintiff's contention that, although the lien of its mortgage attached to the land pending Martin's suit, resulting in a judgment fixing an equitable lien upon the land, subject to the two prior mortgages aforesaid, yet, as the \$1,000 loan to the Craftons, evidenced by plaintiff's mortgage, paid off those mortgages, plaintiff is entitled to have the Standard's mortgage kept alive and be subrogated to all rights of the mortgagee therein, and have its present mortgage foreclosed and the lien thereof declared superior to the lien of Martin's judgment, and the land sold to satisfy the same. Not so. When plaintiff furnished the Craftons with this \$1,000 to pay the Standard's mortgage, aside from being an incumbrancer pendente lite when it took back the mortgage sought to be foreclosed, plaintiff was a stranger to the title, a volunteer, and not entitled to subrogation therein, for the reason that when that mortgage was paid, it was extinguished, as held by the trial court. In *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63, quoting approvingly from *Walworth, C., Ryan, C. J.*, speaking for the court, said:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished." *Sanford v. McLean*, 8 Paige [N. Y.] 117 [23 Am. Dec. 773]."

In that case the facts stated in the complaint were: That on June 29, 1864, one Bates and another Harvey were in possession of certain lands claiming title to a portion thereof by deed from one Nalden, who became the owner thereof by purchase at foreclosure sale of a mortgage given to the defendant Wilcox, and to the remainder by a tax deed and a sheriff's deed executed pursuant to a judgment against Wilcox while he was the owner of the land. On the date aforesaid, Bates conveyed his interest in the lands to the wife of Harvey. While the Harveys were in possession, they mortgaged the lands to Hodson April 23, 1866, for \$2,500, on which was due and unpaid on October 26, 1869, \$1,750. At that time, the Harveys being unable to pay, Hodson applied to plaintiff to purchase the mortgage, which he agreed to do, and, as they were about to make an assignment thereof, it was suggested that instead the mortgage be canceled, and that plaintiff take a new mortgage from the Harveys, which he agreed to do, whereupon plaintiff paid Hodson, at the request of the Harveys, \$1,750 and took a new note and mortgage from the Harveys for that amount, which was duly recorded, and the Hodson mortgage satisfied of record.

In the meantime, that is, on October 12, 1869, Wilcox commenced an action in the circuit court against Bates and wife and Harvey and wife, the result of which was that the deed to them from Nalden and to him from the sheriff, and the tax deed aforesaid, were declared mortgages to secure Bates and Harvey for advances made by them, and the deed from Bates and wife to Harvey and wife was declared a voluntary conveyance and void as against Wilcox. The prayer of the petition was that the mortgage to plaintiff be held valid as against Wilcox, and that plaintiff be subrogated to the rights of Hodson under that mortgage, and for judgment of foreclosure of plaintiff's mortgage. A demurrer to the complaint was sustained, and plaintiff appealed. In affirming the judgment, the court held that the *lis pendens* established by Wilcox's suit was sufficient to charge the appellant with notice; and, quoting from *Downer v. Miller*, 15 Wis. 612, said:

"We know of no case that has ever carried the doctrine of subrogation so far as to hold that a mere loan of money, for the purpose of enabling the borrower to pay a debt, entitles the lender to be subrogated to the rights of the creditor whose debt was thus paid. And *Pelton v. Knapp*, 21 Wis. 63, appears to proceed upon the same principle. See, also, *Marvin v. Vedder*, 5 Cow. [N. Y.] 671, *Richmond v. Marston*, 15 Ind. 134, and the English and American Notes to *Aldrich v. Cooper*, *Hare & Wallace's Edition of White & Tudor's Leading Cases*, *passim*."

And so, we repeat, aside from *Rev. Laws 1910, § 4732*, under which the plaintiff was chargeable with notice of the pendency of Martin's action, and hence could acquire no interest in the land as against Martin's title, that plaintiff was a stranger, and not entitled to be subrogated to the rights of the mortgagee in the Standard mortgage, and that, too, although the evidence discloses that plaintiff had no actual knowledge that Martin's action was pending at the time its mortgage was executed, and that the abstract failed to state the fact. And although, too, by refusing plaintiff relief, it will lose the \$1,000 with which the Standard and the Wyant mortgages were satisfied, to Martin's benefit only.

In *Garwood v. Administrators, etc.*, of *Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195, the facts were that Josiah Smith and wife, on February 26, 1810, gave to the executors of John Smith a real estate mortgage for \$370, which was duly recorded and finally assigned to Wills and Haines. On April 29, 1815, Smith and wife made a second mortgage on the same land to Engle for \$650, which was duly recorded. On January 20, 1824, for a consideration of \$500, they conveyed the premises to complainant, and, as the deed contained general covenants of warranty, the money was applied to the payment of the two mortgages which, by consent of both parties, were discharged and canceled of record. On May 30, 1822, or subsequent

to the date of the cancellation of the mortgages, but prior to complainant's deed, William Eldridge obtained a judgment against Josiah Smith which was a lien upon the mortgaged land. Later he sued out an execution, and on April 19, 1824, the sheriff sold and conveyed the land to Eldridge, the plaintiff in the execution, for \$330, which was a fair consideration. Eldridge lay still with his execution until after the plaintiff had discharged the mortgages. Under this state of facts the court denied the prayer of complainant to be subrogated to the rights of the mortgagees and said:

"Under these circumstances, the complainant asks the interference of this court. At law, it is quite certain, he is without remedy; for although he may have been, as he alleges, without actual notice of the Eldridge judgment at the time he purchased, yet he had constructive notice by the record, and unless the power of this court is sufficient to grant relief, the complainant will have lost the \$500 with which he paid off the mortgages, and Eldridge will have received on his purchase the exclusive benefit thereof. There is then, to my mind, a natural justice in the complainant's case, to which I should be disposed to extend relief, if I could do so without disturbing well-established principles."

And in the syllabus:

"S. G. having purchased of the owner certain real estate, subject to two mortgages, and a judgment, applied the whole of the purchase money to the satisfaction of the mortgagees, being the first incumbrances, and caused them to be canceled and discharged of record, held that a purchaser under the judgment took the property clear of the incumbrance of the mortgages, and that S. G. was entitled to no relief in equity." See, also, *Kahn v. McConnell et al.*, 37 Okl. 219 [131 Pac. 682, 47 L. R. A. (N. S.) 1189.]

We are therefore of opinion that plaintiff cannot recover, not only for the reason that plaintiff was a volunteer, and hence cannot be subrogated to the rights of the mortgagee in the Standard mortgage and permitted to enforce the lien thereof for its benefit, but for the further reason that, as plaintiff's mortgage which it is seeking to foreclose was executed after Martin's action against the Sutherlands had established a lis pendens against the land, the lien of that mortgage thereto did not attach so as to affect Martin's title, subsequently acquired on a sale of the land as the result of that suit (*Holland v. Cofield*, 27 Okl. 469, 112 Pac. 1032), and that the court did right to so hold and cancel the same and remove it from his title.

Finding no error, the judgment of the trial court is affirmed. All the Justices concur.

DICKSON v. McDUFFEE et al. (No. 8885).
(Supreme Court of Oklahoma. April 10, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 520(1), 549(5)—RECORD—MOTIONS AND EXCEPTIONS—BILL OF EXCEPTIONS.

Motions presented to the trial court, rulings thereon, and exceptions thereto are not properly

a part of the record, and can only be preserved and presented for review on appeal by incorporating the same into the record by bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2359, 2360, 2366, 2450.]

2. APPEAL AND ERROR \S 362(1)—WRIT OF ERROR—REVIEW—DISMISSAL.

As the petition in error herein presents no question for the consideration of this court, except the action of the trial court in relation to certain motions which are not reviewable upon a transcript, unless brought into the record either by bill of exceptions or case-made, the motion to dismiss must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 3282-3284.]

Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Proceeding between Sarah Dickson and H. P. McDuffee, administrator of the estate of G. J. McDuffee, deceased, and others. Judgment for the latter, and the former brings error. Motion to dismiss proceeding in error sustained.

J. P. Evans, of Cherokee, for plaintiff in error. W. Wilder, of Cherokee, for defendants in error.

KANE, J. This proceeding in error was commenced by the plaintiff in error filing in this court a petition in error with a transcript of the record attached. The cause now comes on to be heard upon a motion of the defendant in error to dismiss the proceeding in error upon the following grounds:

"(1) Because the plaintiff in error failed to attach to her petition in error a case-made or a bill of exceptions preserving any of the motions or orders of the trial court excepted to that are not by statute made a part of the record.

"(2) Because said motions and orders of the trial court that are not a part of the record, unless made so by a bill of exceptions or case-made, have not been preserved, and are not a part of the record in this case.

"(3) Because the petition in error presents no question for the consideration of this court, independent of the motions and the rulings and orders and acts of the lower court, that have to be by law made a part of the record by a case-made or a bill of exceptions."

[1] The motion to dismiss must be sustained. The grounds assigned for dismissal are substantially the same as those set out in the motion to dismiss in the case of *Ludwig v. Benedict*, 33 Okl. 300, 125 Pac. 739, wherein it was held:

"Rulings on instructions and exceptions thereto cannot be considered, unless the instructions are excepted to at the trial, the exceptions made to appear of record, and the objections pointed out to the trial court on motion for new trial."

In *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736, it was held:

"Motions presented to the trial court, rulings thereon, and exceptions thereto are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same by bill of exceptions or case-made."

[2] As the petition in error herein presents no question for the consideration of this

court, except the action of the trial court in relation to certain motions, which are not reviewable upon a transcript, unless brought into the record either by bill of exceptions or case-made, the motion to dismiss must be sustained.

SHARP, C. J., and HARDY, TURNER, and THACKER, JJ., concur.

WOMACK v. STATE. (No. A-2437.)
(Criminal Court of Appeals of Oklahoma.
April 26, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1159(3)—APPEAL—CONFLICTING EVIDENCE—CONVICTION.

Questions of fact are for the jury to determine. Where there is direct conflict between the evidence for the state and that of the defendant, and the evidence for the state is sufficient to justify a verdict of guilty, the judgment of conviction will not be reversed because of such conflict in the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3076.]

2. INTOXICATING LIQUORS \S 239(10) — OFFENSE—INSTRUCTION.

Where the evidence on the part of the state will support either the inference that the unlawful sale was entirely consummated by the appellant, or by him and another, it was not improper for the court to instruct the jury as follows: "You are instructed that under the laws of Oklahoma any person who in any way knowingly takes part in the sale of intoxicating liquor illegally, whether the act is completed by himself alone, or in conjunction with another, is guilty of violating the law the same as if he had completed the whole illegal act himself."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. $\S\S$ 342-345.]

Appeal from County Court, Harper County; A. H. Walker, Judge.

W. W. Womack was convicted of selling intoxicating liquor, and he appeals. Affirmed.

R. S. Smedley and C. W. Hofmeister, both of Buffalo, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. Appellant was convicted in the county court of Harper county of the offense of selling a pint of whisky to one U. M. Mix, and sentenced to pay a fine of \$50 and to serve 30 days' confinement in the county jail. From this judgment of conviction an appeal is taken, and two alleged errors are relied upon for reversal: First, that the verdict is contrary to the evidence; second, that the court erred in giving the following instruction:

"You are instructed that under the laws of Oklahoma any person who in any way knowingly takes part in the sale of intoxicating liquors illegally, whether the act is completed by himself alone, or in conjunction with another, is guilty of violating the law the same as if he had completed the whole illegal act himself."

[1] The prosecuting witness, U. M. Mix, swore positively that in July or August, 1912, he purchased a pint of whisky from this appellant and paid him \$1 therefor; that the purchase was made after night, and that the whisky was delivered to him in the town of Buffalo, in Harper county, Okl., at the county's coalhouse, which appeared to be directly back of the courthouse; that just before the purchase was made he had a conversation with the appellant about buying some whisky, and that the appellant told him to be at that place at that time, and that a man appeared there with the whisky, and he supposed it to be appellant; that he was the only person he had spoken to about purchasing whisky at that time. The state also introduced in evidence a certified copy of the record of the United States Revenue Department showing that the appellant had taken out a retail liquor dealer's license designating his residence in the town of Buffalo as his place of business, and covering the period of time during which this sale was made and for some time prior and subsequent thereto. The appellant flatly denies making any sale to Mix of any kind of liquor, but admits that he took out the license, but claims that he took it out because he was told by the revenue collector that it would be necessary for him to have a license in order to purchase liquor to bathe a sick horse that he claims to have had about the time this sale was made. He also admits that he ordered about a gallon of whisky a week during this period of time from liquor dealers in Kansas City, Mo., but that he used the same exclusively for doctoring the horse. He paid \$45 for the privilege granted by the retail license. If the testimony of the witness Mix is to be believed, together with the fact that the appellant procured a retail liquor dealer's license covering the period of time that this sale was made, then the state has made out a clear case of guilt against him. The witness Mix was not impeached as to his general reputation for truth and veracity. He was shown to be a man who had lived in that country a great number of years, and was running a threshing machine at the time of this purchase. He seemed to be worthy of belief. The defense interposed was somewhat unique. It had a tendency, in our opinion, to discredit the testimony of the appellant and to render his story less worthy of belief than that of the prosecuting witness, Mix. The fact that appellant paid the tax required by the United States of retail liquor dealers would indicate that he was possessed of a "blind tiger" in addition to the "sick horse." We do not propose to tolerate the establishment of hospitals of this kind for such purpose in this state. This court has repeatedly held that, where the evidence on the part of the state is such as would justify the jury in arriving at the conclusion that the defendant was guilty,

the judgment of conviction will not be reversed on the ground of the insufficiency of the evidence unless it appears from the record that the jury was influenced by passion or prejudice. *Davis v. State*, 10 Okl. Cr. 160, 135 Pac. 438; *Calvert v. State*, 10 Okl. Cr. 185, 135 Pac. 737; *Sayers v. State*, 10 Okl. Cr. 233, 135 Pac. 1073; *Maggard v. State*, 9 Okl. Cr. 236, 131 Pac. 549.

There is nothing in this record to convince this court that the elements of passion or prejudice entered into the verdict in this case.

[2] It is also contended that the court erred in giving instruction No. 8, which is as follows:

"You are instructed that under the laws of Oklahoma any person who in any way knowingly takes part in the sale of intoxicating liquors illegally, whether the act is completed by himself alone, or in conjunction with another, is guilty of violating the law, the same as if he had completed the whole illegal act himself."

Counsel for plaintiff in error assert that the case of *Steen et al. v. State*, 4 Okl. Cr. 309, 111 Pac. 1097, sustains the contention that the foregoing instruction was erroneous. In this counsel are mistaken. In the *Steen Case* this court expressly held:

"One who solicits a person to purchase liquor and pilots him to another who has the liquor and sells it assists in making the sale and is indictable and punishable as a principal in the transaction."

Instead of supporting the contention of counsel the *Steen Case* absolutely refutes it, but it is contended because the state did not show that the appellant was in the habit of selling intoxicating liquor to other people, or had the general reputation of being a bootlegger, that this judgment should be reversed. Such evidence would have been absolutely incompetent for the reason that a person cannot be convicted of an offense by proof that he has been guilty of other like offenses, or that he has the general reputation of doing the thing charged against him. Circumstances might arise where evidence of that kind would be competent, but not in a case where a sale of intoxicating liquor is charged. The fact that it was proved conclusively that the appellant paid for the United States revenue tax required of retail liquor dealers makes out a prima facie case of his intent to sell liquor. He admits that he paid this tax. The record shows that he had paid for a period covering from December, 1911, up to and including June, 1913. He voluntarily by that act entered into a business which he must have known, and was required to know, was in violation of the laws of this state. Unless he had intended to engage in that business, it is our opinion that he would not have parted with \$45 for that privilege. His intent must have been to profit by violating the laws of this state, and when a person enters into an unlawful occupation for the purpose of gain

he does so after full and deliberate consideration.

The judgment of the trial court is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

McCARRICK v. LENOX MINING CO. (No 2948.)

(Supreme Court of Utah. March 23, 1917.)

1. CORPORATIONS ~~§~~414(4)—OFFICERS—AUTHORITY TO ISSUE PROMISSORY NOTE.

Ordinarily, the secretary of a corporation has no right to execute and deliver its promissory note without authority being conferred upon him by its board of directors.¹

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1643.]

2. CORPORATIONS ~~§~~414(4)—OFFICERS—ISSUANCE OF PROMISSORY NOTE.

Where the secretary of a corporation issued its promissory note in accordance with his custom which had the sanction of the board of directors, the corporation was bound, since, where an agent of a corporation has been permitted to transact its business, his authority to bind it will ordinarily be implied from the apparent power conferred upon him.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1643.]

3. APPEAL AND ERROR ~~§~~1011(1)—REVIEW—CONFLICTING EVIDENCE.

Where there is a conflict in the testimony with substantial evidence in the record to support the findings of the trial court, the judgment will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988.]

Appeal from Third District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by E. McCarrick against the Lenox Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Hurd and W. C. Jennings, both of Salt Lake City, for appellant. W. H. Folland and Thos. L. Mitchell, both of Salt Lake City, for respondent.

CORFMAN, J. This was an action brought by the plaintiff against the defendant corporation, as maker of a promissory note. A trial was had to the court, without a jury, resulting in a judgment for the plaintiff. Defendant appeals.

The complaint, after alleging the corporate existence of the defendant and the issuance and delivery of the note by defendant to plaintiff, sets out the note *hæc verba* bearing date January 8, 1909, providing for the payment on demand of the sum of \$436.52 with interest at the rate of 12 per cent. per annum from date, before and after judgment, and for \$100 attorney's fees, if collected by an attorney. The complaint further states that no part of the principal sum or interest has been paid, and that plaintiff is the owner and holder of the note. Judgment is prayed

~~§~~For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ *Lochwitz v. Pine Tree M. & M. Co.*, 37 Utah, 349, 108 Pac. 1123.

for in the said principal sum, interest, and attorney's fees.

The defendant's answer admits the corporate existence of the defendant, denies the issuance or delivery of the note, and alleges that if it ever was issued or delivered it was without any legal authority therefor on the part of the person assuming to issue and deliver it, and for a special defense affirmatively alleges that the board of directors of the defendant corporation did not, by resolution or otherwise, authorize or empower the note in question, or any note, to be executed or delivered in the form set forth in the complaint, or to contract for the payment by defendant of any attorney's fee.

It is contended by defendant, and this seems to be the only question this court is called upon to determine, that the note here in question was unauthorized; that the secretary of defendant corporation had no authority conferred upon him to execute and deliver a note, and particularly the one for the sum of \$436.52, in behalf of the defendant to the plaintiff.

It appears from the testimony that the defendant had not been very active or successful in the carrying on of its business and mining operations, and that certain members of its board of directors, in order to meet the company's financial obligations, had, as individuals, contributed of their personal means to the amount of \$188 each, and that the defendant had executed and delivered to the contributing directors, including the plaintiff, promissory notes therefor; that in January, 1908, when these notes remained unpaid and had become barred by the statute of limitations, a meeting of the board of directors of the company was held and the minutes of this meeting among other things, discloses the following record thereof:

"A motion was made that the amount due E. McCarrick, outside of the note, amounting to \$2.50, \$16.92, \$50, be embodied in a new note after the surrender of the old note of \$188, with interest added at 12 per cent. This motion was made by C. J. McNitt and seconded by Mr. Davis and that the note bear interest at 12 per cent. per annum. Carried: Voted to adjourn. A. H. Page, Secretary."

The foregoing record, it will be seen, is very indefinite and uncertain as to its meaning when unaided by oral testimony. However, the trial court, and we think rightfully, permitted oral testimony to be introduced as to what was contemplated at the time by the board of directors, and the plaintiff, as to this, testified:

"It was a board meeting, and I only just simply can outline about what occurred there at that time. And the matter of paying these obligations which were past due came up, and Mr. Davis and Mr. Page, whom the company owed \$188, the same as they owed to me, was given the privilege to pay these obligations, and they failed to take advantage of that. Then I suggested I would pay them, provided that my note of \$188 was embodied in a new note with these items and 12 per cent. per annum from the time

in 1901, January 30, 1901, to that present time, that \$188, and they agreed to it, the board did."

The testimony in behalf of the plaintiff further discloses that the principal sum, \$436.52, of the note in question, was made up of several items of past indebtedness, \$2.50, \$16.92, \$50, paid for the defendant by the plaintiff, including the principal sum and interest owing on the \$188 note to plaintiff.

[1, 2] Counsel for defendant contended in the trial court, and now contends before this court, that the secretary of the defendant had no inherent power as such officer to make and deliver to the plaintiff the note in question, or any other note, in behalf of the defendant; that the act of the secretary in doing so was wholly unauthorized by the board of directors; and, further, that it was never intended by the defendant at all that plaintiff should have a new note of the defendant for any greater sum than \$69.42, the sum total of the advances made by plaintiff exclusive of the \$188 note, and interest thereon, held by him. We agree with counsel in his contention that ordinarily the secretary of a corporation, as such officer, would have no right to execute and deliver its promissory note without authority being conferred upon him by its board of directors, and so find the law to be as cited by counsel in his brief. *Lochwitz v. Pine Tree M. & M. Co.*, 37 Utah, 349, 108 Pac. 1123; 3 *Clark & Mar. Corp.* § 2151; 4 *Thompson Corp.* § 5746. In this case then, it became a question of fact to be determined by the court, a jury being waived, whether or not the defendant's directors authorized its secretary to make and deliver for it the note in question. It is apparent from the minute record, hereinbefore referred to, that defendant's board of directors considered and intended that a new note of some denomination should be made to plaintiff. As to what officer, or officers, should execute and deliver the note in behalf of the defendant, the minutes of the directors' meeting are silent. However, there is testimony in the record to show that it had been the custom of the secretary to execute and deliver in behalf of the defendant other promissory notes and instruments in writing. It appears that the several old notes held for advancements made by the directors, including the plaintiff's, had been made by the secretary; that it was quite the custom for the secretary to exercise these powers; and that it was generally left for him so to do without the express direction on the part of the board of directors. The power of an agent or officer of a corporation to bind his principal, necessarily, is governed by the law of agency, and it seems to be the well-established rule that, where an agent of a corporation has been permitted to transact its business, his authority to bind it will ordinarily be implied from the apparent power thus conferred upon him. *First Nat. Bank v. Colonial Hotel Co.*, 226

Pa. 292, 75 Atl. 412; *Lytle & Co. v. Bank of Dothan*, 121 Ala. 215, 26 South. 6; *Moore v. H. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *Foster v. Ohio Colorado Red. & M. Co. (C. C.)* 17 Fed. 130; 3 Cook Corp. (7th Ed.) § 713.

[3] The testimony bearing on the issues in this case is conflicting in many ways, yet there is substantial evidence to support the findings of the trial judge. Therefore, in keeping with the repeated rulings of this court, where there is a conflict in the testimony, but where there is substantial evidence in the record in support of the findings of the trial court, the judgment must be affirmed, with costs.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

BECK v. LEWIS et al. (No. 2950.)

(Supreme Court of Utah. March 28, 1917.)

1. JUSTICES OF THE PEACE § 82(2)—RETURN OF PROCESS—CONCLUSIVENESS.

In an action before a justice of the peace, an officer's return upon a summons of service in a certain precinct does not sustain a finding that defendant was not a resident of another precinct as alleged in the complaint.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 263.]

2. JUSTICES OF THE PEACE § 205(6)—CERTIORARI—CONCLUSIVENESS OF RECORD.

Under Comp. Laws 1907, § 3685x, providing that a judgment based upon a complaint falsely stating a jurisdictional fact may be reviewed by certiorari, the district court in certiorari proceedings to review a judgment of the justice court cannot receive parol evidence.¹

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 793.]

3. JUSTICES OF THE PEACE § 73, 74(4)—JURISDICTION.

Under Comp. St. 1907, § 3668, prescribing where actions in justices' courts shall be commenced, and section 3669, providing for changing the place of trial where suit is brought in the wrong precinct, a justice does not lose jurisdiction over a suit brought before him in the wrong precinct until the affidavit setting forth the facts as required by section 3669 is filed.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 239.]

4. JUSTICES OF THE PEACE § 60—WAIVING OBJECTION TO SUIT IN WRONG PRECINCT.

Under Comp. Laws 1907, § 3668, providing where actions shall be commenced in justices' courts, and section 3669, providing for changing the place of trial where suit is brought in the wrong district, the privilege of bringing suit in a particular district is personal to the defendant and may be waived.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 217-221.]

5. JUSTICES OF THE PEACE § 84(4)—JURISDICTION—SUIT BROUGHT IN WRONG PRECINCT.

Under Comp. Laws 1907, § 3668, providing where actions in justices' courts shall be com-

menced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, a justice acquires jurisdiction where defendant appears, although suit was brought in the wrong precinct.²

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 271.]

6. JUSTICES OF THE PEACE § 60—WAIVING OBJECTION TO SUIT IN WRONG PRECINCT.

Under Comp. Laws 1907, § 3668, prescribing where actions in justices' courts shall be commenced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, the defendant waives objection to the precinct by suffering a default judgment, especially where the complaint stated the necessary jurisdictional facts and no application for changing the place of trial was made.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 217-221.]

Appeal from First District Court, Box Elder County; J. D. Call, Judge.

Certiorari proceedings by John A. Beck, Jr., against Herbert C. Lewis and others to review a judgment entered in justice court. Judgment for petitioner, and respondents appeal. Reversed and remanded, with directions to dismiss the proceeding.

A. D. McGuire, of Tremonton, for appellants. Henry Seeger, of Brigham City, for respondent.

FRICK, C. J. On the 18th day of February, 1916, the appellant Lewis commenced an action in the justice court of Manilla precinct, Box Elder county, Utah, against the respondent, Beck, to recover a certain amount alleged to be due upon an alleged contract. Appellant, in his complaint, alleged "that defendant is a resident of Manilla precinct, Box Elder county, state of Utah." The foregoing allegation was made in compliance with Comp. Laws 1907, § 3668, which provides where actions shall be commenced if commenced in justices' courts; and also in compliance with section 3685, subd. 3, which provides what must be alleged with regard to the defendant's residence. The officer who served the summons made return that he served the same on the respondent, Beck, personally on the 18th day of February, 1916, "at Rawlins precinct, county of Box Elder," etc. The defendant, although duly served with summons, as just stated, nevertheless failed to appear in the action in the justice court, and on the 8d day of March, following, judgment was entered against him by default. Immediately after judgment was entered against him, and on the same day it was entered, the respondent, Beck, commenced certiorari proceedings in the district court of Box Elder county to vacate and set aside the judgment upon the alleged ground that the respondent, Beck, was a resident of Rawlins precinct and not a resident of Manilla precinct as alleged in the complaint, and that for that reason the justice who rendered the judgment was without jurisdiction.

¹ *McMillan v. Durand*, 38 Utah, 274, 112 Pac. 807; *Griffith v. District Court*, 35 Utah, 443, 100 Pac. 1064; *Quealy v. Sullivan*, 42 Utah, 555, 132 Pac. 4; *State v. District Court*, 36 Utah, 267, 103 Pac. 261.

² *State v. District Court*, 35 Utah, 223, 102 Pac. 883.

[1] In making that contention, respondent relies on the provisions of Comp. Laws 1907, § 3685x, which, in substance, provides that in case a jurisdictional fact is omitted from the complaint, or is falsely stated therein, a judgment based upon such a complaint "shall be void; and shall be so declared, on review, at the instance of the party aggrieved, either on appeal or by means of a writ of prohibition, or certiorari. * * *". While the officer made return, as we have seen, that he served the respondent personally in Rawlins precinct, his counsel concluded, and, as we think, correctly so, that the return, standing alone, was not sufficient to justify a finding that the respondent was not a resident of Manilla precinct as alleged in the complaint, since the officer may have found respondent outside of Manilla precinct and over the line in Rawlins precinct when service was made upon him. Counsel was therefore, by the district court, permitted to prove at the hearing of this proceeding, dehors the record and over appellant's objection, that respondent's residence was in Rawlins precinct and not in Manilla precinct as alleged in the complaint. Appellant now insists that the district court erred in admitting evidence dehors the record respecting that fact.

[2] We have several times specifically held that in certiorari proceedings the record, as certified up, is conclusive, and that it may not be aided by parol or other evidence in the court in which the proceedings are commenced. The court to which the record is certified is required to pass upon the record as certified up, and not to make a new record and then pass upon that. *McMillan v. Durand*, 38 Utah, 274, 112 Pac. 807; *Griffith v. District Court*, 35 Utah, 443, 100 Pac. 1064, and *Quealy v. Sullivan*, 42 Utah, 565, 132 Pac. 4. We have also pointed out that if the record, for some reason, does not disclose some fact or facts, such facts may nevertheless be supplied in the court in which the proceedings which are sought to be reviewed were had, and that that court may certify up such additional facts if they exist and are properly made a part of the record. But omissions may not be supplied dehors the record in the court in which the certiorari proceeding is pending, as was done in this case. The district court therefore erred in permitting the respondent, Beck, to prove that his place of residence was in Rawlins precinct and not in Manilla precinct as alleged in the complaint. That fact, if it was a fact, should have been made to appear in the justice court, and if that had been done and the justice had, nevertheless, proceeded with the case, certiorari would lie. In that event, the justice, in certifying up the proceedings, would have disclosed that he had been ousted of jurisdiction; but, as the record now stands, the jurisdictional facts are all shown by the record itself. *State v. District Court*, 36 Utah, 287, 103 Pac. 261.

[3-6] There is, however, still another reason why the judgment in this proceeding cannot be sustained. There are other sections of our statute which must be considered, construed and applied as in *pari materia* with the sections we have already referred to. Section 3669 specifically provides for a change of the place of trial in the event a defendant is sued in the wrong precinct; that is, in case he has a right to be sued in the precinct in which he resides and is sued in another. By that section it is provided that in case a defendant is sued in the wrong precinct he may file an affidavit setting forth the facts in that regard, and, if he does so, the justice before whom the action was commenced loses jurisdiction and he must transfer the case to the proper precinct. We held in *State v. District Court*, 36 Utah, 68, 104 Pac. 750, that on filing the affidavit, and not before, the justice before whom the action is pending, if commenced in the wrong precinct, is ousted of jurisdiction to proceed. No other conclusion is logically permissible. Under our statute, the jurisdiction of justices of the peace is coextensive with the county in which they are located and reside. The right to have the place of trial changed, in case a defendant is sued in the wrong precinct, is a personal privilege upon which he may insist or which he may waive, just as he chooses. If he appears in the justice court, that court has jurisdiction to try the case precisely the same as though the action had been commenced in the proper precinct. *State v. District Court*, 36 Utah, 223, 102 Pac. 868. The defendant may, however, also waive his right to a change of place of trial in case he is served with summons but makes default. Such is especially true where, as in this case, the necessary jurisdictional facts are stated in the complaint filed with the justice. To say the least, such an allegation must prevail until the necessary affidavit, for a change of place of trial, in which it is made to appear that the action was commenced in the wrong precinct, is filed as provided by section 3669, *supra*, and as held in *State v. District Court*, 36 Utah, 68, 104 Pac. 750. In that case it is also held that the justice is not ousted of jurisdiction until such an affidavit is filed, but that in case it is filed that court may proceed no farther with the case. It follows therefore that the respondent, Beck, in failing to file the proper affidavit for a change of place of trial in the justice court, has waived his right to object to the jurisdiction of the justice, and hence the district court erred in entering judgment against the appellant in this proceeding.

The judgment of the district court is therefore reversed, and the case is remanded to the district court of Box Elder county, with directions to dismiss the proceeding. Costs to appellant.

McCARTY and CORFMAN, JJ., concur.

MOWER v. OLSEN et al. (No. 2967.)

(Supreme Court of Utah. March 29, 1917.)

1. ANIMALS ⇨100(3) — TRESPASSING ANIMALS—ACTIONS—COMPLAINT.

A complaint alleging plaintiff's ownership of land, defendant's ownership of sheep, and that the sheep trespassed on the lands of plaintiff to his damage, is sufficient as against general demurrer, though not expressly alleging that the trespass was willful and intentional; for the word "trespass" implies as much.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 357, 364, 382, 411.]

2. APPEAL AND ERROR ⇨1054(1)—REVIEW—HARMLESS ERROR.

Where an action was tried to the court, and there was sufficient competent testimony to sustain its findings, the admission of incompetent testimony will be deemed harmless.¹

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4185.]

3. ANIMALS ⇨93—TRESPASS ON UNINCLOSED LANDS—LIABILITY.

Under Comp. Laws 1907, § 20, declaring that, if any, neat cattle, horses, sheep, etc., shall trespass or do damage upon the premises of any person, except where such premises are not inclosed by a lawful fence in counties where a fence is required by law, the party aggrieved may recover damages by an action at law against the owner of the trespassing animals, an owner of sheep who directed his herder to drive or permit the animals on uninclosed lands of plaintiff is liable, though the statute, while recognizing the common-law rule requiring every owner to restrict his animals on his own lands, made exceptions as to uninclosed lands.²

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 334-337.]

4. ANIMALS ⇨100(4)—TRESPASSING ANIMALS—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against a sheep owner for damages for the trespass of his sheep on plaintiff's property, evidence held to warrant a finding that the trespass was willful and intentional.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 358-360, 383, 412.]

Appeal from District Court, Sanpete County; A. H. Christensen, Judge.

Action by Hyrum D. Mower against William Olsen and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. W. Cherry, of Mt. Pleasant, for appellants. Jacob Johnson, of Salt Lake City, for respondent.

CORFMAN, J. This was an action brought to recover damages for trespass of defendants' sheep on plaintiff's lands. A trial to the court without a jury resulted in judgment for the plaintiff. Defendants appeal.

The complaint describes and alleges the ownership in the plaintiff of certain lands in Sanpete county; that during the times mentioned in the complaint the defendants were the owners, in possession, and chargeable with the care of about 1,000 head of sheep;

that at divers times during the month of May, 1915, and particularly on the 12th, 13th, 15th, 17th, 18th, 19th, 21st, and 22d of said month of May, the sheep ran and trespassed upon the lands of plaintiff, ate up, trod down, injured, and destroyed the grass and verdure growing thereon, and in consequence plaintiff suffered loss and damage in the sum of \$75, for which plaintiff prays judgment.

The answer admits the ownership in the defendant Guy Olsen of 852 head of sheep, denies generally the other allegations of the complaint, and, as a special defense, affirmatively alleges that a portion of the lands described in the complaint was at the times mentioned therein wild, uncultivated, and uninclosed lands adjoining the public domain, and that, while the defendant Guy Olsen was lawfully grazing his sheep on his own land and on the public domain near the said lands in question, a small number, without the knowledge of the defendants, strayed thereon, and for a few hours grazed without damage to the plaintiff.

It appears from the record that during the times of the alleged trespass plaintiff was the owner of 320 acres of land in Indianola precinct, Sanpete county, through which a county road extended, running north and south, thus separating the land in two parts, one to the east and one to the west of the county road. About 130 acres of the entire tract on the west side of the road was cultivated land. The balance of the tract on the west and all on the east side of the road was in a wild state, producing nature grass only, and was used for the pasturing of live stock. The lands lying to the east of the county road were uninclosed, except on the west and a part of the way on the north side. The land adjoining on the east and south sides was public land. The plaintiff had a dwelling house on the land east of the road. A spring of water is on the land east of the road, and it was at and in the vicinity of this spring where the defendants' sheep were generally seen by witnesses who testified at the trial as to the trespass over an area of approximately 120 acres. Defendants were the owners of and in charge of about 900 head of sheep. The sheep were in the immediate control of a herder under the direction of the defendants, and the sheep were being held and grazed on public lands, and of private ownership as well, adjoining and in close proximity to plaintiff's lands. Conversations were had between plaintiff and defendants regarding the trespassing of the sheep upon plaintiff's land, and some attempt made to compromise and settle their differences out of court; the parties going over the plaintiff's land together at a time when some of the sheep were grazing thereon. The sheep were seen grazing upon plaintiff's land on divers occasions, as alleged in the complaint, and it was testified to that the her-

¹ *Victoria, etc., Co. v. Haws*, 7 Utah, 515, 27 Pac. 695; *Spratt v. Paulson*, 161 Pac. 1121.

² *Buford v. Houtz*, 5 Utah, 591, 18 Pac. 633; *Jones v. Blythe*, 33 Utah, 362, 93 Pac. 994.

der in charge of the sheep when they were being driven off stated he was instructed by defendants to pay no attention to the line of plaintiff's land. The defendants had before paid the plaintiff \$10 damages to the land for 1913 or 1914. A Mr. Bushman, who was pasturing his cows on the land, testified that he had said to the herder, while he and the herder were driving the sheep off the land, that he would have to take his cows out as the feed was all gone, and the herder had said, "That is no difference to me; Olsen told me to get some feed," and "Never mind the line."

Such, in brief, was the testimony from which the trial court made its findings and entered its judgment.

Numerous errors are assigned by defendants, all of which have been reviewed by this court. We will here discuss, however, only such as are contended for by appellants in their brief, and as may be material for the proper determination of this appeal.

[1] 1. It is urged that the trial court committed error in the overruling of defendants' demurrer to the complaint. The demurrer was a general one, on the ground the complaint did not state facts sufficient to constitute a cause of action. Wherein the complaint is insufficient counsel does not seem to very clearly point out. Suffice to say the complaint in form and substance seems to state a cause of action in clear and concise language and conforms with, and is adapted to, the practice of the Western code states. 4 *Suth. Code Pl. & Pr. Forms*, § 6595. While it is not expressly alleged in the complaint that the trespass complained of was a willful and an intentional one, yet, in the broadest sense, we think the term "trespass" implies as much, and that defendant's general demurrer was properly overruled.

[2] 2. Errors are also assigned by defendants on the ground that the trial court received evidence of the declarations of the person in charge (the herder) of defendants' sheep at the times when the trespass complained of was being committed. There seems to be sufficient testimony to show that the sheep were in charge of a herder under the immediate supervision of at least one of the defendants. The record further shows that the sheep were repeatedly driven off the plaintiff's land while they were in charge of the herder. It was testified to by plaintiff, without objection on the part of defendants, that on one occasion, when the plaintiff, one Ira Hollman, and the herder, were engaged in driving the sheep from the land, "the herder said Olsen had told him to pay no attention to the north lines; he said every sheep that Olsen had got has been bedding upon your ground." Subsequently, other conversations were had by plaintiff with the herder in charge of the sheep while they were on plaintiff's lands in which declarations were made by the herder to the effect

that the defendants had instructed him to not regard plaintiff's private ownership and use of the lands. These subsequent declarations of the herder in charge of the trespassing sheep, when testified to by plaintiff's witnesses, were objected to by defendants on the grounds that it was hearsay and incompetent, and, the trial court having received the testimony, errors are assigned. After carefully reading the evidence in this case, we deem it wholly unnecessary to enter upon a discussion of, or pass upon, the admissibility of this evidence; for, in view of the whole record, this court's findings in that regard for or against the contention of the defendants would not at all be controlling. Assuming, but not deciding, that these assignments of error made by defendants, as a matter of law, are well taken, the cause having been tried to the court without a jury, the judgment will not be reversed, as there is sufficient competent evidence to sustain the findings of the trial court. *Victoria, etc., Co. v. Haws*, 7 Utah, 515, 27 Pac. 695; *Spratt v. Paulson*, 161 Pac. 1121.

[3] Other errors assigned and contended for by defendants may be best considered in now determining whether or not the judgment of the trial court against the defendants, in plaintiff's favor, in view of the facts disclosed by the evidence, is against the law, as provided by statute and as announced by this court in its former decisions.

Comp. Laws 1907, § 20, p. 136, so far as applicable here, provides:

"If any neat cattle, horses, asses, mules, sheep, goats, or swine shall trespass or do damage upon the premises of any person, except in cases where such premises are not inclosed by a lawful fence in counties where a fence is required by law, the party aggrieved, whether he be the owner or the occupant of such premises, may recover damages by an action at law against the owner of the trespassing animals."

It will be observed that the statute above quoted is in conformity with the common law, requiring every owner to restrain his animals within his own lands. However, it was held in the case of *Buford v. Houtz*, 5 Utah, 591, 18 Pac. 633, and later affirmed in 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, that the requirement of the common law is not adapted nor applicable to the sparsely settled portions of the West. Later, and after the enactment of the Utah statute above quoted, the question was again before this court as to the purport and proper construction of this statute, under a given statement of facts, in the case of *Jones v. Blythe*, 33 Utah, 362, 93 Pac. 994. Justice McCarty, speaking for the court upon the matter of willful and intentional trespass upon uninclosed lands in counties where a fence law is in force, says:

"We think it is plain that the Legislature, by this statute, intended to take away all remedy by suit or impounding for damages caused by the stock of one party straying upon the uninclosed lands of another in counties where a fence law is required; and while it is true that,

under the statute referred to appellant would not have been liable for damages caused by an involuntary or inadvertent intrusion of his sheep upon the lands in question, the statute gave him no right to deliberately and intentionally drive his sheep, or to so direct their movement as to cause them to go, upon the lands in question, and keep them there against the will of the respondent. In other words, while the statute withholds from the owner of uninclosed lands, in counties where there is a fence law in force, the right to impound and hold for damages animals trespassing upon such lands, it certainly does not deprive the owner of the right to remove the trespassing animals therefrom; hence it necessarily follows that the owner may, by suit, collect damages for a willful and malicious trespass, such as the evidence conclusively shows was committed in this case."

The Supreme Court of the United States, in passing upon a Texas statute similar to our own, in the case of *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363, is quoted by Mr. Justice McCarty in *Jones v. Blythe*, supra, as follows:

"The object of the statute above cited is manifest. As there are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the lands of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands and pasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle."

Then again, in a much later case, *Thomas v. Blythe*, 44 Utah, 1, 137 Pac. 396, Justice Frick, commenting on the statute and the construction to be placed upon it, says:

"Respondent's lands come within the vast area of arid lands aforesaid, and the mere fact that he may be the owner of the lands described in the complaint does not change their character in the least degree. Nor does that fact, standing alone, give him any special rights as against animals that are not intentionally driven or kept thereon against his will. It is only when animals are driven onto or kept on his lands against his consent that he has any legal cause for complaint. It is his protest or refusal to consent that makes the owner of such animals a wrongdoer and liable for damages. The rights and duties aforesaid arise out of the nature of things in this arid country. However, when one is warned to keep his animals off certain lands which are owned by another, and which are pointed out by the latter to the former, the former cannot complain if he is held liable for the damages he may cause to such other by intentionally having his animals eat and destroy the grass and herbage growing upon such lands."

It will be seen from the foregoing cases, all cited in the defendants' brief, that this court construes the statute to mean, and now stands committed to the doctrine, that where

a party knowingly, deliberately and intentionally drives or permits his animals to go upon the lands of another, against his will and regardless of his protests, for the purpose of deriving the benefit of his pasturage, it becomes such a trespass as the law will require him to answer for in damages.

[4] True, it is earnestly contended by counsel for defendants that there is no evidence in the record here of a willful and intentional trespass on the part of the defendants, but with this contention, after perusing the testimony given before the trial court, we cannot agree. While there is some conflict in the testimony bearing on the question of willful and intentional trespassing, yet there appears to be an abundance of proof in the record to show that the defendants were acquainted with the fact that their sheep were entering upon the lands of plaintiff and eating up the grasses thereon. Not only were the physical conditions and surroundings such as to put any reasonably prudent person on notice of private ownership and use of the lands in question, but the conversations had between the plaintiff and the defendants concerning the sheep entering and feeding on the lands in question, the undisputed testimony given that the defendants had paid to the plaintiff damages on account of their sheep trespassing on the same lands during 1913 or 1914 previous, and the repeated attempts made by plaintiff and defendants to settle out of court the plaintiff's claim for damages against them all very conclusively tends to show that the defendants well knew and appreciated that their sheep were at the times here complained of against them by plaintiff intruding upon privately owned and used lands of plaintiff, and affords very convincing proof that the trespassing was willful and intentional.

We are of the opinion that the findings of the trial court are fully sustained by the evidence, as disclosed by the record in this case, and therefore the judgment must be affirmed.

It is so ordered; respondent to recover costs.

FRICK, O. J., and McCARTY, J., concur.

GLEASON v. SAN PEDRO, L. A. & S. L. R. CO. (No. 2971.)

(Supreme Court of Utah. April 4, 1917.)

1. RAILROADS §478(1)—FIRES—COMPLAINT—SUFFICIENCY.

A complaint, alleging plaintiff's ownership of property and defendant's operation of a steam railroad near plaintiff's property, which averred that while defendant was operating engines and cars it negligently allowed its engines to blow sparks of fire and coals upon plaintiff's property, which sparks ignited a stack of hay and straw on plaintiff's land, and that by reason of defendant's negligence such property was destroyed to his great damage, defendant being negli-

gent in the operation of its engines in permitting sparks and coals to escape and carelessly failing to equip such engines with proper devices to control the escape of fire, is sufficient to state a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698, 1704.]

2. APPEAL AND ERROR ⇨1040(10)—REVIEW—HARMLESS ERROR.

In such case, where the record showed that defendant was in no way prejudiced by the general statements in the complaint, and as plaintiff in the very nature of things could not know the precise defect in the engine which allowed the escape of sparks, the overruling of a demurrer on the ground that the complaint was uncertain and ambiguous was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105.]

3. EVIDENCE ⇨488—VALUE—ADMISSIBILITY.

While evidence of the original cost of constructing a building is, when confined to proper limits, admissible to show its value in an action for the destruction thereof, testimony by plaintiff that he valued the structure destroyed by fire at a certain amount is incompetent.¹

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2273.]

4. APPEAL AND ERROR ⇨237(2)—MOTION TO STRIKE TESTIMONY — UNRESPONSIVE ANSWER.

Where testimony which was incompetent was also unresponsive to the question, defendant need not, such testimony having been elicited by plaintiff, move to strike the answer in order to preserve the point for review; plaintiff alone being entitled to object that the testimony was unresponsive.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 241.]

5. RAILROADS ⇨481(1)—FIRES—EVIDENCE—ADMISSIBILITY.

While, in an action against a railroad company for firing property adjacent to its right of way, negligence may be inferred from the fact that the fire set out is from sparks emitted from an engine, nevertheless, evidence that an engine emitted sparks and that sparks and cinders were some time thereafter found as far from the right of way as the property fired is inadmissible to show negligence in the given particular, for a railroad company is allowed to operate its locomotives by means of steam generated from fire, and the sparks found might not have been emitted at a time other than when the fire was set out.²

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1728, 1729.]

6. RAILROADS ⇨484(1) — FIRES — ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for negligently firing plaintiff's property, evidence held sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740, 1746.]

McCarty, J., dissenting.

Appeal from Third District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by T. H. Gleason against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Dana T. Smith, of Salt Lake City, for appellant. Hancock & Barnes, of Salt Lake City, for respondent.

FRICK, C. J. [1, 2] The plaintiff, after alleging the necessary matters of inducement and that he was the owner of certain property and its value, further alleged:

"That on said date, to wit, about the 12th day of September, 1913, the defendants operated cars and engines propelled by steam over, along, and across its said railroad track near the belongings and property of the plaintiff aforesaid, and that while the said defendants were operating engines and cars over and along said tracks as aforesaid, the said defendants negligently and carelessly permitted and allowed its said engines to blow sparks of fire and coals of fire over and upon this plaintiff's property as aforesaid, and that said sparks of fire and coals as aforesaid being so negligently, carelessly, and wrongfully thrown over and upon the property of this plaintiff, did light near and upon the stacks of hay and straw of the plaintiff as aforesaid, and that by reason thereof, and by reason of the carelessness and negligence of the defendant in so operating its said engines and cars and in throwing said coals of fire upon plaintiff's property, the said hay and straw was set on fire, and all of said property was consumed and burned up and completely destroyed, to his great damage in the sum of \$1,250. That the defendant was negligent and careless toward this plaintiff in operating said cars and engines along this plaintiff's property, and in permitting and allowing said coals of fire to escape from, and be blown from said engines over and upon the property of this plaintiff, and in negligently and carelessly failing to equip said engines with proper equipment and devices to control the said fire and coals and in failing to operate and conduct its said engines and operate the same so that said coals of fire would not light upon and ignite the property of this plaintiff, and in wrongfully permitting said coals of fire to light upon the property of the plaintiff as aforesaid."

The defendant demurred to the complaint upon two grounds: (1) That the facts stated were not sufficient, etc.; and (2) that the complaint was uncertain and ambiguous, in that it could not be ascertained therefrom in what manner defendant was negligent, etc. The court overruled the demurrer, and the defendant now assigns the ruling as error.

While the complaint is not a model in stating the particulars in which it was claimed the defendant was negligent in causing the fire, yet, in actions of this kind, the plaintiff, in the very nature of things, may not know the precise defect in the engine which it is alleged caused the sparks or fire to escape therefrom, for the reason that the same is entirely under the control and management of the defendant. In view of that fact great precision cannot be required from the plaintiff in stating the precise defects in the engine or in the management thereof by the engineer, either or both of which may have caused the fire. Moreover, the record shows that the defendant was in no way prejudiced by the general statements in the complaint. Apparently it had no more difficulty in pre-

¹ Smith v. Mine & S. S. Co., 32 Utah, 21, 88 Pac. 683.

² Preece v. R. G. W. Ry. Co., 24 Utah, 493, 68 Pac. 413; Olmstead v. Railroad, 27 Utah, 519, 76 Pac. 557.

senting its defense than if the complaint had been made entirely specific in every particular. The complaint clearly stated a cause of action. It is clear, therefore, that no prejudicial error resulted from the court's ruling in that regard.

[3] It is insisted that the court erred in admitting the testimony of the plaintiff, over defendant's objection, respecting the value of a certain shed which was destroyed by the fire in question. The record shows that counsel, in order to prove the value of the shed, propounded the following question to the plaintiff: "And what was the cost of the construction of the shed, if you recall?" Defendant's counsel objected to the question upon various grounds, among which, that "the proper foundation had not been laid," that the question did not call for the proper measure of damages and was not proper as "tending to show the value of the property at the time of the fire." The court sustained the objection, and plaintiff's counsel then proved by the witness that the shed was entirely destroyed, and then propounded the following question: "Now are you prepared to state what it would cost to replace that shed?" The witness answered "Yes, sir." Counsel asked, "What?" Defendant's counsel objected again for the same reasons before stated. The court overruled the objection, and defendant's counsel excepted to the ruling. The witness answered: "I valued it at \$300." It was made to appear, however, that the shed had been constructed many years before the fire; that it was constructed by digging cedar posts into the ground, to which the boards constituting the walls were nailed, and that it had a straw-covered roof. We have been quite liberal in allowing evidence of value where, as here, property has been destroyed which had no market value at the time of its destruction. In such cases evidence of the actual value of the property destroyed is always permissible, and the actual value may be ascertained as pointed out in *Smith v. Mine & S. S. Co.*, 32 Utah, 21, 88 Pac. 683. The plaintiff was either unwilling or unable to shed any light upon the cost of constructing the shed. Of course the original cost of construction, standing alone, would not be proper evidence of its present value, and, if offered for that purpose, would be incompetent. *Chicago, etc., Ry. Co. v. Davis*, 78 Ill. App. 58. Yet, as a means of arriving at the actual value, if properly guarded by the court as pointed out in *Smith v. Mine & S. S. Co.*, supra, such evidence is admissible. But neither this nor any other court, so far as we know, has ever gone to the length of permitting a plaintiff to prove the value of property by merely showing what he assumed it to be worth or what it was worth to him. To admit such evidence constitutes error. *Central Branch U. P. Ry. Co. v. Hot-ham*, 22 Kan. 41; *Railway Co. v. Jones*, 59 Ark. 105, 26 S. W. 595. The district court,

therefore, erred in permitting the witness to answer the question.

[4] Nor can it aid plaintiff that defendant's counsel did not move to strike the answer as not responsive. The answer was responsive; but, even though it had not been, defendant's counsel did not have the right to have it stricken if it was competent evidence, and the court ruled that it was. In *Merkle v. Bennington*, 58 Mich. 163, 24 N. W. 779, 55 Am. Rep. 666, Mr. Chief Justice Cooley states the rule upon the subject in the following words:

"The objection that an answer is not responsive is one to be made by the party who puts the question, not by his antagonist. If the answer is in itself proper evidence, the party who is examining the witness has a right to take and retain it if he chooses to do so. His doing this merely saves him the trouble of putting another question to draw it out."

To the same effect is *Dunahugh's Will*, 130 Iowa, 692, 107 N. W. 625.

Indeed, the rule is elementary that the right to move to strike upon the ground that the answer is irresponsive is a shield in the hands of the examiner, and not a sword in the hands of his adversary.

The court, therefore, erred in permitting plaintiff to answer the question and of which error the appellant has a clear right to complain. The only question that is doubtful is whether, in view of the other evidence relating to the value of the shed, the error is of that character which requires a reversal of the judgment on that ground alone. In view of the whole evidence we should hesitate to reverse the judgment upon that error alone, but for the reason that the judgment must be reversed on other grounds, we deem it only fair and just to the trial court to admonish it not to repeat the error on a retrial of the cause.

It is further contended that the court erred in admitting evidence on behalf of the plaintiff relative to the starting of fires and the casting out of live sparks by defendant's engines before and after the fire in question occurred. The evidence was admitted without objection, and the question arises as follows: The plaintiff did not identify the engine in his complaint, but, from the evidence offered in his behalf, it was made to appear that only one train had passed plaintiff's premises on the day the fire occurred which could have caused the fire. The engine was, however, not identified by plaintiff's evidence; that is, its number was not shown. When plaintiff rested his case defendant's counsel moved for a nonsuit, and, in connection therewith, also moved that all of the evidence respecting the setting of fires and the casting out of sparks by other engines be stricken from the record. The court refused to strike the evidence, and also denied the motion for a nonsuit. Error is now predicated on the court's ruling in refusing to strike the evidence.

In view that the evidence, in the first in-

stance, was admitted without objection we are of the opinion that the question raised by counsel that the evidence of other fires which were caused by the defendant's engines before and after the fire in question is not fairly presented for review. In view that counsel failed to interpose timely objection, he cannot, as a matter of right, now insist that the evidence should have been stricken or that there was any error committed in admitting it. The proposition was, however, orally argued, and is briefed by counsel on both sides; and, inasmuch as we are compelled to remand the case for a new trial upon other grounds, we, under our statute, are required to pass upon the question as a guide to the trial court in retrying the case. The question, therefore, is, To what extent and under what circumstances, if at all, may evidence of the setting of fires and the throwing out of live sparks by other engines of the defendant, in passing along certain premises where the fire is caused, be shown? Upon that question the courts are not in harmony. It is, however, only fair to state that many of the cases that are frequently cited as being either for or against the proposition can be easily distinguished on other grounds. There are, however, cases in which it is held that such evidence is not admissible unless the engine which caused the fire is identified. There are other cases in which it is held that such evidence is, under no circumstances, admissible unless and until it is shown that the engines which it is contended caused the other fires, or which emitted live sparks, were of the same kind and were substantially in the same condition and were managed as was the engine which it is contended caused the fire in controversy. See 1 Elliott, Ev. § 188, and 3 Elliott on Railroads (2d Ed.) § 1243a, where many cases are collated. One of the leading cases upon the question now under consideration is the case of *Sheldon v. H. R. R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155. In that case the engine which it was contended caused the fire there in question was identified, but the court nevertheless held that it was proper to show that other engines operated by the defendant over its railroad adjacent to plaintiff's premises had caused fires at other times and places. The court held that after the plaintiff had excluded all other causes that probably might have caused the fires, such evidence was competent. That case was followed in the case of *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339, and in *Webb v. Rome, etc., Ry. Co.*, 49 N. Y. 420, 10 Am. Rep. 389. Those cases, so far as we have been able to ascertain, have not been overruled or modified by the Court of Appeals of New York. Another early case holding the same doctrine is the case of *Illinois Cent. Ry. Co. v. McClelland*, 42 Ill. 358. A case frequently cited, and one of the best-reasoned cases upon the subject, is the case of *Longabaugh v. V.*

C. & T. Ry. Co., 9 Nev. 271, erroneously cited by the United States Supreme Court in a case hereinafter referred to as being in 4 Nevada. In the Nevada case Mr. Justice Hawley, with his usual vigor, goes into the question thoroughly, and concludes that such evidence is competent. Another case that is very frequently cited is the case of *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. Mr. Justice Strong, in speaking for the court in that case, in the course of the opinion, said:

"The question, therefore, is whether it [the evidence] tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."

To the same effect are *Northern Pac. Ry. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446; *Chicago, etc., R. Co. v. Gilbert*, 52 Fed. 711, 3 C. C. A. 264; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502, 27 Atl. 519. In the last case cited the Supreme Judicial Court of Maine states the doctrine in the following words:

"They [defendant's counsel] claim that the admission of the evidence from several witnesses, tending to show fires communicated by the locomotives used on the defendant's road at different times about the same time that the plaintiff's lumber was destroyed, and in the same vicinity, was erroneous; that it should be confined to the particular locomotive which passed over the road just before the fire, and which it is claimed communicated it. We think its competency, where the issue is whether the fire was communicated from a locomotive, is clearly established by courts of the highest authority. It tends to show the capacity of the inanimate thing to set fires along the road; and, when a fire is discovered soon after a locomotive has passed, and there is no evidence tending to show that it might have been caused in some other way, it authorizes the inference that it was caused by the locomotive. *Railroad Co. v. Richardson*, 91 U. S. 454 [23 L. Ed. 356], and cases cited; *Crocker v. McGregor*, 76 Me. 284 [49 Am. Rep. 611]; *Loring v. Railroad Co.*, 131 Mass. 469."

The question is also discussed by the author in 1 Jones, Com. Ev. (Blue Book) § 166C, where the author arrives at the conclusion that such evidence is competent. He says:

"There is practically no conflict remaining on the point that evidence of other fires by other locomotives is relevant on the issues of negligence and the cause of the fire complained of, and this, too, without identification of the engines. Whatever little contrary opinion existed has been entirely occluded since the opinion of Mr. Justice Strong [*Grand Trunk Ry. Co. v. Richardson*, supra]. In that case testimony was introduced by the plaintiff that some of the company's locomotives scattered fire at various times during the same summer before the fire, when passing the sawmill, without showing that either of the two engines which the plaintiff claimed to have communicated the fire in question was among the number, and also without showing that either was similar in construction, state of repair, or man-

agement to those which scattered fire as aforesaid. It was claimed that in order to have rendered the testimony admissible, it should have been confined to the same engines, operated in the same manner and in the same state of repair, or to other engines proved to have been of the same construction, used in the same manner and in the same state of repair."

The author then proceeds to state what is decided in the case at some length, and concludes as follows:

"After the plaintiff has refuted other probable causes, evidence that engines were so managed near the location of the fire as to be likely to set on fire objects not more remote than the property burned not only renders it probable that the fire was set by the defendant's engine, but raises an inference that there was something improper in the construction or management of the engine which caused the fire. But the presumption in such case is only *prima facie*, not conclusive, and is, of course, subject to rebuttal by competent evidence."

In 1 Wigmore, Ev. § 455, the subject is also thoroughly considered, and the author of that excellent work on Evidence comes to the conclusion that such evidence is proper. He quotes from one English and from one American case. In view that the excerpts quoted by the author cover the precise question now under consideration we take the liberty of appending the excerpts in full. The quotation from the English case is as follows:

"1846, *Piggot v. R. Co.*, 3 C. B. 229 (admitting evidence of sparks on other occasions from the defendant's locomotives); *Tindal, C. J.*: '[The evidence was admissible] to ascertain whether or not sparks such as those described could be emitted, from the engines used by the company, to the distance represented.' Maule, J.: 'The evidence objected to was that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here, had, on various other occasions, been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and admissible.'"

The quotation from the American case is as follows:

"1897, *Savage, J.*, in *Dunning v. R. Co.*, 91 Mo. 87, 30 Atl. 352 [64 Am. St. Rep. 208]; 'It is admissible as "tending to prove the possibility, and a consequent probability, that some locomotive caused the fire"—language from *Railway Co. v. Richardson*, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track, at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof.'"

The author then proceeds as follows:

"But the foregoing inference is based on the assumption that the engine in question is one of a class, and what is true of the class is true of the individual engine upon this assumption only. Not all engines are of the same construction or in the same condition with reference to a capacity to emit sparks, and therefore the instancing of such a capacity in some of them does not evidence such a capacity in another unless they belong to the same class with reference to construction, etc.; in short, unless the principle of substantial similarity of condition (ante, § 442) is fulfilled. Upon this all agree; but the question arises whether the detailed showing of similarity of construction should be required in advance from the plaintiff, or whether the similarity should be assumed in certain cases, leaving it to the defendant, on the principle of explanation (ante, § 449), to show, if he can, that the construction or condition was not similar. It seems wiser, where the other engines belong to the same owner or run over the same line, to assume this similarity: First, because it is a probable one; and, next, because it is comparatively difficult for a plaintiff, though comparatively easy for a defendant, to produce the proper evidence. This was long ago pointed out in one of the earlier cases."

Much more could be said, and still other cases could be cited, but if we undertook to refer to all of the cases and attempted to review them, we would be required to write a treatise upon the subject.

On the other hand, there are also a large number of cases which hold that such evidence is admissible only when the engine which it is contended caused the fire in controversy is not identified. Indeed, Elliott contends that the weight of authority supports the doctrine of the latter cases, while Mr. Jones and other writers insist that the great weight of authority supports the views expressed by Mr. Wigmore and by the Supreme Court of the United States in the *Richardson* Case. In the cases referred to by Mr. Elliott, it is held that where it is known what engine caused the fire, such evidence is not admissible, at least not until it be first shown that the engine casting out the live sparks and which caused other fires was substantially in the same condition and was operated in like manner as was the engine which it is contended caused the fire in controversy. In other words, that the conditions and circumstance surrounding all of the engines must be shown to have been substantially the same. One of the leading cases supporting that view is the case of *Gibbons v. Wisconsin Valley Ry. Co.*, 58 Wis. 335, 17 N. W. 132. That case refers to the case of *Grand Trunk Ry. Co. v. Richardson*, supra, and criticizes the doctrine there announced.

The California Supreme Court holds to that doctrine, and it has several times been held that such evidence is admissible where the engine that it is contended caused the fire is not identified and not known by the plaintiff. See *Henry v. Southern Pac. Ry. Co.*, 50 Cal. 176. The foregoing case was followed in *Butcher v. Railroad Co.*, 67 Cal. 525, 8 Pac. 174, and in *Steele v. Pacific Coast Ry.*, 74 Cal. 331, 15 Pac. 851, although in the

last case cited it is not made to appear that the decision was based upon the distinction pointed out in the two previous ones. See, also, *Ireland v. Cincinnati, W. & M. Ry. Co.*, 79 Mich. 163, 44 N. W. 426. There are additional cases which could be cited that hold the same doctrine but the foregoing sufficiently illustrate the theory of those cases.

After a careful consideration of all of the cases, those that we have cited and many others, and what is said by Mr. Jones and by Mr. Wigmore in their works on Evidence, we are constrained to hold that where a plaintiff has produced evidence which tends to exclude all other agencies which could have caused the fire in question, it is proper for him to show that other engines operated by the defendant on its line of railroad passing plaintiff's premises have cast out live sparks and have caused other fires in the vicinity within a reasonable time both before and after the fire in question as tending to prove the "possibility and consequent probability," as Mr. Justice Strong puts it, that the fire was caused by defendant's engine. Such evidence is competent to show that engines do cause fires, and where live sparks are thrown out in unusual or in large quantities of large or unusual sizes and are carried a considerable distance from the railroad track, the evidence may be admitted as tending to show that the engines were not properly equipped with proper spark arresters, or were out of repair, or were improperly operated by the engineer and fireman.

[5] It is asserted, however, that all that it is necessary to prove in this jurisdiction is that the fire was caused by an engine, and from that fact it may be inferred that the fire was negligently set. *Preece v. R. G. W. Ry. Co.*, 24 Utah, 493, 68 Pac. 413; *Olmstead v. Railroad*, 27 Utah, 519, 76 Pac. 557. The question, however, always is, How is the fact established that an engine caused the fire in question? While in the opinion in the *Preece* Case the evidence respecting the setting of the fire is not set forth yet an examination of the record in that case shows an abundance of evidence from which the inference could be deduced that the engine there in question set the fire. The same is true of the *Olmstead* Case. In both of those cases a number of witnesses testified that they saw the engine of the defendant cast out great and unusual quantities of live sparks before or about the time the fires were set; in the *Olmstead* Case at the very time the fire occurred. Indeed, in both of those cases the evidence is strong and convincing that the engines there in question caused the fires, and from the evidence there disclosed it was quite proper, not only to deduce an inference that the fires were caused by the engines in question, but the inference was also proper that they were negligently caused. But in neither of those cases, nor in any other case emanating from a court where the question

is not covered by statute, has it been held that all that is necessary to prove is that an engine passed certain premises, and that a fire was discovered on those premises a short time thereafter. It is universally recognized that there must be some evidence from which it may legitimately be inferred that the fire in question was caused by the passing engine and not by some other agency. To establish the probability that the engine in question caused the fire, the plaintiff may show that the engine, at the time the fire was set, cast out live sparks, or that it set fire to the dry grasses, or otherwise; and to strengthen the probability that engines do set fires, it may also show that other engines of the defendant did the same thing within a reasonable time both before and after the fire in question. When those facts are shown the jury may infer that the fire in question was caused by the engine. Conceding the statement, however, that all the plaintiff must prove is that the fire was caused by one of defendant's engines, while correct in itself, is, nevertheless, meaningless without an explanation of how that fact may be established. Of course, if the fire is seen to pass from the engine to the object which is set on fire, the proof is complete without further evidence. When the facts hereinbefore suggested are made to appear, the jury may also infer that the fire was caused through the negligence of the defendant, either in carelessly operating the engine or in not providing the same with proper appliances to prevent the casting out of live cinders. It is important to keep in mind, however, that railroad companies are by law permitted to operate their engines by means of fire and in that way generate the necessary power. It is therefore lawful for them to operate engines by fire. It is also possible in rare instances that engines may cause fires without negligence. It is necessary, therefore, to prove: (1) That the fire in question was caused by an engine of the defendant; and (2) that it was negligently caused. As before stated, negligence may be inferred if it be shown that the engine caused the fire, but until that is shown by the exclusion of other agencies, there can be no inference of negligence.

While, for the reasons hereinafter stated, the evidence in this case is sufficient to sustain a finding that the fire in question was caused by defendant's engine, yet, in view that the fire originated a distance of 450 feet by actual measurement from the track, the court erred in admitting the evidence now to be discussed. It is contended that the court erred in permitting the plaintiff to show that he and other members of his household, after the fire in question, had picked from the ground for some distance from the railroad track, and as far distant therefrom as the shed was situated, a large quantity of dead cinders of various sizes. Some of those dead

cinders, the evidence showed, were picked up a few days after the fire, some a week or two weeks thereafter, and the time that others were so picked up is not shown. The cinders, over the objection of the defendant, were, by the court, admitted in evidence. We cannot see how those dead cinders proved, or tended to prove, or establish, any fact or facts in issue. One can understand that where an engine in actual operation is seen to cast out large volumes of live sparks, the engine, in all probability, is not in good repair, or is not properly equipped with proper spark arresters, or is not properly managed. But merely to pick up dead cinders from the ground along the railroad track when no one knows when or under what conditions or circumstances they were thrown out is no evidence, except that at some time some engine had cast out cinders either alive or dead. Of course, if the cinders were dead when cast out, they were harmless and a menace to no one. The difficulty, however, with such evidence is that it establishes nothing that is relevant to any issue. It may well be that an engine may have passed the premises in question at some time when it was out of repair, or grossly mismanaged. Again, an engine may, at some time, have been recklessly operated, or an inferior quality of coal may have been used, or an extra amount of draft may have been applied, and thus a large quantity of cinders may have been thrown out. When a plaintiff is permitted to show that the defendant's engines in ordinary weather while being operated cast out large and unusual amounts of live sparks, it is as far as he should be permitted to go. To permit him to produce in evidence dead cinders that he may have picked up that were found along the track, and that may have been cast out by some engine at a time unknown, and under conditions and circumstances unknown, is going entirely beyond the bounds of reason, and can have no other effect than to unduly influence a jury or layman to return a verdict against the defendant in a case where no one ever saw a live spark or fire thrown out from any engine. Jurors will not stop to consider that sparks or coals of fire are dangerous only when alive. They will, at once, assume that the dead cinders must have been alive when cast out, regardless of whether that was the fact or not. Again, where the evidence is limited to the casting out of live sparks seen by witnesses, such witnesses may be cross-examined, and all the conditions under which they were cast out may thus be developed, while if dead cinders picked up along the line of railroad are to be admitted in evidence, no cross-examination showing the conditions under which they were emitted and thrown out is possible. The Court of Appeals of New York has been quite liberal in permitting a plaintiff to produce indirect evidence with regard to the setting of fires, yet that court makes it clear in the case of

Collins v. N. Y. Cent. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50, that evidence of the character we have just discussed is not admissible. See, also, 33 Cyc. 379, 380. Indeed, the question is so clear on principle that decided cases seem wholly unnecessary. We are clearly of the opinion that the court went too far in admitting in evidence the dead cinders that were found on the ground along the railroad track and on plaintiff's premises. The court gave the plaintiff all the latitude that is allowed by any court in permitting him to produce evidence tending to prove that engines of the defendant, both before and after the fire, in passing his premises, had emitted live sparks which were carried a considerable distance from the track, and as far as, and beyond, the shed which was destroyed by fire, and, further, in permitting him to prove that other fires had been started by some of defendant's engines in the vicinity of plaintiff's premises within a reasonable time before and after the fire in question.

[8] It is also urged that the evidence is insufficient to sustain the finding of the jury that the fire in question was caused by defendant's engine. In view that the case must be retried, it could subserve no good purpose for us to review the evidence. While on the face of the record the great weight of the evidence seems to be in favor of the defendant, yet there is some substantial evidence in the record, if believed by the jury, to justify a finding that the fire was caused by defendant's engine, which, according to plaintiff's witness, passed his premises only a short space of time before the fire was discovered on the straw roof of plaintiff's shed. At least four witnesses testified that they saw the shed roof on fire only a short time—some say 10 minutes—after the train had passed the premises. Some of the witnesses also testified that the train labored hard in passing plaintiff's premises, and that it emitted large volumes of smoke from the smokestack. The fire started in the daytime near the middle of the day. We are powerless to pass upon the weight or effect of the evidence, and, in our judgment, the plaintiff produced at least some substantial evidence in support of the finding of the jury. This assignment must therefore fail.

For the reasons stated the judgment is reversed, and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

CORFMAN, J. I concur. I do not concur, however, in the conclusion arrived at by Mr. Chief Justice FRICK, that it was proper to show that other engines at other times emitted sparks and live cinders, when the particular engine it is claimed set out the fire was identified.

In the case at bar the undisputed testi-

mony of all the witnesses, both for the plaintiff and the defendant, was that only one freight engine passed the plaintiff's premises in the forenoon of the day of the fire in question. True, there is a sharp conflict in the testimony as to the time in the forenoon that the engine passed, the witnesses for plaintiff fixing the time at about 11 o'clock a. m., shortly before the fire was discovered, the defendant's witnesses fixing the time not later than 9:20 a. m., but not a single witness for either party suggested the possibility of there having been more than the one engine, identified by defendant's witnesses at the trial as defendant's engine No. 3633. The uncontradicted testimony is that this engine was in good condition, equipped with and had in use the best spark arrester that could be obtained for arresting sparks and live cinders, and that the engine was operated in the usual customary manner by experienced and efficient trainmen exercising due care in its management.

It seems to me that under such conditions and circumstances the admission of testimony to show that other engines belonging to defendant had on other occasions, when operated by different trainmen, caused fires in other places, would, in this jurisdiction, be highly prejudicial to a fair trial, and would not in the slightest degree tend to show that the fire in question was negligently caused by the particular engine identified, but would only tend to befog the real issue to be determined by court or jury, whether or not the defendant was negligent in the maintenance and operation of the identified engine claimed to have set out the fire in question. In the Utah jurisdiction, in this class of cases, once the engine is identified, the real and only issue to be determined is, was the engine defective or lacking in its equipment or parts, or so negligently or incompetently managed and operated by the defendant as to have been the proximate cause of the fire in controversy?

It may be conceded that oftentimes engines, no matter how perfect in equipment nor how skillfully and carefully operated do cause fires; but it is only in those jurisdictions where the statute fixes a liability, regardless of the condition, equipment, and management of the identified engine, that evidence of other engines setting fires, before or after, becomes relevant to the issue. Not only a long line of authorities, but many of the cases, if not all, herein cited and commented on by Mr. Chief Justice FRICK, seem to bear me out in reaching this conclusion, as will be seen. *Savage, J.*, in the case of *Dunning v. Cent. R. R. Co.*, 91 Me. 87, 30 Atl. 352, 64 Am. St. Rep. 208, says:

"The plaintiff's claim is based solely upon the statute (R. S. c. 51, § 64), which provides that, 'When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury.' No question of negligence on the part of the defendant is involved."

Then again, in the case of *Grand Trunk R. R. Co. v. Richardson et al.*, 91 U. S. 454; 23 L. Ed. 356, plaintiff's right to recover was predicated on the Vermont statute fixing the liability of a railroad corporation for fires communicated by its locomotive engines, and here Mr. Justice Strong, in his opinion, says:

"The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, *without showing that either of those which the plaintiffs claimed communicated the fire was among the number.* * * * *The particular engines were not identified.*" (Italics mine.)

In *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155, the engine was identified, but the question there was as to whether the engine was properly constructed, and testimony was offered to show that not only the engine in question, but the other engines of the defendant, were lacking in proper equipment. In *Field v. Railroad Co.*, 32 N. Y. 348, the engine was not identified; and in *Webb v. Railroad Co.*, 49 N. Y. 420, 10 Am. Rep. 389, again the question was one of proper equipment. In *N. P. Ry. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446, the particular engine was not identified, and in *Chicago, etc., R. Co. v. Gilbert*, 52 Fed. 711, 3 C. C. A. 264, the engine was not identified, and the action was brought under the provisions of a Minnesota statute.

While the question is not at all a determining one in the decision reached by Mr. Chief Justice FRICK in the case at bar, I do not want to here commit myself to what I think would be a too liberal rule in permitting evidence to be introduced concerning other engines than the one identified in this class of cases. As to the grounds assigned by Mr. Chief Justice FRICK, for the reversal of the judgment, I concur.

MCCARTY, J. (dissenting). I am of the opinion that there is no prejudicial error assigned, and that the judgment should be affirmed. The jury assessed plaintiff's damages at \$500, and rendered a verdict for that amount, with interest thereon from the date of the fire. The evidence, without conflict, shows that the fire in question destroyed property belonging to plaintiff as follows: Fifteen rods of corral fence described as "a good board fence, cedar posts with two rails along the posts and then boards," 4½ feet high, of the market value of \$75; one set of harness of the market value of \$30; one wagon jack of the market value of \$6; three loads of straw of the market value of \$9; three pitchforks of the market value of \$2.25; one survey tongue of the market value of \$10; two pieces of garden hose \$1; 26 tons of hay, which plaintiff testified was of the value of \$12 per ton. The total value of the property mentioned, according to plaintiff's

evidence, was \$445.25, which is only \$54.75 less than the amount of the verdict.

To meet the positive evidence of plaintiff regarding the market value of the hay, defendant produced a witness who testified as follows: "If I remember right, I think it was about \$10 a ton." To prove the value of the shed counsel for plaintiff propounded this question: "Q. Now are you prepared to state what it would cost you to replace that shed? A. Yes, sir." The principal objection made to this question was "that the cost of reconstructing the shed is not the proper measure of damages." The court, addressing counsel for respondent: "What do you claim is the measure of damages, Mr. Smith?" Mr. Smith: "The value of the shed in the condition it was at the time it was destroyed." The Court: "He may answer the question." The witness: "I value it at \$300." It seems that the answer was given by the witness to meet the views of counsel, making the objection, as to the true measure of damages. I do not think the answer is susceptible of being construed to mean that the value the witness put on the shed was other than his judgment of its true or actual value. The answer, "I value it at \$300" is equivalent to saying, "The value of it was \$300." This, I submit, is proper evidence to prove the value of farm buildings and structures. 3d Chamberlain, *Modern Evidence*, § 2128.

Assuming for the sake of argument, but not conceding, that the court, by admitting this kind of evidence, permitted, as is suggested, "plaintiff to prove the value of the property by merely showing what he assumed it to be worth or what it was worth to him," he, nevertheless, on cross-examination, gave proper evidence tending to show the value of the shed which in part is as follows:

"Q. That shed, you say, was built out of lumber? A. Yes, sir. Q. How long had it been built? A. I can't tell exactly. I judge that shed, part of it, perhaps, had stood there 10 years, and maybe more, and part of it had been built at a more recent date. * * * Q. You stated that that shed was worth \$300? A. Yes, sir. * * * Q. When you say \$300 that is simply a rough estimate? A. Well, it isn't so rough either. A person can easily tell what it would take to build a good barn 80 feet long and 14 feet wide, a pretty good lumber roof on it, and a good straw top on that. A person can tell something about what it would cost. It isn't such a rough estimate."

He also stated on cross-examination that: The shed "was mostly boarded up. * * * It was simply rough lumber; * * * just ordinary \$40 a thousand lumber."

It will therefore be observed that whatever was lacking, if anything, in plaintiff's evidence in chief tending to prove the value of the shed was supplied by his evidence given on cross-examination. According to the evidence of respondent's witness on this point there was at least 1,400 feet of lumber used in the construction of this shed besides a number of cedar posts for uprights, and sufficient quaking asp poles for the roof, and the

evidence, without dispute, shows that the lumber was worth \$40 per thousand. In other words, according to the undisputed evidence, the value of the lumber destroyed was, at least, of the value of \$56. This amount, when added to the value of the other property herein mentioned, which the evidence shows was \$445.25, makes the sum total in excess of the amount of the verdict. Moreover, defendant produced evidence of the most positive character showing that the value of the shed in the condition it was when destroyed was \$75. And the jury evidently accepted this evidence of the value of the shed, otherwise the verdict would, in all probability, have been in excess of \$500. Few cases of this kind are brought to this court in which evidence of value to support the verdict is clearer or of a more conclusive character than is the evidence in this case.

In this jurisdiction the rule of law, in cases of this kind, is that all plaintiff is required to do to make out a *prima facie* case of negligence is to show by competent proof that the damage sought to be recovered was caused by a fire started by a locomotive. When evidence is introduced having sufficient probative force to support a finding by the jury that the fire was so started, the burden is then on the company operating the locomotive to show that it was provided with spark arresters or other proper appliances for preventing the emission of sparks and coals of fire, and that it was operated in an ordinarily careful way. *Preece v. R. G. W. Ry. Co.*, 24 Utah, 493, 68 Pac. 413; *Olmstead v. O. S. L. Ry. Co.*, 27 Utah, 515, 76 Pac. 557.

In the case at bar plaintiff testified that along about the date of the fire, as he was standing in the doorway of his house at night, one of defendant's locomotives, as it passed by his premises, emitted sparks that arose in the air and passed over his house to a point on his premises beyond where the fire in question was started, and then dropped to the ground before the fire in them was extinguished; that at another time he was in his yard near the shed or stable when a locomotive passed, emitting sparks that passed over his haystacks and descended to the ground before they were extinguished; that on another occasion from 5 to 15 minutes after a locomotive passed his premises he saw a "fire spring up" in a nearby pasture at a point 20 rods from the railroad tracks.

W. Warnick, a witness for plaintiff, testified that at the time of the fire he was residing, and for 4 years prior thereto had resided, at Pleasant Grove, Utah, near defendant's railroad track, and "about one-half block from plaintiff's premises"; that on different occasions during these 4 years he had seen defendant's locomotives, as they passed his residence, emit sparks that were carried about 100 yards from the railroad track before they were extinguished. He further testified that he was at home on the day the fire in question occurred; that some-

where around "11 o'clock in the forenoon" he saw a train pass, and in about 20 minutes thereafter his attention was called to the fire by a neighbor; that when he first saw the fire it was on top of the haystack. "It was burning from the top."

Mary Gleason, a sister of plaintiff, and, by occupation, a school-teacher, testified that at the time the fire occurred she was living at plaintiff's home in Pleasant Grove, Utah; "that along about the time of the fire" she had, on several occasions, observed defendant's locomotives, as they passed plaintiff's premises, emit "cinders and sparks" which were carried by the wind to a point on the premises beyond the place where the fire was started. The witness further testified that she was at home during the forenoon of September 12, 1912, the day of the fire; that "a little after 11" a freight train passed the premises along defendant's railroad track; that "the engine was puffing hard;" that about 15 minutes after the train passed a man going by in an automobile told her that the barn was on fire; that when she "went out the fire was just on one end of the stack on top."

Two other witnesses for plaintiff testified that they were residing in the immediate vicinity of plaintiff's premises at the time the fire occurred; that they saw a freight train pass along defendant's railroad track about 11 o'clock in the forenoon of September 12, 1913, and that, in about 15 or 20 minutes after the train passed plaintiff's premises they saw the fire, which was burning on top of the stack, and that in their judgment it had been burning about 15 minutes. Another witness for plaintiff testified to substantially the same facts as testified to by the witnesses mentioned respecting the hour when the freight train passed plaintiff's premises and the time of the discovery of the fire after the train had gone by.

The evidence thus introduced by plaintiff, respecting the distance that sparks and live cinders are sometimes carried by the wind after they leave a locomotive before the fire and heat in them is extinguished, the time the fire was discovered with reference to the time the train passed the premises, and the place, the top of the haystack, where the fire was started, was unquestionably sufficient to support a finding by the jury that sparks and heated cinders from the freight train started the fire. To meet plaintiff's testimony tending to show that the fire was caused by sparks and cinders from the engine, which established a prima facie case of negligence, defendant introduced evidence tending to show that the only freight train that passed by plaintiff's premises between 8 o'clock a. m. and 12 o'clock noon on September 12, 1913, was a train drawn by engine No. 2633; that this train passed plaintiff's premises at 9:15 a. m. on that day. Evidence was also introduced tending to show that engine No. 2633 was equipped with proper, modern, practical,

up-to-date appliances for controlling and arresting sparks and cinders and that these appliances and equipment were, on that date, in good condition, and that the engine was managed and operated with due care.

The evidence respecting the condition of engine 2633, and the appliances with which it was equipped for arresting sparks and cinders, and the way it was operated on the day of the fire, is not, in any respect, denied or disputed. In view that this evidence is undisputed, and that the property destroyed by the fire was situated not less than 350 feet from the railroad track, counsel for defendant contends with much earnestness that defendant's request for a directed verdict should have been granted. There would be much force to this contention were it not for the fact that there appears to be irreconcilable conflict in the evidence regarding the number of freight trains that passed plaintiff's premises on the forenoon of the day of the fire. The evidence on behalf of defendant is of the most certain and positive character that engine No. 2633 passed plaintiff's premises on the day of the fire at 9:15 a. m. Five witnesses for plaintiff, however, testified positively that a freight train passed the premises about 11 o'clock that morning, and that the fire was discovered within 15 or 20 minutes after the train had gone by. The question of whether a freight train passed plaintiff's premises on the morning of the fire, after engine No. 2633 had gone by, was for the jury and not for the court to determine. There is evidence tending to show that two passenger trains passed plaintiff's premises about 9 o'clock on the morning of the fire. On that point Mary Gleason, a witness for plaintiff, testified on cross-examination as follows:

"Q. And had you seen any other trains that morning? A. Yes, sir; I think so. There were passenger trains. Q. Going in what direction? A. I think there were two, one going towards Salt Lake, and one going the other way. Q. And about what time did they pass the house? A. Somewhere about 9 o'clock."

The question of whether sparks and heated or live cinders from a locomotive will or will not start fires from 350 to 450 feet away from the point where they leave the smoke-stack of the engine was also a question of fact for the jury, and not one of law for the court. On first impression it might seem, as counsel contend, to be a physical impossibility for sparks and cinders, after being carried through the air that distance, to drop on a stack of hay and ignite it. Evidence, however, of the most positive character was offered by plaintiff tending to show that fires may, under those conditions, be started. To rebut this evidence defendant offered evidence of a negative character only, that is, its witnesses who testified on this point stated that they had never seen or known sparks and cinders from locomotives to start fires a distance of more than 125 feet from the railroad track.

The cinders that were picked up soon after the fire in the vicinity of plaintiff's premises and along the railroad track, I think, were properly admitted in evidence. The evidence shows that some of the largest of these cinders were picked up 300 feet from the railroad track. And plaintiff testified that on different occasions when standing in his yard while locomotives were passing his premises, cinders, equal in size to the largest of those in evidence, escaped from the engines and dropped on his premises; that he has seen cinders the size of his finger "thrown," when they left the smokestack, "375 feet from the track." While the record shows that it would be a physical impossibility for cinders the size of some of those in evidence to escape from a smokestack of a locomotive equipped with a spark arrester of the same kind and grade which the undisputed evidence shows engine No. 2633 was equipped with on the day of the fire in question, they, nevertheless, tended to show that other engines passed over and along this railroad track, equipped with spark arresters having a mesh of a size sufficient to permit these cinders to escape. It is not claimed that the evidence respecting these cinders is insufficient to justify an inference or conclusion that they escaped from engines that were operated on defendant's railroad track. A jury might well find that the operating of an engine equipped with a spark arrester through which cinders of the size of some of those admitted in evidence could escape is negligence.

As I have pointed out, there is a sharp conflict in the evidence as to whether one or two freight trains passed plaintiff's premises on the morning of the fire. If the jury accepted as true the evidence for plaintiff on this point, which they had a right to do, it necessarily follows that they must have found that the fire was not started by engine No. 2633, but was started by some other engine passing over defendant's railroad track, which defendant has failed to show was equipped with proper and safe appliances for arresting sparks and cinders.

McGUIRE v. STATE BANK OF TREMONTON et al. (Nos. 2934, 2991.)

(Supreme Court of Utah. March 29, 1917.)

1. INTERPLEADER § 33—JUDGMENT.

Where a litigant tenders the money claimed by two other parties into court, no judgment in his favor for the money can legally be entered.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 68-71, 74.]

2. APPEAL AND ERROR § 721(1) — ASSIGNMENTS OF ERROR—JOINT ASSIGNMENTS.

Where several appellants jointly assign errors, an assignment bad as to one of them must be held bad as to all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2985-2988.]

3. APPEAL AND ERROR § 907(3) — REVIEW — FINDINGS—PRESUMPTIONS.

Where an appeal is based on the judgment roll without a bill of exceptions, the presumption is that the findings were justified by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673.]

4. EXCEPTIONS, BILL OF § 41(1) — TIME OF SERVICE—STATUTE.

A judgment was entered on April 3d, and modified on May 15th, and an appeal from the judgment as modified taken. Notice of entry of judgment was given on April 3d, and on April 22d an extension of time for serving a bill of exceptions was granted. Service was acknowledged on the 7th of June. Comp. Laws 1907, § 3286, gives 30 days to an appellant to prepare and serve a proposed bill of exceptions and additional time of 45 days may be given within which to prepare such bill. Held, that the bill was served, settled, and allowed within the time allowed by the statute.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 65.]

5. BANKS AND BANKING § 154(8)—DEPOSIT —SPECIAL DEPOSITS—EVIDENCE.

Where a deposit slip discloses nothing indicating that the money deposited is upon any condition whatever, it constitutes strong evidence that the money was not deposited for a special purpose, or as a special deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 526-529.]

6. BANKS AND BANKING § 154(6)—PRINCIPAL AND AGENT § 119(1)—SPECIAL DEPOSITS—ACTIONS.

Where certain money is deposited in a bank by the agent of the owner in the name of the agent, and there is nothing to indicate that it is a special deposit, one who claims that the deposit was made on condition that it should remain intact until such time as the claimant and the owner of the money should adjust certain unlitigated claims which claimant preferred against the owner, and payment should be made in accordance with such settlement, must prove in order to recover such money that the deposit was in fact made for the purpose claimed by him, and that the agent had authority to make or enter into the agreement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 518-521; Principal and Agent, Cent. Dig. §§ 391, 393, 398, 399, 401.]

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by A. D. McGuire against the State Bank of Tremonton and S. N. Cole. From a judgment directing the deposit of money in question pending administration, all parties appeal. Reversed and remanded, with directions.

W. J. Lowe, of Brigham City, and A. D. McGuire, of Tremonton, for assignee. A. G. Horn, of Ogden, for defendants.

FRICK, C. J. The plaintiff in his complaint in substance alleged that on the 26th day of December, 1913, one J. A. Brown was the owner of a certain sum of money, to wit, \$380, which was placed on deposit with the defendant bank in the name of one J. N. Porter for the use and benefit of said Brown; that thereafter, on the 14th day of August, 1914, said Porter, in writing, duly assigned to

the plaintiff all of his right, etc., to said \$380 deposited as aforesaid, and that said J. A. Brown, on the 17th day of the same month, also in writing, duly assigned all of his right, etc., to said money to the plaintiff; that plaintiff duly notified said bank of said assignments and demanded payment of said money; and that said bank refused to pay the same. Plaintiff also alleges on information and belief that the defendant Cole makes some claim to said money, but that such claim is without right. Plaintiff prays judgment for the amount aforesaid, with interest.

The bank filed an answer in which, while not claiming any right to the money, yet it set forth that the money was deposited in the bank, and that it had a right to retain the same for a certain stated purpose, and that the defendant Cole claimed some right to or interest in said money on account of certain unsettled or unliquidated claims which arose out of some transactions theretofore had between said Cole and said Brown, plaintiff's assignee. The bank prayed that said Cole be substituted as the real defendant in the action, and that it be discharged on depositing said money in court.

The defendant Cole filed an answer, and, excepting the disclaimer of interest and the tender of the money in court, he practically adopted the averments contained in the bank's answer, and alleged that the money was left on deposit in the bank to await a settlement between him and said Brown, the owner thereof.

A trial to the court resulted in findings in which the court in substance found that the money in question was deposited in the bank to await the settlement of some unliquidated accounts which said Cole claimed existed between him and said Brown; and the court further found that "the defendant S. N. Cole has not established his claim to the said \$380 or any part thereof." Upon the findings of fact the court made its conclusion of law in which it found:

"That neither plaintiff or defendants in this action are at the present time entitled to the said sum of \$380, and that the said sum shall be deposited by the clerk of this court, in whose hands said money is now held, in some disinterested bank in Box Elder county, Utah, said sum to be deposited on interest, and to be held until an administrator may be appointed for the estate of said J. A. Brown, notice to creditors published, and the claim of the said S. N. Cole to such money be adjudicated, or until such time as the said S. N. Cole may otherwise establish his claim, or by the law be estopped from asserting the same."

Judgment was entered in conformity with the foregoing conclusion, from which both the plaintiff and the two defendants appeal.

The defendants' appeal was taken first, and it is predicated upon the judgment roll alone, and we will dispose of that first. The only assignments, although stated in different ways, are that the court erred in adjudging "that none of the parties to the action are

entitled to the money sued for," that said bank had disclaimed all interest in said money and had tendered the same in court, and in requiring said money to be deposited as provided in the conclusion of law which we have copied in full.

[1] It may be that the court erred in making its findings and in entering judgment in conformity with the conclusion of law aforesaid, yet there is absolutely nothing contained in the record presented by defendants' appeal from which we can determine that they are, or that either of them is, entitled to judgment. In view that the bank tendered the money in court, no judgment for the money could legally have been entered in its favor. That therefore disposes of the bank's appeal.

[2] The bank and the defendant Cole, however, prosecute this as a joint appeal, and also file a joint assignment of errors. It is well settled that, where several appellants jointly assign errors, unless the assignments are good as to all who join therein, they must be disregarded as to all. In discussing the rule applicable to joint assignments of error in 3 C. J. p. 1352, § 1501, it is said:

"The rule being that upon a joint assignment of errors one of several appellants or plaintiffs in error cannot avail himself of errors which are not common to all, but which affect or injure him alone, that parties cannot jointly assign error or take advantage, on a joint assignment, of errors which affect them severally, and not jointly, and that a joint assignment of error must be good as to all who join therein, or it will not be available to any of them, and if it is not good as to one, it will be overruled or disregarded as to all."

In discussing the question of joint assignment of errors Mr. Elliott, in his work on Appellate Procedure (section 318), says:

"Where several parties unite in one assignment of errors, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors alleged on rulings which affect him alone, and not those with whom he unites in the assignment. The rule that a joint assignment of errors must be good as to all who unite in it is in harmony with the general principle of pleading which requires a demurrer, an answer, or a motion to be good as to all who join in it."

While there are some exceptions to the rule stated above, yet none of the exceptions apply here.

In view, therefore, that the bank and Cole have filed a joint assignment of errors, and in further view that the bank in no event is entitled to a judgment for the money, it cannot legally complain of the judgment that the court entered. The assignment of errors, therefore, being of no avail to the bank, it, for the reasons before stated, likewise cannot avail Cole.

[3] If it should be assumed, however, that the rule respecting joint assignments of er-

rors does not apply as between the bank and its coappellant, Cole, yet the latter is in no position to complain of the judgment. As we have seen, the court found that "Cole has not established his claim to said \$380 or any part thereof." The appeal is based on the judgment roll without a bill of exceptions. The presumption is that the evidence justified said finding, and hence Cole has no legal cause for assailing the judgment.

This disposes of the defendants' appeal.

[4] Proceeding now to a consideration of plaintiff's appeal. The defendants have filed a motion to strike plaintiff's bill of exceptions for the reason that it was not served, settled, and allowed within the time allowed by our statute. Defendants' appeal was from a judgment entered on April 3, 1916. That judgment was thereafter, on May 15, 1916, duly modified in some particulars, and plaintiff's appeal is from that judgment. If it be assumed, however, that for the purpose of plaintiff's appeal the time within which he was required to serve his proposed bill of exceptions commenced to run on April 3d, rather than on May 15th, when the judgment was modified, he nevertheless served his proposed bill of exceptions within the time required by our statute. If it be again assumed that the plaintiff, on the 3d day of April, received notice of the entry of the judgment, then, according to our statute (Comp. Laws 1907, § 3286), he had 30 days thereafter within which to prepare and serve his proposed bill of exceptions. He would thus have had until May 3, 1916, to prepare and serve his proposed bill. On the 22d day of April, 1916, however, he obtained an extension, as he was permitted to do under our statute, of 45 days' "additional time" within which to prepare and serve his proposed bill of exceptions. Forty-five days from May 3 would expire on June 17, 1916. Service of plaintiff's proposed bill was acknowledged by defendants' counsel on the 7th day of June, or 10 days before the expiration of the time within which plaintiff was required to serve it. The bill was afterwards settled, allowed, and filed as required by law, and hence the motion to strike must be overruled.

Proceeding now to the merits of plaintiff's appeal, we find on going into the record that we cannot concur in the conclusion of law and judgment entered by the district court. It appears from the record that in 1913 J. A. Brown aforesaid sold some property to a Mr. Christensen; that Mr. Brown directed Mr. Christensen to deposit the purchase price, amounting to \$1,600, to Brown's credit in the defendant bank; that Christensen did as directed by Brown; that at that time Mr. Brown was quite ill, and he and his wife soon thereafter went to Arizona in hopes of improving his health; that on leaving Utah Mr. Brown left some of his business affairs in charge of the I. N. Porter hereinafter referred to; that said Porter attended to the

matters left in his charge, and after adjusting those matters there was a balance remaining in the bank of \$380 (the money in question) which was deposited in the name of Porter as Brown's money. Mr. Brown returned from Arizona in the summer of 1914, but his health had not only not improved, but had in fact grown worse, and he was very feeble. In August, 1914, Mr. Brown, in writing, assigned said \$380, which is the money in question, to the plaintiff, and, in view that it was deposited in the name of Porter, the latter, also in writing, assigned the same to the plaintiff. These assignments were produced in evidence and are made a part of the record. Plaintiff notified the bank of the assignments and demanded payment of the money, but the bank refused to pay the same for the reason that Cole claimed some interest therein, as before stated. Some time after making the assignment Mr. Brown died and the plaintiff thereafter brought this action to recover the money from the bank and made Cole a party defendant in the action. Cole claimed, and so testified at the trial, that Porter, as Brown's agent, had agreed that said \$380 should be deposited in the defendant bank and should be held there until his unsettled unliquidated claims against Brown could be adjusted, and that the money was deposited in Porter's name for the purpose aforesaid. Porter denied Cole's statement in that regard, and testified that he had never agreed to such an arrangement, and that the money was not deposited upon those or any other conditions affecting Cole.

While it is true that both Mr. Cole and the cashier of the bank testified that Porter had deposited Brown's money as a special deposit, yet, for the reasons hereinafter stated, the evidence is wholly insufficient to justify a finding that Porter had any authority to do that or that Cole by anything that Porter said had acquired any special claim or lien on Brown's money.

[5] The deposit slip was produced in evidence, and nothing is disclosed therefrom indicating that the money was deposited upon any condition whatever. That, in and of itself, constitutes strong evidence against the contention that the money was deposited for a special purpose or was a special deposit, or that Cole, or any one else, had acquired a lien upon or a special claim to the money. *Dearborn v. Washington Svs. Bank*, 13 Wash. 345, 42 Pac. 1107.

[6] We are not now dealing with the doctrine of special or specific deposits as the same applies between the bank and its depositors, or between the latter and the bank's general creditors in case of the bank's insolvency. What we are now dealing with is a claim by an entire stranger to a deposit of certain money which he claims was deposited by the agent of the owner of the money upon the condition that the deposit should re-

main intact until such time as such claimant and the owner of the money should adjust some unsettled and unliquidated claims which the claimant preferred against the owner of the money, and that if, upon such settlement, it should develop that the owner of the money was indebted to the claimant in the amount claimed by him, or in any sum, then the money so deposited, or as much thereof as might be necessary, should be applied in payment of the claim aforesaid. Cole in this case is the claimant, and he thus claims that he has a special claim against or lien upon a certain deposit, and that he has such special claim or lien by virtue of a contract or agreement entered into between him and the agent of the owner of the money. It is elementary that before Cole can succeed where, as here, his claim is based upon an alleged agreement with the agent of the owner, he must prove: (1) That the deposit was in fact made for the purpose claimed by him; and (2) that the agent had authority to make or to enter into the agreement. Now, all that the evidence shows is that Mr. Brown had given Porter a power of attorney. He had thus constituted Porter his agent for some purpose. What was contained in the power of attorney, however, no one seemed to know. It was also made to appear that Porter did attend to some business matters for Brown, but there is not a scintilla of evidence in the record to show that Brown ever authorized Porter to deposit any of Brown's money upon the condition claimed, or that Porter was authorized to create liens upon or special claims against Brown's money or property. Cole does not claim that Porter had the authority to settle with him and to pay his claim when adjusted. Neither did the court take such a view. Indeed, the court entertained just the opposite view. If, therefore, Porter had no authority to settle with Cole and adjust and pay his claim, if Cole had any, how can it be successfully contended that merely to appoint Porter as Brown's agent for certain purposes Porter could pledge Brown's property or could create a special lien upon it for a past transaction and stale claim? If it be assumed that, in attending to the affairs of Brown, it had become necessary to secure a certain obligation, which was created by Porter himself for Brown's benefit, Porter had the authority to do that as an incident to the main transaction; yet we know of no rule, either in equity or law, which authorizes an agent to pledge the principal's money or property or to create special liens against the same by contract for past claims unless such agent is specially authorized to do so. The evidence as it now stands is therefore wholly insufficient to justify a finding that Brown conferred authority upon Porter to pledge the former's money or property for any purpose, or that Porter could make a special deposit of Brown's money as claimed

by Cole, and for the purpose aforesaid. This case, therefore, does not present a question of the weight or the effect of the evidence, but the case is one where there is an entire absence of legal evidence to establish an essential fact. Under such circumstances the question is one purely of law. The district court, as we have seen, found that Cole had not established his right to the money or to any part thereof. We think that finding is well supported by the evidence. If it is so supported, therefore, we cannot well conceive how the court, from the evidence in the record, arrived at the conclusion that Porter had the authority to bind Mr. Brown or his assignee by entering into an agreement with Cole, who was an alleged creditor of Brown, but with whom Porter was not specially authorized to transact any business for Brown, much less to pledge Brown's money or property as security for Cole's claim, which was unsettled and unliquidated. We repeat, if Porter had no authority to settle or adjust the claim, and no one contends that he had such power, then whence came his power or authority to secure the same by pledging Brown's money or property? The district court, as a matter of course, arrived at the conclusion that Cole had at least the right to establish his claim against the deceased Brown in the probate court, which is the only court in which claims against decedents may be established and allowed. The court also undertook to hold matters in status quo as between Cole and Brown's estate. The court therefore recognized the fact that Brown's assignee had some rights in the premises, and therefore required Mr. Cole to establish his claim in the probate court. The court, however, overlooked the fact that plaintiff had proved that he was the only person who had the absolute legal right to the money in question by virtue of Brown's and Porter's assignments. As soon as those assignments were delivered to the plaintiff the right and title to the money, notwithstanding Cole's claim, passed to plaintiff, and it thereafter no longer was Brown's money, or, on his death, a part of his estate. The court, under the circumstances, was powerless to hold the money in court until Cole, as Brown's creditor, should establish his claim against Brown's estate. If Cole has a claim against Brown's estate, he may, as a matter of course, establish it in the probate court, and he may then obtain satisfaction thereof out of any property belonging to the estate, but he may not lay claim to property which in good faith passed from Brown in his lifetime to another. That is just what was attempted in this case, however.

For the reasons stated the judgment is reversed, and the cause is remanded to the district court of Box Elder county, with directions to grant plaintiff a new trial and to proceed with the case in accordance with the views herein expressed; defendants to

pay the costs on their appeal, and also to pay the costs on plaintiff's appeal.

MCCARTY and CORFMAN, JJ., concur.

ONTARIO SILVER MINING CO. v. HIXON,
County Treasurer. (No. 2976.)

(Supreme Court of Utah. March 26, 1917.)

TAXATION §158—MINING PROPERTY—DRAIN
TUNNELS.

A tax assessed upon certain drain tunnels used to drain a mine, under Const. art. 13, § 4, authorizing taxation of all machinery used in mining and all property upon or appurtenant to mines and mining claims which have a value separate and independent of all such mines or mining claims, was unauthorized where it appeared that the tunnels had no separate and independent value, though used by adjoining mines for a consideration, but that their value was inseparably connected with the operation of the mine.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 278.]

Appeal from Third District Court, Summit County; C. W. Morse, Judge.

Injunction by the Ontario Silver Mining Company, a corporation, against J. M. Hixon, County Treasurer, etc. From judgment for plaintiff, defendant appeals. Affirmed.

P. H. Neeley, of Coalville, Dan Shields, Atty. Gen., and J. H. Wolfe and O. C. Dalby, Asst. Attys. Gen., for appellant. Van Cott, Allison & Riter, of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff commenced this action in the district court of Summit county to enjoin the defendant, as treasurer of said county, from enforcing the collection of a certain tax assessed and levied upon certain drain tunnels which were constructed and are used to drain plaintiff's metal mine and from selling said tunnels, etc.

The parties appeared in court and agreed upon the facts, which, so far as material, in substance, are as follows: That the plaintiff is the owner and for many years has operated what is commonly known as the Ontario mine, in Summit county, Utah; that as the mining operations in said mine were extended downward into the earth a large and constantly increasing flow of water was developed in said mine; that to drain said water from said mine and to make it possible to successfully develop and mine the minerals therein a drain tunnel known as drain tunnel No. 1 was commenced in July, 1881, and was completed in July, 1883; that by means of said tunnel the water was drained from said mine at the 600-foot level; that thereafter work was continued on said tunnel and it was extended from time to time so that by the aid of large pumps the water was ultimately drained from said mine through said tunnel down to the 1,300-foot level; that, notwithstanding the construction of said tun-

nel and the installation of a large Cornish pump at a cost of about \$500,000, it was necessary to construct another tunnel known as drain tunnel No. 2, which was completed in October, 1894, and which drained the mine down to the 1,500-foot level; that said tunnels, in addition to draining plaintiff's mine, also directly and indirectly drained the metal mines of the mining companies hereinafter mentioned which operated mines in the vicinity of plaintiff's mine; that the cost of constructing said tunnels within the exterior boundaries of plaintiff's mining properties amounted to the sum of \$940,181.15; that in 1894 the plaintiff entered into an agreement with the Daly-West Mining Company whereby said last-named company was given the privilege of using said drain tunnel No. 1 for the purpose of transporting to the surface the ores in its mine by paying a royalty to the plaintiff of 15 cents per ton, and plaintiff also granted said Daly-West Mining Company the right to drain its mine through drain tunnel No. 2, and to transport its ores through the same; that for the latter use said Daly-West Mining Company paid plaintiff the sum of \$750 per month, together with 10 cents a ton for concentrating ores and 15 cents a ton for all other ores; that similar agreements were entered into with the Daly-Judge Mining Company and the Thompson-Quincy Mining Company, whose mines were also being drained by means of said drain tunnel No. 2; that the three foregoing agreements were all made for the purpose of facilitating the mining operations of the Daly-West, the Daly-Judge, and the Thompson-Quincy Companies, both by furnishing suitable easements for the working of the mines and transportation of ores and supplies, but more important for the drainage of the said property without which the cost of mining (and perhaps the practicability) would increase almost to the point of prohibiting mining operations therein; that the said tunnel No. 2 has at all times since its construction been used exclusively for the drainage of said several mines, and no ore, waste, supplies, or other material has ever been transported through it; that the land at and surrounding the portals of said tunnels and through which they are constructed throughout their entire length consists of mining claims and grounds for which the United States has issued patents as such, and the whole of said land so patented is, and has been during the existence of said tunnel, and now is owned and in the possession of the said mining companies; that said tunnels are used only for mining purposes as before stated, and are not, and have not been, used for any other than mining purposes; that said tunnels were assessed at the valuation of \$63,833, that for the year 1913 plaintiff received for the use of said tunnels from said mining companies for the uses aforesaid

the sum of \$14,758.92, and for the year 1914 the sum of \$21,328.51; that the tax levied on said tunnels, and which is sought to be restrained in this action, amounts to the sum of \$2,163.93; that the plaintiff has refused to pay said tax upon the ground that the same is illegal, and the defendant has advertised said tunnels for sale, and, unless restrained, will sell the same under the statute authorizing the sale of property for delinquent taxes.

We have omitted all formal parts and all other surplus matter from the foregoing statement of facts. Upon substantially the foregoing facts, and upon the constitutional provision hereinafter stated, the court found for the plaintiff and made conclusions of law declaring said tax illegal and void, and entered judgment permanently enjoining the defendant from collecting said tax and from selling said drain tunnels.

The defendant appeals, and insists that the district court erred in declaring said tax illegal and void and in entering judgment as stated.

The tax in question was assessed and levied pursuant to article 13, § 4, of our Constitution, which reads as follows:

"All mines and mining claims, both place and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed" by the state board of equalization. (Italics ours.)

The tax must therefore be sustained, if sustained at all, by the provisions of the section we have just quoted.

The Attorney General and his assistants, who appeared for defendant in this court, contend that the tax in question is legal, and that it is based on and sustained by that portion of the section which we have italicized and to which we refer without repeating it here. Counsel for the defendant further insist that the two tunnels in question are property, that they are appurtenant to plaintiff's mine and that they "have a value separate and independent" from its mine. While no case precisely in point has been found, yet both sides cite and apparently rely upon the case of *Hale v. County of Jefferson*, 39 Mont. 137, 101 Pac. 973, in which case a constitutional provision identically like ours was under consideration. In that case a ditch which was used to convey water to a placer mine and by means of which the placer mine was being worked was assessed

for taxation, and the owner of the mine and the ditch brought an action to enjoin the imposition of the tax. It was stipulated in that case that the ditch there in question, which was a number of miles in length, was used for the sole purpose of conveying water to the placer mine, and that the same had never been used for any other purpose, and the owner had never derived any benefits or revenue therefrom, except such benefits as he derived from the use of the water in working the placer mine. It was conceded, however, that the owner of the ditch could sell the water for beneficial uses for other purposes, and that for said purposes the ditch would be valuable. The Supreme Court of Montana held that the ditch there in question did not constitute property having a value "Separate and independent" from the placer mine within the purview of the provision which we have italicized above. Plaintiff's counsel contend that the Montana case is not distinguishable in principle from the case at bar. Upon the other hand, counsel for the defendant insist that the case at bar is distinguishable from the Montana case for the reason, as we have seen, that the plaintiff has derived and is deriving some revenue from the tunnels in question. A careful reading of the aforesaid constitutional provision will, we think, disclose that the mere fact that the owner of the mine may derive some revenue or other benefit from some particular property is not conclusive upon the question as to whether it is assessable for taxation as separate and independent property. No mining property, regardless of where it is situated, is assessable unless it has "a value separate and independent" from the mine. Now, whether any property or any improvement has a separate and independent value from the mine must depend, somewhat at least, upon the use to which such property or improvement is devoted by the mine owner. This is clearly illustrated by the decision in the *Hale Case*, supra. It was stipulated in that case that the property had never been used for any other purpose than to convey water to the placer mine. In the case at bar it is stipulated that the tunnels in question never had been used, and at the commencement of this action were not being used, except for the purposes stipulated—that is, for mining purposes. Now, what value had those tunnels separate and independent from the plaintiff's mine? The moment the mine is permanently shut down or ceases to be operated the tunnels are of no practical value whatever. Upon the other hand, if the tunnels are closed the accumulating water prevents all further progress in the mine. Whatever value the tunnels possess, therefore, is inseparably connected with the operation of the mine. Again, it is very clear that plaintiff's mine cannot be operated without the aid of the tunnels. How can it successfully be maintained, therefore, that

the tunnels in question have a separate and independent value from the mine? Were it not for the fact that the two tunnels can be used to drain mines which are adjacent to plaintiff's mine, and that they can also be used to transport to the surface ores that are mined in those mines, no one, we think, would have ventured the assertion that those tunnels have a value separate and independent from plaintiff's mine. Under the constitutional provision mining property, in order to be assessable, must possess value which is not only separate from, but independent of, the mine. It is quite clear that the two tunnels have no such value. Whatever value they have is connected with and in fact is an integral part of the mine itself. Just as much so as any shaft which descends into the earth or an underground incline, tunnel, or drift would be which was used in connection with the mine. The mere fact, therefore, that the plaintiff's neighbors who are engaged in the business of mining the ores from adjoining mines are willing to pay something for the use of the tunnels through which the working of their mines is made possible cannot change the nature of the property in the two tunnels so as to make it subject to taxation under the constitutional provision aforesaid. Again, if the matter be viewed entirely from the standpoint of economics, neither the state nor any of its subdivisions are prejudiced by the foregoing construction. From the stipulation it is made quite clear that neither the plaintiff's nor any of the other adjacent mines can be successfully worked or operated if the drain tunnels were closed. If the mines were shut down the state would thus necessarily lose all revenues it now derives from that source, and it is clear from the arguments presented by defendant's counsel that, if the plaintiff limited the use of the tunnels to the drainage of its mine, under the constitutional provision, the tunnels would have no separate and independent value which could be assessed for taxation. If the tunnels are taxable, therefore, it is entirely because that, by means of their existence, it is made possible to operate and to develop the mines adjacent to plaintiff's mine. To do that redounds to the benefit of the state at large and to the adjacent mine owners perhaps in a greater degree than it does to plaintiff's benefit. If any one should be taxed, therefore, it should be the adjacent mine owners, but that cannot be done under the constitutional provision, even though they owned the tunnels, because, so far as they are concerned, the tunnels would have no value except in connection with their mines.

We do not wish to be understood by what we have said that, merely because certain property is necessary to operate the mine, for that reason alone it may not be assessed as possessing a separate and independent

value. Whether any specific property may or may not be assessed as having a separate and independent value can be best determined when the facts are presented for decision. It is sufficient now to hold that the tunnels in question are not assessable as having a separate and independent value under our Constitution.

We are of the opinion, therefore, that the two tunnels in question are not assessable for taxation. Any other conclusion would result in the taxation of any shaft, tunnel, or incline in any mine which the mine owner might permit another mine owner to use, in order to work the latter's mine. Moreover, we think, it was not contemplated by the constitutional provision aforesaid that any of the underground tunnels, drifts, or inclines of any mine which are used in connection with the mine, and which are necessary to successfully operate the mine, like the tunnels in question, should be taxed as separate and independent property.

The judgment is therefore affirmed, with costs to respondent.

McCARTY and COREMAN, JJ., concur.

STATE v. MARTIN. (No. 2928.)

(Supreme Court of Utah. March 23, 1917.)

1. CRIMINAL LAW — 1092(8) — BILL OF EXCEPTIONS — DELAY IN FILING — EFFECT.

The district court loses jurisdiction to settle and allow a bill of exceptions not served and allowed within the time fixed by statute or within an extension of that time on proper application, and the Supreme Court cannot consider a bill not settled and allowed within the proper time after conviction.¹

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2855, 2856, 2861.]

2. CRIMINAL LAW — 1092(9) — BILL OF EXCEPTIONS — TIME FOR FILING — STATUTE — EXTENSION.

Under Comp. Laws 1907, § 4946, providing that bills of exceptions in criminal cases shall be settled, signed, and filed as provided by law in civil cases, and section 3286, providing that in civil cases the party desiring to settle a bill of exceptions must serve his proposed bill within 30 days after the entry of judgment or after service of notice of the determination of a motion for new trial, the district courts may, for cause shown, extend the time for settling the bill in case an extension is applied for within the 30-day period, or at any time before a previous extension has expired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2857-2860.]

3. CRIMINAL LAW — 369(15) — EVIDENCE — OTHER OFFENSES — IDENTITY.

In a prosecution for robbery, letters which there was evidence to show defendant wrote and which referred to another robbery, but indicated that it was committed by the same person as

¹ Butter v. Lamson, 29 Utah, 439, 82 Pac. 473; Bryant v. Kunkel, 32 Utah, 377, 90 Pac. 1079; Ins. Agency v. Investment Co., 35 Utah, 542, 101 Pac. 699; Metz v. Jackson, 43 Utah, 496, 126 Pac. 784; Allen v. Garner, 45 Utah, 89, 143 Pac. 228.

committed the robbery in question, are admissible to identify defendant as a guilty party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 824.]

4. CRIMINAL LAW §404(5) — EVIDENCE—PROOF OF HANDWRITING — STANDARD OF COMPARISON.

In a criminal prosecution, the state can introduce letters which it was shown without dispute defendant had written, to be used by experts as standards of comparison with the handwriting of a letter which defendant denied writing, and which showed the guilt of the writer.²

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 892, 1457.]

5. CRIMINAL LAW §1134(3)—APPEAL—SENTENCE—FACTS CONSIDERED.

Notwithstanding Comp. Laws 1907, § 4916, as amended by Laws 1915, c. 113, providing that, when discretion is conferred upon the court as to the extent of punishment, the court may take into consideration any circumstances either in aggravation or mitigation which may then be presented to it by either party, the facts considered by the trial judge in determining what sentence within the legal limits he will impose cannot be reviewed by the Supreme Court, though the judge's preliminary remarks indicated that he was influenced by facts which were brought out in another prosecution against the same defendant tried before him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2989, 2990, 3056.]

6. CRIMINAL LAW §1186(1)—APPEAL—REMAND FOR RESENTENCE.

The trial judge's consideration of facts brought out by another trial in sentencing defendant is not even an irregularity which authorizes the Supreme Court to set aside the sentence and remand the defendant for resentencing, which may be done under certain circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3217, 3219, 3230.]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Joseph Henry Martin was convicted of robbery, and he appeals. Motion to strike the bill of exceptions denied, and judgment affirmed.

John G. Willis and D. L. Stine, both of Ogden, for appellant. Dan Shields, Atty. Gen., and J. H. Wolfe and O. C. Dalby, Asst. Attys. Gen., for the State.

FRICK, C. J. The defendant was convicted of the crime of robbery, was sentenced to the state prison, and appeals.

The state filed a motion to strike the bill of exceptions upon the ground that it was not served within the time required by our statute and that for that reason the district court was without authority to settle and allow the same.

[1] We have frequently held that, unless the proposed bill of exceptions is served and allowed within the time fixed by our statute, or within such an extension of that time as may, on proper application therefor, be fixed by the district court, then that court loses jurisdiction or power to settle and allow the same, and that this court may not consider a bill not settled and allowed within proper

time for any purpose. *Butter v. Lamson*, 29 Utah, 439, 82 Pac. 473; *Bryant v. Kunkel*, 32 Utah, 377, 90 Pac. 1079; *Ins. Agency v. Investment Co.*, 35 Utah, 542, 101 Pac. 699; *Metz v. Jackson*, 43 Utah, 496, 136 Pac. 734; *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228. The question therefore is: Was the bill of exceptions in question served and allowed within the proper time?

[2] Our statute (Comp. Laws 1907, § 4946) provides that bills of exceptions in criminal cases "shall be settled, signed and filed as provided by law in civil cases." Section 3236 provides that in civil cases the party desiring to settle a bill of exceptions must prepare and serve his proposed bill on the adverse party "within thirty days after the entry of judgment * * * or [within thirty days] after service of notice of the determination of a motion for a new trial." The district courts may, however, for good cause shown, extend the time in case an extension is applied for within the 30-day period aforesaid, or at any time before a previous extension has expired. See cases above cited. The motion for a new trial in the case at bar was denied on December 11, 1915. The statutory time within which to prepare and serve a bill therefore expired on January 10, 1916. On January 3, 1916, the defendant applied for and was granted 30 days' "additional time within which to prepare and serve" his proposed bill of exceptions. That extension gave him to the tenth day of February, 1916, within which to prepare and serve his proposed bill of exceptions. On February 10, 1916, he obtained another extension of 30 days. The time was thus extended to March 11, 1916. The defendant's proposed bill of exceptions was actually served on February 23, 1916, and was settled and allowed by the district court on March 9, 1916. The bill was therefore served, settled, and allowed and filed within proper time, and hence the motion to strike the same must be denied.

We now proceed to a consideration of the merits of the appeal.

Defendant's counsel, in their brief, state the matters to be reviewed by us in the following terms:

"The defendant was indicted upon a charge of robbery. Upon trial he was convicted. He appeals, and urges that reversible errors were committed by the trial court in three general particulars, viz.: (1) In the admission of testimony, pertaining to conversations; (2) in the admission of testimony, pertaining to identity; and (3) by the court taking into consideration circumstances, upon which it based the quantity of penalty inflicted, in direct violation of the statutes pertaining thereto."

[3] The first assignment arises as follows: The defendant was charged with robbery alleged to have been committed on the 28th day of October, 1911. On the trial of the cause, however, the state produced evidence tending to show that the defendant had

§—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

² *Smith v. Hanson*, 34 Utah, 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520.

written certain letters in which he connected himself with a certain attempted robbery, which was attempted on the 11th day of August, 1911. The alleged robbery last above referred to was attempted at the same place and upon the same person as was the robbery in this case, and the contents of the letters referred to clearly indicated that the person attempting the commission of that robbery was the same person who it was alleged committed the robbery in question, and that it was committed at the same place and upon the same person. The letters were offered by the state merely as a means of identifying the person who it was alleged committed the robbery in question here. If the defendant wrote the letters in question, and the jury found that he did write them, then the contents of those letters clearly identified the defendant as the person who committed the robbery in question. The transaction of August 11, 1911, was therefore not offered nor admitted for the purpose of showing that the defendant had in fact committed or attempted to commit another independent crime or offense, but both the letters and what occurred on that occasion were offered and admitted only as a means of identifying the defendant and to connect him with the offense charged; and we can conceive of no good reason, and none is suggested, why the letters and the evidence which is objected to were not admissible for that purpose. That the evidence and letters were admissible for that purpose is well settled. Wharton, Crim. Ev. (10th Ed.) p. 133 et seq., and cases cited; *People v. Harben*, 5 Cal. App. 29, 91 Pac. 395.

[4] It is further contended that the district court erred in admitting in evidence certain writings as standards of comparison which the state proved had been written by the defendant. This assignment is based on the following facts: The state had in its possession a large number of letters which it was contended were written by the defendant, and which, if written by him, contained very strong, if not conclusive, evidence that he had committed the offense charged against him. The authenticity of the letters was disputed by the defendant, and the state produced the writings in question as standards of comparison and submitted them to certain experts on handwriting who testified that in their opinion the letters in question were written by the same person who had written the writings that were used as standards of comparison which were produced by the state, and which it was shown, without dispute, the defendant had written. Counsel for defendant insists that the district court erred in admitting in evidence the standards of comparison aforesaid and in permitting the handwriting of the defendant to be used as a standard of comparison which was not in the case for some other legitimate purpose. It is not necessary for us at this time to again review

the conflicting views of the courts upon this proposition and the conditions under which such views arise. That was sufficiently done in the case of *Smith v. Hanson*, 34 Utah, 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520. The question raised and discussed by counsel was considered and decided against their contention in the case just referred to. In that case, after giving the subject careful consideration, we explicitly held that a writing that is proved to the satisfaction of the court to be the handwriting of the person whose handwriting is in dispute, when such writing was made under ordinary and proper conditions, may be used by both the experts on handwriting and the jury as a standard of comparison. We are content with the conclusion there reached upon this subject, and hence refrain from pursuing the subject further.

[5] Finally, it is earnestly contended that the district court committed error prejudicial to the substantial rights of the defendant in passing sentence upon him. The record discloses that before passing sentence the district court reviewed the past record of the defendant, and in doing so referred to some matters that were not made a part of the record in the case at bar, but which had come out on a former trial of the defendant which occurred before the same judge who tried the case at bar, and which matters related to or were connected with the circumstances shown at the present trial. It could subserve no good purpose for us to repeat here the comments made by the district judge in passing sentence. It must suffice to say that the judge at considerable length discussed a number of matters which occurred in the course of the former trial and which were strongly incriminating, and which, in the mind of the judge, clearly disclosed that the defendant deserved a rather severe sentence. Indeed, the court strongly intimated that it was entirely within the power of the defendant either to affirm or dissipate some very strong incriminating circumstances that in the mind of the judge proved his guilt. Counsel vigorously insist that under our statute (Comp. Laws, 1907, § 4916, as amended by chapter 113, Laws Utah 1915) the district judge was powerless to consider anything either in mitigation or in aggravation of punishment, unless he heard the facts in relation thereto in open court, as in that section provided. It should be remembered that it is not contended that the alleged error now under consideration in any way affected the fairness or impartiality, or that it in any way influenced the result of the trial. The question therefore is whether this court can review a matter which merely reflects the mental attitude of the trial judge, which is the result of what the judge heard and saw during two trials of the defendant.

If it be assumed that the judge's condition of mind and what he had heard and seen during the two trials to some extent at

least influenced him in passing sentence, yet the question still remains whether that is a matter that is subject to review by this court. Suppose the judge, with the matters referred to by him in mind, but without giving them expression, had merely imposed sentence upon the defendant. The effect, so far as he is concerned, would have been precisely the same as it now is; the only difference being that the judge would have remained silent with respect to the matters he had in mind. It would have been the same judge with the same mental attitude or condition that would have passed sentence. That merely shows that the mental attitude of the judge, whether expressed or not, in passing judgment, cannot be made a matter for review by this court. Moreover, the whole matter arose after the trial was ended and after the jury had passed on the facts, and therefore could have had no influence upon the trial or the result thereof. Then again, the court pronounced only the sentence which the law imposed; that is, while the law permitted the judge to impose a lesser punishment than he did, yet it also authorized him to impose the very one he did in fact impose. The sentence therefore strictly conforms to the statute, and, that being the case, we are powerless to declare it illegal, or even erroneous. The question presented by counsel therefore is not one that is reviewable by this court, but under our Constitution may be presented to the board of pardons, and when, in their judgment, the defendant has been sufficiently punished for the crime of which he stands convicted, that body may either pardon him or commute his sentence, and may thus restore him to liberty.

[8] The matter presented here does not even constitute such an irregularity as would authorize this court to set the sentence aside and remand the defendant to the trial court for resentencing, which may be done under certain circumstances, as is clearly made to appear from the following authorities: *People v. Johnson*, 71 Cal. 384, 12 Pac. 261; *State v. Houghton*, 46 Or. 12, 75 Pac. 822; *State v. Harness*, 11 Idaho, 122, 80 Pac. 1129; *People v. Rardin*, 255 Ill. 9, 99 N. E. 59, Ann. Cas. 1913D, 282.

The record presented for review discloses no reversible error, and the judgment therefore should be, and it accordingly is, affirmed.

MCCARTY and CORFMAN, JJ., concur.

DURKEE DITCH CO. et al. v. MEANS et al.
(No. 8768.)

(Supreme Court of Colorado. April 2, 1917.)
WATERS AND WATER COURSES — 146 — IRRIGATION — RIGHTS.

Seepage water which originally was diverted from a stream for irrigation and flowed into

a gulch tributary to the same stream cannot be diverted from the gulch to the prejudice of the rights of senior appropriators on the stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 153.]

Error to District Court, Delta County; Thomas J. Black, Judge.

Petition by J. H. Means and others against the Durkee Ditch Company and others. There was a judgment for petitioners, and plaintiffs bring error. Reversed and remanded, with directions.

William H. Burnett and Milton R. Welch, both of Delta, for plaintiffs in error. Catlin & Blake, of Montrose, for defendants in error.

BAILEY, J. In June, 1912, defendants in error filed a petition in a water adjudication proceeding in Water District No. 40, for an original decree for a ditch designated as the Morton Ditch Appropriation No. 2 Ditch, wherein it was alleged that said ditch took its waters from Madsen gulch, conveying it therefrom to a ditch called the Morton Ditch, and thence to their lands. They further alleged that since 1904 the waters of Madsen gulch had been used by them, that it was a natural stream supplied by springs and seepage water, that the gulch and the water were tributary to the Morton Ditch Irrigation System through Appropriation No. 2 Ditch, and since the appearance of seepage and spring waters in that gulch the ditch had been used to divert water therefrom to their lands. It was found upon the hearing that Appropriation No. 2 Ditch collected seepage and return waters from Madsen gulch, that these waters had increased gradually, so that, in 1912, it supplied 1.6 second feet of water, and that Madsen gulch was tributary to Dry Creek, a small stream emptying into the Gunnison River, in Delta County.

Upon these findings an original appropriation was decreed, based upon original construction and use. There was incorporated in the findings of fact a paragraph to the effect that all of the Madsen gulch water had at all times been diverted and used by petitioners, and that none thereof had ever been allowed to flow down to Dry Creek. The decree treats the appropriation by petitioners of these waters as an independent, prior appropriation, not subject to priorities on Dry Creek, to which stream such waters would be tributary, if permitted to flow beyond claimants' ditch.

A protest against the petition was filed by plaintiffs in error, alleging in substance that they were the owners of certain priorities on Dry Creek, and that Madsen gulch was tributary thereto; that, except for the irrigation of lands adjacent to Madsen gulch by waters from Dry Creek, no seepage or return water would flow in said gulch at any time; that if the waters were not intercepted and caught up they would flow down the gulch to Dry

Creek, and thus supply senior priorities lower down that stream; and that there is not sufficient water to supply the needs of the senior priorities of plaintiffs in error on that stream. Their objections to the decree were overruled, and upon exceptions reserved the matter is here for review on error.

It appears from the record that the parties herein were all parties to adjudication proceedings in Irrigation District No. 40, in 1908, at which time priorities on Dry Creek were adjudicated. Plaintiffs in error were there awarded priorities senior to that of defendants in error, who then were decreed a priority from that stream for the ditch known as the Morton Ditch. Defendants in error then testified that they had no other source of supply for their lands. It also appears that the Morton Ditch crosses Madsen gulch, and that prior to the construction of the Morton Ditch Appropriation No. 2 Ditch, the waters of that gulch, what there were of them, had run directly into and through the Morton Ditch.

Madsen gulch is a natural gulch, or draw, arising in the mesa east of Dry Creek, and emptying into it. The gulch was originally comparatively dry; but since the surrounding mesas have been under irrigation water in constantly increasing quantities has been found in the gulch. It is not disputed that this water is seepage, waste and return water following its natural course back to Dry Creek, whence it was taken, and that it would reach that stream if not intercepted. It is not added water. It is in no sense new or developed water. It belonged originally to Dry Creek, and yet so belongs. Both parties have cited *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107, in support of their respective contentions. Plaintiff in error relies upon the general doctrine there laid down, and defendants in error upon the statement therein that this general doctrine is not to be unreasonably extended, to include situations where its application would be inequitable and unjust. The general principles laid down in that opinion govern the case at bar, and are applicable to the questions involved in this case. The waters of Madsen gulch, claimed by defendants in error, being naturally tributary to Dry Creek, are not subject to independent appropriation and diversion, to the injury of senior rights down that stream. The fact that these waters have been captured before they again reach Dry Creek in no wise strengthens the position of petitioners, for the waters are to be considered a part of the stream from the moment they are released by a user, under an appropriation from it, and they must be permitted to return to the stream, for the benefit of other appropriators therefrom, in the order of their priorities.

Other errors have been assigned, but consideration of them is unnecessary.

The judgment is reversed, and cause remanded for further consideration in conformity with the views herein expressed.

WHITE, C. J., and ALLEN, J., concur.

MIHOOVER v. WALKER et al. (No. 8815.)
(Supreme Court of Colorado. April 2, 1917.)

1. VENDOR AND PURCHASER ⇨286(1) — VENDOR'S LIEN—WAIVER—ASSUMPTION OF MORTGAGE.

Where, as part consideration for a sale, the purchaser of land assumed the payment of an incumbrance, and the vendor was compelled to discharge the incumbrance, he could enforce his lien; the assumption of the mortgage not being a waiver.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 713, 715, 719, 722-732.]

2. MORTGAGES ⇨624(1) — REDEMPTION BY HOLDER OF EQUITY—EFFECT.

Where the holder of the equity of redemption redeems land sold on foreclosure of a mortgage, he acquires no rights other than those which existed at the time of the foreclosure; the estate being restored to him free of the lien which was foreclosed, but subject to all others.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1878.]

3. MORTGAGES ⇨624(1) — RIGHT OF GRANTEE OF OWNER OF EQUITY.

A grantee of the equity of redemption in mortgaged land has no better right than his grantor in redeeming the land from foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1878.]

4. PLEADING ⇨214(1) — DEMURRER — ADMISSION.

Demurrer to a bill admits its allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529.]

5. VENDOR AND PURCHASER ⇨265(1) — VENDOR'S LIEN—SUBSEQUENT PURCHASERS AND INCUMBRANCERS.

A vendor's lien avails against all subsequent purchasers and incumbrancers of the land under the grantee who are not bona fide purchasers for valuable consideration and without notice, being good as to all purchasers with notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700, 701.]

6. VENDOR AND PURCHASER ⇨265(1) — VENDOR'S LIEN—ASSUMPTION OF MORTGAGE INDEBTEDNESS.

Where the owner of land incumbered it by deed of trust to the public trustee of a county to secure a note, and thereafter sold the land to one who agreed to pay the note as part of the purchase price, but the latter failed to pay interest, so that the deed of trust was foreclosed, and the land bought in by the holder of the note, leaving an amount still due, and the grantee of the first owner transferred his equity of redemption by deed made subject to the incumbrance and to a recorded note given by the grantee to the original owner to evidence a further part of the purchase, and the last party conveyed to defendants, the original owner of the land could assert and enforce a vendor's lien against defendants, who had notice of the first grantee's agreement to pay the note, since failure to pay the assumed debt was failure to pay the agreed purchase price; it being presumed that the

amount of the lien was deducted from the price defendants paid for the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700, 701.]

Error to District Court, Pueblo County; C. S. Essex, Judge.

Suit by John R. Mihoover against Zella M. Walker and another. To review a judgment dismissing the suit, plaintiff brings error. Reversed, and cause remanded for further proceedings.

Highberger & Garnett, of Pueblo, for plaintiff in error. W. O. Peterson, of Pueblo, for defendants in error.

TELLER, J. The plaintiff in error was plaintiff below in a suit against the defendants in error to foreclose a vendor's lien. The complaint alleges that the plaintiff, being the owner of an unincumbered title in fee to certain real estate, incumbered the same by deed of trust to the public trustee of Pueblo county to secure a note of \$800; that thereafter he sold and conveyed said real estate to one Schrader, who agreed to pay said note as a part of the purchase price of the land so sold to him; that because said Schrader failed to pay interest which became due on the note, the deed of trust was foreclosed, and the land bought in by the holder of the note at \$500, leaving still due the sum of \$381.86; that Schrader transferred his equity of redemption in the premises to one Boese, by deed which was made subject to said incumbrance of \$800, and to a recorded note of \$200, given by Schrader to plaintiff to evidence a further part of the purchase; that Boese, on the day of the transfer to him, by quitclaim deed conveyed his interest in the land to the defendants; that both Boese and defendants took their respective conveyances with full knowledge of plaintiff's claims in the sums of \$381.86 and \$200, respectively; that plaintiff was compelled to pay to the holder of his note the balance of \$381.86; that the defendants redeemed the premises from the sale under the deed of trust, and now claim the property free of plaintiff's liens; and that Schrader is insolvent, wherefore plaintiff has no remedy save in equity. The defendants filed a demurrer setting up that the complaint did not state a cause of action. The demurrer was sustained, the plaintiff elected to stand on his complaint, and the suit was dismissed.

The question before us is that of the correctness of the court's ruling on the demurrer and consequent judgment of dismissal. The only question argued is as to the right in plaintiff to a vendor's lien.

It is not disputed that a vendor's lien is recognized in this state (*Fostoria G. M. Co. v. Hazard*, 44 Colo. 595, 99 Pac. 758); but defendants in error contend that there is no such lien in this case. Counsel cite 39 Cyc. 1787, to the effect that a vendor's lien exists when the vendor "has taken no security for

the purchase money, other than the personal obligation of the purchaser," and contends that this case does not fall within that definition because plaintiff, by requiring Schrader to assume the debt on the premises, took what amounts to security, "for with that agreement" counsel says, "Schrader could not get the property clear without paying the debt." But counsel now claims that the property is clear as a result of Schrader's failure to comply with that agreement. How the effect which it is declared can be produced only by paying the debt can result from a refusal to pay it and a consequent sale on foreclosure is not pointed out.

[1] The assumption of a mortgage on the property purchased is not a waiver of the vendor's lien. In 39 Cyc. at page 1802, it is said:

"Where, as a part of the consideration for the sale, the purchaser assumes the payment of an incumbrance on the land, and the vendor is compelled to discharge such incumbrance, he may enforce the lien."

See, also, *Elliott v. Plattor*, 43 Ohio St. 198, 1 N. E. 222, *Strohm v. Good*, 113 Ind. 93, 14 N. E. 901, and *Bach v. Kldansky*, 186 N. Y. 368, 78 N. E. 1088.

Counsel appears to recognize the law as laid down by the above-named authorities, and does not seriously contend that there was not a lien on the land while in Schrader's hand; but insists that, since the defendants Walker did not assume the debt, and paid the full sum required to redeem, the lien is lost. He urged that if the lien is held good the statutory right of redemption is abrogated.

[2] This indicates a misapprehension of the effect of such redemption, and a failure to recognize the distinction between a redemption by a creditor, and one by the holder of the equity of redemption. The latter by redeeming acquires no rights other than those which existed at the time of the foreclosure. The estate is restored to him free of the lien which was foreclosed, but subject to all others. *Warren v. Fish*, 7 Minn. 482 (Gil. 347).

[3] A grantee of the equity of redemption has no better right than his grantor. "A conveyance by the debtor can confer no greater rights than he himself had. It cannot disincumber the property, nor give a better or superior title. The successor is not a bona fide purchaser for value, but simply occupies the shoes of his predecessor, with no new or enlarged rights or privileges." *Flanders v. Aumack*, 32 Or. 19, 51 Pac. 447, 67 Am. St. Rep. 504. See, also, *De Roberts v. Stiles*, 24 Wash. 619, 64 Pac. 795.

[4] The demurrer admits the allegations of the bill that the defendants and their grantor took title with full knowledge of plaintiff's claim for a balance on the purchase price. Was this, then, a valid lien as against the Walkers?

[5] Such a lien "avails against all subse-

quent purchasers and incumbrancers of the land under the grantee, who are not bona fide purchasers for a valuable consideration and without notice." Pom. Eq. Juris. vol. 3, 1253. In other words, it is good as to all purchasers with notice. "If the purchaser of land knows that his vendor is still owing a part of the purchase money, for which no security has been given, he will take the land subject to the implied lien of the original vendor." Koch v. Roth, 150 Ill. 212, 37 N. E. 317. See, also, Swan v. Benson, 31 Ark. 728; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Strohm v. Good, 113 Ind. 93, 14 N. E. 901; Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356; Thomas v. Bridges, 73 Mo. 530; Whetsel v. Roberts, 31 Ohio St. 503; Warvelle on Vendors, § 680; 39 Cyc. 1820.

In Koch v. Roth, supra, it was held that if the vendee, who has assumed a debt of his grantor as a part of the purchase price, conveys to one who has notice of such assumption, and the latter settles the debt for less than its face, the vendor has a lien for the amount of the discount. The court there said:

"Upon principle, there can be no good reason why there should not be a lien for unpaid purchase money due the vendor, whether such money is to be paid into the hands of the vendor himself, or into the hands of a creditor for his benefit. * * * The vendor's lien is based upon the theory that a vendee ought not to hold the land of another and not pay for it; and the rule, that equity looks to substance and not form, is applicable to the enforcement of vendor's liens."

In Elliott v. Plattor, supra, there was an exchange of property, one of the parties agreeing as a part of the consideration for his purchase to remove incumbrances on the land which he conveyed. This he did not do. The court held that the other party had a vendor's lien on the land which she conveyed, and said:

"The vendor's lien is based upon the theory that it would be unconscionable that the vendee should hold the land and not pay for it."

In Strohm v. Good, supra, the facts are similar to the case at bar in that the vendee assumed and agreed to pay a mortgage which was on the land which he bought. The vendor afterward paid the mortgage, and the vendee claimed that such payment extinguished the lien; but the court refused to agree to that contention. It said:

"Where one buys land and refuses to pay for it, equity awards his vendor a lien, which will be kept alive for his protection."

[6] The authorities are agreed that in cases like this the failure to pay the assumed debt is a failure to pay the agreed purchase price, and it is as inequitable to permit the Walkers, who had notice of the agreement, to escape payment, as it would have been for Schrader to do so. The Walkers having

knowledge of the lien, it is presumed that the amount of the lien was deducted from the price they paid for the property. Weiner v. Heintz, 17 Ill. 259; Warvelle on Vendors, § 680. It would be grossly unjust under such circumstances to permit defendants in error to hold the property without making full payment of the purchase price by paying plaintiff in error's claim. The court erred in sustaining the demurrer and dismissing the suit. The question as to the time of enforcing the lien of the \$200 note, which is now past due, is moot, and requires no consideration.

The judgment is reversed, and the cause remanded, for further proceedings in harmony herewith.

WHITE, C. J., and HILL, J., concur.

INTERSTATE SAVINGS & TRUST CO.
et al. v. WYATT. (No. 8673.)

(Supreme Court of Colorado. April 2, 1917.)

JUDGMENT \Leftrightarrow 817 — FOREIGN JUDGMENT—RECOGNITION.

The statute of Texas giving to a person paying more than the legal rate of interest a right to recover in an action of debt double the amount of interest paid, though in a sense penal as to the party exacting the usurious interest, is remedial as to the party paying, so that a Texas judgment based on such statute is entitled to recognition in Colorado.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1456, 1457.]

En Banc. Error to Court of Appeals.

Action by Nannie D. Wyatt against the Interstate Savings & Trust Company and the Interstate Savings Bank. There was judgment for plaintiff, and defendants brought error to the Court of Appeals, which affirmed (27 Colo. App. 217, 147 Pac. 444), and defendants bring error. Affirmed, and cause remanded.

J. Foster Symes, of Denver, for plaintiffs in error. Robinson & Robinson, of Denver, for defendant in error.

TELLER, J. The defendant in error recovered a judgment against plaintiffs in error in the state of Texas, and brought suit on it in this state and had judgment. The action in Texas was under a statute of that state which gives to a person paying more than the legal rate of interest a right to recover, in an action of debt, double the amount of the interest so paid. When the case for the plaintiff was closed, defendants moved for judgment on the ground that the Texas judgment was obtained in an action for a penalty for the violation of a public law, and that such judgment ought not to be enforced in this state. The motion was denied, and a writ of error prosecuted to the Court of Appeals. That court affirmed the judgment (27 Colo. App. 217, 147 Pac. 444), and we are

now to determine as to the correctness of that action.

It is contended that the Texas judgment is not entitled to full faith and credit in this state under the federal Constitution and laws, because, it is said, it is penal in character, and "the courts of no country execute the penal laws of another."

Counsel cites several cases in which courts of one state have refused to recognize a right of action under the laws of another state, which were held to be penal. In some cases cited the refusal to give effect to the laws of a sister state was put upon the ground that said laws were contrary to the public policy of the state in which the suit was brought. The Court of Appeals found that some of these cases could not be distinguished in principle from the case at bar, but declined to follow them because of the greater authority to the contrary. It followed *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, which has been approved in many cases.

In *Credit Men's Adjustment Co. v. Vickery et al.*, 161 Pac. 297, this court held, on the authority of *Huntington v. Attrill*, supra, that, while the statute which makes directors of a corporation liable for its debts when it fails to file the annual statement required by law was penal as to the liability of the directors, and to be strictly construed, it was remedial as to the creditors. In *Huntington v. Attrill*, supra, the court had under consideration the action of the Maryland Court of Appeals which held penal and unenforceable in Maryland a judgment rendered in New York assessing a penalty on a director of a corporation for making a false oath as to its affairs. The subject of penal statutes was discussed at length, the court, among other things, saying:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * * Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' *Lake v. Smith*, 1 Bos. & Pal. (N. R.) 174-181. * * *

"The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

Again the court said:

"The test is not by what name the statute is called by the Legislature or the courts of the

state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

It was accordingly held that the New York statute under which the judgment was recovered was not a penal law in the international sense, and the judgment of the Maryland court was reversed.

Following the rule as announced in *Credit Men's Adjustment Co. v. Vickery*, supra, it must be held that, while the Texas statute is in a sense penal as to the party exacting the usurious interest, it is remedial as to the party paying it. The Texas judgment is entitled to recognition in this state.

The judgment is affirmed, and the cause remanded to the district court.

ALLEN, J., not participating.

SOUTHWESTERN SURETY INS. CO. v. MILLER et al. (No. 8794.)

(Supreme Court of Colorado. April 2, 1917.)

1. DETECTIVES ↔ 3—BONDS—CONSTRUCTION.

Rev. St. 1908, § 2083, requiring private detective agencies to give bonds, declares that such bonds shall be conditioned that the principal obligor shall lawfully and faithfully, without oppression, and without compounding any criminal offense, carry on the detective business within the state. Pursuant thereto, a detective agency executed a bond conditioned in the language of the statute. Held that, as the statute further provides that suit may be brought by any person injured by a breach of any of the conditions thereof, an employer of the detective agency may sue on the bond for its breach.

[Ed. Note.—For other cases, see *Detectives*, Cent. Dig. § 2.]

2. DETECTIVES ↔ 3 — BONDS — LIABILITY—"BUSINESS."

In view of Rev. St. 1908, § 2086, there may be a breach of the bond of a detective agency with respect to the detective business, instead of what is commonly understood as detective work; the business being that which occupies the time, attention, and labor of men for the purpose of livelihood or profit. Hence a patron of a detective agency may sue on a bond given under the above statute for damages where the detective making representations that he needed money to carry on the work induced plaintiff to execute to him a warranty deed to lands to enable him to raise funds and he fraudulently conveyed the lands, to plaintiff's damage.

[Ed. Note.—For other cases, see *Detectives*, Cent. Dig. § 2.

For other definitions, see *Words and Phrases*, First and Second Series, *Business*.]

3. DETECTIVES ↔ 3—BONDS—LIABILITY.

A detective agency, which executed a bond pursuant to Rev. St. 1908, § 2083, conditioned that the agency should lawfully, honestly, and faithfully, without oppression, and without compounding any criminal offense, carry on the detective business within the state and perform such services and such business as employed to perform, may violate the terms of the bond without being guilty of oppression or compounding any criminal offense, where it defrauded patrons by misrepresentations; the words "law-

fully, honestly and faithfully," not being limited by the expression "oppression or compounding of any criminal offense."

[Ed. Note.—For other cases, see Detectives, Cent. Dig. § 2.]

4. APPEAL AND ERROR ⇨1170(5)—REVIEW—HARMLESS ERROR.

In view of Sess. Laws 1911, p. 17, § 20, declaring that the Supreme Court shall disregard any error or defect in the proceedings not affecting the substantial rights of the parties, a variance between pleading and proof is not prejudicial, where the evidence disclosed a greater degree of wrongdoing on the part of defendant than alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4542.]

5. DETECTIVES ⇨3—BONDS—ACTIONS—COMPLAINT.

The complaint seeking recovery on a bond given by detective agency set forth the bond in full, and subsequently alleged the acts of the detective acting as agent of the agency which showed a violation of the bond. *Held*, that under Mills' Ann. Code, § 49, declaring that the complaint shall contain a statement of facts constituting a cause of action in ordinary and concise language without unnecessary repetition, the complaint was sufficient to state a cause of action against the surety showing the relation of the parties and the breach of the condition of the bond.

[Ed. Note.—For other cases, see Detectives, Cent. Dig. § 2.]

6. NEW TRIAL ⇨99 — NEWLY DISCOVERED EVIDENCE—RIGHT TO.

Alleged newly discovered evidence does not warrant the granting of a new trial unless it appear there was no lack of diligence and such evidence contradicts material evidence of the successful party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207.]

7. DETECTIVES ⇨3 — BONDS — MEASURE OF DAMAGES.

Where a detective agency defrauded a patron, the patron's measure of damages is such sum as will fairly compensate her for the loss suffered, and an instruction to that effect in an action on a bond is not objectionable, particularly where substantially the same instruction was requested by the surety.

[Ed. Note.—For other cases, see Detectives, Cent. Dig. § 2.]

8. APPEAL AND ERROR ⇨1004(1)—REVIEW—VERDICT.

It being the duty of the jury to reconcile the evidence, a verdict supported by sufficient testimony cannot be disturbed on appeal as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944, 3946.]

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Carrie Miller, in the name of the People of the State of Colorado, by and to the use of Carrie Miller, against the Southwestern Surety Insurance Company, a foreign corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

West & Strickland, K. D. Battle, and N. P. Rathvon, all of Denver, for plaintiff in error. Edwin N. Burdick and De S. De Lappe, both of Denver, for defendant in error.

ALLEN, J. This was an action brought by Carrie Miller, in the name of the people, against the Southwestern Surety Insurance Company, as a surety upon the bond of the Central Detective Agency.

The complaint sets out in full the bond sued upon. The condition of the bond is as follows:

"Now, therefore, if the said Central Detective Agency shall lawfully, honestly and faithfully, without oppression and without compounding any criminal offense, carry on said business, and shall perform such services in said business as the Central Detective Agency may be employed to do or perform, and shall obey, do and perform each and every and all duties, terms and conditions and requirements of all of the provisions of the laws of the state of Colorado, now in force, or that may hereafter be adopted applicable and pertaining to such business license, as aforesaid," etc.

This bond was given by the said detective agency in pursuance to section 2088, R. S. 1908, and is conditioned according to the requirements of that statute. The said section provides, among other things, that:

Such bond shall be "conditioned that the principal obligor in such bond shall lawfully, honestly and faithfully, without oppression, and without compounding any criminal offense, carry on the detective business within this state, and perform such services in such business as he may have been employed to do or perform."

The complaint also alleges, in substance, that one Taggart, as agent of such detective agency, was engaged by the plaintiff to perform certain detective work, and while so engaged Taggart made representations to the plaintiff as to the need of money to carry on the work, and proposed to said plaintiff that money sufficient should be raised by the mortgage of certain lands owned by her; that said Taggart stated to plaintiff that upon her execution to him of a warranty deed to such lands he would proceed to raise the money thereon for the purpose aforesaid; that thereupon plaintiff executed a warranty deed to said Taggart to be used as security in raising such sum of money, and thereafter the said Taggart falsely and fraudulently made representations to the plaintiff that he was unable to raise such sum of money, but that in truth and in fact the said Taggart did record such deed and did sell, transfer, and convey said lands to a third party, and did receive for such sale, transfer, and conveyance the sum of \$600, without the knowledge or consent of the plaintiff except as hereinbefore set forth; that the said Taggart converted the said \$600 so obtained to his own use; that such land was at the time worth \$3,200.

Most of the assignments of error are based upon the proposition that, even though the facts relative to the real estate transactions may be true as pleaded and testified to by the plaintiff below, she is not entitled to recover under the law. We think none of such assignments of error are well taken.

[1] The first question presented for our

determination is the same as that raised by the surety company's demurrers to the complaint, the overruling of which is assigned as error, and that is whether or not the acts of the detective agency, acting by the said Taggart, and complained of by the plaintiff below, are within the terms and conditions of the bond.

Some effort is made by the plaintiff in error to show that an employer cannot be in a position to sue upon the bond of a detective agency whom he has employed. Section 2088, R. S. 1908, provides that suit upon such bond may be brought "by and to the use of any person * * * injured by a breach of any of the conditions thereof." Under the statute, the benefit appears to inure to the party injured in case of a breach of the bond. We deem this sufficient as showing that the employer of a detective agency, as well as any other person, may in a proper case avail himself of the remedy provided for in the statute above cited. We think the intention of the statute is to give equal protection and to afford a remedy to the employer of detectives and to persons subject to the detectives' investigations from the unlawful, unfaithful, and dishonest conduct of the detective in the course of the performance of his duties, within his contractual relations, and within the scope of his employment, if injury should result from a breach of the bond on account of such conduct. The case of *Frost v. American Surety Co.* (1914) 217 Mass. 294, 104 N. E. 750, Ann. Cas. 1917A, 583, is authority for the proposition that the relation of master and servant obtains between the detective and his employer and that the bond is for the protection of the employer.

[2] The further question arises as to what acts may constitute a breach of the conditions of the bond. We can yield no assent to the contention of plaintiff in error that such acts must pertain solely to what is commonly understood to be "detective work." The statute and the bond has reference to "the detective business." A "business" is that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. 9 C. J. 1101. A man may do in the course and as a part of his business many acts which would be done if he were engaged in some other business, such as keeping books or making and carrying out agreements for compensation for services rendered or goods furnished in the business. When he performs these acts, he is not popularly understood to be doing anything outside of his regular business. When the detective Taggart committed the acts complained of, he was still regarded by the public and by all persons concerned as carrying on the detective business, since these acts had reference to securing profit, not as a real estate agent, but in the detective business; the profit being ostensibly and in reality by way of compensation for detec-

tive services within his employment by the plaintiff Miller.

The words "carry on the detective business," as found in the statute and in the bond, constitute a general expression. General words in a statute should receive a general construction. 36 Cyc. 1118. The words quoted are joined with the conjunction "and" to a clause containing the words "perform such services," from which it is reasonable to conclude that, while the words last quoted refer to acts pertaining to the work of detecting or investigating, the words first quoted have a broader meaning and are intended to comprehend acts outside of those pertaining to detective work.

The Legislature intended to place the business of private detectives in the hands of trustworthy persons only. This appears from section 2086, R. S. 1908, which provides, among other things, that the application for a license to carry on the detective business shall contain the names of not less than three persons as references of whom inquiry can be made as to the character, standing, and reputation of the party making the application. Mere references, or responses made to inquiries, are not a guaranty of the honesty or reliability of any person. Hence the statute in a subsequent section requires a bond to be furnished by the detective, and the bond is intended to be a security that the detective will carry on his business as a trustworthy person and that the employer of such detective will not be injured by the manner in which the latter carries on his detective business. The bond is for the protection of the employer, as was stated. While such employer may be injured by an unlawful, unfaithful, or dishonest mode of doing detective work, it is also true that such employer may be injured by fraud practiced upon him by the employed detective in carrying on the business. In carrying on the business the detective may make agreements as to the compensation for detective services; such agreements are a part of the detective business. In the making and carrying out of such agreements, the detective has the same opportunity, if not a greater one, to inflict injury upon his employer than by the manner in which he conducts the detective work contracted for. The intent of the statute is to protect employers in their dealings with detective agencies, so that when such detective agencies are employed to make an investigation they shall deal with their employer "lawfully, honestly and faithfully," as long as business relations arising out of the employment and connected with it continue. The conditions of the bond apply to such acts as are done in the course of employment, and also such acts as are done to enable the detective to perform his detective duties or to compensate him therefor.

[3] Detective agencies may violate the terms of the bond without being guilty of the "oppression" of the "compounding of any

criminal offense" mentioned in the statute, since the words "lawfully, honestly and faithfully" each bear their distinct significance and have the same force and effect as if they were not followed by the phrase "without oppression, and without compounding any criminal offense."

[4] We do not think that the plaintiff in error is in a position to complain that the allegations of the complaint were not supported by the evidence or that there was a variance between the pleading and the proof. From our examination of the abstracts of the record, we are forced to reach the conclusion that the evidence disclosed a greater degree of wrongdoing on the part of the detective Taggart than that alleged in the complaint, and we are unable to see that there was such a variance between pleading and proof as was prejudicial to the plaintiff in error. Under these circumstances, we cannot reverse the judgment on such grounds, especially is this the case in view of section 20, c. 6, Session Laws of 1911, which provides that:

The Supreme Court "shall disregard any error or defect in the proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

There was no material evidence given on the part of the defendant tending to contradict or to rebut the evidence of the plaintiff, except that concerning the value of the land, and the same, being unimpeached, must be taken to be true.

We do not discover any error in the admission of incompetent, irrelevant, or immaterial evidence that was in any way prejudicial to the defendant.

[5] The plaintiff in error bases an assignment of error upon the contention that the breach of the bond was not properly pleaded to bind the surety. We think the complaint in its statement of the ultimate facts was clearly within the requirements of section 49, Mills' Ann. Code, which provides that the complaint shall contain a "statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition." The complaint sets out the bond in full, which necessarily reveals the conditions therein; then specifically alleges the acts of the detective Taggart which manifestly showed such conduct on his part as was unlawful, unfaithful, and dishonest, and a violation of such conditions. This we think an ample pleading of the breach of the conditions of the bond in question, and a full compliance with the Code section above cited.

[6] The letter claimed to be newly discovered evidence relied upon as a ground for motion for new trial was not accompanied by evidence tending to rebut the presumption of negligence in not producing the same at the trial as required under the rule. Furthermore, if admitted in evidence, this letter

would not tend to contradict or rebut the material evidence given on the part of the plaintiff relative to the real estate transactions. There was no error in not granting the motion for new trial on such ground.

[7] On the measure of damages, the court instructed the jury, in substance, that if they found from the evidence that the plaintiff was entitled to recover they should award such damages as would, in their judgment after a fair consideration of the evidence, justly and fully compensate plaintiff for the pecuniary damages she had suffered. This appears to have been a fair instruction in that regard under the law, and was substantially the same as instruction 10 requested by the defendant.

[8] The evidence was somewhat conflicting as to the value of the land of which the plaintiff had been deprived by the detective Taggart in a manner alleged to have been unlawful, unfaithful, and dishonest in his dealings with plaintiff. It was the duty of the jury to reconcile the testimony in that regard, and on the whole evidence there appears to have been sufficient testimony on which to base the verdict of the jury; and, under such circumstances, this court would not be justified in holding that the verdict was excessive.

Other assignments of error not hereinbefore noted are not well taken. They present only such questions of law as are already passed upon in this opinion.

The judgment is affirmed.

Affirmed.

WHITE, C. J., and BAILEY, J., concur.

BOULDER & LARIMER COUNTY IRRIGATING & MFG. DITCH & RESERVOIR CO. v. CULVER et al. (No. 8752.)

(Supreme Court of Colorado. April 2, 1917.)

1. WATERS AND WATER COURSES ~~§~~32—APPROPRIATION—ABANDONMENT.

An appropriation of water for irrigation is not abandoned by abandoning on destruction by flood the ditch to which the water was decreed; it being diverted into another ditch owned by the same persons and used for irrigation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22.]

2. WATERS AND WATER COURSES ~~§~~30—APPROPRIATION—CHANGING POINT OF DIVERSION.

Change of point of diversion of an appropriation of water, permission for which Laws 1903, p. 279, provides shall be decreed unless it appears it will injure vested rights of others in the waters of the stream, may be made from a point above to one still further above the junior appropriator's point of diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20.]

3. WATERS AND WATER COURSES \Leftrightarrow 217—APPROPRIATION—GATES AT INTAKE.

The owner of an irrigation ditch should, as required by Laws 1911, p. 463, maintain a headgate at point of intake from a stream, so that the water commissioner may properly regulate the use of water; an appropriator having no right to divert more water than is necessary, or at a time when it cannot be beneficially applied for irrigation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306.]

Error to District Court, Boulder County; Neil F. Graham, Judge.

Suit by the Boulder & Larimer County Irrigating & Manufacturing Ditch & Reservoir Company against Frederick W. Culver and others, consolidated with another proceeding between the same parties. From an adverse judgment, plaintiff brings error. Affirmed.

L. R. Rhodes, of Ft. Collins, for plaintiff in error. John A. Rush, of Denver, for defendants in error.

GARRIGUES, J. Over 50 years ago Cary Culver and John Mahoney settled on Little Thompson creek, in Larimer county, where they acquired a large tract of land and were engaged in farming and stock raising. In 1867 they took out a ditch called the Culver and Mahoney ditch from the creek for irrigation. About 1,200 acres of their land lay under this ditch as extended in 1875. In 1878 Culver and Mahoney, together with one Blore, took out another ditch with intake about a half a mile further up the creek which they called the Supply Lateral ditch. Being higher up, it covered about 2,000 acres of the Culver and Mahoney tract. It seems from the evidence that this ditch might have been built in 1878 for three purposes: To carry independent water from the St. Vrain creek that came from the Supply Lateral; to make a distinct appropriation from the Little Thompson through the supply lateral ditch; and to carry the appropriations already made by the Culver and Mahoney ditch. Culver succeeded to the rights of Mahoney, and after the former's death, his four children, defendants in error, succeeded to his ditch and water rights. In 1883 there was a general adjudication under the statute of all the ditch rights on the stream, which among others, settled the following priorities: Culver and Mahoney ditch priority No. 13, 19.5 cubic feet per second, date April 15, 1867, priority No. 30, 19.5 cubic feet per second, date April 30, 1875; Boulder and Larimer County ditch, priority No. 27, 27.2 cubic feet per second, June 30, 1875, priority No. 36, 39.52 cubic feet per second, May 10, 1877; and the Supply Lateral ditch, priority No. 43, 35.568 cubic feet per second, November 30, 1878. There is evidence that the Culver and Mahoney ditch was hard to maintain, and that one purpose in constructing the Supply Lateral ditch was to

transfer into and use through it, the Culver and Mahoney appropriations. The evidence shows that from 1878 to 1894, the Culver and Mahoney water was generally, though not always, carried through the Supply Lateral ditch. In 1894 an unprecedented flood swept down the creek and carried away the Culver and Mahoney headgate, dam, and flume, and filled up the ditch with debris so that it was completely destroyed and could be no longer used to divert water from the creek. Since this flood in 1894 the Culver and Mahoney ditch water, when needed for irrigation of the Culver lands and obtainable from the creek, has been diverted into and used through the Supply Lateral ditch. The evidence, which sustains the finding of the court, shows that the 39 feet of the old Culver and Mahoney appropriations since 1894 has been diverted and used exclusively through the Supply Lateral ditch, and that the old Culver and Mahoney ditch since then, except as a lateral, has been abandoned. No decree was obtained authorizing such transfer. The Culver and Mahoney water was used this way without complaint through the Supply Lateral ditch until 1912, when the water commissioner refused to recognize the transfer until a decree was obtained therefor. Thereupon, August 5, 1912, defendants in error filed a petition in the proper court praying that the original decree entered in 1883 to the Culver and Mahoney ditch be so modified that the appropriations decreed to it be changed in the point of diversion and the priorities transferred to the headgate and intake of the supply lateral ditch. The Boulder & Larimer County Irrigating & Manufacturing Ditch & Reservoir Company, plaintiff in error, entered its appearance and protested against such transfer. January 21, 1913, it filed a complaint praying that the priorities of appropriation decreed to the Culver and Mahoney ditch be declared abandoned, and that the transfer of the priorities be enjoined. April 7, 1913, these two cases were consolidated for trial, and August 18, 1913, after trial to the court, it found there had been no abandonment of the Culver and Mahoney water since the decree of 1883 and entered a judgment dismissing the complaint. In the transfer case it entered a decree permitting the Culver and Mahoney water to be transferred from the headgate of the Culver and Mahoney ditch into the intake and headgate of the Supply Lateral ditch, and plaintiff in error brings the case here for review.

[1] 1. The evidence shows that the 39 feet of the Culver and Mahoney water was used every year, when obtainable, from 1878 to 1894, through one ditch or the other, that after the flood destroyed the Culver and Mahoney ditch in 1894 it was abandoned except as portions of it were used as a lateral, but that the Culver and Mahoney priorities were not abandoned, and that the water de-

creed to this ditch was diverted into the intake of the Supply Lateral ditch where it was used without objection for irrigation until 1912. While the ditch was abandoned, the evidence is not clear, satisfactory, and convincing that the water rights decreed to it were abandoned. It is quite the contrary. Therefore the judgment dismissing the abandonment complaint will be affirmed.

[2] 2. The transfer statute (Laws of 1903, p. 279) provides that the court shall enter a decree permitting the change unless it appears from the evidence that such change will injuriously affect the vested rights of others in and to the water of the stream. The intake of the Supply Lateral ditch is about a mile above the intake of the old Culver and Mahoney ditch, and the intake of the Boulder and Larimer County ditch is about a mile below. The evidence shows, unless the water was abandoned, that it made no difference to the Boulder and Larimer County ditch consumers whether the Culver and Mahoney water was diverted through the intake of the Culver and Mahoney ditch or the Supply Lateral ditch. It is apparent from the evidence that it could make no difference at which headgate it was taken out, if the Culvers were entitled to use the water. In fact, one of the officers of plaintiff in error testified that, if the water was not abandoned, and the Culvers were entitled to use it, taking it out higher up the stream would be an advantage to their ditch rather than an injury. The finding of the court that the vested rights of others in and to the use of the water of the stream will not be injuriously affected on account of the transfer is right, and the decree permitting the transfer will be affirmed. The whole question turned on the right of the Culvers to the use of this water through the Supply Lateral ditch. Of course, if the Culver and Mahoney water rights were abandoned, then, the priority of the Boulder and Larimer County ditch being senior to the priority of the Supply Lateral ditch, plaintiff in error would be injuriously affected by the transfer. The contention of plaintiff in error seems to be that the Culver and Mahoney water was abandoned at the time the ditch was abandoned in 1894, and that since then the water they diverted into the Supply Lateral ditch was the water decreed to that ditch, having a priority dating from 1878. But the evidence does not sustain this contention. On the contrary, it shows that the Culver and Mahoney water has been constantly used since 1894 through the Supply Lateral ditch with no intention of abandonment. It would seem strange for the owners to permit an appropriation having a priority dating from 1887 to pass their intake and flow down the stream for the use of a junior ditch, while diverting into their own ditch an appropriation having a priority dating from 1878.

3. It is possible that in the adjudication of 1883 the Culver and Mahoney water should have been decreed to the Supply Lateral ditch instead of the Culver and Mahoney ditch. If it was an error, we are not attempting to correct it, but we do not see how plaintiff in error can be harmed by a change in the point of diversion, with the question of abandonment eliminated. The Culver and Mahoney priorities are senior to the Boulder and Larimer County ditch appropriations, and the latter are all senior to the Supply Lateral ditch appropriation; so, after the 39 feet of the Culver water has been diverted, the Boulder and Larimer County ditch is prior to the Supply Lateral ditch.

[3] The evidence shows that the Supply Lateral ditch is taken out on a grade below the bed of the creek, and that it has no headgate. Laws of 1911, p. 463, require the owners of irrigating ditches taking water from any stream to erect, maintain, and keep in repair at the point of intake a suitable and proper headgate. It gives the water officials power to compel the installation of a headgate, so that the water commissioner can regulate the flow into the ditch. While the Culvers have the prior right to divert 39 feet from the stream when they have a necessity for its use, they have no right to divert more on the Culver and Mahoney decree than is necessary, or at a time when it cannot be beneficially applied for irrigation, and the intake of the ditch should have a headgate so that the water commissioner can properly regulate the use of the water. Judgment affirmed.

WHITE, O. J., and SCOTT, J., concur.

HENSEN v. PETER. (No. 13839.)

(Supreme Court of Washington. April 13, 1917.)

1. LIMITATION OF ACTIONS §111—COMPUTATION OF PERIOD—STAY BY INJUNCTION.

An injunction obtained by a judgment debtor preventing enforcement of judgment within time limited by Rem. Code 1915, § 459, will suspend the running of the statute until dismissal of injunction, and this does not amount to judicial legislation as reading exceptions into a statute that the Legislature has not seen fit to make, nor does it rest on the idea that the statute of limitations is inherently an unconscionable defense, nor does it carry the implication that a litigant is to be penalized for failure to maintain his position in a lawsuit, but is based upon the equitable principle that one cannot avail himself of unconscientious advantage obtained by his wrongful act and without fault of his adversary.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 521.]

2. LIMITATION OF ACTIONS §111—COMPUTATION OF PERIOD—STAY BY INJUNCTION—TIMELY ACTION AFTER REMITTITUR.

Where plaintiff had eight months in which to enforce judgment when prevented by defendant's injunction which stopped the running of

the statute of limitations, and sold property under execution 67 days after filing of remittitur, his sale was timely, and it is immaterial whether judgment lien continued in force during such suspension and in addition for a period corresponding to the unexpired portion thereof, or that plaintiff must proceed within a reasonable time after dissolution of injunction, as in either event the action was timely.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 521.]

3. EXECUTION § 221—RIGHT TO SELL PROPERTY AFTER RETURN.

In absence of statute, an officer having levied an execution before the return day may thereafter and after actual return prosecute necessary proceedings to convert the property into money, and for the purpose of satisfying the judgment, and this is especially so where sheriff has been interrupted by the judgment debtor's injunction.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 626-628.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Motion to confirm execution sale of real property by Louis Hensen, contested by W. H. Peter. Motion denied, and contestant appeals. Reversed, with directions to confirm sale.

McBurney & O'Connor, of Seattle, for appellant. Cochran & Plummer, of Port Angeles, and Van Dyke & Thomas, of Seattle, for respondent.

WEBSTER, J. [1] This is an appeal from an order denying a motion to confirm an execution sale of real property. The pertinent facts are these: On the 30th day of July, 1908, appellant Louis Hensen obtained a judgment against respondent W. H. Peter in the superior court of King county, in the sum of \$560. On the 20th day of November, 1913, appellant caused an execution to be issued upon the judgment, directed to the sheriff of Clallam county. On the 21st day of November, 1913, the execution was levied upon certain real property in Clallam county belonging to respondent. Thereafter the property was duly advertised to be sold on January 10, 1914. On the 9th day of January, 1914, a temporary injunction was sued out of the superior court of Clallam county by respondent, restraining the sheriff and appellant from proceeding to sell the property under the execution. Upon trial the injunction was dissolved and the action dismissed, whereupon respondent appealed to this court and superseded the judgment. The appeal was thereafter heard, and the judgment of the lower court affirmed. *Peter v. Hensen*, 86 Wash. 413, 150 Pac. 611. On the 4th day of January, 1916, the remittitur in the cause was filed in the office of the clerk of the superior court of Clallam county. On the 11th day of March, 1916, the property formerly levied upon was sold by the sheriff, and return of sale was duly made to the superior court of King county. Appellant thereafter moved for a confirmation of the sale, to

which respondent objected upon the ground that at the time the property was sold more than six years had elapsed since the rendition of the judgment upon which the execution was based, and that, by virtue of the provisions of Rem. Code, § 459, the lien of the judgment had expired, and the sale was consequently void. This objection was sustained, and appellant's motion for confirmation denied, from which order this appeal is prosecuted.

Respondent urges that, notwithstanding the injunction, upon the expiration of the statutory period of six years, the judgment ceased to be a lien upon his property, and that the sale under the execution was a nullity. Appellant contends that, inasmuch as the sale would have been made well within the six-year period but for the injunction which was subsequently dissolved, respondent cannot be heard to say that the lien has been discharged by the running of the statute. The effect of an injunction, which is subsequently dissolved, on the lien upon real estate of a judgment which expires by limitation during the time the injunction is kept in force, is an important question of first impression in this jurisdiction and one upon which the courts are not in entire accord. Therefore we have carefully examined the authorities in an effort to ascertain and adopt the correct rule.

Freeman, in his work on Judgments (4th Ed.) vol. 2, § 394, after discussing the question at some length, concludes that the better view is that the issuing of an injunction which is subsequently dissolved does not destroy the judgment lien; that if the judgment debtor procures an injunction, and thereby prevents the enforcement of the judgment within the time limited by law, and the injunction is thereafter dissolved, he is, upon equitable grounds, not permitted to take advantage of his own wrong by urging that the lien has been lost by the delay caused by his writ.

In 1 Black on Judgments (2d Ed.) § 395, the same view is expressed in the following language:

"Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien."

In 1 Joyce on Injunctions, § 670, the following rule is announced:

"Equity will regard a judgment debtor, applying for an injunction to restrain the execution of the judgment, as consenting that if the injunction be improvidently granted, he will put his adversary in the same condition he was at the time it was granted, and, therefore, if while an execution has been unjustly restrained the judgment has been barred at law by the statute of limitations, equity will furnish a remedy by enjoining the judgment defendant from pleading such statute."

High, in his Treatise on Injunctions (4th Ed.) vol. 2, § 1536, announces this rule:

"The effect of a decree dissolving an injunction against the enforcement of an execution at law is to restore the execution creditor to the same position which he occupied before the granting of the writ, and he may proceed to enforce his execution as if no injunction had been granted."

In the course of the opinion in *Pulteney v. Warren*, 6 Vesey, Jr.'s, Rep. 73, Lord Eldon said:

"I consider these persons as plaintiffs, asking an injunction, and impliedly saying they ask it upon the terms of putting this plaintiff [the defendant in the injunction proceedings] in exactly the same situation, as if it had been determined they were not entitled; for otherwise there is no color of justice calling upon the court to discuss the question whether they are entitled to equitable relief."

In *Work v. Harper*, 31 Miss. 107, 68 Am. Dec. 549, a case where a judgment creditor was prevented from enforcing his execution until after the expiration of the time prescribed by statute, in consequence of an injunction granted on application of a mortgagee of the property the lien of whose mortgage was at the time of the issuance of the injunction secondary to that of the judgment, and the injunction was subsequently dissolved upon the failure of the mortgagee to establish his right to the writ, it was held that he could not take advantage of the fact that the lien of the judgment was lost. Mr. Justice Handy, speaking for the court, said:

"Upon the first point, it appears that the judgment of the appellee was rendered on the 21st of October, 1846, and on the 16th of January, 1847, the appellant's bill was filed, by which the appellee was enjoined from proceeding to execution upon his judgment, until such time as the lien of the judgment was barred by the statute of limitations. The appellant now seeks to avail himself of the expiration of the lien, in order to protect his title under the mortgage. And the question is, whether he is entitled to do so, under the sanction of a court of equity. It is not, and cannot properly be, denied that the judgment was a valid lien upon the property at the time the execution was levied, and that it was superior to the claim of the appellant under the mortgage. That this just legal right has been prevented from being enforced until it is impaired or lost, and that, by the litigation which has been commenced and carried on by the appellant. And when he has failed to establish the claim to protection upon which the litigation was commenced, and it appears that he has improperly prevented the judgment creditor from enforcing his execution, he cannot be permitted to take advantage of the accidental circumstance occasioned by himself, that the lien of the judgment is lost. The loss of the lien has been occasioned by himself, against the will of the appellee, and without any fault on his part; and upon no principle of equity could he be held to lose his right, to the benefit of the appellee."

In *Sugg v. Thrasher*, 30 Miss. 135, the same court, in discussing the question, uses this language:

"The general rule, as argued by counsel, that the statute of limitations, in all cases where it is applicable, is regarded as a meritorious defense, may, to the fullest extent, be admitted. The same may be said, in respect to the argument that it is a defense which may avail a party as well in equity as at law; and it may further be admitted that a court of equity will not lend its aid to deprive a party of the ad-

vantage of this defense if fairly obtained. It may also be conceded that if the advantage of this defense has arisen from the laches of the creditor, and not from the conduct of the debtors, that it is their privilege to make it, and it is not within the province of the court to question its propriety, on the score of morality. But while these principles must be admitted as general rules, there are others of equal, if not of greater, potency, which must not be overlooked under the peculiar circumstances of this case. It is a familiar principle of equity that a man shall not be allowed to avail himself of an unconscientious advantage acquired over his adversary. The inquiry in this case naturally forces itself upon the mind. Why was it that the plaintiff at law delayed this long period to enforce his judgment? The response is that the debtors, by the means which they employed, forced him to delay. It was not an act of choice on his part, but one of legal compulsion. He but obeyed the process of the court, issued and kept in operation by the debtors, in the fruitless litigation which they carried on for this long period of time. That which is forced upon a party cannot be said to be his voluntary act. He ceased to prosecute his remedy on his judgment, because such was the command of the process, which issued in pursuance of the prayer of the debtors. * * * But it is not necessary to dwell on this point. It is sufficient to know that the plaintiff only obeyed the process in refraining from enforcing his judgment; and it certainly comes with a bad grace from parties who availed themselves of all the means known to the law, to continue this process in full operation, now to complain of the plaintiff's obedience to that which he dared not, under what ought to have been heavy penalties, to disobey. The question then simply resolves itself into this. If the plaintiff voluntarily omitted to prosecute his remedy until the bar of the statute attached, it is his misfortune, and the debtor is at liberty to set up the defense, as in any other case. If, on the contrary, the plaintiff's failure in this respect must be attributed to the obedience which he was bound to pay to the injunction, the failure must be regarded as the legitimate result of the act of the debtors, and they cannot in conscience interpose the statute as a defense. Not a doubt can exist that it was alone the injunction which caused the delay in issuing execution on the judgment; and such being the fact, the case falls completely within the rule of equity already stated."

Later in the opinion, in answer to the argument that courts should not by construction ingraft upon statutes exceptions that have not been clearly expressed by the Legislature, it is said:

"This rule is admitted to the fullest extent. The question is not one of either legislative or judicial exception, arising by construction of the statute, but whether, under the facts of the case, it is a defense of which the defendants can conscientiously avail themselves. It is admitted to be a defense at law, but such a defense as a court of equity acting upon the consciences of the parties will not permit them to make. Not that the defense of the statute of limitations is of itself unconscientious or immoral, but that it is rendered so by the facts and peculiar circumstances of the case. The right asserted was as clear as it was when the plaintiffs first encountered the injunction, and the object is to leave the parties, with respect to their rights, where they stood when the debtors commenced their litigation in the superior court of chancery. No principle upon which the statute of limitations rests is violated by this course. Admit that it is what counsel say it is, a statute of repose, every principle of justice and sound policy forbids that parties should by improper means, or by abusing the process of the law in-

tended for salutary purposes, bring themselves within its operation, and enjoy the advantage thus unrighteously acquired. To sustain such a principle would be but holding out inducement to litigants to commence and protract, by artifice or other unauthorized means, vexatious litigation, which a view of finding immunity ultimately under the statute. When parties have fairly acquired this defense by regular course of things, they are entitled to the benefit of it, if they choose to make it, but they ought never to be encouraged to start prematurely in search of it, by protracting either unfounded or useless litigation."

In *Overton v. Perkins*, Mart & Y. (8 Tenn.) 367, the Supreme Court of that state held that the lien of a judgment upon which execution has issued and been fixed by levy on the lands of the debtor will not be defeated by the debtor's obtaining an injunction which is afterwards dissolved; that the injunction suspends, but does not destroy, the lien. In the course of the opinion the court said:

"When property is once levied upon, either real or personal, the creditor has a right to have his judgment satisfied by the sale of the same, unless he be guilty of some default, by which he loses his lien. 1 Salk. 322; 1 Burr. 34; [Lusk v. Ramsay] 3 Munf. [Va.] 441. This is a general rule, and to which no exception is found in the present case, as we will endeavor to show. What is an injunction? A writ issued upon the ex parte statement of the defendant at law, made to a court of equity, which admits the validity of the legal rights of the plaintiff at law, but relies upon a statement of facts which could not be there heard; and upon this the injunction is, in the first instance, granted. If the facts are proved true, the injunction is made perpetual on a final hearing. But suppose they turn out false and fraudulent, merely intended to hinder and delay the creditor in the collection of his just debt? The creditor resists the pretended equity at great trouble and expense; and after years of litigation (fifteen years in this instance) he procures the bill to be dismissed. Is he then to be told, his lien upon the property levied upon before the injunction restrained its sale, is gone; the debtor has sold it in the meantime, and is now insolvent. Has the creditor been in any default? None. He has used all possible vigilance to collect his debt for the last fifteen years; is now contending with the second injunction; throughout has been vigilant, and only hindered and delayed in the collection of his debt by the acts of the debtor. Will not, then, the acts of the debtor do an injury to the creditor, in the enforcing of his judgment, if it is declared that the injunction destroyed the lien? If this would be the consequence of such a decision, it will be illegal to make it."

In *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671, it was held that the time during which a judgment creditor was, upon motion of the judgment debtor, enjoined by the court from enforcing his judgment is to be excluded from the computation of the time within which the creditor is allowed to enforce his judgment. In that case the court said:

"* * * We are clearly of opinion that it must be held that the lien of the judgment was in life at the time of the issuing of the third execution, in October, 1863, upon the ground that the time from July 8, 1857, to October 21, 1858, during which execution was stayed by the court at the instance of the judgment debtor, must be excluded from the computation of the five years allowed by the statute. If so, then,

of course, the second execution was issued and returned in time to preserve the lien of the judgment. At common law, the right to sue out an execution in a personal action was limited to a year and a day from the entry of judgment. If the party had slipped his time, he was put to his action upon the judgment. This limitation of the common law was as inflexible and as positive as that of our statute; yet it was well established at common law that when the plaintiff had judgment with stay of execution, or execution was stayed by injunction, the plaintiff might sue out an execution within one year after the stay terminated or the injunction was dissolved. On the same principle, if the defendant brought a writ of error, and thereby hindered the plaintiff from taking his execution within a year, and the plaintiff in error was nonsuited or the judgment affirmed, the defendant in error might proceed to execution after the year, without scire facias, because the writ of error was a supersedeas to the execution, and the plaintiff must acquiesce until he hears the judgment above. The reason for this is that, the stay of execution being with the consent and for the benefit of the judgment debtor, and the injunction or writ of error being his own act, he should not take advantage of them, nor could he be surprised or prejudiced by the delay, because that delay was in fact referable to himself. It would be unreasonable and inconsistent for the law to present to a party, in one hand, a command to do an act within a certain time under the penalty of losing his rights, and, with the other hand, restrain him from doing the act. For this reason, the time during which the plaintiff was thus prevented by the law from issuing execution was at common law excluded from the year allowed for that purpose."

See, also, *Knox v. Randall*, 24 Minn. 479.

In 1911 the Supreme Court of Michigan, considering the precise question presented by the case now before us, declared that it was one of first instance in that state, and, after examining numerous authorities, concluded that on both reason and authority the injunction operates as an interruption of the running of the statute of limitations, and will so operate as long as it is maintained in force. *Steele v. Bliss*, 166 Mich. 593, 132 N. W. 345, 37 L. R. A. (N. S.) 859, Ann. Cas. 1912D, 1020. As bearing upon the question, see, also, *United States v. Wiley*, 11 Wall. 508, 513, 20 L. Ed. 211; *Braun v. Sauerwein*, 10 Wall. 218, 223, 19 L. Ed. 895; *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; 1 High, Injunctions, § 87; 19 Am. & Eng. Ency. Law (2d Ed.) 215; 10 R. C. L. 1269.

We cannot without unduly extending this opinion undertake to discuss in detail the cases holding to the contrary doctrine. Suffice it to say that every argument advanced in those cases is considered in the authorities already cited. We are convinced that the rule announced in the decisions and texts to which we have referred is sustained by the overwhelming weight of authority, both numerically and upon principle, and is founded in natural and moral justice.

This view is not open to the criticism of being judicial legislation in that it amounts to reading exceptions into a statute that the

Legislature has not seen fit to make. Nor does it rest upon the thought that the statute of limitations is inherently an unconscionable defense. Nor does it carry the implication that a litigant is to be penalized beyond the burdens ordinarily imposed by law for failing to maintain his position in a lawsuit. It merely declares that one shall not, by waging unfounded litigation, be rewarded at the expense of his unwilling opponent. It is based upon the equitable principle that a party will not be permitted to avail himself of an unconscientious advantage obtained by his own wrongful act and without fault on the part of his adversary. It is sustained by the wholesome consideration that a party should not be permitted to profit by the abuse or misuse of legal process or by imposing upon judicial tribunals litigation without merit. It is also fortified by that sound public policy which sets its face against putting a premium upon unrighteous and vexatious litigation commenced and prosecuted by a party for the ulterior purpose of obtaining by indirection an advantage which in equity and good conscience he is not entitled to enjoy. In a number of states it is provided by statute in varying forms of words that the time during which the execution of a judgment or decree is enjoined or stayed shall not be computed as any part of the period of limitation; but the cases to which we have referred are not based upon such statutes.

[2] It will not be necessary in this case to go into the question of whether, by suspending the right to proceed under the execution, the lien of the judgment was continued in force during such suspension and in addition for a period corresponding to the unexpired portion of the six years at the time the injunction was served, or that the judgment debtor must proceed within a reasonable time after the dissolution of the injunction. Appellant at the time he was enjoined by respondent had more than 8 months in which to enforce his judgment. The property was sold under the execution 67 days after the filing of the remittitur in the superior court. Under either view this was timely.

[3] Upon the day following the service of the temporary injunction the sheriff of Clallam county made his return of the execution to the superior court of King county, attaching thereto a copy of the order of injunction. It is now urged that the sale was void for the reason that it was made after the return of the writ. This contention is without merit. It is well settled that, in the absence of a statute to the contrary, an officer who has entered upon the service of an execution by levying the same upon the property of the debtor before the return day may, after the return day and after the actual return, continue to hold the property and prosecute such further proceedings as may be neces-

sary to convert the property, whether real or personal, into money for the purpose of satisfying the judgment. This is especially so where the sheriff has been interrupted by an injunction issued at the instance of the judgment debtor. 1 Freeman, Executions (2d Ed.) §§ 58, 106; 1 Joyce, Injunctions, § 669; Knox v. Randall, supra; Corbin v. Pearce, 81 Ill. 461; Johnson v. Bemis, 7 Neb. 224; Moomey v. Maas, 22 Iowa, 380, 92 Am. Dec. 395; Savings Institution of Harrodsburg v. Chinn's Adm'r, 70 Ky. (7 Bush) 539; Van Gelder v. Van Gelder, 26 Hun (N. Y.) 356; Rose v. Ingram, 98 Ind. 276; Spang v. Commonwealth, 12 Pa. 358; Pettingill v. Moss, 3 Minn. 222 (Gil. 151), 74 Am. Dec. 747; Wheaton v. Sexton's Lessee, 4 Wheat. 503, 4 L. Ed. 626; Clerk v. Withers, 92 Eng. Rep. (Full Reprint) 211.

The order appealed from will be reversed, with direction to confirm the sale.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

STATE ex rel. GRIFFITH v. SUPERIOR COURT OF WASHINGTON FOR CLARKE COUNTY et al. (No. 13981.)

(Supreme Court of Washington. April 24, 1917.)

1. CERTIORARI §—17—GROUNDS—REFUSAL TO GRANT CHANGE OF VENUE.

Relator is entitled to certiorari where judge denies him a change of venue which he is entitled to as a matter of right.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 22.]

2. VENUE §—44—CHANGE—MATTER OF RIGHT.

Plaintiff's attorney having agreed that defendant was entitled to a change and that he would not oppose motion, held, that defendant was entitled to change of venue as a matter of right.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 66.]

Department 1. Certiorari by State, on relation of Charles Griffith, against the Superior Court of the State of Washington for Clarke County and the Honorable R. H. Back, Judge of said Court, and others. Granted.

Edwin Rhodes, of South Bend, for plaintiff. Miller & Wilkinson, of Vancouver, for defendants.

PER CURIAM. The Alki Investment Company brought an action in the superior court for Clarke county against Charles Griffith the relator herein, for the recovery of money. The relator lives in Pacific county. The attorney for relator corresponded with the attorneys for the plaintiff in that action, and in response to a letter and the service of a copy of a motion for change of venue, and demurrer, service of which was accepted on the 28th day of December, 1916, counsel for the plaintiff said:

"We concede your position is correct and you would be entitled to remove this case to Pacific county and shall not, of course, resist your motion for change of venue. If you will send your original motion and demurrer and order to the clerk of court here, or to us, we will have the judge here sign the order transferring the case and have the clerk send the papers down to your county. We presume that you do not care to insist on your demurrer, that you have simply filed the demurrer for the purpose of making an appearance at the time of filing your motion. If you do not care to insist on the demurrer we are willing to allow you such reasonable time as you may want to answer."

Upon receipt of this letter, counsel for the defendant, the relator here, forwarded the papers to the clerk of the court together with the acceptance of service of the motion and demurrer. The clerk called the attention of the judge to the motion, and it was by him denied. It appears by the return of the respondent trial judge that the acceptance of service and the agreement to change the venue was not called to his attention. The case being thereafter noted for hearing upon the demurrer, the relator came to this court asking for a writ of certiorari.

[1, 2] While it is unfortunate that this matter was not corrected in the court below, where it might well have been corrected without additional costs or controversy, we think nevertheless that the relator is entitled to his writ. Under the facts disclosed he is entitled to a change of venue as a matter of right. State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395; Smith v. Allen, 18 Wash. 1, 50 Pac. 783, 39 L. R. A. 82, 63 Am. St. Rep. 864; State ex rel. Shwabacher, etc., v. Superior Court, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814; State ex rel. Stewart & H. Drug Co. v. Superior Court, 67 Wash. 321, 121 Pac. 460.

The respondent superior judge will be directed to enter an order transferring the case of Alki Investment Co. v. Charles Griffith to the superior court for Pacific county for further proceedings.

CONNOR v. SPOKANE COUNTY. (No. 13757.)

(Supreme Court of Washington. April 20, 1917.)

1. TAXATION — 177 — STATE LANDS — TITLE.

State lands under contract of sale are in the state not taxable as real property so as to warrant issuance of certificates of delinquency.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 302, 303.]

2. TAXATION — 730 — STATE LANDS — CERTIFICATE OF DELINQUENCY.

A purchaser's interest in a contract to buy state lands is not assigned by a certificate of delinquency.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463.]

3. TAXATION — 730 — STATE LANDS — FORECLOSURE SALE.

A certificate of delinquency on state lands under contract of sale will not ripen into title upon the right of redemption being foreclosed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463.]

4. TAXATION — 821(2) — REFUND — STATE LANDS.

Rem. Code 1915, § 9252, authorizing repayment of sums paid for void certificates of delinquency, applies to a certificate issued on state lands under contract of sale, since such certificate cannot ripen into perfect title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1623.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Charles R. Connor against Spokane County. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. White and William C. Meyer, both of Spokane, for appellant. Geo. W. Belt, of Spokane, for respondent.

CHADWICK, J. There is no dispute of fact in this case. At some time prior to 1910 the state of Washington conveyed to one J. Brown lot 12, block 86, being a part of the subdivision of school section 16, township 25 north, range 43 E. W. M. The property was assessed as real property for the years 1910 and 1911. Taxes were not paid, and on the 4th day of September, 1912, the county treasurer issued a certificate of delinquency to the respondent for the taxes accumulated up to that time. Respondent thereafter paid the taxes for the years 1913 and 1914. In the latter year the state canceled its contract and forfeited all the rights of its vendee. Whereupon respondent brought this action to recover the full amount of taxes paid by him with interest at the rate of 6 per cent. per annum upon each several payment. The whole sum, with interest, aggregated at the time the judgment was entered in this case \$105.64.

The certificate of delinquency provides in terms:

"When, from the failure of taxing officers to do or perform any act in listing or assessing the property herein described, or in issuing this certificate, the same is declared void, and is redeemed by the county or municipality issuing the same, then the rate of interest shall be 6 per cent. per annum. And the said county of Spokane hereby guarantees that, if for any irregularity of the taxing officers this certificate be void, then said county will repay to the holder hereof the sum of \$47.71, with interest thereon at the rate of 6 per cent. per annum from the date of this certificate until paid."

The sections of the statute to which our attention has been directed are Rem. Code, § 9252, which provides for the issuance of certificates of delinquency, and for their form and content, one item being:

"A guaranty of the county or municipality to which the tax is due that if for any irregularity of the taxing officers this certificate be void, then

such county or municipality will repay the holder the sum paid thereon with interest at the rate of six per cent. per annum from the date of its issuance: Provided, that nothing herein contained shall prevent the running of interest during the said period of twelve months from the date of delinquency, at the rate of interest provided by law on delinquent taxes"

—Rem. Code, § 9139, which is hereafter quoted as a part of the revenue law of 1893, and section 9092, defining real property for the purposes of taxation.

The right of the case depends upon whether the land was taxable as real property so as to sustain a certificate of delinquency issued to a third party. This court has held that the legal title to state land held under an executory contract of sale is in the state of Washington. *State v. Frost*, 25 Wash. 134, 64 Pac. 902; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68.

[1] That the property was not taxable as real property so as to afford a basis for the issuance of a certificate of delinquency is made clear by reference to *State v. Frost*, supra, where the case of *Washington Iron-Works Co. v. King County*, 20 Wash. 150, 54 Pac. 1004, upon which appellant rests its case, is explained. It is said in 25 Wash. at p. 138, 64 Pac. 903:

"The state may dispose of its granted lands upon such terms and in such form as it may choose, having due regard to the conditions of the trust imposed upon the grant, which relates to the limitation in price; and the Legislature has enacted that each contract for the sale of such lands shall provide for the payment of all taxes and assessments against the lands. A further provision is made that such contracts may be forfeited by the executive department, if such payment is not made. Primarily these contracts imply that assessments and taxes shall be levied upon these lands. Thus the statute authorizing their sale provides for such taxation. It must not be inferred from such provision and the language of the statutes that the Legislature intended to tax the lands while the ownership is in the state, as such, because that is forbidden by the Constitution. Again, the Legislature, in the revenue law (Laws 1893, p. 335, § 26), declares: 'Property held under a contract for the purchase thereof, belonging to the state, county or municipality, and school and other state lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same.' It would seem fair to construe this legislation as charging the interest of the contractor for public lands with the payment of all taxes and assessments levied against the land, and that such interest only is chargeable. The procedure prescribed is as against the land, but, as we have seen, it is against the land for the purpose of fixing the amount of the assessment. The land is assessed at its fair cash value as land, but the interest in the land intended to be charged is that of the contractor. Such a construction is in harmony with the constitutional provision and all the obligations of the federal trust, and may fairly be given to the statute and the purpose intended by the Legislature accomplished. It is apparent that the Legislature intended that the large areas of tide, school, and other granted lands, which are sold under long time contracts, and with the presumption

in each instance that the contract will be carried out in good faith, should not be reserved from the taxing power of the state; that such property, valuable and enjoyed by the contractor as owner during the existence of the contract, should bear the just burdens of government.

"We therefore conclude that the title passed to the purchaser at the tax sale is that of the interest of the contractor; that the state is not divested of its right to the purchase price, or its right to forfeit the contract upon nonpayment of the purchase price."

[2, 3] It may be held that the state, as between itself and its vendee, may provide for and affix as precedent to the final conveyance of the legal title to lands held under an executory contract of sale a condition that the interest of the vendee in the land may be taxed, and that such taxes shall be paid before a deed issues, but it does not follow that the state can put the burden of the payment of such a tax upon a third party, nor that a certificate of delinquency would convey anything to the purchaser. A certificate would not operate as an assignment of the vendee's interest in the contract, and could in no possible way ripen into title by foreclosure or otherwise.

The theory which sustains the issuance of certificates of delinquency to strangers to the title is that the state, in the exercise of its sovereign right to tax, may pass a potential deed to property upon which taxes are due and unpaid. The penalty for neglect or failure to pay taxes assessed upon real property is that such title as rests in the sovereignty of the state will be passed to the one who is willing to assume the burden of clearing the charge. The foreclosure of a delinquency certificate is a proceeding in rem, and is operative to convey all the title that either the owner or the state possessed at the time of sale. *Sparks v. Standard Lumber Co.*, 92 Wash. 584, 159 Pac. 812. Public policy would forbid any scheme that would subject the state to a loss of its property for an inconsiderable part of its value; for, if land sold under executory contract of sale be subject to a tax as real property, and if a certificate of delinquency may issue, we would have the anomaly of the state, either directly or through the agency of one of its municipalities, giving an apparent title through the instrumentality of a certificate of delinquency and a foreclosure proceeding, with power to defeat the title evidenced by the record by simply forfeiting its contract to sell the land.

[4] To issue a certificate which evidences no present or prospective right to perfect title by foreclosure and sale is such an irregularity as to call for the refunding of the amounts paid.

Affirmed.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

STATE v. SMITH.

(Supreme Court of Idaho. April 24, 1917.)

1. CRIMINAL LAW \S 511(2)—SUFFICIENCY OF EVIDENCE—ACCOMPLICE TESTIMONY—CORROBORATION.

A conviction cannot be sustained on the uncorroborated testimony of an accomplice; but it is not necessary that the testimony of the accomplice be corroborated in every detail; all that is required is that there be corroborating evidence upon some material fact or circumstance which in itself, and without the aid of the testimony of the accomplice, tends to connect the accused with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1129.]

2. CRIMINAL LAW \S 508(1)—WEIGHT OF EVIDENCE—ACCOMPLICE TESTIMONY.

The law clearly contemplates that some weight should be given to the testimony of an accomplice, and when the requirements of the law as to corroboration have been met, such testimony may become of the utmost importance in securing a just enforcement of the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1099, 1103, 1112.]

3. CRIMINAL LAW \S 622(1)—SEPARATE TRIAL—DISCRETION OF TRIAL COURT—STATUTE.

Under section 7860, Rev. Codes, as amended by chapter 112, Sess. Laws 1911, p. 308, the granting or refusal of a separate trial rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1380, 1382, 1383.]

4. CRIMINAL LAW \S 902—RIGHT TO ALLEGE ERROR—INSTRUCTIONS.

Where counsel for accused at the time of the giving of an instruction states that it is satisfactory, he cannot on appeal from an adverse decision complain of the conduct of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1993, 2125.]

5. CRIMINAL LAW \S 1166½(6) — HARMLESS ERROR—INFORMATION AS TO CHALLENGES.

Where accused is represented by counsel during the trial, and exercises the right to challenge jurors, the neglect of the trial court to inform him that, if he intends to challenge an individual juror, he must do so before the jury is sworn, will not be regarded as prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3113, 3115, 3118.]

6. LARCENY \S 55 — SUFFICIENCY OF EVIDENCE.

The evidence in this case examined, and held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 152, 164, 165, 167-169.]

7. LARCENY \S 77(1)—INSTRUCTIONS—POSSESSION OF PROPERTY.

Instruction No. 11 examined, and found not to be prejudicial to the appellant.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 190.]

Appeal from District Court, Adams County; Ed. L. Bryan, Judge.

Clyde Smith was convicted of the crime of grand larceny, and from the conviction and from an order overruling his motion for a new trial, he appeals. Affirmed.

Frank Harris, of Welser, P. E. Cavaney, of Boise, and Freehafer & Stinson, of Coun-

cil, for appellant. T. A. Walters, Atty. Gen., J. Ward Arney and A. C. Hindman, Asst. Attys. Gen., and L. L. Burtenshaw, Pros. Atty., of Council, for the State.

BUDGE, C. J. The appellant and one Logan were charged jointly, on information by the prosecuting attorney of Adams county, with the crime of grand larceny. The charging part of the information is as follows:

"That on or about the 15th day of May, 1914, and at Adams county, state of Idaho, the said defendants, Clyde Smith and Lloyd Logan, being then and there, did there and then willfully, unlawfully, and feloniously steal, take, carry, lead, and drive away from the possession of one Ben Woodden ten head of fat beef cattle branded with a 'W' on the right hip, the same then and there being the personal property of the said Ben Woodden, with the intent then and there to convert the said cattle to their own use."

The defendants pleaded "not guilty," and the cause was tried before the court with a jury. The jury returned a verdict acquitting Logan and finding the appellant guilty as charged in the information. The appellant was sentenced to serve a term of imprisonment in the state penitentiary of not less than one nor more than fourteen years. Thereafter a statement and motion for a new trial were presented and overruled, to which action of the trial court appellant duly excepted.

This is an appeal from the judgment and from the order overruling appellant's motion for a new trial. Appellant assigns and relies upon 45 separate assignments of error. It will be unnecessary in this opinion to discuss in detail or separately all of the assignments of error.

[1] The assignment of error principally relied upon by counsel is directed against the sufficiency of the evidence introduced upon the trial to corroborate the testimony of the witness Miller, an accomplice. From an examination of the instructions touching the necessity for corroboration in order to warrant a conviction, and the extent to which corroboration is necessary, it appears that the law is fully and sufficiently elucidated therein. It is not necessary that the testimony of an accomplice be corroborated in every detail; all that is required is that there be corroborating evidence upon some material fact or circumstance which in itself, and without the aid of the testimony of the accomplice, tends to connect the accused with the commission of the offense. *State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226; *State v. Bond*, 12 Idaho, 424, 86 Pac. 43; *State v. Grant*, 26 Idaho, 189, 140 Pac. 959.

In this case the evidence, independent of any testimony given by the accomplice, Miller, conclusively shows: That the cattle in question were the property of and in the possession of Ben Woodden, the owner, on the 15th day of May, 1914, near his residence; that during Woodden's absence for

an hour or two on said day the cattle disappeared; that there were horses' tracks found immediately behind the cattle and following them; that on the same day appellant was seen in possession of the cattle by one Stiles, near his residence, a distance of two or three miles from Woodden's home; that on the night of the 15th of May, 1914, the appellant and Miller stayed at Stiles's place, and permitted the cattle to range within a short distance of his home; that in a conversation with Stiles the appellant told him, among other things, that he was riding after cattle for a couple of men in Boise, and that Miller, the accomplice, who was with him at the time, was a new man at the business and had only been on a couple of days; that on the following morning the appellant and Miller rode south in the direction that the cattle were left the night previous; that one Wing, a sheepman, was nearby, and he and the witness Stiles walked in the direction of the cattle together; that Wing's dog turned the cattle, and just about that time the appellant came up to Stiles and Wing and cursed them and accused them of dogging the cattle, and that upon the evening prior they came from the direction of the bridge across Little fork, up above Woodden's ranch, or north of Stiles's home, and on the morning of the 16th they drove the cattle south of Woodden's and Stiles's homes, being in the opposite direction from the Woodden ranch; that on the 24th day of May the cattle were found near Logan's ranch, some fourteen miles from Woodden's ranch, and driven to Indian Valley, where some of them were later identified, while they were confined in the lot back of the Mercantile Store; that the appellant was in the possession of the cattle, with the accomplice, Miller, not only on the night of the 15th and on the morning of the 16th, but that they were also in possession of the cattle when they arrived at Logan's place and during the time that the cattle were held in that vicinity near Logan's home, up to about the 24th of May, 1914. These facts are not only sufficient corroboration of the accomplice's testimony, but, when considered in connection with all of the circumstances, were amply sufficient to justify the jury in finding the appellant guilty as charged.

In the case of *People v. Melvane*, 39 Cal. 614, that court, having under consideration a statute identical with ours, says:

"The corroborating evidence may be slight, and entitled to but little consideration; nevertheless the requirements of the statute are fulfilled if there be any corroborating evidence which of itself tends to connect the accused with the commission of the offense."

[2] The law clearly contemplates that some weight should be given to the testimony of an accomplice; if this were not true, the law should preclude its admission altogether. The Legislature has sought to safeguard the rights of persons accused of crime by providing that the testimony of an accomplice

is not sufficient to sustain a conviction except where there is other evidence tending to connect the person accused with the commission of the offense. When such evidence has been supplied, the testimony of the accomplice may become of the utmost importance in securing a just enforcement of the law. It is unusual that a person engaged in the commission of a crime will consent to become a witness for the state to the material facts of the crime. Whenever such person does so consent, if his testimony is in itself reasonable and creditable, and if it is corroborated by other evidence as to the material features of the narration, such testimony may become of the most important and satisfactory character. Of course, as in every other criminal charge, the crime must be proven as laid in the information.

[6] It is suggested by appellant that when the cattle were taken he and the accomplice did not intend to steal them, but intended only to take them and hold them for the purpose of procuring a reward for their return. The intent with which the cattle were taken was one of the material questions which was properly submitted to the jury, under all of the evidence, for their determination. Where a particular motive for the crime is alleged in the information, and the evidence justifies the jury in finding that such motive did really exist, it is immaterial whether the accused had additional motives. It is sufficient to warrant a conviction if the motive which is alleged in the information is proven. From the evidence the jury were clearly justified in finding that the appellant committed the crime charged in the information, namely, the larceny of the cattle; therefore whatever other motives he may have had would be wholly immaterial.

[3] Appellant assigns as error the refusal of the trial court to grant him a separate trial. This, however, was in the sound discretion of the trial court. Section 7860, Rev. Codes, as amended by chapter 112, Sess. Laws 1911. We do not think the trial court erred in refusing to grant a separate trial in this case. *State v. Allen*, 23 Idaho, 772-778, 131 Pac. 1112.

[4] Counsel for appellant strenuously insists that the trial court should have submitted the codefendant's case to the jury on an advisory instruction to acquit, at the close of the state's case, in order that Logan might have been acquitted before becoming a witness for appellant, and seeks to predicate prejudicial error on the failure of the trial court to pursue such a course. It appears from the record that at the close of the state's case counsel for appellant moved the court for an advisory instruction to acquit the defendant Logan and appellant. The court sustained the motion as to the defendant Logan, and overruled said motion as to appellant. The court asked appellant's attorney to prepare the instruction, whereupon counsel stated:

"I think the court can put it in as good language as any counsel for defendant."

The court then gave the following instruction:

"Gentlemen of the jury, the court will instruct you at this time that in your further consideration of this case and in your deliberations after you have retired for final deliberation you should not consider the defendant Lloyd Logan as connected with this case, and you are further instructed that what the court has said to you with respect to the defendant Lloyd Logan should not be considered by you in any manner or to any degree whatever in connection with your investigation of the charge against the defendant Smith in this case, but is a matter entirely independent of the other matter, and should not influence you in any way for or against the defendant Smith."

Whereupon appellant's counsel stated:

"That is satisfactory to the defendants."

The appellant, through his counsel, having indicated that he was satisfied with the instruction given, cannot now be heard to complain that his rights in this respect were not protected.

[5] Appellant assigns as error the failure of the court to inform him of the provisions of section 7826, Rev. Codes, which section reads as follows:

"Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so before the jury is sworn."

This court held in *State v. Suttles*, 13 Idaho, 88, 88 Pac. 238, and *State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425, that the record need not affirmatively show that the defendant was instructed as to his right to challenge a juror as required by this section. And in the absence of any showing to establish the fact as to whether or not the court has complied with the requirements of the law in this respect, the presumption is that the court complied therewith and discharged every duty the statute imposed upon it in the trial of the case. This places the burden upon appellant of introducing a proper and satisfactory affirmative showing in the record, pointing out the failure of the court to so inform him. We do not think that the record in this case presents a sufficient showing on the point to enable this court to review it. However, waiving the proper presentation of the assignment, appellant has not shown that he was prejudiced by the failure of the court to so inform him, if, as a matter of fact, the court did omit to so inform him. Counsel for appellant have cited two cases in support of their contention. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511, does not even refer to the point. *People v. Moore*, 103 Cal. 508, 37 Pac. 510, is clearly distinguishable from the case at bar. In the *Moore* Case appellant had no counsel in the trial court, and did not exercise the right of challenge, the court in that case saying:

"There is nothing in the record to show that he was not prejudiced by the failure of the court to give the information required by the statute to be given; nothing which enables us to avoid the general presumption that error is prejudicial.

* * * The general rule that every one is presumed to know the law cannot be successfully invoked in a criminal case against a statute which provides that the defendant must be specially instructed as to what the law is on a particular point."

The cases reviewed in the *Moore* Case (*People v. Mortier*, 58 Cal. 266; *People v. O'Brien*, 88 Cal. 489, 26 Pac. 362; *People v. Ellsworth*, 92 Cal. 596, 28 Pac. 604), are all to the effect that where, as in this case, appellant was represented by counsel on the trial and exercised his right to challenge jurors, he is not prejudiced by the neglect of the trial court to advise him that, if he intends to challenge an individual juror, he must do so before the jury is sworn.

[7] Many of appellant's assignments of error are directed against the instructions of the court as given and the refusal to give requested instructions. We will confine this portion of the opinion to a discussion of instructions Nos. 11 and 16 as given by the court. Instruction No. 11 reads as follows:

"Possession of property recently stolen, if proven, is not evidence sufficient of itself to warrant a conviction. It is merely a circumstance tending to show guilt, which, taken in connection with other evidence, is to determine the question of guilt. If, however, the jury believes beyond a reasonable doubt that the property described in the information was stolen, and was seen in the possession of the defendant soon after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained is a circumstance tending to show his guilt; and the defendant is called upon to explain such possession, if such possession has been proved, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclosed any such."

This instruction was sustained by this court in *State v. Wright*, 12 Idaho, 212-217, 218, 85 Pac. 493; *State v. Janks*, 26 Idaho, 567, 144 Pac. 779. Some slight changes in the wording appear in the instruction as given in the case at bar, but they tend to render the instruction more favorable to the appellant.

Instruction No. 16 reads as follows:

"I further instruct you that under the law of this state a person charged with the commission of a crime may testify in his own behalf; yet the defendant is under no obligation to do so, and his neglect to do so shall not create any presumption against him."

Appellant insists that this instruction as given is erroneous in that it does not state the law as fairly for the defendant as the language of the statute upon which it is based. Section 8143, Rev. Codes, is as follows:

"A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding."

This court held in *State v. Levy*, 9 Idaho, 483, 75 Pac. 227, that it was not error to instruct the jury in the language of this statute. And while we think it would be much better to give the instruction in the language

of the statute than to give it in the form used in instruction No. 16, supra, we do not feel that under the circumstances of this case the instruction as given amounts to prejudicial error.

We have examined the instructions given by the court and the instructions requested by the defendant and refused by the court, and are satisfied that the instructions as given fairly and fully stated the law applicable to the facts and circumstances of the case.

Many errors are assigned on questions arising during the trial as to the admissibility of evidence. We have carefully examined the record in this regard, and without discussing these numerous errors in detail, we have to say that we have found no prejudicial error in the record.

The judgment therefore is affirmed.

MORGAN and RICE, JJ., concur.

BASINGER et al. v. TAYLOR et al.

(Supreme Court of Idaho. April 3, 1917.)

1. EMINENT DOMAIN ⇨28 — WATERS AND WATER COURSES ⇨140—DOMESTIC USE—APPROPRIATION — CONSTITUTIONAL PROVISIONS.

Under section 3 of article 15 of the Constitution, those using water for domestic purposes have a preference over those claiming water for any other use. But in case the water has already been appropriated for another inferior use, the use for a superior purpose is subject to the provision of law regulating the taking of private property for public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 75.]

2. WATERS AND WATER COURSES ⇨133—WATER RIGHTS—PERMIT.

A permit issued by the state engineer is not a water right, and is not in itself evidence of appropriation of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 146.]

3. WATERS AND WATER COURSES ⇨143 — RIGHT TO USE OF WATER—DECREE.

Under a pleading claiming title to the public waters of this state, a decree must be based upon the amount of water actually diverted and applied to beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

4. WATERS AND WATER COURSES ⇨140—APPROPRIATION—PRIORITIES—RELATION.

An appropriator of water, who seeks to invoke the doctrine of relation, in order that the date of priority of his appropriation shall relate back to the date of the initiation of his appropriation, must show a substantial compliance with all the provisions of the statute, and also final consummation of the appropriation as defined by the statute, and can invoke the doctrine only to the extent of the completion of such appropriation.

5. WATERS AND WATER COURSES ⇨152(3)—WATER RIGHTS—DIVERSION—INJUNCTION.

The holder of a permit issued by the state engineer for the appropriation of water is not entitled to an injunction to prevent the diversion of waters from a stream, unless he shows

that he is in a position to make beneficial use of such water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157.]

6. WATERS AND WATER COURSES ⇨145 — PLACE OF DIVERSION—CHANGE.

A person entitled to the use of water may change the place of diversion, if others are not injured by such change. The right to change the place of diversion is subject to the protection of the rights of other appropriators from the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20.]

Budge, C. J., dissenting.

Appeal from District Court, Custer County; J. M. Stevens, Judge.

Action by Perry Basinger and others to quiet title to the use of water as against E. K. Taylor and R. L. Sutcliffe, water master of Little Lost River district, in which Samantha J. Taylor and another intervened and filed a cross-complaint. Decree that plaintiffs, except the Blaine County Irrigation Company, were entitled in common to a certain measurement of water, subject to rights of defendants Taylor to water for domestic use, and plaintiffs appeal. Decree reversed, and new trial ordered.

Hansbrough & Gagon, of Blackfoot, and Holden & Holden, of Idaho Falls, for appellants. Clark & Brodhead and Higgins & Ambrose, all of Mackay, and Barber & Davison, of Boise, for respondents.

RICE, J. This action was instituted to quiet title to the waters of Dry creek, in Custer county, and to restrain the defendant Sutcliffe, as water master, from interfering with the rights of plaintiffs below, appellants here. All of the appellants, except the Blaine County Irrigation Company, were farmers who had used water from said creek for many years for the irrigation of their lands. They had diverted their water from said Dry creek, across low land and gravel bars, through a ditch known as "Farmers' ditch," and discharged the same into Wet creek at a point about a mile and a half distant from the place of diversion.

On July 6, 1907, the district court decreed these farmers to be entitled to the use of 22 second feet of the waters of Dry creek. About June 1, 1908, respondent Taylor located on Dry creek and began to prepare his lands for cultivation. The same summer he constructed a ditch leading out of Dry creek a short distance above the Farmers' ditch. On October 29, 1910, appellant Blaine County Irrigation Company made application for and received permit from the state engineer for 150 second feet of the water from Dry creek. This company began the construction of a pipe line to divert water from the creek about 7 miles above respondent's point of diversion. In July, 1912, the pipe line was completed and water diverted from Dry creek into Corral creek, a tributary of Wet

creek. At this time the appellants, who had used the Farmers' ditch, by agreement with the Blaine County Irrigation Company, changed their point of diversion to the intake of the pipe line. By the terms of the agreement their water was thereafter to be diverted through the pipe line, and thence, by way of Corral creek and Wet creek, to the place into which their water had formerly been discharged.

The trial court in its decree adjudged that all appellants, except the Blaine County Irrigation Company, were entitled in common to 22 second feet of the waters of Dry creek, subject only to the right of the respondents E. K. Taylor, Samantha J. Taylor, and J. B. Taylor to water for domestic use, and that such respondents were entitled at all times to have delivered at their point of diversion sufficient water from Dry creek for domestic uses and culinary purposes, and to have flow in the natural channel of said stream a sufficient quantity of said waters to furnish the same at their point of diversion in good, healthy, and normal state.

[1] It is admitted that in point of time the right of all appellants, excepting the Blaine County Irrigation Company, is superior to any right the respondents may have for domestic and culinary purposes, and that their right by reason of the application of the water to a beneficial use, and the decree of the district court, has become a vested right. It is clear that, under the Constitution, those using water for domestic purposes have the preference over those claiming for any other purpose; but the usage for such superior purpose is subject to the provisions of section 14 of article 1 of the Constitution, regulating the taking of private property for public use. In the case of *Montpellier Milling Co. v. City of Montpellier*, 19 Idaho, 212, at page 219, 113 Pac. 741, at page 743, the court said:

"It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right."

The decree of the trial court in this case, if allowed to take effect, may operate to deprive appellant water users of their property, without compensation, to the extent that they may be deprived at certain seasons of the year of the amount of water necessary for the domestic use of respondents. We think the decree, in that respect, is in contravention of section 3 of article 15, and section 14 of article 1, of the Constitution. *Montpellier Milling Co. v. City of Montpellier*, su-

pra; *Town of Stirling v. Ditch Co.*, 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238. Respondents, however, contend that they have shown an adverse use to the waters of Dry creek for domestic purposes for a period in excess of 5 years. We think the evidence fails to show an adverse appropriation by respondents for domestic purposes, and respondents could not claim as riparian proprietors. *Drake v. Earhart*, 2 Idaho (2 Hasb.) 750, 23 Pac. 541; *Hutchinson v. Watson Ditch Co.*, 16 Idaho, 484, 101 Pac. 1059, 133 Am. St. Rep. 125.

This is not a proceeding to condemn the property of appellant water users and subject the same to a higher and more beneficial use, but an action to quiet title. The trial court, therefore, erred in its first and second conclusions of law, to the effect that respondents were entitled at all times to have delivered at their point of diversion sufficient water for domestic uses and culinary purposes, and the decree based thereon is erroneous.

[2] Respondent E. K. Taylor was made party defendant in the original action, and respondents Samantha J. Taylor and J. B. Taylor intervened in the action. By their cross-complaints each respondent alleges title to 6.4 second feet of the waters of Dry creek, diverted at or near the center of section 15, township 10 N., range 25 E. B. M., which said waters were first diverted from said creek on June 1, 1908, and conducted by means of irrigation works to and used upon certain described lands. The interveners did not allege any privity of title or estate between themselves and defendant E. K. Taylor. Each respondent alleges that he has been gradually increasing his irrigation works from year to year since June 1, 1908, until the beginning of the irrigation season of 1913, at which time he was diverting and using upon his said lands a certain amount of water. To sustain his title respondent E. K. Taylor introduced in evidence permit No. 2929, issued by the state engineer on application of L. L. Folsom, dated April 11, 1907, and certificate of the state engineer, dated November 8, 1913, to the effect that E. K. Taylor, holder of permit No. 2929, had fully complied with the provisions of the laws of the state of Idaho relating to the completion of the works of diversion set out and described in said permit, and that the said works were adequate for diverting and conveying to the place of intended use 15 second feet of the waters of said Dry creek. Respondents Samantha J. Taylor and J. B. Taylor neither by allegation nor proof show any interest in such permit.

The briefs on file in this case devote much space to a discussion of respondent's title to permit No. 2929. It appears from the exhibits in the case that L. L. Folsom conveyed permit No. 2929 to the Custer County Land & Irrigation Company by deed dated February 18, 1908. The Custer County Land &

Irrigation Company, in September, 1908, conveyed the said permit to Ben E. Hervey. In March, 1909, Ben E. Hervey conveyed to the Spokane-Idaho Irrigation & Power Company, Limited, permits Nos. 3924, 2929, and 4092, issued by the state engineer of the state of Idaho, with other property, "saving and excepting a sufficient quantity of said water and water rights to irrigate 1,920 acres of land, heretofore expressly reserved and granted unto E. K. Taylor." Defendant Taylor testified that prior to settling upon the lands occupied by him, to which he diverted the waters of Dry creek, he had had an agreement with L. L. Folsom, or the Custer County Land & Irrigation Company, as a result of which a deed had been executed to him of permit No. 2929 and placed in escrow in a bank at Boise, Idaho; that he had made the payments called for by the terms of the escrow agreement, and had arranged to convey his rights to Hervey, with the reservation of sufficient water for his own needs; that upon calling upon the escrow holder for the delivery of the deed the same could not be found, and thereupon, by mutual agreement, the Custer County Land & Irrigation Company conveyed direct to Hervey, and Hervey conveyed to the Spokane Company with the reservation set out above. Admitting the facts to be as above outlined, they fail to show any conveyance of title to respondent E. K. Taylor. The statement, reserving a "sufficient quantity of said water and water rights to irrigate 1,920 acres of land, heretofore expressly reserved and granted unto E. K. Taylor," is merely descriptive of the reservation, and is not a grant to Taylor. The appellants, not being parties to any of the above-enumerated conveyances, are not affected by the reservation.

Without reference to the question of title, however, respondent Taylor could not rely upon permit No. 2929 in this case. The issue presented by his cross-complaint is ownership of a water right, and on this issue the holding of a permit from the state engineer, in and of itself, has no probative force. A permit from the state engineer is not a water right, and this court has held that it is not an appropriation of the public waters of the state and is not real property. *Speer v. Stephenson*, 16 Idaho, 707, p. 716, 102 Pac. 365; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485. A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit; but until all the requirements have been complied with, including the ac-

tual application of the water, the holder of the permit has nothing but an inchoate right. Proof of ownership of a permit will not sustain a decree founded upon a pleading alleging ownership of water. After the holder of a permit has fulfilled all the requirements of the statute, and made proof to the state engineer that he has put the water to the beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use. Section 3261, Rev. Codes. Under the provisions of section 3262, such license is prima facie evidence of a water right; but no certificate issued by the state engineer prior to the issuance of such license is made prima facie evidence of a water right.

In the case of *Washington State Sugar Co. v. Goodrich*, 27 Idaho, 38, 147 Pac. 1073, 1077, this court said:

"The granting by the state engineer of a permit for the right to use the waters of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit and a fulfillment of the conditions and limitations therein; but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one, and dates back to the issuance of said permit."

[3, 4] By granting respondents a decree to 15 second feet of water, dating from April 11, 1907, the court seems to have been of the opinion that respondents were entitled to the benefit of the doctrine of relation, and that their right for the full amount of water which their works were capable of diverting would date from the time of the application for the permit. We do not think that the respondents in this case were entitled to the benefit of the doctrine of relation. The first statute passed in Idaho Territory relating to water rights was enacted February 10, 1881. Laws 1880-81, p. 267. This was followed by the act of February 25, 1899. Laws 1899, p. 380. From the time of the passage of the act of February 10, 1881, to the act of March 11, 1903 (Laws 1903, p. 223), there was in force in Idaho a statute requiring notice to be posted and recorded by those who desire to initiate a claim for water or water rights, and requiring diligence on the part of the claimants in order that the doctrine of relation might be invoked for their benefit. Both the acts of 1881 and 1899 provided that by completion of works was meant the conducting of water to the place of intended use, and they further provided that by compliance with the rules prescribed in the statutes the claimants' right to use the water would relate back to the time the notice was posted. Both acts also provided that failure to comply with such rules deprived the claimants of the right to the use of the water as against a subsequent claimant who complied therewith, with a single exception, namely, that

all ditches, canals, or other works which had been made and constructed prior to the passage of the acts, by means of which the water of any stream had been diverted and applied to a beneficial use, must be taken to have secured the right to the water claimed to the extent of the quantity which said works were capable of conducting and not exceeding the quantity claimed, without regard to or compliance with the requirements of the statute.

In the face of these statutes no one was entitled to invoke the doctrine of relation who failed to comply with the requirements of the statute, with the exception above stated. 2 Kinney on Irrigation & Water Rights, p. 1299; Pyke v. Burnside, 8 Idaho, 487, 69 Pac. 477; Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co., 24 Idaho, 63, 133 Pac. 655. The act of 1903 prescribed certain limitations in the matter of diligence in the prosecution of the work, and provided that application to a beneficial use was necessary to complete the appropriation of public waters of the state. The doctrine of relation cannot be invoked by a person alleging title to a water right, and asking that his title be quieted, until the final consummation of the appropriation as defined by statute, and can be invoked only to the extent of the completion of the appropriation. 2 Kinney on Irrigation & Water Rights, p. 1290; Bennett v. Nourse, 22 Idaho, 249, 125 Pac. 1038; Cole v. Logan, 24 Or. 304, 33 Pac. 568. Under the acts of 1881 and 1890, the appropriation was completed upon the completion of the irrigation works and conducting of the water through the same to the point of intended use, and to the extent of the carrying capacity of the works, subject, however, to its being lost by failure to apply the water to a beneficial use within a reasonable time. Under the law of 1903 no appropriation is complete until the water has been applied to a beneficial use, and it follows that no appropriation can exceed the amount of water so applied.

It is clear that under the cross-complaints in this action any decree to the respondents must be based upon the amount of water actually diverted and applied to a beneficial use. Pyke v. Burnside, supra. It seems that no objection was offered to the action of the court in grouping the rights of all respondents and so decreeing the water. There was testimony to the effect that at the time of the commencement of the suit, or at least at the time of the diversion of water by appellant company, respondents had under cultivation 240 acres of land, and 60 acres additional ready for cultivation. There was some testimony to the effect that an inch of water per acre was necessary to the proper irrigation of such land. Under the most favorable view of the evidence, respondent could not be entitled to a decree for more than 6 second feet. The decree awarding respondent E. K.

Taylor, and interveners Samantha J. Taylor and J. B. Taylor, 15 second feet of the waters of Dry creek, with date of priority as of April 11, 1907, is erroneous, and not sustained by the evidence.

[5] The appellant Blaine County Irrigation Company sets out the permit of the state engineer under which it is operating. Appellant claims that by diverting the waters of Dry creek at the point of intake of its pipe line a great saving of water is made; that between the intake of the pipe line and the outlet of the Farmers' ditch, where it formerly emptied into Wet creek, there was a loss of about 60 per cent. of the water flowing down Dry creek and through the Farmers' ditch, and that, having effected this saving, they were entitled to the same. The evidence showed that more than 50 per cent. of the loss occurred in the Farmers' ditch and about 10 per cent. in the creek itself. It appears that the farmers taking water through the Farmers' ditch had their water measured to them at a point near where it was discharged from the ditch into Wet creek. The decree of the court in 1907 did not designate the point at which their water should be measured. This court has held that water appropriated for irrigation purposes must be measured to the claimant at the point of diversion. Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189; Bennett v. Lewis, supra. It may be that the decree of 22 second feet of water to the farmers is not a final limitation of their rights to 22 second feet at the point of diversion from Dry creek, but in the absence of a modification of that decree we do not think the court would be justified in holding that they would be entitled to divert more than 22 second feet. Moreover, appellant company has not shown itself in position to insist on this point. The evidence fails to show that the appellant company has made a beneficial use of this water, or is in a position to do so; the evidence merely showing that this company has diverted water from Dry creek. In order for appellant company to maintain its action for an injunction under its permit, it must not only show a substantial compliance with all the requirements of the statutes, but also that it is in a position to apply the water it diverts to a beneficial use. See Sandpoint, etc., Co. v. Panhandle, etc., Co., 11 Idaho, 405, 83 Pac. 347.

The question of the rights of the respondents and appellant irrigation company, under their respective permits, in case title thereto is shown, is not before the court under the pleadings in this case. Under proper allegations, actions may be instituted for the protection of rights initiated by permits.

[6] In this action appellants also ask that the right of those taking water through the Farmers' ditch to change their point of diversion be confirmed. Under the statute their point of diversion may be changed, provided such change causes no injury to

any other appropriator of water. Respondents are the only parties who could claim to be injured in this case. Their rights must be determined in this action, and when so determined must be protected. A sufficient amount of water must be permitted to flow down the creek to the point of diversion of respondents to satisfy their rights according to their respective priorities. Subject to rights of respondents, the appellants are entitled to change their point of diversion.

The decree of the trial court must be reversed, and a new trial ordered. No costs awarded on this appeal.

MORGAN, J., concurs.

BUDGE, C. J. (dissenting). I am unable to concur in that portion of the opinion which holds that, under the evidence, respondent E. K. Taylor has not shown any right to operate under permit No. 2929. No one claiming under this permit has disputed Taylor's right thereunder, and the undisputed testimony of Taylor is to the effect that he purchased rights under this permit; that the deed conveying the same was made out and placed in escrow, to be delivered upon the completion of Taylor's payment therefor to his grantor; that he completed all the payments, but that upon demanding the deed in escrow it could not be found; and that by mutual agreement the rights which Taylor had purchased from his grantor were conveyed directly from Taylor's grantor to Taylor's grantee, reserving therefrom certain rights to Taylor under the permit. Taylor's evidence is corroborated by the transfer from Ben E. Hervey to the Spokane Irrigation & Power Company, Limited, "saving and excepting a sufficient quantity of said water and water rights to irrigate 1,920 acres of land heretofore expressly reserved and granted unto E. K. Taylor." While it is true that this language is merely descriptive of the reservation, and does not constitute a grant to Taylor, it is evidence clearly corroborating Taylor's statement that a grant had theretofore been made to Taylor.

This entire action is equitable in its nature, and it is one of the fundamental maxims of equity that equity regards that as done which ought to be done. Pom. Eq. Jur. (3d Ed.) vol. 1, §§ 363-377, inclusive, and numerous cases there cited. The facts and circumstances in evidence touching Taylor's right under permit No. 2929 lead to but one conclusion; that is, that E. K. Taylor ought to have been granted a right to operate under permit No. 2929, and in equity this right is as complete as though the grant were actually made in form. All persons claiming under permit No. 2929 concede Taylor's interest and rights thereunder. No one else has a right to complain, and his rights under the permit can only be questioned for noncompliance with the law thereunder, and while it is true that

the lands described in permit No. 2929 cover only a portion of the Taylor lands, the certificate of completion of the works issued by the state engineer to Taylor clearly describes all of the lands of the Taylors. The fact that all of the Taylors' lands were not clearly described in the permit, or, in other words, the fact that they actually applied the water to lands different than those described in the permit, would be immaterial. *Mahoney v. Nelswanger*, 6 Idaho, 750, 59 Pac. 561. Under the statute the state engineer has authority to grant a certificate of completion of works for lands different from those described in the permit. The state engineer is a public officer, and the presumption is that his acts, within the line of his duties, are regular, and in the absence of any showing that the permit had been amended the presumption is that all of the regular steps have been complied with.

Nor is it correct to say that the permit in and of itself has no probative force. True, a permit is not a water right; but it does give any lawful holder of the permit, or an interest thereunder, the right to proceed with reasonable diligence and in compliance with the statute to mature the water right. To hold that a permit has no probative force would be tantamount, when pursued to its logical result, to holding that a person could get no rights under the statute which any appropriator would be bound to respect until the holder of the permit was in position to show that he had fully complied with the law in every respect and completed his appropriation by applying it to a beneficial use. *Sandpoint, etc., Co. v. Panhandle, etc., Co.*, 11 Idaho, 405, 83 Pac. 347; *Speer v. Stephenson*, 16 Idaho, 707, 714, 716, 102 Pac. 365; *Washington Sugar Co. v. Goodrich*, 27 Idaho, 26, 147 Pac. 1073.

The evidence touching the rights of the Taylors and their use of water and the relation existing between E. K. Taylor, on the one hand, and Samantha J. and J. B. Taylor, on the other hand, and the pleadings in this respect appear to be incomplete. The pleadings should be amended to promote the ends of justice in this case, in order that the trial court may receive evidence in support of their respective claims and award a judgment in proper form, which would adequately protect the rights of the parties under the law and the facts.

Independent of the discussion touching Taylor's rights under permit No. 2929, I am of the opinion, under the facts of this case, that the appropriation of the Taylors should be found to be complete to the right to the use of all the unappropriated water flowing in Dry creek, to the capacity of their ditch, not theretofore appropriated by the individual plaintiffs, for the reason that the evidence conclusively shows that the Taylors had constructed their ditch of sufficient size and capacity to carry all of the unappropri-

ated water, and had actually diverted the same and delivered it to the point of intended use, some time during the season of 1908, and a long time prior to the date of the permit held by the Blaine County Irrigation Company. And I think the evidence bears out the statement that the Blaine County Irrigation Company intended to secure its supply of water from flood waters, to be by it conserved in a reservoir for sale and distribution. The completion of the ditch by the Taylors and the diverting of the water to the point of intended use vested in them a property right in the use of the water, which could only be divested by condemnation for a higher use or lost by abandonment. To permit them to be deprived of such a vested property right in any other manner would clearly violate the Constitution and laws of this state.

It is not necessary for an appropriator to follow the procedure provided by statute in order to acquire a valid water right which will be good as against all subsequent appropriators. One who actually diverts and appropriates water to a beneficial use, or appropriates and diverts water to the point of intended use, and thereafter, with reasonable diligence, applies such water to a beneficial use, acquires as good a right thereto as one who appropriates under the provisions of the statute. *Conant v. Jones*, 3 Idaho (3 Hasb.) 606, 32 Pac. 250; *Brown v. Newell*, 12 Idaho, 166, 85 Pac. 385; *Lockwood v. Freeman*, 15 Idaho, 395, 98 Pac. 295; *Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488. In the latter case the court said:

"It has never been the intention, so far as we are advised, of the Legislature to cut off the right an appropriator and user of water may acquire by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this state. Sec. 3056, Rev. Codes; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793 [51 Pac. 990, 40 L. R. A. 485]; *McGuinness v. Stanfield*, 6 Idaho, 372 [55 Pac. 1020]. * * * But if he should actually divert the water and apply it to a beneficial use before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords."

It is clear, then, that there are two distinct methods by which one may acquire a water right: First, by actual appropriation; second, by compliance with the statute. The difficulty seems to arise in determining just how, or in what manner and to what extent, in a given case, the rights of one claiming by actual appropriation have accrued and will be protected. In this case the Taylors went into possession of their land in the spring of 1908; during that season they completed the construction of their ditch, or

canal, and actually diverted the water and carried it to the point of intended use, and the evidence shows that they proceeded, with due diligence, to clear their land, to cultivate it, and to apply the water to a beneficial use thereon.

If I understand the majority opinion, it restricts the doctrine of relation to the extent of a compliance with the statute, which would be correct, if the statutory method were the only method whereby water could be appropriated. But there is another doctrine, well settled in this state and other jurisdictions where the same question has arisen, which is adequate to fully protect the rights of the Taylors in all of the water which they claim, and this is the well-known doctrine of appropriation for future needs. *Wiel, Water Rights* (3d Ed.) vol. 1, §§ 396, 483, 484. This author says, in section 483:

"But while in mining a fixed amount may usually be sufficient from the start for all purposes, in irrigation of newly settled land it will not. The need for water grows as the area cultivated grows. The settler can cultivate, perhaps, only a few acres the first year; but he does everything with a view to later expansion. As is said in one case, it is reasonable to suppose that reclamation of the entire area owned at the time of diversion is contemplated. [Citing *Seaweed v. Pacific, etc., Co.*, 49 Or. 157, 83 Pac. 963.] Before his larger acreage is cleared and planted, however (which may take several years), other claimants to the use of the water have arrived. Does the law allow the former to continue increasing his use in the face of these later claimants? It seems well settled that such is the rule. * * * The essence of the rule is that the design may be carried out in spite of an intervening appropriator elsewhere on the stream, as the quotations below show."

In support of this doctrine the author cites cases from Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and California. The only limitations upon the rule are that the future needed amount must have been originally claimed at the time of initiating the appropriation, the future needs must have been in mind, the enlarged use must have been a part of an original policy of expansion, use on the land in question must have been contemplated at the time of the original appropriation, the future enlargement cannot exceed the original capacity of the ditch, the amount actually diverted can be held without using no longer than is reasonable under the circumstances of each case, and the right may be lost by abandonment. What is a reasonable time is a question of fact in each case, and depends upon the magnitude of the undertaking and the natural obstacles to be encountered in execution of the design. Section 484, *supra*, containing illustrations from numerous authorities there cited. This court clearly and without ambiguity adopted the above rule in this state in *Conant v. Jones*, *supra*. Under the circumstances in this case I feel justified in quoting at length, from the opinion in *Conant v. Jones*, that portion which is particularly in point, as follows:

"It is contended that respondent has not used, or put to a beneficial use, all of the water of said creek, and for that reason he has forfeited his right to all of the water not used for the purpose intended. It is true that the evidence fails to show that respondent has utilized the entire amount of water diverted. There is no question but what respondent had the right to appropriate, of unappropriated water, sufficient, not only for the present, but also for the future, needs of his land, when he shall get it into cultivation. The question arises as to the diligence to be exercised in the application of the water to the intended use. Section 3161 of the Revised Statutes of 1887 declares the diligence necessary to be exercised in conducting water to the point of intended use after the location of the same; but the law is silent as to the diligence to be exercised in making application of the water appropriated. The appropriator would no doubt be entitled to a reasonable time in which to get his land in cultivation and to make such application. If that be true, it follows that what constitutes reasonable time is a question of fact dependent upon the circumstances of each particular case. No inflexible rule should be made by which to decide what constitutes a reasonable time in this matter. We are of the opinion that a person who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need, or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use—such time at least, as is reasonable under all of the circumstances of the case. Poor men as a rule have settled upon the arid lands of this state and taken them under the laws of Congress, many of them under the homestead law, and are able to clear but a small portion of such lands of sage brush from year to year, and put it in condition for raising a crop, and it will take years for many of them to prepare their entire farms for cultivation and to make application of the water appropriated thereto. A decision that would defeat persons acting in good faith and using reasonable diligence from securing the full benefit of the water appropriated would be most unjust and inequitable. In the meantime, however, he is only entitled to such water from year to year as he puts to a beneficial use. A person may add from year to year acreage to his cultivated land, and increase his application of water thereto for irrigation as his necessities may demand, as his abilities permit, until he has put to a beneficial use the entire amount of water at first diverted by him and conducted to the point of intended use."

The rule there laid down has been followed by this court in *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19, and *Brown v. Newell*, supra. It should be noted in connection with the latter case that it was decided in 1906, three years after the adoption of the statute providing for the issuance of permits and the ultimate maturing of water rights thereunder by complying with the statutory provisions. The facts in that case are substantially parallel with the facts in the case at bar, so far as they describe the acts and intention of the Taylors. The court says in its opinion:

"It is contended by appellant that the acts of diversion and appropriation done by Horton in 1899 did not amount to an actual appropriation. It clearly appears from the evidence that the ditch was opened in the fall of 1899, and the headgate was put in, and the water, to the amount of 200 inches, was actually delivered on the Horton claim. These acts were followed

up the next year by extending the ditch, so as to more completely distribute the water over the entire claim, and this in turn was followed by cultivation of a larger acreage of the claim. We think the facts bring this case within the well-established rules of law both as to what constitutes an appropriation as well as the reasonable time in which the appropriator may apply the water to the intended use. *Conant v. Jones*, 3 Idaho [3 Hasb.] 606, 32 Pac. 250; *Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477; *Sand Point W. D. L. Co. v. Panhandle Co.*, 11 Idaho, 406, 83 Pac. 347. * * * It is unnecessary for us to consider the validity of the water right notice and claim posted by Horton on March 28, 1900, or of the subsequent steps taken by him under that notice in his endeavor to comply with the law. The actual diversion and application of the water had preceded that date, and it therefore becomes unnecessary for us to consider the steps taken in regard to the posting and recording the notice and the prosecution of work thereafter."

The facts in the present case are sufficient to indicate the amount of land settled and occupied by the Taylors, which, from the evidence, it clearly appears they intended to reclaim and irrigate by the application of water, which was actually appropriated and diverted to the point of intended use sometime during the season of 1908. The evidence shows that the ditch was designed to carry the water from their point of diversion to and upon their lands, and that it was completed that season, and that its capacity was adequate to carry water sufficient for the irrigation of all of the lands in question. The evidence further shows that the Taylors have proceeded with reasonable diligence in the application of this water upon their land to a beneficial use in the reclamation thereof. Of all of these facts the Blaine County Irrigation Company had actual notice at the time it secured its permit from the state engineer in October, 1910.

All of the facts and circumstances in evidence clearly show that the Taylors have brought themselves well within the rule governing appropriation for future needs. To hold otherwise would amount to overruling a long line of harmonious decisions governing such property rights in this state, and would abrogate a rule of law which is well settled in all of the arid states.

For the reasons herein expressed, I am unable to concur in the majority opinion upon this phase of the case.

WALSH v. NIESS et al.

(Supreme Court of Idaho. April 11, 1917.)

APPEAL AND ERROR \Leftarrow 612(5)—TRANSCRIPT—RECORD—DISMISSAL.

Held, where the transcript or record on appeal from an order or contested motion does not contain a certificate that the papers therein contained constitute all the records, papers, and files used or considered by the judge making the order on the hearing of the motion, as required by section 4821, Rev. Codes, and rule 24 (153 Pac. xi) of this court, the appeal will be dismissed.

ed under rule 27 (153 Pac. xi) of this court, on the court's own motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2698, 2700.]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by John Walsh against A. H. Niess and the Utaida Rod & Gun Club. From an order dissolving an injunction and from an order denying a motion to set aside a default, defendants appeal. Appeal dismissed.

A. H. McConnell, of St. Anthony, for appellants. N. D. Jackson, of St. Anthony, and A. H. Wilkie, of Ashton, for respondent.

BUDGE, C. J. This is an appeal from an order dissolving an injunction and from an order denying a motion to set aside a default. Upon an examination of the transcript we find that it contains no certificate; that the papers therein constitute all the records, papers, and files used or considered by the judge on the hearing.

Section 4819, Rev. Codes, provides that:

"On appeal * * * from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, * * * order appealed from, and of papers used on the hearing in the court below."

Section 4821, Rev. Codes, provides:

"The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys. * * *"

Rule 24 of this court requires a certificate to the transcript signed by the judge, clerk, or attorneys, and prescribes the form and the contents of such certificate. No such certificate appears in this transcript.

Rule 27 of this court provides:

"A strict compliance with the requirements of the rules concerning the preparation of transcripts will be exacted of the appellant or plaintiff in error in all cases by the court, whether objection be made by the opposite party or not, and for any violation or neglect in these respects which is found to obstruct the examination of the record the appeal may be dismissed. * * *"

The effect of the absence of the certificate that the transcript is required to contain, showing that the papers and records contained therein were all of the papers used by the trial judge on the hearing, has recently been considered by this court in the case of *Dudacek v. Vaught*, 28 Idaho, 442, 154 Pac. 995. It is unnecessary to again review the authorities at length. The appeal will be dismissed. *Simmons, etc., Co. v. Alturas Com. Co.*, 4 Idaho, 386, 39 Pac. 553; *Village of Sand Point v. Doyle*, 9 Idaho, 236, 74 Pac. 861; *Knutsen v. Phillips*, 16 Idaho, 267, 101 Pac. 596; *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363; *Doust v. Rocky Mountain Bell Tel. Co.*, 14 Idaho, 677, 679, 95 Pac. 209; *Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5; *Dudacek v. Vaught*, supra.

The appeal is dismissed. Costs awarded to respondent.

MORGAN and RICE, JJ., concur.

Ex parte BAUGH.

(Supreme Court of Idaho. May 3, 1917.)

1. HABEAS CORPUS ~~§~~102—EVIDENCE—PROBABLE CAUSE—STATUTE.

Under the provisions of section 8354, Rev. Codes, upon petition for a writ of habeas corpus this court may examine the evidence upon which the order of commitment was based to determine whether or not there was probable cause to believe: First, that the crime charged has been committed; second, that the party held to answer has committed it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 87-89.]

2. HABEAS CORPUS ~~§~~102—PROBABLE CAUSE—DIVIDENDS.

Where the evidence taken at the preliminary hearing of one accused of having intoxicating liquor in his possession, contrary to law, shows that the accused owned a drug store and building in which the same was situated, and that during his temporary absence therefrom certain parties entered the store with a satchel containing intoxicating liquor, that the sheriff entered immediately afterwards and confiscated and removed the liquor, and there is no evidence showing that it was brought upon the premises with the knowledge or consent of the accused, there was not probable cause for holding him to answer.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 87-89.]

Application by W. H. Baugh for writ of habeas corpus. Writ issued, hearing had on return thereof, and petitioner discharged.

Paul S. Haddock, of Shoshone, for petitioner. Harland D. Heist and Frank T. Disney, both of Shoshone, for the State.

MORGAN, J. W. H. Baugh, the petitioner herein, and A. M. Brickey, Jake Rolfsen, Sam Adams, and A. W. Gregor were arrested upon a charge of having intoxicating liquor in their possession, contrary to law, in Lincoln county. A preliminary examination was had before the probate judge of that county, sitting as a committing magistrate, which resulted in petitioner being held to answer to said charge in the district court. He gave bond for his appearance, was afterward surrendered to the sheriff by his bondsmen, and petitioned this court for and procured the issuance of a writ of habeas corpus, directed to that officer commanding him to bring petitioner before the court that the cause of his detention might be inquired into. The sheriff's return to the writ shows that he holds petitioner in custody pursuant to the proceedings above described and by reason of his surrender by the sureties on his bond. The question presented here is: Does the evidence taken at the preliminary examination justify the action of the magistrate in holding petitioner to answer?

Section 7578, Rev. Codes, relating to preliminary examinations, provides:

"If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged. * * *

[1] It is well established that, upon petition for a writ of habeas corpus, the court can go back of the order of commitment by a magistrate and inquire into the question of probable cause. Section 8354, Rev. Codes, referring to the writ of habeas corpus, provides:

"If it appears on a return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section: * * * 7. Where a party has been committed on a criminal charge without reasonable or probable cause."

See, also, *In re Helgho*, 18 Idaho, 566, 110 Pac. 1029, 32 L. R. A. (N. S.) 877, Ann. Cas. 1912A, 138; *In re Knudtson*, 10 Idaho, 676, 79 Pac. 641; *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *Ex parte Beville*, 6 Okl. Cr. 145, 117 Pac. 725; *People v. Moss*, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309.

In habeas corpus proceedings the sufficiency of the evidence to justify a verdict or the submission of the case to the jury will not be inquired into. The writ cannot be so used as to exercise the functions of an appeal, but the court may inquire into and examine the proofs submitted at a preliminary hearing to see whether or not: First, there is any evidence tending to show that a public offense has been committed; second, there was cause to believe the accused committed it. *State v. Baeverstad*, 12 N. D. 527, 97 N. W. 548; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

[2] The testimony taken at the preliminary examination was reduced to writing and is here for our consideration. It appears therefrom that petitioner is a physician and surgeon, residing at Shoshone, in Lincoln county, that he owns a drug store and the building in which it is situated, and that the second story of the store building is conducted as a lodging house.

The evidence introduced on behalf of the state consists, in addition to certain exhibits, of the testimony of the sheriff, who testified that on February 18, 1917, at about 11:30 p. m., he saw Brickey and Rolfson cross the railroad tracks coming from train No. 17, which is one of the main line west-bound passenger trains of the Oregon Short Line Railroad Company, and they had in their possession a satchel; that they went directly to and into petitioner's drug store. The sheriff entered the store immediately after Brickey and Rolfson and found therein, in addition to the two men last named, Gregor

and Adams; the latter being employed as a clerk in the store. The officer asked where the satchel was, to which Rolfson replied that he did not know anything about a satchel. The sheriff then stated that he had seen them bring it into the store and that he was going to get it. He asked Brickey where it was, and he replied that he did not know anything about it. Adams, however, pointed out the satchel to him and he took it into his possession. He afterwards broke open the satchel and found 12 quarts of whisky in it. It further appears from the sheriff's testimony that he did not see the petitioner during that evening, although he was both upstairs and downstairs in the store building.

From the testimony of petitioner, which was taken at the preliminary examination and which is uncontradicted, it appears that on the evening of the occurrences above mentioned he received instructions from the Oregon Short Line Railroad Company, of which company he was assistant surgeon, to visit certain patients out of town, and that he left Shoshone for that purpose on a freight train about a quarter past 11 o'clock that evening and did not return until about 5 o'clock next morning, that he left Adams in the store at the desk writing a letter, and that he had no knowledge whatever of the acts of Rolfson, Gregor, or Brickey that evening. Petitioner further testified that he had no knowledge about the valise or its contents or as to where they came from except from hearsay. It appears from the testimony of Adams, and it is uncontradicted, that when Brickey and Rolfson came to the drug store the former applied for a room, and that he directed him upstairs, where he later procured lodgings.

The proceeding before the committing magistrate was commenced pursuant to chapter 11, Sess. Laws 1915, p. 41, section 2 of which provides:

"It shall be unlawful for any person, * * * to have in his * * * possession * * * any intoxicating liquor. * * *

That law has been fully discussed and construed by this court in *Re Application of Ed Crane for a Writ of Habeas Corpus*, 27 Idaho, 671, 151 Pac. 1006.

The evidence introduced at the preliminary examination clearly shows that the crime of having intoxicating liquor in his possession has been committed by some one, but absolutely fails to connect the petitioner with the offense, except that he owned the building into which it was carried without his knowledge or consent. If this may be deemed to be even constructive possession, which is doubtful under the circumstances disclosed by the record before us, it clearly is not such a possession as is contemplated by the law of 1915 supra. That law clearly contemplates that the possession of intoxicating liquor, in order to be a crime, must be had knowingly or at least by the connivance or

with the consent of the possessor. It is not to be understood that it may be violated accidentally, inadvertently, or innocently, but if violated at all it must be done, as charged in the criminal complaint in this case, knowingly, intentionally, and unlawfully. Section 6314, Rev. Codes, provides:

"In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." *State v. Omachevriaria*, 27 Idaho, 797, 152 Pac. 280.

The prayer of the petition is granted, and the sheriff of Lincoln county is directed to discharge the petitioner from custody.

BUDGE, C. J., and RICE, J., concur.

PARCHEN v. CHESSMAN. (No. 3737.)

(Supreme Court of Montana. April 2, 1917.)

1. APPEAL AND ERROR ⇨1099(6), 1195(1)—LAW OF THE CASE—SECOND APPEAL.

The holding on appeal that facts pleaded as a defense would warrant reformation of note sued on and made the defense available is binding on a second appeal, as well as on the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4375, 4601.]

2. REFORMATION OF INSTRUMENTS ⇨45(1)—MISTAKE — QUALITY AND QUANTITY OF PROOF.

The rule that to warrant reformation of instrument for mistake the evidence must be clear, convincing, and satisfactory, refers to the quality, rather than the quantity, of proof; and the preponderance of evidence according to which, where the evidence is contradictory, Rev. Codes, § 8028, provides that the decision must be made, may be established by the testimony of a single witness, as against that of a greater number, section 7861, declaring that the direct evidence of one witness, who is entitled to full credit, is sufficient proof of any fact, except perjury and treason.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157, 177, 182, 189, 191.]

3. APPEAL AND ERROR ⇨994(3)—REVIEW—CREDIBILITY OF WITNESS.

The determination of the trial court on the credibility of witness cannot be interfered with, unless his testimony is characterized by such inherent improbability as in effect to destroy it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904-3905½.]

4. BILLS AND NOTES ⇨138—"RENEWAL"—"RENEW."

An agreement for "renewal" of or to "renew" a note means the substitution of another with the same substantive terms as the old, except as to date, and, in case of partial payments, as to amount (quoting 7 Words and Phrases, First and Second Series, Renew; Renewal).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339.]

5. REFORMATION OF INSTRUMENTS ⇨45(8)—MISTAKE—SUFFICIENCY OF EVIDENCE.

Relative to reformation of a renewal note, by elimination of the clause waiving the defense of limitations, evidence held sufficient to warrant the finding of mistake having been made in drafting the note.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 167, 168, 179.]

6. REFORMATION OF INSTRUMENTS ⇨45(1)—EVIDENCE—QUESTIONS OF CREDIBILITY AND WEIGHT.

Relative to mutual mistake, for which reformation of instrument is sought, there is presented merely a question of credibility of witnesses and weight to be given their testimony, by one party testifying to and the other against the mistake; it not being necessary that both should testify to the mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157, 177, 182, 189, 191.]

7. REFORMATION OF INSTRUMENTS ⇨19(2)—"MUTUAL MISTAKE"—MISTAKE OF SCRIVENER.

Though it is not a case of technical "mutual mistake" where by mistake of the scrivener the writing does not correctly express the terms agreed on by the parties, it is a mistake that equity will correct that the writing may express the agreement of the parties (quoting Words and Phrases, Mutual Mistake).

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 75.]

Appeal from First Judicial District Court, Lewis and Clark County; John A. Matthews, Judge.

Action by Henry M. Parchen against William A. Chessman. Judgment for defendant, and plaintiff appeals. Affirmed.

Galen & Mettler, of Helena, for appellant. Gunn, Rasch & Hall, of Helena, for respondent.

HOLLOWAY, J. This action was brought to recover upon a promissory note dated December 26, 1897. The defendant prevailed in the lower court, and plaintiff has appealed.

The second defense interposed is to the effect that in 1893 the defendant executed and delivered to plaintiff his certain promissory note; that when such note became due in 1894 it was renewed by defendant executing and delivering to plaintiff another note; that in 1896 a third note was given in renewal of the second; and that in 1897 the note sued upon was given in renewal of the balance due upon the third note. It is further alleged that the note sued upon was prepared by a scrivener through whose mistake a clause was inserted which neither of the parties to the transaction ever intended should be included; that not any one of the three preceding notes contained the objectionable clause; that it was the intention and agreement of plaintiff and defendant that the note sued upon should be a renewal pro tanto of the note executed in 1896; and that it should be in the same form and of like tenor and effect as the preceding notes evidencing the same indebtedness.

[1] Upon a former appeal (*Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681) we held that the facts pleaded in this second defense, if true, would warrant reformation of the note and make available the first defense. That decision became the law of the case binding upon this court as well as upon the court

below. *Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664; *Conway v. Monidah Trust*, 51 Mont. 113, 149 Pac. 711.

The findings made by the trial court follow substantially the allegations contained in the defendant's second defense, and the principal contention now made is that the evidence is insufficient to sustain such findings.

[2, 3] It is insisted that the testimony of the defendant in support of his affirmative defense is altogether uncorroborated, and that, if it is not absolutely necessary that it be corroborated, at least a court of equity should proceed with extreme caution in awarding reformation of a written instrument upon the testimony alone of the party seeking such relief. We may agree with counsel that to warrant reformation the evidence must be clear, convincing, and satisfactory; but this rule refers to the quality rather than to the quantity of proof. It is idle to refer to authorities which hold that to warrant reformation on the ground of mistake the mistake must be made to appear beyond a reasonable doubt or by any quantum of proof beyond a bare preponderance. Whatever may be the rule in other jurisdictions, the question is set at rest in this state by statute. Section 8028, Revised Codes, declares that in a civil case the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence. *Gehlert v. Quinn*, 35 Mont. 451, 90 Pac. 168, 119 Am. St. Rep. 864. Neither can it be questioned that the preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary; for section 7861, Revised Codes, declares that:

"The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact, except perjury and treason."

See *Story v. Maclay*, 6 Mont. 492, 13 Pac. 198; subdivision 2, § 8028, above.

It was for the trial court to determine the credibility of the defendant in the first instance, and, unless his testimony is characterized by such inherent improbability as in effect to destroy the testimony itself, this court will not interfere.

[4] We find nothing improbable in the story told by the defendant; on the contrary, there were facts and circumstances corroborating his testimony which doubtless weighed in the estimation of the court below. It is beyond controversy that the note sued upon is one of a series of four notes given to evidence the same indebtedness. The first one was executed in 1893. In 1894 the second one was given in renewal of the first. In 1896 the third was given in renewal of the second, and finally the note sued upon was given in renewal of the third. As each note was superseded by a new one, the old note was surrendered to the defendant. Upon the trial

defendant was unable to produce either the first or third note, but he did produce the second note, which disclosed that it did not contain the objectionable clause found in the one sued upon. If each succeeding note was intended to be a renewal of the preceding one, then every one of the notes should have contained the same substantive terms except as to amount and date of payment. In *Hay v. Insurance Co.*, 77 N. Y. 235, 33 Am. Rep. 607, the court said:

"An agreement to renew a policy implies that the terms of the existing policy are to be continued, and this would be so of any instrument, in the absence of evidence, that a change was intended."

"The word 'renewed' or 'renewal,' as applied to promissory notes in commercial and legal parlance, means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time, to restore to its former condition an obligation on which the time of payment has been extended." 7 Words and Phrases, 6084.

"The word 'renew,' in a lease providing that the lessee shall have the right to renew the lease, imports a giving of a new lease like the old one, with the same terms, stipulations, and covenants." 4 Words and Phrases (2d Ser.) 267; *Leavitt v. Maykel*, 203 Mass. 506, 89 N. E. 1056, 133 Am. St. Rep. 323.

[5] With this second note in evidence tending so strongly to confirm the defendant's version of the transaction, it cannot be said that the trial court was not justified in finding that a mistake was made in drafting the note sued upon; and this is particularly so in view of the fact that 21 years elapsed between the execution of the first note and the date of the trial, and that these witnesses were compelled to rely upon their uncertain recollection of transactions the last of which occurred seventeen years before they testified.

[6] It is further contended that, even though the evidence discloses that as to defendant there was a mistake made in inserting the objectionable clause, there is not any evidence of a mutual mistake, since plaintiff insists that the note correctly represents the agreement made at the time it was executed and delivered. We know of no rule of law which requires that each of these parties must come upon the witness stand and admit that the writing does not correctly express their agreement, in order to prove that a mistake common to both was made in its execution. The fact that by a mistake a certain provision was incorporated which neither party intended should be included may be proved as any other fact, and if upon the whole case it appears that such a mistake was made, reformation may be authorized, even though one of the parties denies that any mistake whatever occurred. There is presented merely a question of the credibility of the witnesses and the weight to be given to their testimony.

[7] It may be conceded that, if plaintiff and defendant mutually agreed that the note sued upon should be in the same form (excepting

amount and date of payment) as the 1894 note, which was produced in evidence, and if the objectionable clause was inserted only through the mistake or inadvertence of the scrivener, there is not presented a mutual mistake on the part of plaintiff and defendant according to the strict legal significance of those terms, though such a mistake is frequently referred to as a mutual mistake by the authorities.

"The phrase 'a mutual mistake' as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument." 5 Words and Phrases, 4650; Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152.

It may be that the only issue presented where it is claimed the mistake occurred through the inadvertence of the scrivener is: What was the language intended by both parties to be incorporated in the writing? But when the claim is made that by reason of the mutual mistake of the parties the instrument does not express their intention, "the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences." Section 6110, Rev. Codes. It is only in a very restricted sense, if at all, that it may be said that this defense presents a question of mutual mistake. It may possibly be said to be a mutual mistake in the sense that, by defendant executing the note and plaintiff accepting it with the objectionable clause included, both are apparently made to do what neither intended to do, viz. to agree upon a form of note which includes the clause in question. But in reality, if the testimony of defendant be accepted, there was not any mistake made by plaintiff or defendant. They agreed upon the terms of their contract and were not mistaken as to its meaning or as to the legal consequences to flow from it. It was only because of the mistake of the scrivener that the instrument does not correctly express the terms agreed upon.

When it is said by courts and text-writers that equity will not lend its aid to reform an instrument for mistake unless it is a mutual mistake, the terms "mutual mistake" are used in contradistinction to a unilateral mistake or the mistake of one party to the instrument only. If the error occurs through the mistake of the scrivener, it is none the less a mistake, and, to the extent of it, the writing does not express the will of the parties. To that extent the instrument is not their contract, for it lacks the indispensable element of meeting of minds upon the same thing at the same time. To speak of enforcing a contract which never existed is a contradiction of terms.

But, though this case does not present a technical mutual mistake, it does present a mistake which a court of equity will not hesi-

tate to correct to the end that the writing may express the agreement of the parties. Born v. Schrenkelsen, 110 N. Y. 55, 17 N. E. 339; West v. Suda, 69 Conn. 60, 36 Atl. 1015; 34 Cyc. 910.

It is not made certain by this record whether the plaintiff read the note sued upon before it was executed and accepted by him; but we do not deem it material if in fact he read the note before he received it and understood that it contained the objectionable clause. Plaintiff's own testimony makes it clear that he had no agreement with defendant that the note should contain the particular clause in controversy. The question before the trial court was: What were the terms upon which the parties agreed at the time of their agreement? The discovery by one party after that time that the writing does not correctly express the agreement does not affect the agreement itself.

We have examined the other assignments, but do not think they merit special consideration.

The judgment is affirmed.

Affirmed.

SANNER, J., concurs. BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

CRANE & ORDWAY CO. v. BAATZ et al. (No. 3743.)

(Supreme Court of Montana. April 2, 1917.)

1. MECHANICS' LIENS §5 — CONSTRUCTION OF STATUTE.

The rule that mechanic's lien laws are remedial, and will be liberally construed and applied, means that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5.]

2. MECHANICS' LIENS §154(2)—LIEN NOTICE—AFFIDAVIT—DESCRIPTION OF PROPERTY.

In view of Rev. Codes, § 7988, defining "affidavit," section 7291, prescribing the mode of perfecting a mechanic's or materialman's lien, is not complied with by a document, filed by a materialman as a lien claim, to verify the description of the property affected, containing an acknowledgment of the managing agent of the claimant corporation, taken before a notary public, that the corporation executed the lien notice, since the acknowledgment was not an affidavit; the affidavit being essential, and going to both the account and the description.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 262.]

3. MECHANICS' LIENS §154(2)—LIEN NOTICE—AFFIDAVIT TO ACCOUNT AND DESCRIPTION.

The affidavit to a materialman's lien notice should verify the account and the description of the property affected.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 262.]

4. MECHANICS' LIENS §134 — NOTICE OF LIEN—ACCOUNT AND DESCRIPTION OF PROPERTY—FORM OR ORDER.

No set form or order for the account and description of the property affected in a mechanic's lien notice is required.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 208.]

5. MECHANICS' LIENS §148—VERIFICATION OF ACCOUNT—STATUTE.

Under Rev. Codes, § 7291, prescribing how to perfect a mechanic's or materialman's lien, a materialman's claim of lien must verify the account as a just and true one, after allowing "all credits."

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 254.]

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

Action to enforce a materialman's lien by the Crane & Ordway Company, a corporation, against Nick Baatz and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Peters & Smith, of Great Falls, for appellant. Freeman & Thelen, of Great Falls, for respondents.

SANNER, J. The correctness of the judgment from which this appeal is taken depends upon whether the plaintiff has a valid lien, under section 7291, Revised Codes, upon the property of the respondent Nick Baatz. As and for such lien the plaintiff filed in the proper office a document comprising:

(1) An unsigned notice of lien claim, reciting, among other things, that the claimant furnished certain materials for the Nick Baatz building, erected on lot 1, in block 414, of the original townsite of Great Falls, Cascade county, Mont.; "that the value of the said materials amounted to the sum of \$2,707.93, as will more fully appear, reference being had to an itemized statement of account of said materials hereunto annexed, marked 'Exhibit A,' and hereof made a part."

(2) The following matter, just after the notice:

"[Venue.] Charles S. O'Brien, being first duly sworn, on oath deposes and says: That he is the managing agent for the Crane & Ordway Company, a corporation, the party in the foregoing notice of lien and statement of account of the amount due said Crane & Ordway Company for the materials therein described, after allowing all credits and offsets; that said notice and statement contains a correct description of the property to be charged with said lien; and that all the facts stated in said notice and statement are true. C. S. O'Brien, Managing Agent for Crane & Ordway Company.

"On this 3d day of February in the year 1914, before me, Julius C. Peters, personally appeared Charles S. O'Brien, known to me to be the managing agent of the Crane & Ordway Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same. Julius C. Peters, Notary Public for the State of Montana, residing at Great Falls. My commission expires December 19, 1916. [Seal.]"

(3) Forty-five typewritten pages of figures headed, "Exhibit A, Itemized Statement of Account," followed by (4) this matter:

"[Venue.] C. S. O'Brien, being first duly sworn, deposes and says that he is the local manager of the Great Falls branch of the Crane & Ordway Company, a corporation existing under and by virtue of the laws of the state of Minnesota; that he has read and examined the within account; that it is true of his own knowledge; that the said account is just; that the balance of twenty-seven hundred seven dollars ninety-three cents (\$2,707.93) is wholly unpaid. C. S. O'Brien.

"Subscribed and sworn to before me this 3d day of March, 1914. E. H. Schmidt, Notary Public for the State of Montana, residing at Great Falls, Montana. My commission expires July 8, 1916. [Seal.]"

[1] The trial court held this document to be ineffective to create a lien, because it does not purport to be "a just and true account of the amount due * * * after allowing all credits, and containing a correct description of the property to be charged, * * * verified by affidavit," as required by law; and this conclusion is assailed as a violation of the well-known rule that mechanic's lien laws are remedial, and therefore to be liberally construed and applied. Counsel mistake, and therefore misapply, the rule they seek to invoke. It is that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction, for it is remedial in character, and rests upon broad principles of natural equity and commercial necessity. But the special right acquired in virtue of a mechanic's lien is purely statutory, and the manner of securing it, by perfecting the lien, consists of various steps, which are also statutory, and must be strictly followed. *Sritzel-Spaberg Lumber Co. v. Edwards*, 50 Mont. 49, 54, 144 Pac. 772; *McGlauffin v. Wormser*, 28 Mont. 177, 181, 72 Pac. 428.

[2] The present case has to do with the means taken to secure the lien. "The paper containing the account, description, and affidavit is deemed the lien," and while certain errors in the account or description may not invalidate the lien, the affidavit is essential, and must go to both the account and the description. Rev. Codes, § 7291. It will be observed that the only effort to verify the description, as such, occurs in the matter marked (2) above, which contains no jurat, or other intimation by any one authorized to administer oaths, to show that any oath was taken; on the contrary, it proves, if anything at all, that C. S. O'Brien acknowledged that the corporation claimant executed the notice. By no liberality of construction can the matter embraced in item (2) be called an affidavit. Rev. Codes, § 7988; *Metcalf v. Prescott*, 10 Mont. 283, 294, 25 Pac. 1037.

[3-5] The appellant, conceding, as it must, that the affidavit should verify the other two things necessary to make up the lien, to wit, the account and the description, insists that

the affidavit which appears at the end of "Exhibit A, Itemized Statement of Account," that is to say, item (4) above, does so because the "account," to which it refers, means the narration embraced in the entire document, including the description. If this were true, the lien should be sustained, for no set form or order is required (*Wertz v. Lamb*, 43 Mont. 477, 482, 117 Pac. 89); but the true meaning of "account," as used in section 7291, is not as contended, and is not the meaning intended to be conveyed by the affidavit, item (4). This affidavit does not assume to verify the description at all, and does not verify the account itself as the statute requires. The account must be a just and true one, "after allowing all credits," and must be verified as such. The purpose of the affidavit is clear enough. It is not merely to entitle the lien claim to record, but to furnish a sanction for it in such an oath as will subject the affiant to punishment for perjury if it be false in material particulars. No such result could follow here, even though the description in item (1) were wholly false, or the account in item (3) were altogether untrue and unjust, "after allowing all credits."

The judgment appealed from is affirmed.
Affirmed.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

NATIONAL BANK OF GALLATIN VALLEY v. INGLE et al. (No. 3744.)

(Supreme Court of Montana. March 31, 1917.)

1. ANIMALS § 27—LEASE OF SHEEP—CONSTRUCTION BY PARTIES.

Where the parties to a lease of a band of sheep construed the contract so as to express their intentions and acted in accordance therewith, the court will adopt the construction they placed upon it as to which party had title to lambs sold by the lessee.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-78.]

2. ANIMALS § 27—LEASE OF SHEEP—DIVISION OF LAMBS.

Where a band of sheep was leased, and the contract gave the lessee an interest in the original sheep, the right to the possession and care of them, to the end that they might yield an increase from which he could receive pay for his services, and also the right to become owner of the original stock by substitution of other stock, the title became vested in a particular half of the lambs, or their proceeds, when a division of the lambs was effected by the lessee's sale and delivery to a third person after the date on which the lease contract provided the lambs should be divided.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-78.]

3. CHATTEL MORTGAGES § 138(1)—PRIORITY—LESSOR'S LIEN.

Where a band of sheep was leased, the lessee to receive half the wool and lambs, replacing lost stock, and the lessee mortgaged the lambs, and, when the division of lambs between lessor and lessee took place, the lessor had notice of

the mortgage, but consented to a division of the lambs, he was divested of his lien, and thereafter the mortgage was not subject to the lessor's lien, as between the lessor and the mortgagee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228, 229, 231-236.]

4. ASSIGNMENTS § 34—VERBAL ASSIGNMENT—DIRECTION TO PAY MONEY.

Where the division of lambs by the lessor and lessee of a band of sheep effected a waiver by the lessor of his security on the lessee's share of the lambs, and operated to vest in the lessee the right to dispose of the proceeds, when the lessee directed payment of his share of the purchase money to the bank, to which he had given a mortgage, the direction was in effect a verbal assignment, which the buyer of the lambs was bound to honor, and on which the bank could sue him.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 67-71.]

5. CHATTEL MORTGAGES § 225(1)—RIGHTS OF THIRD PERSONS—"INNOCENT PURCHASER."

An "innocent purchaser" is one who pays or obligates himself to pay the full purchase price of mortgaged property to the vendor, with no notice of any claim or right to the property in another (citing *Words and Phrases*, *Innocent Purchaser*).

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470.]

Appeals from District Court, Sweet Grass County; Albert P. Stark, Judge.

Action by the National Bank of Gallatin Valley against Ernest Ingle and others. From a judgment denying plaintiff any relief as against defendant Parham, and from an order refusing new trial, plaintiff appeals. Judgment and order reversed, and cause remanded, with directions to enter judgment for plaintiff against defendant Parham.

Geo. Y. Patten, of Bozeman, for appellant.
F. B. Reynolds, of Billings, for respondents.

McCULLOCH, District Judge. This action was brought to recover on a promissory note executed and delivered by defendant Ingle to plaintiff, and to foreclose a chattel mortgage, given to secure the same. From the judgment, in so far as it denied plaintiff any relief as against defendant Parham, and from an order refusing a new trial, these appeals are prosecuted.

The plaintiff alleges that defendant Wirak leased a band of ewe sheep to defendant Ingle for a term of three years. Ingle was to perform certain services and pay certain expenses incident to the care of the flock, and, in payment and reimbursement therefor, to receive one-half the wool clip and one-half the lambs; the wool to be divided each year at the shearing pens and the lambs to be divided when weaned, on October 1st of each year; the title to the lambs to be in defendant Wirak until division was made as stipulated in the agreement. All shortage in the original stock was to be made good by Ingle at shearing time each year, by furnishing ewes of the age of those lost, or, at the option of Ingle, to replace such loss by giving three ewe lambs for

every two ewes lost. At the end of the third year Ingle was to replace the original stock with ewes of a certain age, and the original stock was then to become the property of Ingle. At shearing time in 1912 (the third year) the original stock had been diminished to the extent of some 800 head, which Ingle was obliged to replace, but which he did not replace, then nor at any other time.

In January, 1912, Ingle executed and delivered the promissory note and the chattel mortgage sued upon, and the mortgage was duly filed for record. From the pleadings it appears that prior to October 1, 1912, defendant Parham contracted with defendant Wirak for the purchase of all the lambs belonging to the band of sheep in question; that Parham had knowledge at the time of the interests of Ingle in the lambs, but had no actual knowledge of the existence of the chattel mortgage at the time of the purchase by him of the lambs; that the lambs were delivered to Parham after October 1st and by him immediately delivered to one Bailey, to whom he had sold them; that after delivery of the lambs, and before Parham paid the purchase price, he was informed of the existence of plaintiff's chattel mortgage, and was directed by Ingle to pay the plaintiff the amount due him for his one-half of the lambs; that, owing to the failure of Ingle to replace the sheep missing from the band, Wirak demanded payment of all the money to him, and Parham paid it to Wirak, instead of to the bank.

The trial court found, along with other facts, that in the latter part of August, 1912, Wirak, with the consent of Ingle, contracted with Parham for the sale of the lambs, and at the same time informed Parham of Ingle's interest; that in the latter part of September Wirak was informed and had knowledge and notice of plaintiff's chattel mortgage. Among its conclusions of law, the trial court declared that the sale of the lambs to Parham operated as and effected a division of the lambs as between Wirak and Ingle, and that each of them thereby became entitled to one-half of the proceeds of the sale; that the filing of the mortgage, owing to the indefinite description of the property, did not impart notice to Parham; that the sale of the lambs from Wirak to Parham was completed when the delivery was made to Parham; that when Parham first learned of the mortgage he had sold and delivered the lambs to one Bailey, and that Ingle and Wirak were present at and knew of such sale and delivery; that Parham was not then in possession, nor had he any interest in them; that plaintiff, by its agent, Ingle, having consented to the sale and assisted in the delivery of the lambs to Parham without informing him of its mortgage, and not having given Parham notice of its claim prior to his sale and delivery of the lambs to Bailey, is estopped from asserting any claim against defendant Parham. Judgment was awarded against

Ingle, but in favor of Parham. No judgment was sought against Wirak.

At the time Ingle executed and delivered the chattel mortgage to plaintiff, had he any interest in the increase of the flock that could be mortgaged? The contract provided that the shortage of ewes was to be made good by replacement at shearing time; that the division of lambs was to take place on October 1st, and that the title to the lambs was to remain in Wirak until the division of them was made. If the language of the contract were strictly construed, Ingle would have no title or interest in the lambs until October 1st, even had he at shearing time made good all shortages occasioned by losses occurring in the original band during the previous year. From shearing time to October 1st Ingle would be compelled to care for a large band of lambs in which he had no interest. Notwithstanding the language of the contract to the effect that title was to remain in Wirak until division, the intention of the parties was evidently that Wirak was to have a lien upon the lambs to secure the faithful performance by Ingle in the way of replacement of lost stock. Wirak alleges in his answer:

"That it was the intention of said parties to said contract that the provision above mentioned, as to the title to said lambs remaining in defendant Louis L. Wirak until the same were divided, should stand as security to said Louis L. Wirak for the performance of the obligation of said Ernest Ingle assumed by him in said contract, including the obligation to make good the loss on the original stock as above mentioned; * * * that said plaintiff took said mortgage with full knowledge of the terms of said contract made and entered into by and between said Louis L. Wirak and Ernest Ingle, and did thereby take said mortgage subject to the equities of defendant Louis L. Wirak."

[1] If the right Wirak was intended to have, and which he and Ingle understood he had, was a mere equity, to wit, security for performance of Ingle's agreement to replace stock on account of losses, then the title to the lambs was not in Wirak, but, instead, he had a lien upon the lambs for the performance of that particular part of the contract, and Ingle had the title. Assuredly Wirak could not hold his own property as security for the performance of an obligation Ingle owed to him. He certainly so understood when he contracted with Parham for the sale of the lambs and informed Parham of Ingle's interest; and Ingle certainly so understood when he mortgaged his interest in the lambs to plaintiff. The parties themselves having construed the contract so as to express their intentions, and having acted in accordance therewith, the court will adopt the construction they placed upon it.

[2] Aside from this, the contract gave Ingle a certain interest in the original sheep, being the right not only to the possession and care of them, to the end that they might yield an increase from which he could receive pay for his services, but also the right, to become owner of the original stock by substitution of other stock therefor. Title

became vested in a particular one-half of the lambs or the proceeds thereof when, as the court concluded, a division was effected by the sale and delivery to Parham on October 10th.

[3] Wirak had no knowledge of the existence of the chattel mortgage until the latter part of September, which was shortly before the delivery of the sheep to Parham. When the division of lambs between Wirak and Ingle took place, Wirak had notice of plaintiff's mortgage; yet he saw fit to consent to a division of the lambs, which divested him of his lien upon them. The division of the lambs did not divest Wirak of the right to have the losses of original stock made good by Ingle, but it did divest him of the security he had for the making good of such loss; so that the mortgage of the bank, which up to that time was subject to the lien of Wirak, was no longer so as between Wirak and the bank.

[4] Another conclusion of law made by the trial court is that, since a delivery of the lambs was made by Wirak and Ingle to Parham, and also by Parham to Bailey—Bailey being a purchaser from Parham—with the knowledge of Wirak and Ingle, before Parham became aware of the bank's mortgage, and the sale between Wirak and Parham being complete, there is no liability on the part of Parham to the bank, although Parham had notice of the mortgage before he paid the money to Wirak. This is not correct, because it overlooks the proposition that the division of the lambs effected a waiver by Wirak of his security upon Ingle's share and operated to vest in Ingle the right to dispose of the proceeds. When, therefore, Ingle directed the payment of his share of the purchase money to the bank, that direction was in effect a verbal assignment which Parham was bound to honor, and upon which the bank could maintain its action.

[5] Moreover, Parham was not an innocent purchaser for value. An innocent purchaser is one who pays, or obligates himself to pay, the full purchase price of property to the vendor, with no notice of any claim or right to the property in another. 4 Words and Phrases, p. 3629; 5 Cyc. 719; 24 Am. & Eng. Ency. Law (2d Ed.) p. 12. Assuming that Wirak made the sale to Parham, and that Ingle was not known in the transaction, as respondents' attorneys contend in their brief, and that Parham then obligated himself to Wirak for the payment of the full purchase price, he was not an innocent purchaser so far as Ingle was concerned, because he then knew that Wirak was not the sole owner of the lambs, and he also knew that Ingle had some property right in them, and the extent of that right. Knowing, when he first obligated himself to Wirak, that Ingle was a part owner of the lambs, knowing, when the lambs were delivered, that Wirak

had no right to receive the entire purchase price, and learning, before he had paid the purchase price, that the bank held a mortgage executed by Ingle, it is difficult to understand how Parham could be an innocent purchaser as to the bank.

Touching the asserted estoppel, these reflections are pertinent: If, as the trial court found, Ingle, at the time of the delivery of the lambs to Parham, was acting as agent of plaintiff in the delivery, plaintiff having previously consented to the sale of the lambs, it necessarily follows that Ingle, as agent for plaintiff, was in possession of the lambs. If the plaintiff was in possession of the lambs just prior to their delivery to Parham, it must have been by reason of the mortgage. Under this theory, it was Ingle who consented to the sale being made by plaintiff who was selling them under the mortgage. Just how this condition of affairs would estop plaintiff from asserting any claim against defendant Parham, in view of the want of any showing that he was misled to his prejudice is by no means clear. *Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596. It follows that plaintiff was entitled to judgment against defendant Parham.

The judgment and order appealed from are therefore reversed, and the cause is remanded, with directions to enter judgment accordingly.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.
Hon. R. LEE McCULLOCH, District Judge of the Fourth Judicial District, sat in place of the Chief Justice.

HARRINGTON v. CRICHTON. (No. 3987.)
(Supreme Court of Montana. March 23, 1917.)

ELECTIONS § 177—BALLOTS—STUB AND OFFICIAL STAMP.

Rev. Codes, § 575, providing that in the canvass of votes a ballot not indorsed by the official stamp must not be counted, enacted prior to section 545, providing for a stub at the top of the ballot and separated from the rest of it by a perforated line, each stub to be differently numbered, does not prevent counting of it, where the judges in putting the official stamp on the back of the ballot and "near the top of it," as required by section 551, put it on the back of the stub, so that the judge in removing the stub, as required by section 552, before depositing the ballot, after finding that the number was the same as on the ballot given the voter, removed the official stamp.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 149.]

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Election contest by Eva Harrington against May J. Crichton. Judgment for contestant, and contestee appeals. Reversed and remanded.

Henry C. Smith, E. D. Phelan, and C. E. Pew, all of Helena, for appellant. C. A. Spaulding and J. R. Wine, Jr., both of Helena, for respondent.

MATTHEWS, District Judge. The parties to this action were, at the last general election, rival candidates for the office of county superintendent of schools for Lewis and Clark county, both being legally qualified and duly nominated. The board of canvassers found that appellant had received the highest number of votes cast for said office and declared her duly elected and caused a certificate of election to be issued to her. Being dissatisfied with the result of the election, respondent filed her petition of contest. Issue was joined and a trial had, resulting in a judgment in favor of respondent declaring her duly elected to said office, and declaring the certificate so issued to appellant null and void. From this judgment the appellant appeals, assigning as error, among others:

"(3) The district court erred in refusing to count the ballots from the Gilman precinct, the Elkhorn precinct, and other ballots, the sufficiency of the stamping of which was questioned."

This is the main contention and controlling question in the case and is based on the findings of the court below, appearing in its memorandum opinion, that:

(1) "During the recount of said ballots by the attorneys for the respective parties, and in the presence of the court, ballots were found in the returns of more than one precinct within the city, and from at least two precincts outside the city, that did not have on the back thereof the official stamp. * * * (2) "The exclusion of the unstamped ballots found in the several precincts, other than precinct No. 31, Gilman precinct, if, under the law, they should not be counted, would not change the result; if, however, the unstamped ballots in precinct 31 should not have been counted by the judges of election, and were to be disregarded on the official count, the result would be the election of the contestant." And the conclusions of law based on said findings, that the ballots not stamped should not have been counted, resulting in the judgment heretofore mentioned.

It appears from the evidence adduced at the trial that in Gilman precinct No. 31, through an erroneous interpretation of the instruction to judges of election, sent out according to law by the county clerk, that "on the back near the top of the ballot must be stamped the words 'official ballot,' the name and number of the election precinct," the judges systematically stamped each ballot before delivery, with the rubber stamp furnished, "on the back near the top" of the sheet on which was printed the blank ballot, but so near the top that the entire legend thereof appeared above the perforation. Each ballot, when voted, was returned by the voter so folded that the official stamp and the number of the ballot were on the outside, so that the judges of election could tell at a glance that the paper returned was the official ballot delivered to the voter. Thereupon the ballot judge tore off the stub and with it the official stamp so placed above

the perforation, and placed the ballot in the box provided for that purpose. On the closing of the polls the box was opened; the ballots counted; results entered as required by law; and the ballots so counted, being the same ballots that went into the box during the day in the regular course of voting, were sealed in an envelope, indorsed and delivered to the county clerk, and, on the trial, produced in court.

The contention of respondent, sustained by the court below, is that inasmuch as no ballot in precinct No. 31 was, at the time it was taken from the box and counted, indorsed with the official stamp, every ballot cast in said precinct was void and should not have been counted. The court below found that there was no evidence of fraud of any kind in the election, and that there was no evidence that any ballot box had been tampered with and, in fact, there is no contention of fraud or irregularity in the election, other than the irregularity in the stamping of ballots in the precincts named. The whole question, therefore, is whether under the law the appellant, who was admittedly the choice of a clear majority of the people of her county, shall lose the fruits of victory through the irregularity in stamping ballots referred to.

Section 9, art. 9, of the Constitution of the state of Montana, provides:

"The Legislative Assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise."

The Legislature has provided a general registration law and present set of rather elaborate and effectual laws to secure the purity of our elective franchise and for the prevention of fraud in elections. Under these laws a uniform ballot is provided. It is printed and distributed at the public expense, and no other ballots than those so provided can be cast or counted. Rev. Codes, § 542.

Section 545, after providing for the blank form of ballot, reads as follows:

"The ballot shall be printed on the same leaf with a stub, and separated therefrom by a perforated line. The part above the perforated line, designated as the stub, shall extend the entire width of the ballot," etc.

The county clerk is required to furnish each precinct with the appropriate stamp, with ink pad for the purpose of designating or stamping the official ballots. Section 547.

Section 551 then provides:

"At any election the judges of election must designate two of their number whose duty it is to deliver ballots to the qualified electors. Before delivering any ballot to an elector, the said judges must print on the back, and near the top of the ballot, with the rubber or other stamp provided for the purpose, the designation 'official ballot' and the other words on same, as provided for in section 547 of this chapter; and the clerks must enter on the poll lists the name of such elector and the number of the stub attached to the ballot given him. * * *

"Sec. 552. On receipt of his ballot the elector must forthwith, without leaving the polling

place and within the guard rail provided, and alone, retire to one of the places, booths or compartments, if such are provided, and prepare his ballot. * * * After preparing his ballot, the elector must fold it so the face of the ballot will be concealed and so that the indorsements stamped thereon may be seen, and hand the same to the judges in charge of the ballot box, who shall announce the name of the elector and the printed or stamped number on the stub of the official ballot so delivered to him, in a loud and distinct tone of voice. If such elector be entitled then and there to vote, and if such printed or stamped number is the same as that entered on the poll list as the number on the stub of the official ballot last delivered to him by the ballot judge, such judge shall receive such ballot, and after removing the stub therefrom in plain sight of the elector and without removing any other part of the ballot, or in any way exposing any part of the face thereof below the stub, shall deposit each ballot in the proper ballot box for the reception of voted ballots, and the stubs in a box for detached stubs. * * *

Section 572 provides:

"As soon as the polls are closed the judges must immediately proceed to canvass the votes given at such election. The canvass must be public in the presence of bystanders, and must be continued without adjournment until completed and the result thereof is public declared. "Sec. 573. * * * The judges must then take out of the box the ballots unopened except to ascertain whether each ballot is single, and count the same to determine whether the number of ballots correspond with the number of names on the poll lists. * * *

Section 575 provides:

"In the canvass of the votes any ballot which is not indorsed, as provided in this title, by the official stamp, is void and must not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice, is void and must not be counted; if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part."

From the entire comparison of the sections quoted, it clearly appears that the duties imposed by law upon the electors and the judges of election are largely reciprocal, and in many material matters the elector may, by his own negligence, render his ballot void in whole or in part. Thus he should be held chargeable with seeing that the official ballot delivered to him by the judges of election has stamped "on the back and near the top" the appropriate designation of the official ballot, and, if he negligently receives a ballot not so stamped or on which the stamp is glaringly deficient or lacking in some of the essential elements required by law, he cannot be heard to complain that his vote is not counted and that his ballot is void. *Slaymaker v. Phillips*, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842; *Newhouse v. Alexander*, 27 Okl. 46, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674; *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495; *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313; *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805; *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837; *Miller v. Schallern*, 8 N. D. 395, 79 N. W. 865. The cases above correctly state the general rule:

"If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature." *McCreary on Elections* (3d Ed.) § 190.

No one of the cases cited, however, was decided upon a statute similar to the one here under consideration, that is, under a statute providing for a "stub" at the head of the official ballot, separated from it only by a perforation, requiring minute scrutiny to determine its presence.

An examination of the statutes on the subject discloses the fact that section 575 was enacted prior to the provision for a stub at the head of the ballot. With the old form of ballot, with nothing to be removed, the unfortunate circumstances surrounding the voting at Gilman could not have arisen; either the ballot would have been properly stamped, or stamped not at all, to be in the first instance accepted, and in the second rejected. Under such circumstances, the reasoning of the courts as expressed in *Kelly v. Adams*, supra, is convincing:

"To ignore this provision of the statute, and allow ballots to be counted which do not contain the official indorsement, would authorize the voting of ballots that might have been surreptitiously obtained or copied, and one of the purposes of the ballot law be entirely frittered away and the door opened for fraud."

But does the reason for such a strict construction of the statute prevail under our present law?

The Legislature, by providing for the stub to be numbered, and to be removed only at the time of depositing the ballot in the ballot box, has hit upon an effective method of guarding against fraud and illegal voting, and has insured the deposit of the voted ballot in the ballot box, and the provisions of section 575 should now be construed in the light of the changed conditions. The problem presented to the Legislature was first to secure to the voter a free, untrammelled vote, and, second, to secure a correct record and return of that vote; and the legislative body is presumed to have had that problem in mind in preparing rules for the guidance of both the elector and the election officers. But the rules laid down are but a means to an end; to hold a slight infraction of those rules fatal, when the elector has substantially complied with the requirements and the mistake is but a technical error of the election officials, and in the face of the fact that the result was precisely what it would have been had no error been committed, and such holding would defeat the clear expression of the will of the majority, would be to subordinate substance to form and defeat the end sought to be secured. It would be to render that, which was intended to prevent fraud and injustice, an instrument of injustice. The power to disfranchise an entire precinct

—while it does exist—should be exercised with great care, and effect should be given to the expression of the will of the majority, when that expression is clear and free from any taint of fraud, and when possible to do so without violating the spirit of the statute.

In the case of *Talcott v. Philbrick*, 59 Conn. 485, 20 Atl. 436, 10 L. R. A. 150, the court said:

"All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor. * * * A great constitutional privilege—the highest under our government—is not to be taken away on a mere technicality, but the most liberal interpretation should be made in support of the elector's action whenever the application of common sense rules which are applied in other cases will enable the courts to understand and render it effectual."

The error or mistake by reason of which it is sought to disfranchise the entire electorate of Gilman precinct was that of the sworn officials of the state, charged with the protection and safeguarding of the rights of the people. In the case of *Moyer v. Van De Venter*, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670, 50 Am. St. Rep. 900, the court said:

"There is good ground for recognizing a distinction between the obligation placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to preserve the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character of the first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby."

With this declaration of the Washington court we heartily agree; and in this connection the reasoning of this court in the case of *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191, applies with peculiar force, though referring to a dissimilar state of facts. There, when a registry agent had failed to require the elector to take the oath provided for, the court held that his vote should nevertheless be counted, saying:

"If the elector may be deprived of his right to vote in this manner, an unprincipled registry agent may change the political status of a precinct at will, and, by concerted action on the part of a number of such, the political complexion of a county may be easily changed, and the popular will be effectually thwarted. If the elective franchise may be thus tampered with, incalculable abuses will creep into the state."

Each elector of Gilman precinct received from the proper judge of election a ballot on which that judge did "print on the back and near the top" the prescribed inscription. Each elector prepared his ballot according to law and did "so fold it that the face of the ballot will be concealed and so that the indorsements stamped thereon could be seen." He then delivered it to the proper officer who, in his presence, detached the stub and deposited the ballot in the ballot box. It would

seem that the elector should be chargeable with no more than ordinary care, and that when he ascertained that the official stamp was on his ballot, in the position in which the law apparently required it to be, and so folded that ballot as to have the inscription in view, he had discharged that duty; and that the act of the election official thereafter in removing not only the stub but also the official stamp should not be permitted to render his ballot worthless. At the time of counting the ballots, the judges had the identified ballots before them and had at hand the means of identification, removed from the ballot through their mistaken construction of the law.

The ballots from Gilman precinct should have been counted; to hold otherwise would be to render the statute an instrument of the injustice it was intended to prevent. If, by stamping the official designation on the stub above an almost indiscernible perforation but in the apparent position required by law—thus lulling the elector into fancied security—the ballot may be thereafter rendered null and void by removing the stub, concerted action of two unscrupulous judges of election (that is, the one designated to give out and the one designated to receive the ballots) could easily nullify the action of an adverse precinct and defeat the popular will in an election.

The judgment is reversed, and the cause is remanded to the district court, with direction to enter judgment in favor of appellant (contestee) confirming her title to the office in question.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.
Hon. JOHN A. MATTHEWS, Judge of the Fourteenth Judicial District, sat in place of the Chief Justice.

STATE v. RAINS. (No. 3802.)

(Supreme Court of Montana. April 2, 1917.)

1. HOMICIDE —140—"ATTEMPT" TO MURDER —INFORMATION.

Facts sufficient to constitute the crime of attempt to murder are not stated by an information charging that defendant attempted to murder R., and towards the commission of the crime started to walk to her home, and, meeting her on a highway, stopped her, and struck her in the face, and compelled her to return to her home, and forced her to enter it, and locked her in, he being possessed of a loaded revolver, and loaded rifle and bottle of laudanum, by the use of all of which he, having the intent to murder her, did then and there attempt to do so, and that he failed and was prevented in the execution thereof by the fact that he took a pail to go for water, and after he had gone out and locked the door she escaped by a window; the facts alleged so limiting and characterizing the general allegations as to make them ineffectual, Rev. Codes, § 8894, defining an "attempt" as an act done with intent to commit a crime, and "tending," but failing, to effect its purpose, the

facts alleged showing at most preparation, and not any act connected with any accomplishment of the purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 236.

For other definitions, see Words and Phrases, First and Second Series, Attempt.]

2. WITNESSES — 61(1)—COMPETENCY—HUSBAND AND WIFE.

Rev. Codes, § 9483, as amended by Laws 1915, c. 111, expressly excepts from the rule of noncompetency of husband or wife to testify against the other in a criminal case cases of criminal violence on one by the other.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 174, 175.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Charles Rains was convicted of attempt to murder, and appeals. Reversed and remanded.

Johnson & Tucker, of Hamilton, and Park Smith, of Helena, for appellant. S. C. Ford, of Helena, and Frank Woody, of Butte, for the State.

SANNER, J. [1] The principal question presented by these appeals is whether the information, upon which the appellant was tried and convicted of an attempt to commit murder, states facts sufficient to constitute that offense. Omitting the formal parts, the information is as follows:

"In the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli. * * * Comes E. C. Kurtz, county attorney of said county, and * * * informs the court: That one Charles Rains, late of the county of Ravalli, state of Montana, on or about the 15th of October, 1915, at and in the county of Ravalli, in the state of Montana, did unlawfully, feloniously, and willfully, on purpose, and with his deliberate premeditated malice aforethought, attempt to kill and murder one Elizabeth Rains, and in said attempt and towards the commission of said offense did, then and there, feloniously and with his premeditated malice aforethought, start to walk to the home of Elizabeth Rains, in the said county of Ravalli, state of Montana, and that upon meeting her, the said Elizabeth Rains, in and upon a private highway a short distance from her home, did then and there, on purpose and with his deliberate premeditated malice aforethought, intercept and stop her, and did strike her in the face, and did compel her to return to her home with him; that upon the arrival at the home of said Elizabeth Rains the said Charles Rains did deliberately and feloniously force her to enter her house, and did enter after her and lock the door, and take possession of the key to said door, all of which was done with the deliberate, premeditated, and felonious intent, then and there, upon the part of him, the said Charles Rains, to kill and murder the said Elizabeth Rains, he, the said Charles Rains, being at said time in the possession of a 38-caliber Iver Johnson revolver, loaded with cartridges containing powder and leaden bullets, and being in possession, at said time, of a 22-caliber special rifle, loaded with cartridges containing powder and leaden bullets, and being at said time in the possession of a bottle containing laudanum, by the use of all of which he, the said Charles Rains, having then and there the deliberate, premeditated, and felonious intent to kill and murder said Eliza-

beth Rains, did then and there attempt to do so. That said Charles Rains did then and there fail in the perpetration and commission of said offense, and was then and there prevented in the execution of the same, by the following facts: The said Charles Rains did take a water pail and unlock the door and start to go to a nearby spring for the purpose of getting a pail of water; that after stepping outside said house he locked the door from the outside, keeping the key to said door in his possession; that as soon as he stepped out of the said door the said Elizabeth Rains opened a window on the opposite side of said house, through which she escaped to a nearby neighbor. All of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Montana."

The appellant's contention is that this document is inadequate to support the judgment, and we think he is correct. Our statute provides:

"An Act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." Rev. Codes, § 8894.

And Mr. Wharton, in his excellent work on Criminal Law (11th Ed., § 212), thus enlarges upon this definition:

"An attempt is an intended apparent unfinished crime. It must be intended, since it is of its nature that it should be committed in order to effect a specific criminal result. It must be apparent, since if it be obviously not likely to effect the result at which it aims (e. g., where a popgun is leveled at a ship, or a witch is employed to use enchantments), it is not indictable. It must be unfinished, as otherwise the indictment would be for the complete crime; but there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter."

So, too, the more modern text in 6 R. C. L. p. 279, says:

"In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, shall have done some overt act adapted to, approximating, and which in the ordinary likely course of things would result in the commission thereof. Therefore the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation."

These criteria, which have the support of abundant judicial authority (*People v. Murray*, 14 Cal. 160; *Hicks v. Commonwealth*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; *Territory v. Reuss*, 5 Mont. 605, 5 Pac. 885; *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732; *Commonwealth v. Tolman*, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414, and note; *State v. Hurley*, 79 Vt. 28, 64 Atl. 78, 6 L. R. A. [N. S.] 804, 118 Am. St. Rep. 934 and note; note to *People v. Moran*, 20 Am. St. Rep. 741 et seq.), are accepted by the Attorney General, but he insists that overt acts, "appreciable fragments" of the offense designed, are alleged. The information tells us very carefully what the appellant did "in said attempt and towards the commission

of said offense," to wit: He started to walk towards the home of Elizabeth Rains; he met her a short distance from her home, stopped her, struck her in the face, and compelled her to return; he forced her to enter her house and locked her in. All this was very wrong, particularly if done with the intent at some time to kill her, and for it he should be severely punished; but just how the death of Elizabeth Rains could be compassed by any or all of them, unless, after the manner of nations, he purposed to blockade her there until she should starve to death—which is not suggested—we are quite unable to see. But it is said:

"He armed himself with three deadly weapons, to wit, a loaded revolver, a loaded rifle, and a bottle of laudanum."

The information states that he was so armed, but it does not charge that all or any of this panoply of war was actually used in any effort to accomplish the alleged design. The worst that can be said of it is that there was preparation. In *People v. Murray*, supra, the court, speaking through Mr. Chief Justice Field, said:

"The evidence in this case entirely fails to sustain the charge against the defendant of an attempt to contract an incestuous marriage with his niece. It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation he may be held to keep the peace; but he is not chargeable with an attempt to kill. So, in the present case, the declarations and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

And in *Hicks v. Commonwealth*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891, which was a prosecution for attempt to murder by poison, wherein the defendant procured the poison and ineffectually solicited another to administer it, the Supreme Court of Virginia remarks:

"It has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either

case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent."

See, also, *Stabler v. Commonwealth*, 95 Pa. 318, 40 Am. Rep. 653; *Regina v. Williams*, 1 Car. & K. 589; *Cox v. People*, 82 Ill. 191.

Singularly enough, when all the things alleged in the information had been done and the preparation was complete, the appellant took a water pail and left the house to get some water, and while he was gone the victim escaped through a window, "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana." Assuming this was sufficient to charge a frustration of the appellant's design within the authorities above cited, what, upon the whole information, was that design? Elizabeth Rains could die but once. Did the appellant intend to shoot her with the revolver, club her to death with the rifle, force the laudanum down her throat, or drown her in the water pail? And if he intended any of these things, what act did he perform which would have accomplished the design, but for the interruption? The fact is, the details so painfully set forth are unrelated to each other, are mutually exclusive, are unconnected with any accomplishment of the main purpose. It may be, as urged by the state, that, had these things been omitted, the information would have been sufficient; they, however, were not omitted, but the pleader, by inserting them, limited and characterized his general allegations, so as to make them clearly ineffectual.

[2] Some contention is made that Elizabeth Rains was incompetent to testify over the appellant's objection; but there is nothing in this. Section 9483, Rev. Codes, as amended by Session Laws 1915, c. 111, p. 248.

The judgment and order appealed from are reversed, and the cause is remanded, with directions to discharge the appellant, so far as the present information is concerned.

Reversed and remanded.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

DOTY v. REECE. (No. 3988.)

(Supreme Court of Montana. March 27, 1917.)

1. ELECTIONS — 307 — CONTEST — ATTORNEY'S FEE — STATUTE.

Under Corrupt Practices Act (Laws 1913, p. 593) § 48, providing that any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose election is contested, etc., and that costs, disbursements, and attorney's fees shall be in the discretion of the court, etc., and section 49, providing that if more than one petition is pending, or the election of more than one person contested, the court may apportion costs, disbursements, and attorney's fees, in an elec-

tion contest, the prevailing party, whether petitioner or respondent, is entitled to attorney's fees in addition to his other costs and disbursements; the amount to be awarded resting in the sound discretion of the court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333.]

2. CONSTITUTIONAL LAW §248—ELECTIONS §270 — EQUAL PROTECTION OF LAWS — STATUTE PRESCRIBING ATTORNEY'S FEES IN ELECTION CONTEST.

Such sections of the Corrupt Practices Act are not violative of Const. U. S. Amend. 14, § 1, as denying to the unsuccessful party in an election contest the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Elections, Cent. Dig. § 247.]

3. STATUTES §79(1) — SPECIAL LAWS — EXCLUSIVE PRIVILEGES — CORRUPT PRACTICES ACT.

Such sections of the Corrupt Practices Act are not violative of Const. Mont. art. 5, § 26, providing that the legislative assembly shall not pass local or special laws granting any special or exclusive privilege whatever.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 84.]

4. CONSTITUTIONAL LAW §326—DENIAL OF ACCESS TO THE COURTS—STATUTE.

Such sections of the Corrupt Practices Act are not violative of Const. Mont. art. 3, § 6, providing that the courts of the state shall be open to every person, and that justice shall be administered without sale.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 950, 960.]

5. APPEAL AND ERROR §880(1)—PARTY ENTITLED TO ALLEGE ERROR.

An election contestant, appealing from judgment dismissing his contest and awarding the contestee attorney's fees, is not in position to complain that his sureties have not had their day in court; they not having appealed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584, 3585, 3587, 3589, 3590.]

Appeal from First Judicial District Court, Lewis and Clark County; R. Lee Wood, Judge.

Election contest by Martin Doty against Frank L. Reece. From a judgment dismissing the contest and awarding contestee an attorney's fee, contestant appeals. Affirmed.

C. A. Spaulding and J. R. Wine, Jr., both of Helena, for appellant. Wight & Pew, of Helena, for respondent.

SANNER, J. At the last general election, the appellant and the respondent were rival candidates for the office of clerk of the district court in and for Lewis and Clark county. Upon the final canvass the respondent was declared elected, and the appellant brought this proceeding to contest the result so declared. He failed to sustain his contest, and the court in its judgment, dismissing the same, awarded to the respondent \$200 as attorney's fees. The purpose of this appeal is to raise the question whether such award was warranted, and the appellant's claim is that it was not, because: (a) There is no statute authorizing it; (b) if there is any such statute, the same is unconstitutional;

al; (c) the award was made as against appellant's sureties without giving them a day in court.

[1] (a) This proceeding was brought under what is commonly called the Corrupt Practices Act, passed by the people at the general election of 1912 (Session Laws 1913, p. 598 et seq.), which provides, among other things, for contesting elections. Section 48 of this enactment is, in part, as follows:

"Any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose election is contested, and the grounds of the contest. * * * Before any proceeding thereon the petitioner shall give bond to the state in such sum as the court may order, * * * conditioned to pay all costs, disbursements and attorney's fees that may be awarded against him if he shall not prevail. If the petitioner prevails, he may recover his costs, disbursements and reasonable attorney's fees against the contestee. But costs, disbursements and attorney's fees, in all such cases, shall be in the discretion of the court, and in case judgment is rendered against the petitioner it shall also be rendered against the sureties on the bond. * * *

Section 49 also provides:

"* * * If more than one petition is pending, or the election of more than one person is contested, the court may, in its discretion, order the cases to be heard together, and may apportion the costs, disbursements and attorney's fees between them. * * *

We think the clear implication of these provisions is that the prevailing party, whether a petitioner or respondent, shall be entitled to attorney's fees in addition to his other costs and disbursements, the amount to be awarded in that behalf to stand upon the sound discretion of the court. The language employed is not precise, but the greater part of it would have to be ignored to justify any other conclusion.

[2] (b) This being their effect, can these provisions be upheld? Appellant insists they cannot for these reasons: They subject the unsuccessful party in an election contest to a penalty not visited upon other unsuccessful litigants, and therefore deny to him the equal protection of the laws guaranteed by section 1 of the Fourteenth Amendment to the federal Constitution; they grant to the successful party in an election contest a special privilege not enjoyed by successful litigants in other cases, contrary to section 26, art. 5, of the state Constitution; they are violative of section 6, art. 3, of the state Constitution, which provides that the courts of this state shall be open to every person and that justice shall be administered without sale, denial, or delay; and they constitute an attempt to delegate legislative power and authority to the courts.

To support the first two of these specifications, counsel rely upon *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33, and a number of cases from other jurisdictions referred to in that decision and cited in the brief of appellant here. In *Mills v. Olsen*, the constitutionality of section 7166, Revised Codes,

authorizing an award of attorney's fees to the successful claimant under a mechanic's lien, was challenged; but this court, without express discussion or decision of the question, contended itself with approval of the reasoning of the authorities referred to. Typical of these authorities, and in fact the controlling case, is *Gulf, C. & S. F. Ry. Co. v. Ellis*, 168 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, wherein a Texas statute authorizing the successful claimant of certain causes of action against railroad companies, to recover attorneys' fees, was annulled as a denial of the equal protection of the laws. The grounds of this decision are thus interestingly stated:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection."

In our opinion, there is not the slightest analogy between the statute so incisively analyzed and the statute before us. The statute before us applies to all election contests, it treats the adverse parties thereto alike, and, if it would be proper to give attorney's fees to every successful litigant in actions to recover money; it is equally so to give attorney's fees to every successful litigant in actions brought to contest elections.

[3] The appeal to section 26, art. 5, of the state Constitution, is also without merit. The provision there is:

"The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever."

The act before us does not grant or attempt to grant to any particular corporation, association, or individual any special or exclusive privilege or immunity; it is a general law applicable alike to all persons within a class, and the provision involved has nothing to do with it. Doubt no longer exists

touching the right of the state through its Legislature to classify, so long as such classification rests upon some difference which bears a reasonable and just relation to the matter in respect to which the classification is proposed (*Gulf, etc., Ry. Co. v. Ellis* supra; *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, and citations); and we think that election contests not only form a perfect class for special treatment because of their intimate relation to a matter of great public concern, but they also present special reasons for the particular discrimination here involved.

[4] Nor does section 6 of article 3 of the state Constitution afford any objection to the award in question. In *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, a similar criticism was leveled at the statute allowing attorney's fees to claimants under mechanics' liens; but it was held to be unavailing. True, the later case of *Mills v. Olsen*—accepting it as decisive—overturned a similar statute, but the reasoning invoked had to do with the guaranty of the equal protection of the laws. As a decision against the application of section 6, art. 3, *Wortman v. Kleinschmidt* is still in effect.

The argument against the statute as delegating to the courts the power to say when attorney's fees may and when they may not be allowed in election contests, falls to the ground in view of the conclusion above announced that the discretion of the court goes only to the amount which shall be allowed in each instance.

[5] (c) Appellant is not in position to complain that his sureties have not had their day in court. As long as they have not appealed and are apparently satisfied, their situation is no concern of his.

The judgment is affirmed.

Affirmed.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, did not hear the argument and takes no part in the above decision.

LOUD et al. v. HANSON et al. (No. 3749.)
(Supreme Court of Montana. April 10, 1917.)

1. APPEAL AND ERROR ⇐1012(1)—FINDINGS—CONCLUSIVENESS.

A trial court's finding of fact will be accepted, unless opposed by the clear preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8990-8992.]

2. SALES ⇐202(1)—WHEN TITLE PASSES.

Where a buyer was to pay for chattels by having a bank credit the purchase price to the seller, the title did not pass where such credit was not extended, under Rev. Codes, § 4632, providing that title passes when the parties agree upon a present transfer, etc.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542, 543, 548, 549.]

3. CHATTEL MORTGAGES ¶139—PRIORITY—POSSESSION.

A chattel mortgage is not affected by a previous mortgage, given by one who did not own the property, but had possession of it, where her mortgagee did not rely on such possession or advance money upon the faith of it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 238.]

4. EXECUTION ¶51—PROPERTY SUBJECT TO—INTEREST IN NOTE.

Where the purchase price of chattels was to be placed to the seller's credit at a bank, the seller had no interest subject to execution in a note given by the buyer to the bank to secure such credit.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 119, 124-136.]

5. CHATTEL MORTGAGES ¶225(1)—PROPERTY SUBJECT TO—CROPS.

A landowner's mortgage of crops is superior to one subsequently given by person to whom the landowner had agreed to give the crops in return for use of certain chattels.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 468-470.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by Charles H. Loud and others, co-partners in business under the firm name and style of Loud, Collins, Campbell, Wood & Leavitt against Albert S. Hanson and others. Judgment for defendant Farmers' & Traders' State Bank, and plaintiffs appeal. Reversed and remanded, with directions.

Collins, Campbell & Wood, of Billings, for appellants. Nichols & Wilson, of Billings, for respondents.

SANNER, J. The plaintiffs brought this action to recover upon a certain promissory note for \$800 and interest, executed on August 20, 1914, by the defendant Albert S. Hanson, and to foreclose a mortgage upon certain chattels described in the complaint, given to secure the payment of said note. Maggie Macer, Farmers' & Traders' State Bank and American Bank & Trust Company are joined as defendants, under allegations that they claim some interest in the property. The American Bank & Trust Company made no appearance. The Farmers' & Traders' State Bank filed a separate answer, claiming in effect that on March 25, 1914, the defendant Macer, then the owner of the chattels in question, mortgaged the same to it to secure the payment of her certain promissory note for \$3,121.70, which mortgage was duly filed for record on April 9, 1914; that said note has not been paid, and, being overdue, a foreclosure of the mortgage as well as a personal judgment against Macer is demanded. The defendants Hanson and Macer jointly answered, and the effect of their answer is to admit all the allegations of the complaint, and to plead that the defendant Macer was not on March 25, 1915, and never became, the owner of the chattels in question, but that, in order that she might become such owner, said mortgage to the Farmers' & Traders' State

Bank was signed by her, together with a note to be secured thereby, under terms and conditions assented to by said Hanson and said bank, which conditions were not fulfilled, and in consequence no consideration ever passed to Hanson for the property, or to Macer for the mortgage. The plaintiffs replied to the answer of the bank, denying that Macer was the owner of the property at the time her alleged mortgage to it was signed, and denying that the bank is the owner of any mortgage on the property. Upon these pleadings the case was brought to trial before the court sitting with a jury; later on, by common consent, the jury was discharged, and the cause was submitted to the court for decision upon the evidence presented. The trial resulted in certain findings of fact and conclusions of law by the court, upon which final judgment was entered in favor of the defendant Farmers' & Traders' State Bank. It is from this judgment, as well as from an order denying their motion for new trial, that plaintiffs appeal.

[1] The principal question is: Was Macer the owner of the property when the mortgage to the bank was signed? The trial court found that she was, and this we must accept, unless it is opposed to the clear preponderance of the evidence. *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Dean v. Stewart*, 49 Mont. 506, 143 Pac. 966. We think there is no conflict of evidence at all so far as essentials are concerned. As to the crops, the existence of a mortgageable interest in her cannot be doubted; and it is conceded that, if she ever became the owner of the other property, she did so by purchase from Hanson, who, prior to March 25, 1914, was the owner. Concerning such purchase, the undisputed evidence, as given by both Hanson and Ed. Macer (who acted for his wife in the negotiations), is: That Hanson wanted to sell, and Mrs. Macer wanted to buy; that she was unable to pay the purchase price, and Hanson was unable to give her any time; that it was decided she might have the property if the Farmers' & Traders' State Bank would take her note for the purchase price, \$2,700; and credit Hanson with that amount, such note to be secured by mortgage on the property, with such other property as the bank might require; that she executed a note to the bank for \$3,121.70 to cover the purchase price of the Hanson chattels and an old debt due the bank from the Macers, and to secure said note she executed the mortgage on the Hanson chattels, together with the crops to be raised on her land for the year 1914; that because the bank did not credit Hanson with the amount of the purchase price, and paid no money to either Macer or Hanson, the latter declined to consummate the sale; that the parties then agreed Macer might hold, use, and enjoy the property for the current year in considera-

tion of the grain crops to be grown on her place and rendered to Hanson as compensation, and this agreement, which has been carried out, forms the basis of Hanson's assertion of ownership in the crops. Mr. Price, the only witness for the bank whose testimony is material to this phase of the case, admits the bank was advised of Hanson's refusal to consummate the sale before the mortgage from Macer was filed; that it was filed in spite of Hanson's objections and insistence to the contrary; that the Macer note for \$3,121.70 was never entered on the bank's account of bills receivable, or elsewhere on its books, because it did not regard the transaction as complete; that no credit was ever given to Hanson, nor any money paid to him or Macer, prior to notice to the bank from Hanson that the deal was off. Price and Hanson agree that the failure to credit Hanson was due to Hanson's refusal to indorse Macer's note; but they conflict as to whether he agreed to do so—Hanson claiming that he agreed to indorse to the extent of the purchase price, to wit, \$2,700, and Price insisting that Hanson was to indorse for the amount of the note as made.

[2, 3] As we view the matter, it is of no consequence why Hanson declined to indorse. The essential fact is that he and Macer agreed, as they had a right to do, upon a sale which was to be for the equivalent of cash, to wit, credit to Hanson at the Farmers' & Traders' State Bank. Until this consideration passed, the sale was incomplete, and title to the property did not vest in Macer. Rev. Codes, § 4632; *Adlam et al. v. McKnight*, 32 Mont. 349, 80 Pac. 613; 35 Cyc. pp. 274, 275, A; Benjamin on Sales (7th Ed.) §§ 343-345; also section 4, p. 298 et seq.; *Mechem on Sales*, §§ 477, 541, et seq. But it is insisted Macer had possession of the property when the mortgage was signed. Macer's possession at that time was in no wise different from what it had been for the preceding two years, during which she managed the property for the use and benefit of Hanson. This the bank knew, and so could not have been influenced by any apparent change of possession; nor did it part with any value upon the faith of any change of appearances or declaration by either Hanson or Macer. Indeed, to part with value is the very thing it declined to do, until long after notice that Hanson refused to consummate the sale. Since title to the Hanson chattels never passed to Macer, she was not the owner of them when the mortgage was signed; and since she was not the owner of them when the mortgage was signed, it created no lien upon them, nor any obstacle to the plaintiffs' mortgage from Hanson, so far as this property is concerned.

[4] Emphasis is laid by respondent on the proposition that, until Hanson indorsed or got credit, he had an interest in Macer's note to the extent of the purchase price, and since

that interest was seized and sold on execution against him, the bank becoming the ultimate purchaser, neither he nor any one claiming under him, is in position now to assert any interest in the property. It was not the agreement that Hanson should have, and he never did have, the slightest interest in Macer's note to the bank. Since Macer never had title to the property, the indebtedness for the purchase price never accrued; if the bank chose to think otherwise, and, acting on its judgment, to buy Hanson's supposed interest on execution sale, that is a loss it must recoup in some way other than at the expense of plaintiffs' mortgage.

[5] Concerning the crops, the case is somewhat different. In them Macer had a mortgageable interest, and upon them her mortgage to the bank was good, as against any contention Hanson might make, though only as security for the old debt. The evidence of Price seems to establish that this debt has been paid; but there is a stipulation in the record, upon which the court doubtless based its finding, to the effect that only \$189.81 has been paid. So that, as the case is presented to us, her mortgage to the bank must be upheld as a prior lien on the crops for the unpaid balance of the old obligation.

As between the plaintiffs and Hanson, the case for foreclosure of plaintiffs' mortgage is complete by admission.

The judgment and order appealed from are therefore reversed, and the cause is remanded, with directions to proceed in conformity with this opinion.

Reversed and remanded.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE ex rel. MYERSICK v. DISTRICT COURT OF FIFTEENTH JUDICIAL DIST. IN AND FOR MUSSELSHELL COUNTY et al. (No. 4007.)

(Supreme Court of Montana. April 11, 1917.)

1. PROHIBITION ¶6(1) — AGAINST ACTS OF SHERIFF.

The writ of prohibition arresting proceedings of a judicial character only will not lie as against a sheriff's acts; he being a ministerial officer.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 31.]

2. PROHIBITION ¶4 — DISCRETION AS TO GRANTING WRIT.

The writ of prohibition is an extraordinary judicial writ issued only in the sound legal discretion of the court, and not as a matter of right.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 3.]

3. PROHIBITION ¶3(1)—ADEQUACY OF OTHER REMEDY.

The writ of prohibition arrests proceedings of a judicial character when they are without or in excess of jurisdiction only when a plain,

speedy, and adequate remedy in the ordinary course of law does not exist, and is to be used sparingly for the furtherance of justice and to secure order and regularity in inferior tribunals.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 4.]

4. PROHIBITION §27—BURDEN OF PROOF.

The applicant for a writ of prohibition assumes the burden of showing that the lower court is acting without or in excess of jurisdiction, and that no plain, speedy, and adequate remedy in the ordinary course of law exists.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 76.]

5. PROHIBITION §5(2) — AGAINST ATTACHMENT SALE—GROUNDS.

Where court ordered sale of attached stock of liquors before judgment in the "interests of the parties" as provided by Rev. Codes, § 6671, the application alleging that the attached goods were depreciating in quality and value, that the liquor licenses were expiring unused, and that expense of keeping the property was continuing, held no abuse of discretion warranting issuance of writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 23.]

6. ATTACHMENT §196—SALE BEFORE JUDGMENT—COURT'S DISCRETION—STATUTE.

Under Rev. Codes, § 6671, conferring power to direct sale of attached property before judgment, where it is "made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subverted by a sale," a showing that attached property will depreciate in value is sufficient.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 642, 645.]

7. PROHIBITION §3(1) — AGAINST ATTACHMENT SALE—ADEQUATE REMEDY.

Where a third party claiming attached property sold before judgment had an independent action in claim and delivery or in conversion or by intervention in original action, prohibition will not lie.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 4.]

8. ATTACHMENT §196 — SALE BEFORE JUDGMENT—DEFENDANT'S INTEREST.

The fact that defendants in an attachment suit have no interest in the property, and consequently purchaser at sheriff's sale would not secure any title, does not reflect upon the court's authority to order a sale before judgment of whatever interest, if any, defendants have.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 644, 653.]

Petition for writ of prohibition on the relation of Charles L. Myersick against the District Court of the Fifteenth Judicial District in and for Musselshell County and others. Alternative writ quashed, and proceeding dismissed.

Collins, Campbell & Wood, of Billings, for relator. Boorman & Boorman, of Roundup, for respondents.

HOLLOWAY, J. On December 2, 1916, William Moore executed and delivered to Geo. L. Stephens his certain promissory note for \$1,000. Before maturity Stephens endorsed and transferred the note to the First National Bank of Roundup. The bank commenced an action on the note against Moore and Stephens, and caused a writ of

attachment to be issued and to be levied upon a stock of wines, liquors, and cigars and certain saloon furnishings and fixtures. This relator made a third party claim to the property attached, but the plaintiff gave to the sheriff a bond of indemnity, and the sheriff retained possession. Upon application of the attaching creditor, the court ordered the sheriff to sell the attached property and deposit the proceeds in court to await judgment. Thereupon relator instituted this proceeding to prohibit the court from taking further steps under the order of sale.

[1] 1. The respondent sheriff is not a proper party to this proceeding and must be dismissed. The writ of prohibition, when issued from this court, arrests proceedings of a judicial character only. *State ex rel. Scharnikow v. Hogan*, 24 Mont. 383, 62 Pac. 583. The sheriff is a ministerial officer and his acts are not subject to control by this writ. If it be a fact that the property levied upon belongs to this relator, his remedy for the wrongful seizure must run against the sheriff. The court below was not responsible for the act of the sheriff in levying the writ.

2. Assuming for the purposes of this proceeding that the relator is a person beneficially interested, though not a party to the action in the court below (*Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768), the question presented is: Does the application disclose such a set of circumstances as warrants the relief sought?

[2, 3] The writ of prohibition is an extraordinary judicial writ which issues, not as a matter of right, but only in the sound legal discretion of the court. *State ex rel. Lane v. District Court*, 51 Mont. 503, 154 Pac. 200, L. R. A. 1916B, 1079. It is to be used sparingly for the furtherance of justice and to secure order and regularity in the inferior tribunals. It arrests proceedings of a judicial character when such proceedings are without or in excess of jurisdiction (Rev. Codes, § 7227), but it issues only when there is not a plain, speedy and adequate remedy in the ordinary course of law (Rev. Codes, § 7228; *State ex rel. Browne v. Boohar*, 43 Mont. 569, 118 Pac. 271).

[4] The applicant must therefore assume the burden of showing that the court below is acting without or in excess of jurisdiction, and also that he has no plain, speedy, and adequate remedy in the ordinary course at law. In this instance we think he has failed in both particulars.

[5, 6] The order of the district court directing the sale of attached property prior to judgment is the only proceeding of a judicial character which is attacked. Jurisdiction to order a sale of attached property prior to judgment is specifically conferred

upon the court by section 6671, Revised Codes. To invoke that jurisdiction it must be "made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale." *Id.* The statute does not define the quantity or quality of proof necessary to move the court's discretion or specify the particular facts from which the court is to determine that a sale will best subserve the parties' interests. It is made to appear from the application for the order of sale that portions of the attached goods will depreciate in quality and value, that the licenses are expiring unused, and that the expense of keeping the property is continuing. We think the court might with propriety have required the facts to be set forth with greater particularity; but we are not prepared to say that the application was insufficient to move the court's discretion.

The distinction is to be made between a sale of perishable property held under attachment, and a sale made in the interest of the parties. While it may be to the interest of all concerned that perishable property under attachment be sold in limine or before judgment, a sale of such property is made by the sheriff on his own responsibility under the authority conferred by section 6670, Revised Codes. It is only when attached property is sought to be sold under section 6671 that a showing is necessary, and the authority to sell is dependent upon an order of court. In this instance we think the showing and order are sufficient.

[7] 3. The relator's petition for the writ of prohibition is further deficient in that he fails to show that he has not a plain, speedy, and adequate remedy in the ordinary course at law. There was available to him an independent action in claim and delivery, or in conversion; but if either of these was inadequate for any reason, he had a complete remedy by intervention in the original action where he might have had determined his right to or interest in the property. *Rev. Codes, § 6496; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 Pac. 396, 23 L. R. A. (N. S.) 536, and note 18 Ann. Cas. 591-594; 2 Corpus Juris, 373; 2 R. C. L. 879; 4 Cyc. 725.*

[8] It goes without saying that, if the defendants in the attachment suit have no interest in the property attached, the purchaser at the sheriff's sale will not secure any title; but this fact does not reflect upon the authority of the court to order a sale of whatever interest, if any, the defendants have.

The motion of the respondent court and judge is sustained. The alternative writ heretofore issued is quashed, and the proceeding dismissed.

Dismissed.

SANNER, J., concurs. BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

OREGON ART TILE CO. v. HEGELE et al. (Supreme Court of Oregon. April 24, 1917.)

1. APPEAL AND ERROR ⇨724(2) — ASSIGNMENTS OF ERROR.

Assignments of error, containing a statement of what was done, plus the complaints made by appellants, are sufficiently specific, definite, and certain.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2997, 2998, 3022.]

2. EVIDENCE ⇨185(12) — SECONDARY EVIDENCE—PRELIMINARY PROOF.

Unsworn declarations of counsel of giving of notice to produce writings for use at the trial will not supply the requisite preliminary proof for introduction under L. O. L. §§ 712, 782, of secondary evidence of their contents.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 660.]

3. DISCOVERY ⇨107—FAILURE TO PERMIT INSPECTION — PRESUMPTION — PRELIMINARY PROOF.

Unsworn statement of plaintiff's counsel of neglect or refusal of defendants to obey an order to give plaintiff an inspection of a writing is not the requisite preliminary proof to make available the presumption, under L. O. L. § 533, that the terms of the writing are as alleged by plaintiff.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 139.]

Department 2. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Suit by the Oregon Art Tile Company against H. W. Hegele and another. Decree for plaintiff, and defendants appeal. Reversed and dismissed.

This is a suit to foreclose a claim of lien for labor and material. H. W. Hegele was a doctor, and occupied office rooms over a theater in a building in Portland known as the Empress Theater Building and owned by the Empress Theater Company. Hegele caused the Oregon Art Tile Company, a corporation, to place tiling on the floors and a part way up the partitions of some of the rooms, so that they could be used for different kinds of baths employed by Hegele in his practice. Most of the work was done pursuant to a contract which fixed \$830 as the price to be paid, but in addition to this the Oregon Art Tile Company performed extra work, which the plaintiff claims was reasonably worth \$95.75. Hegele paid only \$350, and on September 10, 1914, the Oregon Art Tile Company filed a claim of lien for \$575.75 on the "Empress Theater Building, constructed upon lots 3 and 4 and the east half of lots 5 and 6 and the west half of lot 6, block 211," in Portland. The complaint in this suit alleges that the Oregon Art Tile Company contracted with H. W. Hegele "for doing the repair and construction work and furnishing the material therefor in and to a

certain portion" of the Empress Theater Building, "which said portion is more particularly known and described as the offices of the said H. W. Hegele," and, further, that:

"At the special instance and request of the said defendant H. W. Hegele, during the progress of said work, plaintiff performed extra labor in and upon the said Empress Theater Building and more particularly in the defendant H. W. Hegele's offices within the said building, and furnished extra material not called for in said contract, to be used in, and which was used in, the alteration, repair, and construction of the said offices of defendant H. W. Hegele, within the said building;" that "the contract price for said alteration, repair, and construction work" upon the offices was \$830, and that the "reasonable value of said extra material and labor" is \$95.75; that no payments except \$350 have been made, and that a balance of \$575.75 is due; that "on the 10th day of September, 1914, and within 60 days from the completion of the said work, labor and material performed in and upon said Empress Theater Building" the plaintiff filed a claim of lien, a copy of which was attached to and made a part of the complaint.

The defendants, H. W. Hegele and the Empress Theater Company, filed a joint demurrer alleging that the complaint did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, and the defendants then filed a joint answer, denying "every allegation" of the complaint and averring, as a separate defense, that the labor performed and materials furnished by plaintiff "are of such inferior character and so carelessly and negligently performed that the same were and are worthless, and plaintiff is not entitled to recover compensation therefor." At the ensuing trial, which occurred on October 14, 1915, the defendants declined to offer any evidence, but, when the plaintiff rested, the defendants contented themselves by orally moving for a dismissal of the suit for certain specified reasons. This oral motion was supplemented on October 23, 1915, by a written motion to dismiss, which sets forth in detail all the reasons then assigned and now relied upon by the defendants for a dismissal. Subsequently, on December 9, 1915, the court signed a judgment "against H. W. Hegele and the Empress Theater Company" for a specified sum and a decree foreclosing the lien "upon the real property" already described, "including the building situated thereon." Both defendants appealed.

Franklin F. Korell, of Portland (Bronaugh & Bronaugh, of Portland, on the brief), for appellants. Arthur H. Lewis and P. E. Newell, both of Portland (Lewis & Lewis, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] Attention is first directed to the assignments of error. The plaintiff insists that the defendants are precluded from raising some of the questions discussed in their brief for the reason that the assignments are too indefinite and general and because they merely state facts without complaining of any errors.

Assignment No. 1 states that:

"The court erred in allowing witness Finnegan to testify over appellants' objection relative to the contents of a written lease as follows, to wit."

And then follows a transcript of the record showing the question asked, the objection made by defendants, the ruling of the court, and the answer of the witness.

Assignment No. 2 reads thus:

"The court erred in refusing to strike at appellants' request the testimony of witness Finnegan relative to the contents of said lease as follows."

The motion to strike and the reasons assigned for it are then transcribed in full.

Assignment No. 3 recites that:

"The court erred in refusing to dismiss plaintiff's complaint upon motion at the conclusion of plaintiff's testimony."

Assignment No. 4 is general in its terms, for it merely states, in substance, that the court erred in rendering the judgment and decree appealed from.

Rule 11 (56 Or. 618, 117 Pac. x) promulgated by this court requires that the errors relied upon for a reversal or modification of the order, judgment, or decree appealed from shall be set out briefly and concisely; and rule 12 provides that no questions will be examined or considered except those going to the jurisdiction of the court, or when the pleading does not state facts sufficient to constitute a cause of action or defense, or those arising upon the assignments of error. 56 Or. 621, 117 Pac. xi.

If all the questions discussed by appellants were predicated upon assignment No. 4, quite a different question would be presented. Most of the points made by the defendants arise out of the first three assignments of error; and each of these assignments contains a statement of what was done, plus the complaint made by defendants. Assignments 1 and 2 are far from being indefinite or general; but, on the contrary, they are unusually specific and complete, and if they offend at all, it is because they are not brief and concise. Assignment No. 3 arises out of the refusal of the court to allow a motion to dismiss. A particular motion is designated, and no doubt can exist as to the motion referred to. Upon examination of the record of the motion it will be ascertained that the defendants not only moved for a dismissal of the suit, but they also stated their reasons for the motion. The plaintiff relies upon two Oregon precedents, both of which were actions at law, and one of them arose out of a former statute, not now in effect, requiring that the assignment of errors be made in the notice of appeal when an appeal was taken from the judgment in an action at law; but if the appeal was from a decree, it was not necessary to specify the grounds of error in the notice of appeal. 1 Hill's Ann. Laws 1887, § 537; 1 Hill's Ann. Laws 1892, § 537. Under the terms of that statute when an appeal was taken from a judgment in an action

at law, it was held that the requirement concerning the specifications of errors was jurisdictional, and consequently a failure to follow the statute was disastrous. *Deuch v. Seaside Lodge*, 26 Or. 385, 38 Pac. 337; *Wagner v. Portland*, 40 Or. 389, 391, 60 Pac. 985, 67 Pac. 300. When, however, the requirement concerning the assignment of errors is based upon a rule of the court instead of a mandatory statute, and when it is not jurisdictional, a failure to assign errors in the abstract may be remedied, or, as said in *Fleischner v. Bank of McMinnville*, 36 Or. 553, 555, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345, "It may, under certain contingencies, be excused entirely." Here, however, there was no failure; but, on the contrary, assignments were made, and when the assignments are viewed in the light of applicable precedents, it will be ascertained that they are sufficiently definite and certain to enable a presentation of all the questions discussed by the defendants. *Krewson & Co. v. Purdom*, 13 Or. 563, 570, 571, 11 Pac. 281; *Bridal Veil Lbr. Co. v. Johnson*, 25 Or. 105-107, 34 Pac. 1026; *Medynski v. Theiss*, 36 Or. 397, 400, 59 Pac. 871.

The testimony of James B. Finnegan occupies an important place in this appeal. The plaintiff only called two witnesses—J. W. Batcheller, manager of the Oregon Art Tile Company, and James B. Finnegan. The defendants did not offer any evidence, and consequently there is no evidence to support the controverted allegations of the complaint, except the testimony of those two witnesses. The record is utterly devoid of any evidence showing that the Empress Theater Company had actual knowledge of the work done for Hegele, and there is no evidence whatever upon which it can be claimed that the Empress Theater Company is bound by the acts of Hegele as an agent of the company unless it can be said that the terms of the lease bound the Empress Theater Company. The importance of the testimony given by Finnegan and objected to by the defendants can be appreciated when it is stated that there is no evidence concerning the terms of the lease, which it is conceded was in writing, except the oral testimony of Finnegan.

Pursuant to the provisions of section 533, L. O. L., the plaintiff filed a motion on October 9, 1915, "for an order requiring the defendants * * * to furnish plaintiff * * * an inspection of that certain lease by and between" the defendants; and on the same day the court made an order which, after reciting that one copy of the lease is in the custody of Hegele and another in the charge of the Empress Theater Company or its attorney W. M. Davis, directs that Hegele shall exhibit his copy of the lease at his office at 11 a. m. on October 11, 1915, so that the plaintiff can inspect the lease and take a copy of it. The order further directs that "W. M. Davis and the Empress Theater Com-

pany show and exhibit to plaintiff its copy" and allow plaintiff to take a copy at 10 a. m. on October 11, 1915.

Immediately upon examining the witness Batcheller, counsel for plaintiff addressing himself to counsel for defendants asked: "Have you at this time the lease between Dr. Hegele and the Empress Theater Building?" Counsel for defendants responded thus:

"I told you, Mr. Newell, at the time that you made this demand on me, that the only copy of this lease that could be found at the time, or that I could give you any information about its location, was in the office of the Empress Theater Building at Seattle, and that, by the serving of a subpoena on one of its officers here you might be able to get them to bring that down. But I have here this (indicating) which I exhibited to you as a copy of that lease."

Addressing the court, the counsel for plaintiff then stated:

"Having made formal demand and secured an order from the court for the lease existing between Dr. Hegele and the Empress Theater Company, and having not secured it, we have at this time evidence of a secondary nature to introduce showing the covenants contained in the lease between Dr. Hegele and the Empress Theater Company."

Upon the conclusion of the last-quoted statement James B. Finnegan was called as a witness and permitted to testify that at about the time of the completion of the work done by the plaintiff he had occasion to examine the written lease, and that it was shown to him by W. M. Davis. Continuing, the witness testified thus:

"There was one condition in the lease, written in long hand; the exact wording of it I cannot recall, but I remember it very distinctly, which provided that any improvement made by the lessee should be retained and kept by the lessors upon the termination of the lease."

When asked, "What was the length of time for the lease to run?" the witness said that he did not "recall the terms of the lease, the period of it, nor the consideration."

There is nothing to show whether Hegele refused to exhibit any lease that he may have had at the time and place fixed in the order, nor is there any intimation that W. M. Davis refused to permit an inspection of any copy that he may have had. We infer from the transcript that counsel for the plaintiff called at the office of one of the attorneys for the defendants and was shown "a copy of that lease." This inference, however, is only supported by two statements made by counsel for the defendants, supplemented by one statement made to the court by counsel for plaintiff. Counsel for defendants excused a failure to exhibit the original lease by saying that when he exhibited the copy in his office he told counsel for plaintiff that:

"It was an identical copy of the lease itself, * * * and he expressed a satisfaction with what he saw, and because of the fact that he did express his satisfaction, I let it go at that, and made no further efforts."

It must be added, however, that counsel for plaintiff stated to the court that he told

counsel for the defendants that he was not satisfied. There is no evidence to indicate the date of the occurrence in the office of counsel for the defendants.

[2] The question arising out of what occurred at the trial relative to the terms of the lease presents itself in two phases: (1) Whether the testimony of Finnegan was competent secondary evidence; and (2) whether the plaintiff is entitled to avail itself of any presumption concerning the contents of the lease. These two aspects of the question result from sections 712, 782, and 533, L. O. L., which are here set out. Section 712:

"There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

"1. When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in section 782."

Section 782:

"The original writing shall be produced and proved except as provided in section 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party."

Section 533:

"The court or judge thereof, while an action or suit is pending, may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under his control, containing evidence or matters relating to the merits of the action or suit, or the defense therein. If obedience to the order be neglected or refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying therefor, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party so neglecting or refusing as for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness."

The penalty imposed for a failure to produce a writing at a trial after reasonable notice is the granting of permission to offer secondary evidence, while a refusal or neglect to obey an order for an inspection and copy gives rise to a presumption. Sections 712 and 782 furnish authority for secondary evidence; but section 533 goes no further than to authorize a presumption. There is no intimation in the record that any notice contemplated by section 782 was given; and, furthermore, even if the plaintiff did claim that notice to produce the lease for use at the trial was given under section 782, the unsworn declarations of counsel would not supply the requisite preliminary proof. *Reimers v. Pierson*, 58 Or. 86, 90, 113 Pac. 436. There are no circumstances bringing the lease within any of the exceptions, whether expressed by the statute or added by judicial construction, dispensing with the necessity of a notice to produce the lease. The

evidence given by Finnegan concerning the contents of the lease was incompetent secondary evidence, and since his was the only testimony concerning the contents of the lease, it necessarily follows that there is a total lack of evidence as to the terms of the lease unless the plaintiff can avail itself of the presumption permitted by section 533, L. O. L.

[3] The plaintiff claims that the terms of the lease make Hegele the agent of the Empress Theater Company and that the lessor is therefore bound by the acts of the lessee. For the purposes of this discussion we shall assume, without deciding, that notwithstanding the wording of section 533, the statute applies to suits as well as actions, that the words "may direct" mean "must direct," and that the presumption must be considered by the trier of the facts, whether such trier be a judge or a jury. The presumption permitted by the statute is created only when obedience to the order of the court or judge is "neglected or refused." Before the Oregon Art Tile Company can invoke the aid of any presumption arising out of section 533, L. O. L., it must first show that the Empress Theater Company "neglected or refused" to obey the order of the court or judge. The burden rests upon the plaintiff to submit the requisite preliminary proof, and, as said in *Reimers v. Pierson*, 58 Or. 86, 90, 113 Pac. 436, when discussing section 782, L. O. L., "The unsworn declarations of counsel do not constitute such proof." The plaintiff can, of course, claim the benefit of the declarations of counsel for the adverse parties to the extent that such declarations constitute admissions, but there are no admissions in the record which show that the defendants either neglected or refused to obey the order of the court. Counsel for the defendants admitted that he exhibited to counsel for the plaintiff a paper which the former claimed was a copy of the lease. There is nothing in the record except the unsworn contradictory declarations of opposing counsel from which to determine whether the paper was in truth a copy or whether counsel for the plaintiff was or was not satisfied with the paper at the time of the inspection. If the circumstances surrounding the exhibition and inspection of the paper were as declared by counsel for the defendants, the presumption provided for in section 533, L. O. L., would not be created; but if the circumstances were as declared by counsel for the plaintiff, a different result might follow. There is no legal evidence to show that the defendants either neglected or refused obedience to the order for an inspection of the lease, and consequently there is no available presumption that the terms of the lease made Hegele the agent of the Empress Theater Company as contended by the plaintiff. In brief, there is neither competent evidence of the terms of the lease nor is there competent evidence

upon which to base any presumption concerning the provisions of the lease; and consequently there is nothing to show that the Empress Theater Company had any knowledge of the work done, or that Hegele was the actual or constructive agent of the Empress Theater Company.

Aside from the ex parte motion and order for an inspection of a lease and the oral declarations of counsel there is nothing to show that any lease ever existed or when the lease began or ended. Indeed, for aught that appears from any legal evidence, the rooms tiled may not have been among those leased to Hegele.

Although it is not necessary to decide whether the claim of lien was filed within the time required by statute, yet we note, in passing, that Defendant's Exhibit 2 is not without significance, for under the printed word "completed" is written "6/25-14," indicating that the work was completed on June 25, 1914.

On the record as we find it, the plaintiff is not entitled to enforce its claim of lien. The decree is therefore reversed, the suit is dismissed, and the plaintiff is remitted to an action at law for the recovery of whatever sum may be owing for the work performed.

BEAN, BENSON, and MOORE, JJ., concur.

REIMERS et ux. v. BRENNAN et ux.

(Supreme Court of Oregon. April 17, 1917.)

1. EVIDENCE ⚡558(7)—CROSS-EXAMINATION OF EXPERT—VALUE.

Evidence of particular sale is permitted upon cross-examination in proving value in order to test the qualification of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379.]

2. WITNESSES ⚡275(4)—CROSS-EXAMINATION—SCOPE—DISCRETION OF COURT.

In action for damages for fraudulent representation in exchange of real estate, it was a proper exercise of the court's discretion to exclude cross-examination of a defendant to elicit the fact that the property received by him and his wife in exchange was sold two years after the exchange at an advance in value, since both the bona fides of that transaction and the value of the property received by defendants were collateral issues.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 970.]

3. WITNESSES ⚡380(5)—IMPEACHING ONE'S OWN WITNESS.

Under L. O. L. § 861, as to impeaching one's own witness, a witness may be contradicted by a party calling him, where the witness gives testimony damaging to the party calling him on the ground of surprise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in section 864, as to impeaching witness by inconsistent statements, although the party producing the witness is not allowed to impeach his credit by evidence of bad character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219.]

4. TRIAL ⚡295(5)—INSTRUCTIONS—RELIANCE ON REPRESENTATION.

In action for fraud in exchange of realty, an instruction upon right of plaintiffs making an investigation of the property to rely on defendants' representations, held to fairly submit the issues, when considered as an entirety.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708.]

5. FRAUD ⚡22(1)—RELIANCE ON REPRESENTATIONS.

A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller; and between parties dealing at arm's length, where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and, failing to do so, he cannot recover on the ground that he was misled by the seller.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19, 20, 22, 23.]

6. FRAUD ⚡20—INSPECTION—RELIANCE ON REPRESENTATIONS.

Where there has been an inspection by a person making an exchange of property, false representations as to the value cannot, as a rule, be made the basis of an action for damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18.]

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Edward Reimers and wife against T. F. Brennan and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an action to recover damages for alleged fraudulent representations in an exchange of real properties. The jury returned a verdict in favor of the defendants, upon which a judgment of dismissal was entered, and plaintiffs appeal.

It appears that in August, 1913, the plaintiffs were the owners of a 200-acre ranch in Douglas county, Or., worth \$9,000 they claim, which they traded to the defendants for lot 22, block L, Greenway's addition to Portland, Or., facing on two streets, upon which was situated a double flat building and a bungalow. They claim that the defendants' property was not worth over \$5,355.55, and that it was traded to them on the basis of a valuation of \$13,000, while their real estate was taken in exchange at \$9,000, leaving a difference of \$4,000, for which they executed to defendants a mortgage upon the Portland realty. The evidence shows that, after some preliminary negotiations conducted by correspondence, plaintiff Reimers went to Portland and made a careful examination of the Brennan property. He also called upon a Mr. Meves, a restaurant man of his acquaintance, and discussed with him the desirability and value of defendants' premises. Mr. Meves referred him to a Mr. Lofgren, an attorney, whom he consulted with reference to Portland values, and particularly in regard to the worth of the defendants' property. He also investigated one or two other propositions offered in exchange for his farm. He

informed the Brennans that Mrs. Reimers would come to Portland in a few days and inspect the premises, which she did. In the meantime, Mr. Brennan visited the Roseburg ranch, and an exchange as stated was thereupon effected upon the basis mentioned. After the exchange, the Brennans went into possession of the farm, and the Reimers took possession of the city property. No complaint was made by the plaintiffs to the defendants for nearly a year after the deal, when this action was filed.

B. G. Skulason, of Portland (Clark, Skulason & Clark, of Portland, on the brief), for appellants. J. L. Conley, of Portland (Stapleton & Conley, of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). The questions in issue are the value of the property, and whether or not the defendants made fraudulent representations to the plaintiffs by which the exchange was consummated and on account of which they were damaged. During the course of the cross-examination of the defendant J. F. Brennan, and of certain other of the defendants' witnesses, counsel for plaintiffs on cross-examination sought to inquire whether the defendants had sold the Douglas county property for \$15,000 within two years after the exchange. This line of cross-examination was objected to by counsel for defendants and held improper by the court. Thereupon the plaintiffs made an offer of proof in accordance with the questions asked, which was refused and exceptions duly saved.

[1, 2] Evidence of particular sales is permitted upon cross-examination in proving value in order to test the qualification of the witness. In the present case the witnesses were thoroughly examined as experts. It should also be kept in mind that plaintiffs were endeavoring to prove value in order to show fraud on the part of the defendants. If they had been permitted to show that about two years after the exchange of the properties in question the defendants had sold the ranch for \$15,000, then the question of the bona fides of that transaction, the terms, and the kind of payment, would have been opened for investigation and another distinct issue raised instead of one being settled. *East Penn. R. R. v. Hiester*, 40 Pa. 53. The facts in regard to the terms and circumstances of the sale of the farm were not in evidence nor tendered.

There is another reason why plaintiffs should not be heard to question this ruling. In their pleading they complain that the defendants misrepresented and overvalued the Portland property. By the evidence offered they are attempting to show that they undervalued the ranch which they themselves traded in exchange. Value witnesses were called as to the real estate in both counties, and the question was fairly submitted to the jury. It was not an abuse of discretion for

the trial court to curtail the cross-examination in the ruling complained of. *Krebs Hop Co. v. Livesley*, 55 Or. 227, 234, 104 Pac. 3; *McIntosh v. McNair*, 63 Or. 57, 65, 126 Pac. 9; *Furbeck v. Gevurtz*, 72 Or. 12, 143 Pac. 654, 922.

[3] Upon the examination in chief of Mr. Sykes, witness for the defendants, their counsel questioned the accuracy of their own witness over the objection of plaintiffs and later on called another witness named Barber, by whom they were permitted to prove certain contradictory statements made by the witness before he was called to the stand, which was objected to by counsel for plaintiffs as hearsay, not proper impeachment, and exceptions were saved to the ruling of the court allowing the same. Under section 861, L. O. L., a witness may be contradicted by a party calling him where the witness gives testimony damaging to the party calling him on the ground of surprise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in section 864, although the party producing the witness is not allowed to impeach his credit by evidence of bad character.

[4-6] In a very general way, counsel for plaintiffs saved an exception to the court's charge to the jury in regard to the investigation of the property made by the plaintiffs and not relying upon the representations made by the defendants. After defining fraud and misrepresentation, among other things the court advised the jury to the effect that in order to constitute fraud they must find that the person to whom the representations were made, the plaintiffs in this case, believed them, relied upon them, and were induced by reason of them to enter into the deal in this particular case; and further that:

"However, the law does not excuse persons, dealing the one with the other, from the use of their ordinary senses; in other words, the law requires persons dealing at arm's length to use the ordinary care and precaution—of men in the ordinary business walk of life. And if in this case you believe from the testimony that these plaintiffs undertook to make an investigation of the properties belonging to the defendants, and did make such an investigation, then the law will not permit them to say—after we have made this investigation and satisfied ourselves as to the circumstances, and condition of the properties, the law will not permit them to say: 'We are not going to rely upon our investigation, but are going to rely upon your statements.'"

It is suggested by plaintiffs' counsel that the instruction in regard to the ruling upon misrepresentation was too narrow. Taking the last part of the quoted charge alone, it might possibly be subject to criticism; but, taking it as an entirety, we believe there would be no danger, but that the jury would understand the direction of the court that in order to constitute actionable fraud, among other things pointed out, they must find that the plaintiffs relied upon the false represen-

tations of the defendants. *Poppleton v. Bryan*, 38 Or. 69. A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller, and between parties dealing at arm's length, where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and failing to do so he cannot recover on the ground that he was misled by the seller. 30 Cyc. 49; *Allen v. McNeelan*, 79 Or. 606, 156 Pac. 274; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215. Where there has been an inspection by a person making an exchange of property, false representations as to the value cannot as a rule be made the basis of an action for damages. 2 Pom. Eq. Jur. § 892; *Allen v. McNeelan*, supra; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; 14 A. & E. Enc. 112. The charge given by the court to the jury fairly submitted to them the issues to be tried.

Finding no error in the record, the judgment of the circuit court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

WEST v. SCOTT-McCLURE LAND CO.

(Supreme Court of Oregon. April 24, 1917.)

1. MUNICIPAL CORPORATIONS — 510 — BENEFIT ASSESSMENTS — APPEAL TO CIRCUIT COURT.

Portland city charter provides for reassessment against property whenever a benefit assessment has been set aside or declared void, or its enforcement refused by any court, directly or indirectly, or when the council shall be in doubt as to its validity. Section 400 relates to procedure. Section 401 provides that one who has filed objections to a reassessment or new assessment which have not been satisfied, etc., may appeal to the circuit court of a named county, and that the jury shall view the property assessed, and its verdict shall be final and conclusive, etc. If the assessment is not paid within 30 days, the treasurer may collect delinquent assessments by sale in the manner provided by law for the sale of real property on execution, except as in the charter otherwise provided, and the purchase price is limited to the unpaid assessment and the interest and cost of advertising and sale. The sale conveys to the purchaser subject to redemption all the estate, interest, or claim of any person, together with all rights, etc. No levy is required except that a notice shall be posted four weeks upon every lot assessed to an unknown owner. Defendant purchased plaintiff's land at a sale by the city of Portland after an appeal by plaintiff to the circuit court on the amount of benefits to be assessed against his property, the result of which was that the original apportionment by ordinance making the assessment was affirmed. Sections 411 and 412. It is contended that the judgment of the circuit court must be enforced by execution; that a sale by the treasurer for liquidation of the demand was void and created no right or claim in the purchaser. *Held*, that authority for such sequestration of property must be found in the charter and pursued

strictly, and that the only question to be determined by the circuit court is the amount of special benefits assessed to the property, and the assessment is to be enforced by sale of property by the treasurer; no execution being required.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1180.]

2. MUNICIPAL CORPORATIONS — 579 — ASSESSMENTS — VOID SALE — RIGHTS OF PURCHASER — REPAYMENT OF SALE PRICE.

City Charter of Portland, § 419, requiring plaintiff in a suit to quiet title to land sold for delinquent assessments to deposit in court with his first pleading the purchase price at the previous sale with penalty and interest to be paid to the purchaser in case the right or title of such purchaser at such sale shall fail in such action, suit, or proceeding, is unconstitutional and void, since it is in effect taking one man's property and giving it to another.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1293, 1294, 1301.]

Department 1. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit to quiet title by Fred West against the Scott-McClure Land Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is a suit to quiet title to real property in the city of Portland. The complaint is in the usual form, and calls upon the defendant to set forth its estate in the land to the end that the plaintiff's title may be declared paramount to and exclusive of the claims of the adverse party. There are two defenses, one in abatement, and the other to the merits. The first gives a brief history of the action of the city council of Portland under its Ordinance No. 24280, entitled "An ordinance making a reassessment for the construction of a sewer system known as Riverside district sewer," culminating in a sale of the realty in question on May 14, 1914, by the treasurer of the city of Portland, who is ex officio collector of delinquent assessments. The defendant bought the tract thus offered for \$100.65, and received a certificate from the treasurer to that effect. The plea in abatement closes with the declaration:

"That the plaintiff has not tendered or paid into court the said sum of money for which said property was sold or any part thereof, or any interest or penalty thereon as provided in said certificate of sale and as provided in the charter of the city of Portland."

The defense to the merits gives a more detailed history of the proceedings of the city under the ordinance mentioned, including an appeal by the plaintiff here to the circuit court of Multnomah county on the amount of benefits to be assessed against the land, the result of which was that the original apportionment as declared by the ordinance was in all things affirmed. It is said that the judgment of the circuit court therein has never been vacated nor set aside, and the assessment has never been paid. Then follow allegations respecting the further action of the city treasurer terminating in a

sale by that officer to the defendant and an issuance to it of the treasurer's certificate of which it is still the holder, whereby the defendant claims a lien was created upon the premises in its favor. The circuit court sustained a general demurrer to both defenses. The defendant declined further to plead, and there followed a decree quieting the title of the plaintiff and awarding him costs and disbursements. The defendant appeals.

L. E. Latourette and Frank Schlegel, both of Portland, for appellant. Ralph R. Duniway, of Portland (C. L. Whealdon, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). The principal contention on the part of the plaintiff in support of his demurrer to the answer on the merits is that, the assessment having been taken into the circuit court on appeal, and the matter having been determined there as stated, the result is a judgment of that court in favor of the city for the amount of the charge involved which must be enforced by an execution out of that court, in consequence of which the sale by the treasurer for the liquidation of the demand was utterly void and created no right or claim in favor of the purchaser. The charter of Portland, under which these proceedings were had, provides for a reassessment against property whenever an assessment for the opening of a street or the construction or repair of a sewer shall have been set aside or declared void, or its enforcement refused by any court of this state or any federal court having jurisdiction therein, whether directly or by virtue of any decision of those tribunals or when the council shall be in doubt as to its validity in whole or in part. The procedure for that purpose is prescribed in section 400 of the charter of Portland. Section 401 provides partly as follows:

"Any person who has filed objections to such new assessment or reassessment which have not been satisfied by the amendments made by the council may appeal to the circuit court of the state of Oregon for the county of Multnomah from the assessment against any property owned by him or in which he has an interest. * * * Any number of persons may join in such appeal and the only question to be determined therein shall be the amount of special benefits equitably to be assessed against the property of each person joining in the appeal. The jury shall view the property assessed and its verdict shall be a final and conclusive determination of the question. * * * And such appeal shall be conducted and be heard and determined so far as practicable in the same manner as an action at law."

It is laid down in substance in section 402 that, if the amount assessed by the jury be not less than that mentioned in the assessment appealed from, judgment, in addition to declaring the proper apportionment, shall be entered against the appellant and his sureties for his proportion of the costs of such appeal. If within 30 days from the date of the entering of such assessment in the docket of city

liens the sum assessed upon any parcel of land is not wholly paid to the treasurer and his duplicate receipt therefor filed with the city auditor or the assessment is bonded as provided by law, the auditor makes up and transmits to the treasurer a list of delinquencies as they appear upon the docket, whereupon the treasurer proceeds to collect those not paid and named in such list by advertising and selling the tracts in the manner provided by law for the sale of real property on execution except as in the charter otherwise provided. The purchase price is limited to the unpaid assessment and the interest and cost of advertising and sale. The competition at the sale is on the penalty and interest; the amount being awarded to the bidder offering to take the same for the least amount of those two items. Under the charter a sale conveys to the purchaser subject to redemption as provided therein all estate, interest, lien, or claim upon the same of any person, together with all rights and appurtenances belonging thereto. No levy is required except that a notice shall be posted four weeks upon every lot assessed to an unknown owner. Sections 411 and 412.

[1] Throughout it is purely a charter proceeding. Authority for this sort of sequestration of property must be found in that instrument and pursued strictly according to its terms. We note that the only question to be determined by the circuit court shall be the amount of special benefits to be assessed to the property of an appellant, and that the verdict of the jury shall be final and conclusive. Under the municipal organic act the circuit court is made an instrument of the city in the process of assessment. In the matter in hand that tribunal is not exercising the general jurisdiction conferred upon it by the Constitution and laws of the state. In charter affairs it is limited strictly to what is laid down there for it to do. It does not make a new and independent assessment. Its service is ancillary only. It merely considers and affirms or revises the amount already visited upon the property by the city ordinance. Its doings are part of the machinery of the city for its own purposes. After the court has executed its power and entered the result thereof upon its journal its function is fully performed, and the result is none the less a city assessment to be enforced as required by the charter. There is no provision in that document authorizing or allowing the court to issue its own process to enforce the city's claim. The municipality itself is clothed with the only express power on that subject, which is a sale conducted by the treasurer. The mention of that means of collecting the impost upon the property is exclusive of all others. It would have been quite as competent for the legislative power to have provided that the assessment should be considered by any body of men other than the judge and jurors of the circuit court. The mere fact that they are regularly charged

with the administration of the law in other respects does not confer upon them any more authority than what is expressed in the charter. Their function is complete when they have ascertained and declared the amount to be paid by the property holder. They are not authorized to take any other step or to actually collect the apportioned amount. The assessment does not lose its character or identity as such or become anything else because the judge and jury participated in fixing the amount, and, the charter having declared the manner in which city demands of that kind be collected, to wit, by a treasurer's sale, the power must be exercised in that manner and no other. This disposes of the demurrer to the answer to the merits adversely to the plaintiff.

[2] Under the precedents already established in this state, however, a different conclusion must be reached on the objection to the plea in abatement. It is urged in that behalf that the plaintiff cannot maintain a suit to quiet title against a sale by the treasurer without depositing with his first pleading the amount paid by the purchaser to be turned over to the latter if his title shall fail. It has been laid down several times by this court that, when a municipality has carried its proceedings to actual sale, although under a void proceeding, it has exhausted its power against the particular property, that the purchaser is subject to the rule of caveat emptor and has no claim against the city or the true owner of the property for reimbursement, and that the city cannot again exercise its authority in the purchaser's favor to obtain for him the repayment of the purchase price. *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Keenan v. Portland*, 27 Or. 544, 38 Pac. 2; *Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445; *Gaston v. Portland*, 48 Or. 82, 84 Pac. 1040; *Hughes v. Portland*, 53 Or. 370, 100 Pac. 942; *Evans v. Meridianal Co.*, 163 Pac. 1165, filed April 3, 1917. The principle is thus declared respecting the charter under consideration:

"That part of section 400 providing that, when the property has been sold for the payment of a delinquent assessment, and the sale has been declared void, the property shall be reassessed and the proceeds paid to the purchaser in the prior sale, is unconstitutional and void, because it is, in effect, the taking of one man's property and giving it to another."

The doctrine is not altered by the provisions of section 419 requiring the plaintiff in a suit to quiet title to deposit in court with his first pleading the purchase price at the previous sale with penalty and interest to be paid to the purchaser, "in case the right or title of such purchaser at such sale shall fail in such action, suit or proceeding." To require as a condition precedent to maintaining the suit that the plaintiff should deposit any sum of money to be given to his adversary in case of the failure of the latter's title would be merely another form of taking the

property of the plaintiff and giving it to the defendant, bringing it within the principle of the excerpt above quoted. The demurrer to the plea in abatement should have been sustained.

For the reasons already stated, however, the demurrer to the defense on the merits was not well taken, and the decree of the circuit court is therefore reversed:

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

HAWKINS v. ANDERSON & CROWE, Inc.
(Supreme Court of Oregon. April 24, 1917.)

1. DEATH §31(3)—ACTIONS FOR DEATH—RIGHT OF ADMINISTRATOR TO SUE.

Employers' Liability Act (Laws 1911, p. 17) § 4, provides that, on loss of life by negligence, the widow of the person killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action. L. O. L. § 380, provides that in case of wrongful death the personal representatives of decedent may maintain an action at law therefor. *Held*, that where an employé, having no kin as named in section 4 of Employers' Liability Act, is killed, though the administrator cannot recover under such section, he can recover under L. O. L. § 380.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38.]

2. MASTER AND SERVANT §86—EMPLOYERS' LIABILITY ACT—WHEN OPERATIVE.

The Employers' Liability Act is not applicable to cases wherein the rights of the parties are determinable by maritime law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137.]

Department 2. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Action by Martin W. Hawkins, as administrator of C. G. Lee Blond, deceased, against Anderson & Crowe, Incorporated. Judgment dismissing the action, and plaintiff appeals. Reversed and remanded.

This is an action brought by an administrator against the defendant corporation to recover damages for the wrongful death of C. G. Lee Blond, who died from injuries received while in the employ of the defendant and caused by its negligence. A demurrer was interposed to the complaint upon the grounds:

"First. That the plaintiff has not legal capacity to sue.

"Second. That the complaint does not state facts sufficient to constitute a cause of action against the defendant."

This demurrer was sustained, and a judgment rendered dismissing the action, from which plaintiff appeals.

Omitting some of the formal parts thereof, the complaint alleges in substance as follows: That C. G. Lee Blond died in the city of Portland, Or., on or about November 3, 1914, from personal injuries sustained by him while in the employ of the defendant and caused by its negligence as hereinafter

set forth. That he left surviving him no widow, no lineal heirs, no children, no adopted children, no mother, and no father. That his heirs were and are J. P. Lee Blond, a brother, Elizabeth M. Rush, a sister, and B. G. Lee Blond, a son of his deceased brother, F. C. Lee Blond. That thereafter, and on or about November 4, 1915, Martin W. Hawkins was duly appointed administrator of the estate of the deceased, and ever since has been and now is the qualified and acting administrator. That on or about October 17, 1914, the deceased, with others, was employed by the defendant to line a sailing vessel named the *Urania*. That it was the duty of the corporation while having such work performed to furnish decedent a reasonably safe place in which to work, reasonably safe instrumentalities and appliances with which to work, and to maintain the same in a reasonably safe condition, all of which it failed to do. That the ship was constructed with narrow iron beams running lengthwise in the hold thereof and along the sides of the vessel. That what are known as cargo battens were placed between these beams, which battens were supposed to be and are on all ships always bolted or fastened into the hull with iron bolts or nails to hold them permanently and safely in place in order to make the ship strong. That the deceased was ordered by the defendant's foreman to mount the iron beams, use them for the purpose of a scaffold, and to use and hold onto the cargo battens to steady himself and keep himself from falling while performing his duties in lining the ship. That the deceased obeyed this order. That the iron beams were very narrow and about nine feet from the bottom of the ship; that beneath the place where deceased was working there were certain angle irons running crosswise of the boat at the bottom thereof, which projected above the surface of the floor, creating a dangerous situation in case any person should fall and strike against them. That this place was also highly dangerous because of the fact that the cargo battens which deceased was obliged to use and hold onto in doing his work had not been bolted or nailed to hold them permanently or safely in place, or to prevent them from giving way when he took hold thereof to steady himself and keep from falling, "and for the further reason that the hole in said cargo batten through which the bolt is placed to fasten into the side of the ship was too large for the head of the bolt, and said bolt was too small for the hole in said batten to hold said batten fast, firmly and securely in place when it was being used in lining the ship, so that said batten would slide off the bolt when a person was holding onto said batten, all of which facts defendant knew or ought to have known by the exercise of reasonable care and foresight." That on or about October 17, 1914, while deceased was walking on one of these narrow iron beams and taking hold of one of the

cargo battens to perform his work, the latter gave way and slipped off the bolt, causing him to fall with great force and violence a distance of about nine feet to the bottom of the ship, there striking his body against the projecting angle irons, and severely injuring him, from the effects of all of which he died on or about November 3, 1914, to the damage of his estate in the sum of \$7,500, without any fault on his part.

Edward J. Brazell, of Portland (Giltner & Sewall, of Portland, on the brief), for appellant. Harrison Allen, of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is first submitted by plaintiff that the administrator can maintain the action regardless of whether there are any beneficiaries as described under the 1910 statute. With this contention we are not in accord. There being no relatives of the deceased mentioned in the Employers' Liability Act (General Laws of Oregon for 1911, p. 16, adopted by the people in 1910), it is further contended by counsel for plaintiff that the administrator has the right to prosecute the action under section 380, L. O. L., which provides:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, * * * for any injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$7,500.00, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Counsel for defendant claims that as the facts alleged bring the case within the provisions of the Employers' Liability Act, and as there are none of the beneficiaries which are specified in that act, no action can be maintained.

[1] The Employers' Liability Act is entitled:

"An act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures or engaged in any work upon or about electrical wires, or conductors, or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employes, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employes against employers, and prescribing a penalty for a violation of the law."

Section 4 thereof directs:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any lim-

it as to the amount of damages which may be awarded."

As its title indicates the purpose of the act appears to have been to extend the liability of employers and curtail the defenses that were accorded to them previously. It does not seem to have been the contemplation of the lawmaker to take away the right of recovery already conferred by section 380, in cases where the act does not apply. It is now settled that there can be but one recovery in such a case. A judgment under the enactment of 1910 in favor of the widow of the person killed is a bar to another action in favor of the other relatives named, and a recovery by either of the beneficiaries named therein would preclude a recovery under section 380, L. O. L. The latter section has not been abrogated by the enactment of the Employers' Liability Act. 2 Labatt on Master and Servant (1st Ed.) § 664; 1 Dresser on Employers' Liability, § 2, p. 20; Statts v. Twohy Bros., 61 Or. 603, 123 Pac. 909.

While the question involved is presented as a new one, the principle which governs was raised in a different manner and adjudicated in the case of Niemi v. Stanley Smith Lbr. Co., 77 Or. 227, 147 Pac. 532, 149 Pac. 1033. At page 235 of 77 Or., page 1035 of 149 Pac., of the opinion, Mr. Justice Benson said:

"While there is scant authority upon the question as to whether or not the administrator can maintain the action in the event of a failure of all the beneficiaries named in the Employers' Liability Act, we conclude that the better view is well expressed, in the case of Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Vining's Adm'r, 27 Ind. 518, 92 Am. Dec. 269, in which the court says: 'So, also, although by the provisions of section 27 (2 Gav. & H. St. 1862, p. 46) the action for the death of a child must be brought by the father, or in case of his death, or desertion of his family, or imprisonment, by the mother, or by the guardian for his ward, it seems clear to us that, where there was neither father, mother, nor guardian, the case, not being specially provided for would then come within the provisions of section 784, page 330, and the administrator would be the proper person to sue.'"

It will be noticed that it is plainly alleged in the complaint that there are none of the beneficiaries named in the Employers' Liability Act. It is therefore only necessary to add to the Niemi Case, that in the event of the wrongful death of an employé caused by the negligence of an employer engaged in a hazardous occupation, where the deceased leaves surviving him none of the beneficiaries named in the statute mentioned, and where the facts alleged constitute a cause of action for negligence independent of the Liability law, then the executor or administrator can maintain an action for damages for such wrongful death under section 380, L. O. L. Such a case should be tried as though the Employers' Liability Act had never been passed, and not under the latter statute. Statts v. Twohy Bros., supra; McDaniel v. Lebanon Lumber Co., 71 Or. 15, 140 Pac. 990; McClougherty v. Rogue Riv. Elec. Co., 73 Or.

135, 140 Pac. 64, 144 Pac. 569; Niemi v. Stanley Smith Lumber Co., supra; Bowes v. Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; Williams v. South Ry., 91 Ala. 635, 9 South. 77; Colorado Milling Co. v. Mitchell, 26 Colo. 284, 58 Pac. 28; Chiara v. Stewart Mining Co., 24 Idaho, 473, 135 Pac. 245; Hawkins v. Barber Asphalt Co. (D. C.) 202 Fed. 341.

[2] While some of the complaint as worded indicates that it was the intention of the pleader to bring the case within the terms of the Employers' Liability Act, and also that if there were any of the beneficiaries named therein to bring the action they would have a right to do so, nevertheless it seems that a case of negligence is alleged independent of the Employers' Liability Act of 1910. It may be that the rights of the parties are to be determined by the maritime law. Schuede v. Zenith Steamship Co. (D. C.) 216 Fed. 566. If so, the provisions of the Employers' Liability Law, relied on by the defendant as the basis of its demurrer, are certainly not applicable.

It follows that the judgment of the circuit court sustaining the demurrer and dismissing the action must be reversed, and the cause remanded for such further proceedings as may be deemed proper not inconsistent herewith. It is so ordered.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

BOARDMAN et al. v. INSURANCE CO. OF STATE OF PENNSYLVANIA et al.

(Supreme Court of Oregon. April 17, 1917.)

1. REFORMATION OF INSTRUMENTS \S 38(2, 3) —COMPLAINT.

In action to reform an instrument, the complaint must distinctly allege what the original agreement of the parties was, and clearly and precisely point out wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 142, 144.]

2. REFORMATION OF INSTRUMENTS \S 19(1) —MUTUALITY OF MISTAKE.

That an instrument does not express the intent of one of the parties, but does conform to that of the other, does not warrant its reformation, since a contrary rule would destroy the principle of mutuality of contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74, 76-78.]

3. REFORMATION OF INSTRUMENTS \S 45(1) —EVIDENCE—SUFFICIENCY.

In an action for reformation of an instrument, the testimony as to the real contract intended between parties must be clear and convincing, and, if it is at an equal balance either as to what the agreement was or as to the mutuality of the mistake, reformation will not be allowed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 157.]

4. REFORMATION OF INSTRUMENTS \Leftrightarrow 45(14)— EVIDENCE—SUFFICIENCY—INSURANCE POL- ICY.

In suit to reform and recover upon an insurance policy, evidence held not sufficient to show mistake by the insurance company in writing the policy.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 181.]

5. REFORMATION OF INSTRUMENTS \Leftrightarrow 3— GROUNDS—WAIVER OF POLICY CONDITIONS.

In suit to reform an insurance policy, waiver of the conditions of the policy as to change of ownership by failure of the company to inquire about the ownership was not available; such ground of recovery being available only in an action at law on the policy.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 314.]

6. INSURANCE \Leftrightarrow 384—CONDITIONS—WAIVER.

Under Standard Policy Law (L. O. L. tit. 34, c. 6) §§ 4666, 4668, as amended by Laws 1911, p. 279, the statutory conditions as to ownership of insured property cannot be waived except in the manner provided in statute itself, which must be in writing attached to or upon the face of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1019.]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by E. C. Boardman and another against the Insurance Company of the State of Pennsylvania and others. From a judgment, the named defendant appeals. Reversed and rendered.

This is a suit by the partnership of Boardman & Bartle to correct an alleged mistake in an insurance policy issued by the defendant company so as to strike out the words "Boardman & Miller" and insert therein "Boardman & Bartle" as the name of the insured firm. The complaint asserts substantially that on or about December 18, 1914, the defendant, with full knowledge that plaintiffs were in possession of and claimed to be the owners of the property described, issued a policy in the name of Boardman & Miller, whereas the intention of all concerned was to insure Boardman & Bartle, and that this was a mutual mistake and inadvertence of both parties. They further declare upon the policy as sought to be reformed in a way to recover the amount specified therein for the loss of the property by fire occurring August 3, 1915, within the period for which the insurance was to be effective. The answer traverses most of the allegations of the complaint, and especially the averment of mistake. It charges that the policy was issued on or about November 27, 1914, at which time the chattels were owned by the plaintiff Boardman and one Miller under the firm name and style of Boardman & Miller, that at that time neither Bartle nor the firm of Boardman & Bartle had any interest therein, and that the defendant intended to and did issue and deliver the policy to Boardman & Miller, designing only to insure their interests. It then

recites that the policy provided that it should be entirely void unless otherwise provided by agreement indorsed thereon or added thereto, "if the interest of the insured be other than unconditional and sole ownership, or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance"; that about December 18, 1914, the partnership of Boardman & Miller was dissolved by the defendant Bartle purchasing and succeeding to the ownership of Miller in the insured property; and that no agreement providing for any change in the interest of the insured in or to the property or for any change in the interest, title, or possession of the subject of insurance was ever made by or on behalf of the defendant, or indorsed or added to said policy of insurance. The reply traverses the new matter in the answer and states, in substance, that neither the plaintiffs nor Miller ever made any application for insurance, nor did the defendant make any inquiries as to the ownership of the articles insured, but received the premium, well knowing that the plaintiffs were in possession of and owners of them and led the plaintiffs to believe that the property and their interests therein were insured, and thereby waived the condition of the policy as to ownership and all objections, rights, and privileges thereunder or arising therefrom. A further defense not necessary to be considered here relates to a garnishment of the defendant company by creditors of Bartle seeking to satisfy their claims out of insurance money due him. The court decreed a reformation of the policy as prayed for by the plaintiffs, together with a recovery from the company of \$2,000, the face of the policy, and ordered that out of it certain sums should be paid to the other defendants in settlement of demands against the firm and Bartle. The company appealed.

J. C. Veazle, of Portland (Veazle, McCourt & Veazle, of Portland, on the brief), for appellant. Wilson T. Hume, of Portland, for respondents.

BURNETT, J. (after stating the facts as above). [1] The vital question to be determined is whether a mistake has been shown in the framing of the policy within the meaning of the law so as to justify its amendment according to the prayer of the plaintiffs. The precept on the subject of correction of an instrument for a mistake is firmly implanted in the jurisprudence of this state to the effect that the complaint must distinctly allege what the original agreement of the parties was, and point out with clearness and precision wherein there was a misunderstanding; that such mistake was mutual and did not arise from the gross negligence of the plaintiff or that his misconception originated in the fraud of the defend-

ant. *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73; *Epstein v. State Ins. Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Sellwood v. Henneman*, 36 Or. 575, 60 Pac. 12; *Stein v. Phillips*, 47 Or. 545, 84 Pac. 793; *Bower v. Bower*, 49 Or. 182, 88 Pac. 1104; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 94 Pac. 508, 95 Pac. 499; *Howard v. Tettelbaum*, 61 Or. 144, 120 Pac. 373; *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398, 143 Pac. 1104; *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41, 488.

[2] Having in mind the necessity of alleging and proving, as well, that the mistake was mutual, it is not sufficient to reform an instrument if it is shown that it does not express the intent of one of the parties, but does conform to that of the other. In every contract there must be the aggregatio mentium, or meeting of minds, of all the contracting persons. This principle would be utterly destroyed if the court should undertake to correct what was a mistake of only one of the participants in the agreement.

It becomes necessary, therefore, to inquire into the evidence in the instant case to determine whether there was a mutual mistake. The property described in the policy consisted of billiard tables with their equipment and other personalty in a billiard room and cigar stand in a building in Portland, Or. It was subject to two chattel mortgages held by the defendant Trautman said to have been given to him by Phillip S. Miller and the plaintiff Boardman under the firm name of Boardman & Miller. It had been insured for the benefit of Trautman as mortgagee and the firm of Boardman & Miller as owners by a policy of the defendant company expiring December 18, 1914. The testimony is to the effect that on the evening of December 17, 1914, the plaintiff Bartle and Miller finished negotiations with each other for the sale to the former by the latter of his interest in the property and business. On the following day they executed a written instrument transferring the title from Miller to Bartle, and in payment of the purchase price the latter gave his check of that date, which was cashed two or three days afterwards. Mr. Burgard, the agent of the defendant company, who transacted all the business on its behalf, testifies that he wrote up the policy in question November 27, 1914, it being the date thereof, and delivered it to Boardman three or four days later. There is no dispute about the date the policy was actually written. The only witness who testifies for the plaintiffs about its actual delivery was the

plaintiff Boardman. Referring to Burgard, counsel for plaintiffs asked Boardman: "When did he give you that policy?" The witness answered: "It was about the 18th of December; I think the 18th." This is a literal quotation of all the testimony for the plaintiffs as to the date of the actual delivery of the policy. The plaintiff Bartle declares that he never saw it until after the fire, that the first he learned that the property was insured was two or three days after he took possession, and that he did not know Burgard.

Opposed to the testimony of Boardman as to the date of delivery is that of Burgard, who says he wrote the policy November 27, 1914, and delivered it three or four days later, as stated. The presumption is that the writing is truly dated. L. O. L. § 799, subd. 23. In addition to this, Burgard testifies to a conversation he had with Boardman at the time he delivered the policy respecting the renewal of the previous one, which would expire December 18th. The witness says, in substance, that Boardman at first demurred to renewing it because he had a customer of the place who had solicited the insurance, but upon finding that Burgard's firm was agent for the building he concluded it would be a good thing to stand in with the agent under the circumstances, and accepted the policy, and stated that he would put it in the safe, and undoubtedly in a few days Mr. Trautman would come and get it. This conversation is not denied by Boardman. Boardman also testifies that he did not read the policy, but two or three days later surrendered it to Trautman, the mortgagee, whose interest was protected by it. The detailed account given by Burgard of the interview which took place when the policy was handed to Boardman, which the latter does not challenge, contrasted with the bald statement of Boardman to the effect that he thinks it was about the 18th that he received the instrument, operates strongly to turn the scale in favor of the defendant company. Boardman further says that two days after the fire, which happened on the night of August 2-3, 1915, Mr. Trautman told him the policy was made in favor of Boardman & Miller instead of Boardman & Bartle; yet there is in the record a letter dated August 7, 1915, addressed to the company notifying it of the fire destroying the property which Boardman with his own hand signed by the firm name of Boardman & Miller. He declares on cross-examination that he knew that the partnership of Boardman & Miller had ceased to exist when he wrote the letter. When he was asked, "You knew at that time all you know now about the circumstances of the issuance of that policy?" he answered, "I didn't know whether it made any difference or not." Burgard says he knew from the former policy that Miller had an interest, and that he intended to insure Board-

man & Miller. He testifies that the previous policy expired December 18, 1914; that it had not been originally issued to Boardman & Miller, but was transferred to them afterwards. As to his intention about whom he insured the following extract from his testimony on cross-examination is given:

"Q. Whose property did you intend to insure the 18th day of December, the owners' or somebody else? A. Boardman & Miller. Q. You intended to insure, Mr. Burgard, the people who owned the property? A. Boardman & Miller; yes, sir. Q. You intended to insure the people who owned the property? A. Yes, sir. Q. If Boardman & Miller didn't own the property, you didn't intend to insure the property? A. If they didn't own it and we knew they didn't, no, sir. Q. How would you learn whether they did or did not? A. We naturally would be advised if Mr. Miller sold out. Q. Don't you make an inquiry when you issue a new policy, don't you make an inquiry as to who owned the property? A. No, sir; not necessary on a renewal. Q. This was not a renewal of Boardman & Miller? A. Yes, sir. Q. You claim there was an assignment to Miller? A. Yes, sir. Q. Where is that assignment? A. On the old policy. Q. Where is that old policy? A. I don't know whether Mr. Boardman or Mr. Trautman has it, it would be in the hands of some of the interested parties."

There is nothing to contradict Burgard's statement on oath that the policy was written November 27, 1914, which is supported by the presumption above noted that the writing was truly dated. The fact that Boardman signed the notice with the firm name of Boardman & Miller when he knew the actual form of the policy from Trautman's previous statement to him impairs the weight of his testimony. He was evidently proceeding at that time on the theory that the instrument was correct and was trying to collect on it as originally written.

If we contemplate the transaction as of the date that the document was actually framed, it is plain that neither party to it had either Boardman as a single individual or his new firm in contemplation, because that was long before the property changed hands from the old concern to the new. If we judge it as of December 18th, and concede that the paper was not actually delivered to Boardman until that date, still there is nothing in the testimony showing that the defendant or any of its agents knew anything about Bartle or his new firm. It is manifest that, when Burgard wrote the policy on November 27th, he had no intention to contract with Bartle because he knew nothing about him. There is no pretense in the testimony that anything occurred to change this situation so far as the company was concerned; for Bartle himself says he did not know Burgard and never saw the policy until after the fire. Hence there could not be any mutuality of mistake. The allegation of the complaint to the effect that the defendant company had full knowledge that the plaintiffs were in possession of and claimed to be the owners of the property is utterly without proof to sustain it. Moreover, it is highly probable that

if, indeed, the policy was not delivered to Boardman until the 18th, the first day of the existence of the new firm, he would have called the attention of his new partner to the transaction at that time.

[3, 4] The probability as a matter of weight of testimony is that Burgard delivered the policy to Boardman about the 1st of December, while the old firm was yet in being, and before the new one was contemplated by even its members, much less by the defendant. Under such circumstances it is a principle that the testimony as to the real contract intended by the parties must be clear and convincing, and that, if it is at an equal balance either as to what the agreement was or as to whether the mistake was mutual, the correction desired by the plaintiffs will not be allowed. Even if we impute to Boardman and Burgard equal credibility as witnesses, the scale is at a balance, and there is a lack of that clear and convincing evidence demanded by the authorities. But, as we have seen, the testimony of Boardman is weakened by the fact that he treated the policy as having been properly written in the name of the old firm when he notified the company of the fire and signed thereto the name of Boardman & Miller. It is also depreciated by Burgard's narration of the conversation occurring when he delivered the policy to Boardman, which talk the latter does not deny. The element of mutuality in the alleged mistake is not established by even a preponderance of the testimony. Fraud is not imputed to the defendant, and it was expressly disclaimed at the argument.

[5, 6] Something was said at the hearing about the failure of the company to inquire about the ownership of the property being a waiver of that condition of the policy. Conceding, but not deciding, that waiver was properly pleaded, yet under such circumstances the plaintiffs would have a plain, speedy, and adequate remedy at law upon the policy, coupled with an allegation that with the knowledge of all the facts the defendant dispensed with that condition about the title to the chattels. This would defeat a suit in equity under well-known principles. Such precedents as *Allesina v. London Ins. Co.*, 45 Or. 441, 78 Pac. 392, 2 Ann. Cas. 284, and *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 31, 57 Pac. 62, 76 Am. St. Rep. 450, teaching the doctrine of waiver under such circumstances, were cited in support of the argument on that question on behalf of the plaintiffs. Those cases were decided before the enactment of the standard policy law embodied in chapter 6, tit. 34, L. O. L., as amended by the act of February 23, 1911 (Laws 1911, p. 279). As construed by this court in *Oatman v. Bankers' Fire Relief Ass'n*, 66 Or. 388, 133 Pac. 1183, 134 Pac. 1033, and *Finlon v. National Union Fire Ins. Co.*, 65 Or. 493, 132 Pac. 712, the statutory conditions cannot be waived except in the manner provided in the

statute itself which must be in writing attached to or upon the face of the policy. The enactment mentioned gives the provisions of the policy the force of law, under penalty, for it is made a misdemeanor for an insurance company, its officers or agents, to deliver a policy of fire insurance on property in the state except as prescribed in this legislation. Both parties to a policy must be held to know the law. The *Allesina* Case and others like it lose their importance and are not applicable to policies issued since the passage of the law. If the condition as to ownership of the property had been waived, it could be evidenced only by writing conforming to the legal requirement, in which event the remedy at law would have been ample were the case properly pleaded. The essence of the present contention, however, is that a mutual mistake happened calling for a reformation of the instrument, but it has not been established. The testimony strongly points to the conclusion that the policy was in effect at the time the property changed hands, true enough for a period yet to begin, as it properly might have been stipulated, but that, owing to the inadvertence of the members of the firm the transfer of the insurance was not effected until it was too late.

The result is that the decree of the circuit court is reversed, and one here entered dismissing the suit.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

POULLOS v. GROVE.

(Supreme Court of Oregon. April 24, 1917.)

1. MASTER AND SERVANT \S 258(11)—NEGLIGENCE \S 101—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injuries, a complaint, alleging that defendant employed plaintiff as a farm laborer and directed him to go to the second story of a barn for the purpose of assisting in throwing down hay, negligently failing to warn him that there was a hole in the floor of the second story or to guard such hole, and that owing to darkness and insufficiency of lantern light the plaintiff fell through such hole and was injured, stated a cause of action within the purview of the Employer's Liability Act (Laws 1911, p. 16); and hence, under the direct provisions of section 6 of the act, contributory negligence of plaintiff was not a defense, but could only be taken into account by the jury in fixing the amount of damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 825, 826; *Negligence*, Cent. Dig. §§ 85, 163, 164, 167.]

2. MASTER AND SERVANT \S 286(5)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—QUESTION FOR JURY.

The question whether plaintiff's employment was one of risk or danger, and hence under the Employers' Liability Act, which involves the consideration of the conditions under which the work was to be performed as well as the class of employment, *held* for the jury under proper instructions.

3. MASTER AND SERVANT \S 286(3)—INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to go to the jury on the hypothesis that plaintiff was in the loft pursuant to the direction of the defendant, that he was ignorant of the hole, and that he could not see it owing to the darkness and insufficiency of the lantern light.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1010.]

Department 1. Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Action by William Poullos against R. M. Grove. Judgment for defendant, and plaintiff appeals. Reversed and remanded for further proceedings.

In substance, it appears from the complaint that at the dates mentioned therein the defendant owned and operated a farm in Linn county, Or., upon which was situated a two-story barn. About 15 feet above the first floor was the second story, where the hay used for feeding the stock was stored, and it was necessary for those engaged in that work to go there and pitch it down to the racks and mangers below. About March 18, 1915, the defendant employed the plaintiff to do general farm work for him, among other things to assist in feeding the horses, milking the cows, and the like. The plaintiff's initiatory pleading proceeds then as follows:

"That on or about March 31, 1915, and while plaintiff was employed by defendant, and pursuant to such employment, and about 8 o'clock in the evening of said day, defendant directed plaintiff to ascend to the said second story in said barn for the purpose of assisting in throwing hay down from said loft in said barn to the racks and mangers of the horses for the purpose of feeding said horses, and to go upon the hay in said second story at and near that certain hole and pitfall hereinafter mentioned; that prior to said time plaintiff had not been in the loft and second story of said barn and was not familiar with the conditions that obtained therein and did not know of the existence of that certain hole and pitfall hereinafter mentioned; that at said time the entire second story and hay loft in said barn was enveloped in darkness, and plaintiff was unable to see the conditions existing in said second story and in said barn, and did not see and could not see said hole and pitfall, and that the same was concealed and invisible; that at said time and at all times herein alleged it became and was the duty of defendant to provide plaintiff a safe place in which to perform said services and work, and to warn plaintiff of the dangers incident to the performance thereof, and to warn plaintiff of the perils and dangers existing on the premises and on said second story of said barn and of the existence of the hole and pitfall hereinafter mentioned; that, in violation of his said duty, defendant negligently and carelessly caused and suffered a certain hole and pitfall some six feet square in dimensions to extend through the hay and second story of said building at and near the place where plaintiff and others feeding said stock were required to work and remain while feeding said stock, and thereby rendered said place dangerous to the life and person of plaintiff and others working therewith, and negligently and carelessly failed and omitted to place any guard or guards around said hole and pitfall, and negligently and carelessly failed and omitted to warn plaintiff of the presence and existence of said pitfall, and negligent-

ly and carelessly requested and directed plaintiff to go upon said hay and second story and over and across same where said pitfall existed; that at said time plaintiff had no knowledge of said pitfall or the dangers and perils incident to going upon said hay; that at all times herein alleged it was and is practicable to provide good and sufficient guards in the way of walls, boards, and lights that would have warned plaintiff of the existence of said hole and pitfall and prevent plaintiff from falling therein; that in compliance with the commands and requests of defendant and in the course of his employment plaintiff ascended the second story as directed by defendant for the purpose of feeding said stock; that while in the performance of said duty, and without fault upon the part of plaintiff, and solely by reason of the negligence of defendant as hereinabove alleged, plaintiff fell with great force and violence through said hole and pitfall down from the said second story in said building to the floor on the first story of said building some 15 feet distant below, thereby breaking the bone in plaintiff's left thigh and hip and lacerating and bruising the muscles, nerves, and skin of plaintiff's left arm, left side, and left leg, and causing plaintiff's left leg and hip to permanently remain stiff and weak and shortened."

The remainder of the complaint relates to the age and condition of the plaintiff, his earning capacity, and his damage both general and special, concluding with a demand for judgment. The answer denies all the allegations of the complaint except the ownership of the farm and barn thereon, and the fact, as the answer contends, that the plaintiff injured himself. The affirmative defense is to the effect that the plaintiff went into the barn loft without any direction of the defendant and without any reason for his being there; that whatever injury he received was because of his own carelessness and negligence in not observing the hole through which he fell. This in turn was traversed by the reply. The assignments of error relate to the giving of certain instructions by the court. From a judgment in favor of the defendant, the plaintiff appeals.

M. V. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for appellant. Gale S. Hill, of Albany (Hill & Marks, of Albany, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). There is testimony on behalf of the plaintiff to the effect that he applied to the defendant for employment; that the latter told him there was not much to do, but that if he needed work he would employ him, paying him whatever was right, and that after a while when there was more to do he would recompense him with money; and, further, that for several days he worked about the farm cutting and burning brush, helping to pick up lambs, and milking. Relating to the mishap in question, he testifies that in the evening when supper was over and after dark the defendant's son remarked that it was time to go and feed the horses, whereupon the defendant, to quote the witness, said:

"Well, he says to me, 'You had better go with him and help him to do that, too. He will show you where the hay is, and you will know yourself next time.' And I told him, 'All right.' Q. What did you do? A. His son stepped out of doors and got the lantern, and lighted the lantern, and started for the barn, and I was following him. Q. Had you ever been in the second story of that barn before? A. No. * * * Q. And after you got to the barn, where did you go? A. We started to go upstairs, up to the upper deck. Q. And how were you traveling? A. I was keeping following him, always right behind him. Q. And what was the condition, so far as you could see the floor, upstairs? A. Couldn't see anything else; just keeping following his tracks. It was too dark, and I couldn't see nothing else, and following him and following the signs of the light against the other wall of the barn. Q. And what happened? A. After I walked about probably 4 or 5 feet, something like that, then I fell through, fell all at once. I don't know how I fell, but I hit the second floor. I hit the floor, and I was laying there. I don't know how long I was laying there; and, when I come up to myself, I seen Mr. Grove's son standing beside me with the lantern on his hand."

The plaintiff's further testimony was to the effect that his hip was broken and relates to his subsequent sufferings. It is undisputed that in the second floor over the driveway leading through the barn was a hole 6 by 11 feet in the clear. The stairway leading up to the hay loft ended 26 inches from one corner of the large hole. The plaintiff testified, in substance, that on the occasion mentioned the defendant's son preceded him and, going up to the loft, passed near the big hole to the west end thereof, turned across and hung his lantern on a post near the southwest corner of the hole, and that the plaintiff following him during this time fell through the hole to the floor below.

[1] The court in various forms instructed the jury that, if the plaintiff by his own negligence contributed to the injury, he could not recover at all. For instance, when the jury returned for further instructions, the court said to them:

"If both parties were negligent and the negligence of each contributed directly to the injury, the plaintiff cannot recover. That is the doctrine of contributory negligence."

We have in this case a pleading sufficient to disclose an employment of the plaintiff by the defendant. It states enough to show that, in the manner in which it was to be accomplished, the work at which he was set involved a risk and danger to the employé performing the same.

It is said in what is known as the Employers' Liability Act (Laws 1911, p. 16, § 1):

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

We have decided in effect on numerous occasions that this language enlarges rather

than restricts the particular words used in the first part of the section, from which the excerpt is taken. For instance, in *Yovovich v. Falls City Lumber Co.*, 76 Or. 585, 149 Pac. 941, we applied it to a case where the plaintiff's decedent was killed by the release of a tree which had been bent over by another fallen tree from which he had cut a saw log. The statute was held applicable in *Marks v. Columbia County Lumber Co.*, 77 Or. 22, 149 Pac. 1041, Ann. Cas. 1917A, 306, where the plaintiff was injured by the action of a fractious horse which he was using to haul lumber for the defendant. In *Dorn v. Clarke-Woodward Drug Co.*, 65 Or. 516, 133 Pac. 351, the work involved was the installation of a transom in the wall of an office requiring the use of a ladder which slipped and allowed the plaintiff to fall upon the floor whereby he received the injuries of which he complained. The enactment was applied there. It governed the case of *Schaller v. Pacific Brick Co.*, 70 Or. 557, 139 Pac. 913, where the plaintiff was injured in working about a pressed brick machine. It ruled in *Helser v. Shasta Water Co.*, 71 Or. 566, 143 Pac. 917, in which the injury was the result of an explosion of a syphon bottle filled with carbonated water. We decided for the plaintiff under the act in *Mackay v. Commission of Port of Toledo*, 77 Or. 611, 152 Pac. 250, where, owing to a defect in a ladder, it slipped upon the deck of a dredger on which the plaintiff was at work for the defendant, whereby he was thrown to the floor and injured. A fair construction of the complaint in this instance makes out a cause of action within the purview of the legislation mentioned.

The instructions of the court excluded the plaintiff from recovery if it should appear that his own negligence contributed in any degree to the injury which he claims he suffered. Section 6 of the statute, however, says:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

In other words, the enactment does away with the old rule of requiring the employé to carry the whole risk of the employment and to fall of recovery if his own neglect contributed in any way to the injury of which he complains. The new legislation on the contrary allows contributory negligence to be used only to mitigate the actual damages and measure them out between the parties in proportion as the fault of each of them contributed to the injury happening to the plaintiff.

[2] As a matter of law, we cannot classify the infinite variety of employments and say that some of them are works involving risk or danger and that others are not. As stated by Mr. Justice Benson in *Mackay v. Commission, etc.*, supra:

"The question as to whether or not the work involved a risk or danger is one of fact, to be determined by the jury, rather than a question of law."

Each case must depend greatly on the attendant circumstances. The conditions under which the work was to be performed must be considered, as well as the class of employment. All such things affect the question of whether the task involves risk or danger, and this must be left to the jury under proper instructions.

[3] To entirely exclude the plaintiff from recovery if his heedlessness in any way contributed to the injury would be to deprive him of the benefit of the Employers' Liability Act and utterly to ignore the theory of the case as framed by his complaint. We have a case of employment where the defendant was the owner of the barn in which the accident occurred. Confessedly, the opening in the floor was without any guard or obstacle to prevent any one from falling through it. There was enough testimony to go to the jury on the hypothesis that the plaintiff was in the loft in pursuance of the direction of the defendant, that he was ignorant of the existence of the hole, and that he could not see it owing to the darkness and insufficiency of the lantern light. He was entitled to have his case submitted to the jury as he stated it; but by visiting upon him the whole consequence of his carelessness, if any, the court deprived the jury of the right to consider the plaintiff's grievance as pleaded.

The result is that the judgment must be reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and HARRIS and McCAMANT, JJ., concur.

JOHNSON v. PACIFIC LAND CO.

(Supreme Court of Oregon. April 24, 1917.)

1. FIXTURES §35(2)—REMOVAL OF FIXTURES—RECOVERY BY MORTGAGEE.

A mortgagee, whose mortgage is not due, but who is in lawful possession, to recover fixtures from one who has removed them, need not show the security is not ample, or will become so.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 73, 74.]

2. FIXTURES §18(1)—SUBJECTION TO MORTGAGE.

Fixtures attached by the owner to realty, though after the giving of a mortgage, become subject to the mortgage.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 32, 34, 35.]

3. FIXTURES §5—WATER SYSTEM.

Articles which enhance the comfort of a home, such as parts of a water system, are as a rule considered fixtures, when attached in the usual manner.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 4.]

4. FIXTURES §1—TESTS IN DETERMINATION.

In determining whether an article used in connection with realty is a fixture, the general

tests are annexation, adaptation to use, where and as annexed, and intention to make the annexation permanent, this intention being inferred from the nature of the article, the relation of the party annexing, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made; the first two tests, of which the second is entitled to the greater weight, being part of and evidence of the third.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 1, 6.]

Department 2. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by John R. Johnson against the Pacific Land Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for the possession of personal property. The cause was tried before a jury, and a verdict rendered in favor of plaintiff. From a consequent judgment, defendant appeals.

In 1911 plaintiff was the owner of certain real property described in the complaint, consisting of a tract of land with a modern dwelling house, valued at \$3,500, and an orchard situated thereon, in Hood River county, Or. During that year plaintiff sold the same to one Ricord, who executed to him a purchase-money mortgage for \$10,500. Ricord subsequently conveyed the real property to one Vreeland, who in turn sold the same to A. Welch, who conveyed to this defendant. In each instance the grantee assumed and agreed to pay the mortgage, which is not yet due and has not been foreclosed. In March, 1915, this defendant abandoned the premises, and the plaintiff took possession thereof under his mortgage. In 1914, Welch, who was then the holder of the record title to the premises, installed thereon a water system of which the personal property in question was a part. A well was dug, tilling inserted in it, and a platform laid on the top of the same. A motor and pump were installed for forcing the water through attached pipes to a 295-gallon tank placed on wooden sills on the ground in the basement of the house, and thence through water pipes in the dwelling house, by means of electric power. Early in the spring of 1915, defendant caused the pump, motor, and tank to be disconnected from the pipes and removed from the premises. Plaintiff brought this action, claiming a special ownership in the personal property by virtue of his mortgage. Defendant denied plaintiff's right, and affirmatively alleged that the personal property was owned by A. Welch. It was admitted that plaintiff was in the rightful possession of the property as mortgagee.

Claude M. Johns, of Portland (Charles A. Johns, of Portland, on the brief), for appellant. Ernest C. Smith, of Hood River, for respondent.

BEAN, J. (after stating the facts as above). [1] The question for determination

is whether the water system installed on the premises became a part of the realty. It was the contention of the defendant that a mortgagee in possession, suing for damages on account of the removal of fixtures, must show the impairment of his security, and that the complaint is insufficient in this respect. However, a mortgagee, left in possession of real property for the purpose of preserving the security and holding it together until it shall be applied to the indebtedness, who is not foreclosing, and whose mortgage is not yet due, need not show that his security is or will not be ample at some distant date before he can take and replace fixtures, which were a part of the realty subject to a lien of the mortgage. It is only reasonable that the plaintiff has the right to do anything necessary to keep his security intact. The value of these premises and the adequacy of the security is not a fixed quantity, but is something which fluctuates with market values. It would be impossible to say that the security will or will not be adequate at some distant date, when the mortgage comes due and is foreclosed. *Caro v. Wollenberg*, 68 Or. 420, 136 Pac. 866; *Buck v. Payne*, 52 Miss. 271, 279; 27 Cyc. 1248; 34 Cyc. 1390. As stated in 20 A. & E. Enc. of Law, p. 1016, where the mortgagee is in possession lawfully, or, though not in possession, has the right to possession, he may bring an action of trespass as though the title were vested in him unconditionally. 1 *Jones on Mortgages* (4th Ed.) § 707; *Jersey City v. Kiernan*, 50 N. J. Law, 246, 252, 13 Atl. 170.

At the close of the testimony counsel for defendant requested the court to direct a verdict in its favor. There was evidence tending to show, first, that the water system was permanently annexed to the realty; second, that it was especially adapted to the purpose of the property as a residence to which it was attached, and was connected with a view to the purposes for which the realty is naturally and usually employed; and, third, that from the nature of the water system affixed, the relation and situation of the owner making the annexation, the whole situation and mode of the connection, the purpose for which the annexation was evidently made, and taking into consideration all the facts and circumstances disclosed by the testimony, the jury could fairly infer that the party making the annexation did so with a view to making the water system a part of the real property. There was nothing to indicate that the system was adjusted for a temporary purpose. There was, therefore, no error in the refusal of the trial court to direct the jury to find a verdict in favor of defendant. The trial court fully explained the issues raised by the pleadings, and over the objections and exceptions of counsel for defendant charged the jury as follows:

"Plaintiff claims said personal property, because it became a fixture to and a part of the land covered by his mortgage. You are instructed that a fixture is any article or thing which was personal property, but which, by being physically annexed or affixed to real property, becomes accessory to the real property and a part and parcel of it. Personal property may therefore be thus transformed into real property."

"When personal property is attached in a permanent manner to real property, and adapted to be used with that part of the real property to which it is attached, then it becomes a fixture, and a part of the real estate, a part of the land itself."

"In using the term 'permanently attached' in this contention, it is not meant that the personal property shall be so attached as to make its removal impossible, or even difficult; but any personal property which is placed upon and attached to real property, which is used as a part of the real property, and which is suitable for and adapted to such a continued use, in such a position and manner, then it is regarded by the law as being permanently attached."

"Articles of personal property, annexed by the owner to land which is subject to a mortgage, becomes subject to the mortgage, and cannot be removed without the consent of the holder of the mortgage. This is true, whether such annexation was before or after the execution of the mortgage."

Counsel for defendant also asked the court to charge the jury that the intention of the party placing machinery in a building is the sole criterion as to whether it becomes a permanent fixture and a part of the realty, and thus bring it under the mortgage lien, and that the permanency of the installation of such machinery was not to be considered.

[2, 3] A fixture is an article or thing which was personal property, but which, by being physically annexed or affixed to real property, becomes accessory to the real property and part and parcel of it. 13 A. & E. Enc. L. 596. Fixtures attached by an owner to land subject to a mortgage come under the lien of the mortgage, and cannot be removed without the consent of the mortgagee. This is true, whether annexation was before or after the execution of the mortgage. 13 A. & E. Enc. L. 670, and notes; 19 Cyc. 1061, § 1; 1 Jones on Mortgages (4th Ed.) § 436. Articles which enhance the comfort of a home, such as water pipes, water tanks, cisterns, etc., are as a rule considered fixtures, when attached in the usual manner. 19 Cyc. 1062; 13 A. & E. Enc. 666; *Cole v. Roach*, 37 Tex. 413; *Blethen v. Towle*, 40 Me. 310; *Philbrick v. Ewing*, 97 Mass. 133.

[4] In determining the question of whether an article used in connection with realty is to be considered a fixture the general tests are, first, the annexation to the realty; second, adaptation to use, where and as annexed; and, third, the intention to make the annexation permanent, this intention being inferred from the nature of the article, the relation of the party annexing, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851; *Bay City Land Co. v. Craig*, 72 Or. 44, 143 Pac. 911; 19 Cyc. 1039.

The application of these tests does not establish definite criteria, but leaves each case to be determined, not only by the circumstances and nature of the annexation and the uses to which the property is put, but also on the relations of the parties.

The first of the tests—that is, annexation to the realty, either actual or constructive—is generally held to be uncertain and unsatisfactory; the tendency being to accord less and less significance thereto. There must, of course, be actual or constructive annexation, but regard must be had to the object, the effect, and the mode of annexation, and physical annexation is not alone sufficient. The extent and mode of actual annexation have but little weight, except in so far as it relates to the nature of the article itself, the use to which the same is applied, and other circumstances as indicating the intention of the party making the annexation. But it is usually conclusive that a chattel has become part of the realty when it has been so affixed as to be incapable of severance without injury to the freehold. 11 R. C. L. p. 1059 et seq.

The second test, to wit, adaptation or application to the use or purpose of that part of the property with which it is connected, is generally considered as entitled to much weight, especially in connection with the criterion of intention. The tendency is to regard everything as a fixture which has been attached to realty with a view to the purposes for which the realty is held or employed, however slight or temporary the connection between them. R. C. L. § 5, pp. 1061, 1062.

The third test, the intention of the party making the annexation, has been said by some of the authorities to be a controlling consideration, and generally it is held to be the chief test. To have this effect, the intention to make an article a permanent accession to the realty must affirmatively and plainly appear. The test of intention is to be given a broad and comprehensive significance. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words. It is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made, which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention. 11 R. C. L. p. 1062, § 6. The controlling intention is the intention which the law deduces from all of the circumstances of the annexation. 19 Cyc. 1046.

As we understand the instructions of the trial court, while not using the exact language adopted by the text-writers, the substance of the law was given to the jury in the charge. The jury passed upon the facts.

It was not a very violent conclusion for the jury to find that the removal of a large part of the water system, namely, the motor, pump, and tank from the heart thereof, which system connected a well with the dwelling house for the convenience of the occupant of the house, was an injury to the freehold.

Counsel for defendant argues that the chattel was not injured by the removal. That may be true, but how about the real estate that was left behind? The jury found that that was denuded and injured. The question in the present case is between the mortgagor and mortgagee, and the rules which apply when there are intervening equities of third parties, such as attaching creditors and subsequent chattel mortgagees, need not be considered. The question is a mixed one of law and fact, and was fairly submitted to and determined by the jury.

Finding no error in the record, the judgment of the circuit court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

WATSON et al. v. CITY OF SALEM.*

(Supreme Court of Oregon. April 10, 1917.)

1. MUNICIPAL CORPORATIONS \S 444—PUBLIC IMPROVEMENTS—NOTICE FOR BIDS—DEFECTIVE PUBLICATION.

Failure to publish a notice for bids for a street improvement for the time and in the manner required by Salem City Charter, \S 26, invalidates an attempted special assessment for the improvements, since the provisions for publication are mandatory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1064, 1069.]

2. MUNICIPAL CORPORATIONS \S 331—PUBLIC IMPROVEMENTS—NOTICE FOR BIDS—PUBLICATION—"FOR"—"NOT LESS THAN."

Salem City Charter, \S 26, requiring notice for bids for a street improvement to be published for not less than five successive days in a daily newspaper, requires the notice to be published for five full days before the right to submit bids is closed, since the word "for" means through, throughout, during the continuance of; and the words "not less than" signify in the smallest or lowest degree, at the lowest estimate (citing Words and Phrases, First and Second Series, For; Not Less Than).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 856, 857.]

3. MUNICIPAL CORPORATIONS \S 331—PUBLIC IMPROVEMENTS—NOTICE FOR BIDS—COMPUTATION OF PERIOD.

Under L. O. L. \S 531, providing that the time for publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen or which completes the full period required for publication, and Salem City Charter \S 26, requiring notice for bids for street improvement to be published for not less than five successive days in a daily newspaper, a notice that bids would be opened on June 10th, which was first published on June 5th, and published daily thereafter, to and including June 9th, was insufficient, since the whole of June 10th should

have been given in which to file bids before they were opened.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 856, 857.]

4. MUNICIPAL CORPORATIONS \S 444—PUBLIC IMPROVEMENTS—NOTICE FOR BIDS—DEFECTIVE PUBLICATION—EFFECT.

The fact that no bids would have been received from other bidders if the full time had been allowed after publication of notice for bids does not validate a special assessment made for street improvements, since the proceeding is in invitum, in favor of which no equities will be declared.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1064, 1069.]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by George J. Watson and others against the City of Salem. Decree for plaintiffs, and defendant appeals. Affirmed.

This suit involves the validity of a local assessment for a street improvement. Notwithstanding a remonstrance filed by certain property owners the city entered into a contract for the paving of South Twelfth street between Mission street and the south city limits; and upon the completion of the improvement a special assessment was levied upon the abutting property for the cost of the pavement. Claiming that the assessment was void George J. Watson and 22 others commenced this suit for the purpose of freeing their respective parcels of land from the incumbrance of the attempted assessment. Asserting that the assessment was valid in all particulars, the city resisted the suit, but a trial resulted in a decree for the plaintiffs, and the defendant appealed.

B. W. Macy and Grant Corby, both of Salem (Wm. H. Trindle, H. D. Roberts, and Rollin K. Page, all of Salem, and W. T. Slater, of Portland, on the brief, for appellant. John H. Carson and Claire M. Inman, both of Salem (John A. Carson, of Salem, on the brief, for respondents.

HARRIS, J. (after stating the facts as above). The plaintiffs contend that the assessment is void because a sufficient remonstrance was filed against the proposal to pave the street, and because the notice for bids was not published in conformity with the provisions of the charter.

Section 28 of the charter directs that a proposed improvement shall not be proceeded with "if the owners of more than two-thirds majority of the superficial area of the property adjacent to such street or part thereof" file a written remonstrance within a specified time. Earnestly arguing that the remonstrance filed did not contain the necessary "more than two-thirds majority of the superficial area" of adjacent property, the city contends that the total superficial area is 1,261.011 square feet; that to be valid the remonstrance must have represented 840.675 square feet; and that the remonstrance

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on petition for rehearing, see 184 Pac. 1184.

was insufficient since it only contained 763-588 square feet. The plaintiffs insist that the remonstrance represented a larger area of superficial square feet than was admitted by the city, and that it contained the necessary "more than two-thirds majority" of property. The difference between the calculation made by the city and that contended for by the plaintiffs arises out of an attempted replatting of some of the property adjacent to the street. All the land had been platted previous to the commencement of the street improvement proceedings. After the proceedings had been begun, but prior to the expiration of the time allowed for the filing of a remonstrance, and before the contract was let for paving the street, an attempt was made to replat some of the land abutting upon the street without first vacating the previous plat. The plaintiffs base their calculations upon what we shall designate as the attempted plat while the city makes its estimate from the lots and blocks as shown by the previous plats on the theory that the attempted plat is void, since no steps were taken to secure the formal vacation of any of the previous plats. For the purposes of this litigation it will not be necessary, however, to do more than to call attention to the controversy about the remonstrance, since the view we take concerning the publication of the notice for bids is determinative of the suit.

The legal voters of the city of Salem amended their charter in 1911, and among the provisions of section 26 is the requirement that upon the passage of a resolution by the council declaring its intention to improve a street and approving the plans, specifications, and estimates of the city engineer, "the recorder shall duly give notice by publication for not less than five (5) successive days in a daily newspaper published in the city of Salem, Oregon, inviting bids for making said improvement." The common council adopted a resolution on June 3, 1912, approving the plans, specifications, and estimates of the city engineer, declaring its intention to improve South Twelfth street, and directing the recorder to publish a notice inviting bids. A notice inviting sealed bids, and stating that "said bids will be opened on or after the 10th day of June, 1912, at or about 7:30 o'clock p. m. in open council in the city hall," was published in the Daily Oregon Statesman "for five consecutive issues in said paper, to wit: In the issues of June 5, 6, 7, 8, 9, 1912." The council met on June 10, 1912, at 8:10 p. m., and after opening bids referred them to the street committee. Subsequently, on June 24th, the council named the lowest bidder, and authorized the mayor and recorder to enter into a contract with such bidder. The plaintiffs contend that the notice was not published "for not less than five (5) successive days," while the city argues that a publication of the notice in the daily issues of the newspaper

for June 5, 6, 7, 8, and 9 fully met the requirements of the statute.

[1] At the very outset of the inquiry we must remind ourselves that the provision of section 26 of the charter prescribing the publication of the notice for bids is mandatory. The notice for bids must be published for the time and in the manner required by the charter; and since the mode is the measure of the power, a failure to follow the prescribed mode will invalidate an attempted special assessment. *Jones v. Salem*, 63 Or. 126, 132, 123 Pac. 1096; *Matter of Pennie*, 108 N. Y. 364, 15 N. E. 611; *Upington v. Oviatt*, 24 Ohio St. 232; *Breath v. City of Galveston*, 92 Tex. 454, 49 S. W. 575; *Tift v. City of Buffalo*, 25 App. Div. 376, 49 N. Y. Supp. 489; *Michel v. Taylor*, 143 Mo. App. 683, 127 S. W. 949; *Polk v. McCartney*, 104 Iowa, 567, 73 N. W. 1067; *Meuser v. Risdon*, 36 Cal. 239; *Kretsch v. Helm*, 45 Ind. 438; 28 Cyc. 1027.

[2] Analyzing section 26 of the charter it will be observed that the language embraces two elements: (1) The period of publication; and (2) the manner of publication. The period of publication must be "for not less than five (5) successive days." "In a daily newspaper" is the prescribed manner of publication.

The term "for" and the words "not less than" appear in the quoted provision. When used in the connection in which we now find it the term "for" means "through; throughout; during the continuance of." *Century Dictionary*. If the charter read that the notice must be published "for five days," by the overwhelming weight of authority it would be interpreted to mean a publication through, throughout, during the continuance of five full days. 3 *Words and Phrases*, 2858; 2 *Words and Phrases*, Second Series, 594; *Northrop v. Cooper*, 23 Kan. 432; *Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824; *Wilson v. Thompson*, 26 Minn. 299, 3 N. W. 699; *State v. Cherry County*, 58 Neb. 734, 79 N. W. 825; *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227; *Wilson v. Northwestern Mut. Life Ins. Co.*, 65 Fed. 88, 12 C. C. A. 505; *Finlayson v. Peterson*, 5 N. D. 537, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584; 19 Cyc. 1104. The words "not less than," like the language "at least," signify "in the smallest or lowest degree; at the lowest estimate"; and legislation prescribing "not less than" or "at least" a specified number of days is usually construed to mean clear and full days for the specified period of time. 5 *Words and Phrases*, 4833; 3 *Words and Phrases*, Second Series, 631; *In re Gregg's Estate*, 213 Pa. 260, 62 Atl. 856; *Canadian Canning Co. v. Fagan*, 12 B. C. 23; *Reg. v. Aberdare Canal Co.*, 14 Q. B. 854, 68 E. C. L. 854; *Mitchell v. Foster*, 12 A. & E. 472, 40 E. C. L. 238; *Chambers Elec. L. & P. Co. v. Crowe*, 5 D. L. R. 545; *Ward v. Walters*, 63 Wis. 39, 22 N. W. 844; 5 C. J. 1438. *Em-*

phatic as is the word "for" it is, if possible, made still more emphatic by the accompanying language "not less than"; and when combined these words unmistakably mean that the notice must be published for a period of time which cannot be less than five full successive days. In brief the notice must be published five full days before the right to submit bids is closed.

[3] We are relieved from the necessity of inquiring about the common-law rules for computing time, because section 531, L. O. L., prescribes the rule that is to be followed in this jurisdiction. That section reads thus:

"The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded. The time for the publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication."

Quoting only such part of the section as is directly applicable it reads thus:

" * * * The time for the publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day * * * which completes the full period required for publication."

Applying this statute to the record presented by this appeal, June 5th must be excluded in computing the period of time prescribed by the charter, and the whole of June 10th would be necessary to make the full period of five days; and therefore the notice for bids was not published in conformity with the charter. The published notice expressly stated that the bids would be opened on or after June 10th, and they were in fact opened on that day. The notice had not been published for the period of time required by the charter when the time is measured and computed by a statute that has served as the guide not only in actions and suits, but also in other proceedings. *Rynearson v. Union County*, 54 Or. 181, 183, 102 Pac. 785; *Boothe v. Scriber*, 48 Or. 561, 87 Pac. 887, 90 Pac. 1002; *McCabe-Duprey Tanning Co. v. Eubanks*, 57 Or. 44, 102 Pac. 795, 110 Pac. 395; *Grant v. Paddock*, 30 Or. 312, 47 Pac. 712; *State ex rel. v. Macy*, 161 Pac. 111. The right to offer bids should have been kept open until the end of June 10th, and the bids should not have been opened until June 11th.

If it be supposed that the charter required that the notice for bids be given "by publication for not less than five (5) successive weeks" in either a daily or a weekly newspaper, it is fair to assume that, in the light of our statute and judicial precedents, it would be conceded that the day on which the first publication issued would be excluded in computing the period of five successive weeks. The fact that the charter mentions days rather than weeks does not render section 531, L. O. L., any the less applicable. The

charter does not merely say that the notice shall be published five times, but the dominant command is that the notice shall be published throughout a full period of not less than five whole days. The time of the day upon which a paper is issued is usually at some hour after the beginning of that day, and this is one of the circumstances that prompts the enactment of statutes like section 531, L. O. L.

[4] The city argues that even though it be decided that the notice was not published the full time required by law, nevertheless the plaintiffs have not shown that other and additional bids were prevented, or that the property owners suffered any injury. This, however, is a proceeding *in invitum* "in favor of which," as said by Mr. Chief Justice McBride in *Evans v. Meridian Investment & Trust Co.*, 163 Pac. 1185, decided April 3, 1917, "no equities have ever been declared by this or any other court." When a notice for bids is not published in conformity with the requirements of the charter, it is not so much a question of what was done, as it is one of what could have been done. The main purpose of the notice for bids is to promote competition, and to secure to the taxpayers the benefit of such competition, and, as said in *Matter of Pennie*, 108 N. Y. 364, 15 N. E. 611, "we are not at liberty to say that a taxpayer is not aggrieved by the omission" to publish the notice for the full period specified by the charter.

The assessment attempted to be levied is invalid on account of the defect in the publication of the notice for bids, and the decree is therefore affirmed.

MCBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

ALBERT v. CITY OF SALEM.

(Supreme Court of Oregon. April 10, 1917.)

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by J. H. Albert against the City of Salem. Decree for plaintiff, and defendant appeals. Affirmed.

B. W. Macy and Grant Corby, both of Salem (Wm. H. Trindle, H. D. Roberts, and Rollin K. Page, all of Salem, and W. T. Slater, of Portland, on the brief), for appellant. John H. Carson and Claire M. Inman, both of Salem (John A. Carson, of Salem, on the brief), for respondent.

HARRIS, J. The plaintiff owns property adjacent to South Twelfth street in the city of Salem, and brought this suit for the purpose of canceling a local assessment which the city attempted to levy on his property to pay for the cost of paving a portion of the street. A trial in the circuit court terminated in a decree for the plaintiff. The appeal prosecuted by the defendant embraces the same improvement and assessment that were involved in *Watson v. Salem*, decided April 10, 1917, 164 Pac. 567, and since the ruling made in the latter case is

controlling here, it necessarily follows that the decree of the circuit court must be affirmed.

McBRIDE, C. J., and BEAN and McCAM-
ANT, JJ., concur.

BAGGAGE & OMNIBUS TRANSFER CO. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. April 17, 1917.)

1. CARRIERS ⇐14—BAGGAGE—GRANTING EX- CLUSIVE RIGHT TO TRANSFER COMPANY.

A railway company may legally contract with a transfer company giving it exclusive right to solicit from passengers the privilege of transferring baggage, such contracts being for the benefit of both carrier and passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 29.]

2. CARRIERS ⇐14—BAGGAGE—GRANTING EX- CLUSIVE RIGHT TO TRANSFER COMPANY — CONSTITUTION.

Const. art. 1, § 20, prohibiting passing of laws granting exclusive privileges, does not prohibit or regulate the carrier's power to grant exclusive rights to a transfer company, since it only applies to the enactment of laws.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 29.]

3. CARRIERS ⇐14—BAGGAGE—GRANTING EX- CLUSIVE RIGHT TO TRANSFER COMPANY — STATUTE.

L. O. L. § 6927, prohibiting railroads from giving "undue or unreasonable preference" to any person, does not prohibit railroads from granting exclusive privileges to transfer companies; the legislative intent being merely to prohibit the showing of preference to passengers or shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 29.]

4. CARRIERS ⇐397½ — RESPONSIBILITY FOR BAGGAGE.

Railway companies are responsible, as common carriers, for loss of or damage to baggage during transportation, and for a reasonable time while baggage is in depots for delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1519-1528.]

5. CARRIERS ⇐16 — BAGGAGE — REGULATING USE OF STATION.

Since railway companies are responsible for baggage, they may reasonably regulate use of stations, and other matters concerning the dispatch of business for that purpose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 28-30.]

6. CARRIERS ⇐13(2)—GRANTING EXCLUSIVE RIGHT TO TRANSFER COMPANY—ORDINANCE PROHIBITING—VALIDITY—"PUBLIC UTILITY."

City of Portland Ordinance No. 29773, § 3, prohibiting railway companies from granting exclusive privileges to transfer companies, is invalid, not being warranted or expressly authorized by City of Portland Charter, art. 4, § 73 (Sp. Laws 1903, p. 26, as amended), empowering council to exercise police powers "to the same extent as the state of Oregon," and sections 153 and 154, giving the council "general supervision and power of regulation of all public utilities within the city of Portland and of all persons and corporations engaged in the operation thereof"; the term "public utility" being "deemed to include every plant, property, or system engaged in the public service within the city

or operated as a public utility as such terms are commonly understood."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 22, 24.]

For other definitions, see Words and Phrases, First and Second Series, Public Utility.]

7. CARRIERS ⇐13(2)—GRANTING EXCLUSIVE RIGHTS TO TRANSFER COMPANY—SUBJECT TO EXERCISE OF POLICE POWER.

The advantage gained by granting exclusive privileges to a transfer company to solicit passenger's baggage is subordinate to a reasonable exercise of police power under which ordinance may be passed in the interest of the traveling public.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 22, 24.]

8. CONSTITUTIONAL LAW ⇐26—STATE CON- STITUTION—LIMITATION OF POWER.

A state Constitution is a limitation and not a grant of power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30.]

9. MUNICIPAL CORPORATIONS ⇐58—CHARTER —GRANT OF POWER.

A municipal charter is a grant and not a limitation of power, hence authority to enact an ordinance must be found in the charter expressly or by necessary implication.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147.]

In Banc. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by the Baggage & Omnibus Transfer Company against the City of Portland and others. Demurrer to answer sustained, and decree for plaintiff entered, and defendants appeal. Affirmed.

This is a suit by the Baggage & Omnibus Transfer Company, a corporation, against the city of Portland, a municipal corporation, and its directing executive officers, to enjoin the threatened enforcement of a city ordinance. The complaint alleges in effect that the Northern Pacific Terminal Company, a corporation, owns in that city a union depot and railroad tracks connecting with similar lines of other railway companies; that on January 1, 1914, the terminal company entered into a written contract with the plaintiff granting to the latter the exclusive privilege of requesting from passengers on incoming trains the right to transfer their baggage to such places in Portland, Or., as might be directed, and also to maintain within the station grounds a representative to solicit from travelers as they left sleeping cars after occupying them all or a part of the night the same right; that the plaintiff was also granted the advantage of occupying at the depot a part of the baggageroom and was furnished by the terminal company with telephone connections; that the council of the city of Portland adopted, and its mayor approved, Ordinance No. 29773, section 3 of which undertakes to make it unlawful for any railway company to give to the owner of any vehicle a right or privilege which would not be extended upon equal terms to the proprietor of all carriages in that municipality, and pro-

vides a penalty for a violation of the enactment; and that the defendants threaten to enforce the provisions of such ordinance and to subject the plaintiff and its agents to a multiplicity of suits and criminal actions, thereby depriving it of a valuable property right, to its irreparable injury and damage, to redress which wrong no adequate remedy exists at law. Copies of the contract and of the ordinance were made parts of the complaint, the prayer of which is that the enactment may be decreed oppressive and void, and the defendants enjoined from putting their menace into execution. The answer admits some of the averments of the complaint, denies others, and alleges generally that the contract referred to is void, in that it violates public policy by denying to all others than the plaintiff equal rights and privileges; that it is impossible for any other person engaged in the transfer business to obtain possession of baggage at the depot until several hours after the arrival of a train, thereby making it necessary for all passengers who desire the immediate delivery of their trunks, etc., to patronize the plaintiff, whose contract creates a monopoly. A demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense was sustained, and the relief prayed for in the complaint was granted, from which decree the defendants appeal.

W. P. La Roche, City Atty., and L. E. La-tourette, Deputy City Atty., both of Portland, for appellants. Stapleton & Conley and M. E. Crumpacker, all of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] It is contended that the contract in question is void for the reason stated, and, this being so, an error was committed in granting the relief awarded. As to the validity of such agreements, the decisions of courts of last resort are not harmonious. Most of such final determinations relate to the analogous question of the granting by a railway company to a hack driver of a privilege to occupy some favored part of depot grounds so that an advantage is secured in the solicitation of passengers and baggage. In *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661, which is a leading case on the subject, it was held that a railroad company might contract with a firm to furnish the means to carry incoming passengers and their baggage from its station, and thereby grant the exclusive right to conduct such business, which agreement was not violative of a statute providing that such a corporation "shall give to all persons or companies reasonable and equal terms, facilities, and accommodations * * * for the use of its depot and other buildings and grounds." In that case three of the justices dissented, but cited in support of their argument only one American case, that of *New*

England Express Co. v. Maine Central Railroad, 57 Me. 188, 2 Am. Rep. 31, wherein a different conclusion was reached. In *St. Louis, etc., Ry. Co. v. Southern Express Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, it was ruled that railroad companies were not required by usage or the principles of the common law to transport the goods of independent express companies over their lines in the manner in which such commerce was usually carried, nor were they, in the absence of a statute commanding it, required to furnish to all independent express companies equal facilities for doing an express business on their passenger trains. It will thus be seen that by a decision of the highest court in the land the principles of the common law and the rules of general usage have been eliminated from the duty of a common carrier which is not obliged to transport goods of or to furnish equal facilities to express companies unless so demanded by statute. 6 Cyc. 374; 4 R. C. L. 593.

Since the decision was rendered in *Old Colony R. Co. v. Tripp*, supra, a diversity of judicial utterance is to be found in the opinions of American courts as to the application of the rule so adopted by the majority of the court and the doctrine thus asserted by the minority. In *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 490, many of the cases are cited which support and those which deny the principle that a railway company may grant an exclusive privilege to one and refuse it to another who goes upon a common carrier's premises for the sole purpose of soliciting custom or of obtaining business. In that case, in construing a section of the Constitution of Utah which provided that "all railroad and other transportation companies are declared to be common carriers, and subject to legislative control, and such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay," it was held that the clause of the organic law referred to required only that transportation companies should not show favoritism to their own passengers or shippers over the passengers and freight coming from other lines, and did not prohibit a carrier from protecting its passengers from annoyance and interference by others who might desire to solicit the business and patronage of such travelers, or prevent the carrier from providing means by which a passenger might make arrangements for the transportation of himself or his property beyond the end of the carrier's railroad. In deciding that case, it was determined that the doctrine announced in *New England Express Co. v. Maine Central Railroad*, 57 Me. 188, 2 Am. Rep. 31, which it will be borne in mind was cited by the minority of the court in *Old Colony R. Co. v. Tripp*, supra, as sustaining their theory, had been exploded by the Supreme Court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct.

542, 628, 29 L. Ed. 791, where the true distinction was pointed out with regard to persons who wished to be carried as passengers or shippers of freight, and such as desired to be transported for the purpose of carrying on an independent business with the public upon the property or trains of a common carrier. To the same effect, see the case of *Union Depot & Ry. Co. v. Meeking*, 42 Colo. 95, 94 Pac. 16, 126 Am. St. Rep. 145. In addition to the cases cited in *Oregon Short Line R. Co. v. Davidson*, supra, in support of the conclusion there reached, see, also, *New York, etc., R. Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *State ex rel. v. Union Depot Co.*, 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792, 2 Ann. Cas. 186; *Lewis v. Weatherford, etc.*, R. Co., 36 Tex. Civ. App. 48, 81 S. W. 111. In reaching a like determination in *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 299, 26 Sup. Ct. 91, 96 (50 L. Ed. 192), Mr. Justice Harlan says:

"There are cases to the contrary, but in our opinion the better view, the one sustained by the clear weight of authority and by sound reason and public policy, is that which we have expressed."

[2] The decision in *Hedding v. Gallagher*, 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204, cited and relied upon by defendants' counsel as sustaining a contrary conclusion, was expressly overruled upon rehearing. *Id.*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811. We are satisfied that the contract made by the Northern Pacific Terminal Company with the plaintiff is valid unless the agreement has been rendered nugatory by proper enactment. The organic law of the state, which defendants' counsel assert establishes such fact, contains a provision as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Const. Or. art. 1, § 20.

As this clause inhibits only the enactment of a law, it does not prohibit or regulate the right to contract in respect to any subject.

[3-5] It is also maintained by defendants' counsel that the following provision of the statute is controlling:

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation, or particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful; provided, this section shall not prohibit any railroad from giving necessary preference to live stock and perishable freight over other freight." L. O. L. § 6927.

This clause is section 49 of the act of February 18, 1907, creating a railroad commission. Laws Or. 1907, c. 53. A careful reading of the entire statute will disclose the legislative intent was to prohibit a railroad

company from showing preference to any of its passengers or shippers. If the act inhibited railway companies from making contracts with hackmen for the transportation of such baggage as they could secure by interviewing passengers on incoming trains, where equal privileges are offered to all that seek to engage such services, the statute would necessarily apply to any other servant whom a common carrier might desire to employ. Passenger trains are usually operated so as safely to afford rapid transportation, and as they carry baggage it is essential that the trunks, valises, etc., should be segregated from the pile in the car used for that purpose before it arrives at the station where such personal effects are to be put off, so that no unreasonable delay may result. Railway companies are held responsible as common carriers for the loss of or damage to baggage while being transported, and this liability continues for a reasonable time after such trunks, etc., have been placed in their depots for delivery. In order to protect railway companies, it is essential that their employees, and the persons with whom they make indemnity contracts for that purpose should alone be permitted to enter their baggage cars and rooms kept for storing such personal effects. It is to the advantage of railroad companies, and also to the benefit of the traveling public, that baggage when thus stored should be delivered as soon as possible, so that liability therefor might cease, the room kept as empty as practicable, and that the owner might speedily secure possession of his personal effects. Such companies ought therefore to be allowed freely to contract with any responsible person, firm, or corporation for the performance of that service, and there is nothing in the statute prohibiting it. For that purpose it is competent for railways to make reasonable by-laws regulating the use of its stations and other matters concerning the dispatch of its business. 2 Redfield, Railways, § 200.

[6] The validity of section 3 of Ordinance No. 29773, of which mention has been made, must therefore depend upon the power which the council of the city of Portland can legally exercise. Subdivision 1 of section 73 of article 4 of the charter of that municipality, enacted January 23, 1903, and now remaining in force, reads:

"The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained, to exercise within the limits of the city of Portland all the powers, commonly known as the police power, to the same extent as the state of Oregon has or could exercise said power within said limits." Special Laws Or. 1903, p. 26.

Clauses of the organic law of that municipality amended May 3, 1913, by an exercise of the initiative power, provide as follows:

"The term 'public utility' as used in this charter shall be deemed to include every plant, property, or system engaged in the public service within the city or operated as a public utility as such terms are commonly understood."

Section 153, c. 7:

"The council shall have general supervision and power of regulation of all public utilities within the city of Portland, and of all persons, and corporations engaged in the operation thereof." Id. § 154.

It is maintained by defendants' counsel that, founded upon the provisions last quoted, section 3 of Ordinance No. 29773 is a valid exercise of the police power, delegated to the council of the city of Portland, thereby making the municipal enactment referred to equivalent to a statute regulating the business in which the plaintiff is engaged, and, this being so, an error was committed in sustaining the demurrer to the answer. The cases relied upon as sustaining the legal principle contended for will be reviewed. Thus in *Lindsay v. Mayor, etc., of Anniston*, 104 Ala. 257, 16 South. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44, it was held that, though a hackman might under a contract with a railroad company owning a city depot have the right and privilege to enter the premises to solicit patronage, an ordinance subsequently enacted prohibiting hackmen from going within such depot to solicit patronage was not unconstitutional and void as impairing the obligation of a contract because the agreement should be deemed to have been entered into subject to the power of the city to regulate hacks. In *City of Chillicothe v. Brown*, 38 Mo. App. 609, it was ruled that an ordinance regulating the conduct of hackmen, porters, etc., in the pursuit of their business, and forbidding the solicitation of custom at the depot or platform of any railroad within the corporate limits of the city, was reasonable and valid, and that it constituted no defense to an action by the city for a violation of the ordinance that the superintendent of the railway at whose depot the offense was committed had drawn a line on the platforms thereof and told the defendant and others they might stand on the walk up to such mark and solicit travelers for their hotels, etc., as the railroad company had no authority to suspend at its depot the operation of the municipal enactment. In *City Cab, etc., Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914D, 731, it was determined that an ordinance prescribing rules for the regulation of hackmen at a depot stand was not unreasonable in that certain vehicles were assigned to specified positions, some of which were of much more value than others, if such spaces were reasonable so far as the rights of the public were concerned. In *City of Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540, an ordinance providing that hotel runners, hackmen, etc., plying their respective vocations at any railway passenger depot, on the arrival and departure of trains should occupy no part of the depot grounds or premises except that portion allotted to them by the station agent, and it was decided that such enactment should not be construed as giving a railroad

company the right to exclude from the depot grounds any person lawfully engaged in serving the traveling public, either with or without vehicles, nor to confer upon such company the power to grant exclusive rights and privileges to persons engaged in such occupations, but that the ordinance being authorized by statute was to be upheld as a reasonable regulation to promote the convenience of the traveling public and to prevent disorder at railway stations.

[7-8] A careful examination of these cases will disclose that the several ordinances referred to were enacted under express delegation of legislative authority to regulate at railway stations the business and conduct of hackmen; that, though one of them may have entered into a contract with a railroad company for the exclusive privilege of soliciting patronage at its depot, the advantage thus obtained was held subject to the paramount right of a reasonable exercise of the police power, which authority to enact wholesome ordinances might be employed, not for the benefit of the railway company or its favorite hackman, but in the interest of the traveling public. The legal principle thus declared is acknowledged as controlling, but it has no application to the facts involved in the case at bar, for here section 3 of the ordinance in question does not attempt to regulate the conduct or business of hackmen, or to legislate in the interest or for the benefit of the traveling public, but the municipal enactment is designed to inhibit the making of valid contracts by railway companies so that the benefits derived from a grant of the exclusive privilege to solicit a transfer of baggage which the plaintiff enjoys under its agreement may be divided among the owners of vehicles who are engaged in the same business and are able to secure a share of the patronage. Such Utopian state of society is occasionally brought into existence by the acknowledgment, voluntary or otherwise, of the interested parties; but legislation designed to effectuate such felicitous conditions savors of paternalism and would seem to be premillennial. Whether under a state Constitution, which is a limitation and not a grant of power, a statute can be validly enacted and legally enforced, whereby equality of burden and remuneration may be secured, is not now involved. In a municipal charter, however, which is a grant, and not a limitation, of power, the authority to enact such a provision as section 3 of Ordinance No. 29773 must be found in the charter in express language or arise by necessary implication. The organic law of the city of Portland, to which reference has been made, does not explicitly or inferentially contain such a grant of power, and for that reason the section of the enactment mentioned is void.

It follows that the decree should be affirmed, and it is so ordered.

MARYLAND CASUALTY CO. v. KLABER'S ESTATE et al.

(Supreme Court of Oregon. April 24, 1917.)

1. APPEAL AND ERROR §1008(1)—REVIEW—FINDINGS.

On appeal in a proceeding at law, the findings of the trial court as to the facts are conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

2. STATUTES §226—CONSTRUCTION—ADOPTION OF STATUTE.

When a statute of another state is adopted and enacted, it must be deemed to have been passed subject to the interpretation given it by the courts of the state of its origin.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307.]

3. TRUSTS §161—BOND OF TRUSTEE—RELIEF FROM LIABILITY—SHOWING OF MISCONDUCT—STATUTE.

Under L. O. L. § 685, providing that a surety upon the bond of any executor or other fiduciary may apply by petition to the court wherein the bond is directed to be filed, etc., praying to be relieved from further liability as surety, etc., the surety on the bond of trustees under a will was not entitled to be relieved of further liability upon its arbitrary demand to be relieved, without showing any fault, dereliction, or misconduct on the part of its principals.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 209–211.]

Department 2. Appeal from Circuit Court, Multnomah County; T. E. J. Duffy, Judge.

Petition by the Maryland Casualty Company, a corporation, against the estate of Herman Klaber, deceased, and Max Wolf and Herman A. Kaufman, as trustees, to be relieved from a surety bond. From a judgment denying the application, petitioner appeals. Affirmed.

This was a proceeding by plaintiff to be relieved from a surety bond given by it to secure the faithful performance of the duties of the trustees of Bernice Janet Klaber under the will of Herman Klaber, deceased. Herman Klaber died testate, bequeathing the sum of \$100,000 to his daughter, Bernice Janet, and directing that his executors, Max Wolf and H. A. Kaufman, manage and invest such sum and pay it over to her upon her attaining the age of 21 years. The estate was probated and closed, and the probate court made an order turning over the amount bequeathed, less \$950 inheritance tax, to the trustees named in the will, upon their filing a bond in the sum of \$99,050. The cestui que trust was then 4 years of age, and the undertaking had 17 years to run. The petitioner was the surety, and the bond was in the usual form, being executed and filed in the probate court June 26, 1914. In the month of February, 1915, the plaintiff filed in the probate court a petition demanding to be discharged from liability on its bond, and requesting the court to require the trustees to bring the estate in their hands into court and to settle an account showing their doings

therein up to the time of such hearing. It also presented a notice reciting the fact that the money had been turned over to the trustees, and that the petitioner was surety on the bond given by them for the faithful discharge of their trust; that it was the understanding at the time such bond was given that the trust fund should be held under the joint control of the surety and the trustees; that the money had not yet been invested, but was in possession of one of the trustees, and not subject to the joint control of the two, nor of the petitioner. The petition stated on information and belief that it was the intention of the trustees to loan the trust funds to a corporation known as the Klaber Investment Company, in Lewis county, Wash., which company is engaged in the hop business; that the petitioner does not consider that a loan of this character is a proper investment of trust funds, and desires to have a settlement of accounts up to the present time and to be released from further liability, and that the trustees be cited to appear and show cause why it should not be released from further liability on said bond.

The trustees, being cited, appeared and answered, denying that there was ever any understanding with petitioner that the fund should be under joint control of themselves, and further denied that the money was not yet invested, or that it was in possession of one of the trustees, and alleged that petitioner's agent solicited from the trustees the writing of said bond and that it was executed solely upon the understanding and agreement that the trustees would pay the premium demanded by petitioner and not otherwise; that the home office of the petitioner became dissatisfied with the writing of said bond because it would continue for such a long period of time; that in order to relieve petitioner from anxiety in respect to the investment of said fund the trustees offered to invest it substantially as alleged in the petition, loaning \$50,000 to the Klaber Investment Company, a corporation organized by Herman Klaber in his lifetime and substantially controlled by him, being at present owned by his widow. Said corporation having real and personal assets valued at from \$175,000 to \$200,000, and there being no liabilities except for current bills and ordinary expenses, other than a mortgage for \$10,000 against which is an equal amount of cash on hand, the trustees offered to invest the remainder of said funds in a safe and conservative manner by the purchase of bonds or other securities satisfactory to the petitioner, and to hold the same subject to joint control; that negotiations have been constantly going on between the trustees and plaintiff in respect to the matter, but no accommodation has been reached; that there has been no change in the status of the parties or in the condition of the trust fund, and no im-

pairment of the security thereof, since the bond was executed.

Upon the trial the court made the following findings and conclusions:

"(1) There has been no dereliction of duty on the part of the trustees of said Bernice Janet Klaber fund, and no danger has been shown to the funds or property in the hands of the trustees, nor has there been any allegation in the petition of the surety company in which it seeks to be relieved from its obligation as surety that there was at any time a dereliction of duty on the part of the trustees or that the funds or property in the hands of the trustees were in any wise endangered.

"(2) The testimony shows that the trustees are financially responsible and that the funds in their hands are safely and fully protected.

"(3) There is no allegation in the petition of the surety company that it was induced by fraud or any improper representation to execute the bond, and no testimony has been offered tending to prove any such fraud or misrepresentation; but, on the contrary, the testimony establishes the fact that the bond was executed upon the solicitation of the surety company and its duly accredited agents.

"(4) No valid reason has been shown in the pleadings or by the testimony to justify the application of the surety company for release from the obligation assumed by it in executing the said bond."

As conclusions of law the court finds:

"(1) That the appeal taken by the surety company from the judgment and order of the county court was properly taken and that the appeal therefrom will lie from the county court to this court.

"(2) That the appeal in this proceeding is in the nature of an appeal from the decree in an equitable proceeding.

"(3) That the petitioner, the Maryland Casualty Company, has not shown itself entitled to the relief it seeks and there is no valid ground upon which said surety company can be relieved from its obligation as surety on the bond of the trustees of the Bernice Janet Klaber fund.

"(4) That the trustees are entitled to a judgment according to these findings and to recover its costs and disbursements herein."

Upon these findings there was a judgment denying the application, from which petitioner appeals.

F. C. Howell, of Portland (Wilbur, Spencer & Beckett, of Portland, on the brief), for appellant. Joseph Simon, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] If, according to plaintiff's contention, this application is to be treated as a proceeding at law, the findings of the court are conclusive here as to the facts. There remains but one question: Can the surety upon a bond of this character be relieved of further liability thereon upon his arbitrary demand to be so released, and without showing any fault, dereliction, or misconduct on the part of his principal? The decision of this matter hinges upon the construction of section 685, L. O. L., which reads as follows:

"The surety, or representative of any surety, upon the bond, undertaking, or other obligation of any guardian, assignee, receiver, executor, administrator, or other fiduciary, may apply by

petition to the court wherein said bond is directed to be filed, or which may have jurisdiction of such guardian, assignee, receiver, executor, administrator, or other fiduciary, praying to be relieved from further liability as such surety for the acts or omissions of the guardian, assignee, receiver, executor, administrator, or other fiduciary which may occur after the date of the order relieving such surety, to be granted as herein provided for; and for an order requiring such guardian, assignee, receiver, executor, administrator, or other fiduciary to show cause why he should not account and be relieved from any further liability as aforesaid, and that said principal be required to give a new bond. Thereupon, said court shall issue such order, returnable at such time and place and to be served in such manner as said court shall direct, and may in the meantime restrain such guardian, assignee, receiver, executor, administrator, or other fiduciary from acting, except in such manner as said court may direct, for the preservation of the trust estate. If the principal in such bond, undertaking, or other obligation account in due form of law and file a new bond, undertaking, or other obligation, duly approved within the time limited in such order, then said court must make an order releasing said surety filing petition as aforesaid from liability upon the bond for any subsequent act or default of the principal; and in default of said principal thus accounting and filing such new bond within the time limited in such order, said court shall at once make an order directing such guardian, assignee, receiver, executor, administrator, or other fiduciary to account in due form of law within ten days—and if the trust fund or estate shall be found or made good and paid over, or properly secured, such surety shall be discharged from any and all further liability as such for the subsequent acts or omissions of the guardian, assignee, receiver, executor, administrator, or other fiduciary after the date of such surety being relieved or discharged—and further discharging such guardian, assignee, receiver, executor, administrator, or other fiduciary from his position."

The above section was enacted in 1890, and is substantially taken from section 812, Code Civ. Proc. N. Y., as amended by chapter 668, Laws N. Y., passed May 13, 1892. For the purposes of comparison we give the corresponding section in said compilation:

"The surety or sureties or the representatives of any surety or sureties upon the bond of any trustee, committee, guardian, assignee, receiver or executor may present a petition to the court or judge that appointed him, or that approved or accepted such bond, praying to be relieved from further liability as surety or sureties for the acts or omissions of the trustee, committee, guardian, assignee, receiver, or executor occurring after the date of the order relieving surety or sureties, and that the principal on the bond be required to show cause why he should not give new sureties. Thereupon the court or judge must issue the order to show cause accordingly and may restrain such trustee, committee, guardian, assignee, receiver or executor from acting, except to preserve the trust estate until further order. Upon the return of the order so issued, if the principal in the bond file a bond in the usual form, with new sureties to the satisfaction of the court or judge then, within such reasonable time, not exceeding five days, as the court or judge fixes, the court or judge must make a decree or order releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal; otherwise a decree must be made that such trustee, committee, guardian, assignee, receiver or executor account before the court or judge, or a referee appointed, and that upon the trust fund or estate being found or made good and paid over or properly secured, the surety

or sureties shall be discharged from any and all further liability as such of the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver or executor occurring after the date of his or their being so relieved or discharged, and discharging such trustee, committee, guardian, assignee, receiver, or executor."

[2] Previous to its adoption here this section had been construed by the Court of Appeals of the state of its origin, and according to the commonly accepted rules of construction it must usually be deemed to have passed here subject to the same interpretation given it by the courts of the state where it originated. *Putnam v. Douglas County*, 6 Or. 328, 25 Am. Rep. 527; *State v. Finch*, 54 Or. 482, 103 Pac. 506; *Jamieson v. Potts*, 55 Or. 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24; *Abraham v. Roseburg*, 55 Or. 359, 105 Pac. 401, Ann. Cas. 1912A, 597; and many other cases. The statute last above quoted came up for construction in *American Surety Co. v. Thurber*, 162 N. Y. 244, 56 N. E. 631, and the same contention was made in that case as is made by the plaintiff here, in answer to which the court said:

"The appellant claims that the provisions of the section are mandatory, as the word 'must' ordinarily excludes discretion. That word, however, is occasionally used in the Code without the imperative meaning which it usually has. *Spears v. Mayor, etc.*, 72 N. Y. 442; *Wallace v. Peely*, 61 How. Prac. 225, affirmed 88 N. Y. 646. The provision requiring the court to 'issue an order to show cause' implies that cause may be shown. It is more than a substitute for a notice of motion, for it is a specific requirement in a statute creating a special remedy, of which it is a part. There is no reason why the principal should be required to show cause, if no cause can be shown under any circumstances. When all the provisions of the section are read together, we think the court has a discretion to exercise depending on the facts of the case, and is not commanded to make a decree regardless of those facts. In other words, we construe the expression 'a decree must be made' under the circumstances to mean 'a decree may be made.'"

This construction is emphasized by the fact that in 1895 the Legislature of New York again amended section 812 by providing in effect that upon notice and accounting, etc., "the surety * * * shall be entitled as a matter of right to be and shall be discharged from liability." Subsequent to the latter amendment the same court, in the case of *In re U. S. Fidelity & Guaranty Co.*, 50 Misc. Rep. 147, 98 N. Y. Supp. 217, held that under its provisions the surety had an absolute right to be released.

[3] No such change has been made in our statute, and until such amendment is made we are disposed to follow the rule laid down in *American Surety Co. v. Thurber*, supra, which seems to us to be only fair in requiring a surety who enters into a contract for an agreed consideration to abide by it so long as the other party to the agreement faithfully performs the conditions of his trust.

Counsel for appellant cite a number of cases holding, under statutes varying in their

terms somewhat, that sureties have a peremptory right upon petition for that purpose to be relieved from further liability for the acts or omissions of their principals; but in none of these is there a provision requiring the principal to show cause why the surety shall not be relieved, except in the case of *In re U. S. Fidelity & Guaranty Co.*, supra, which, as before shown, depends upon a provision of the statute expressly providing that they shall be discharged "as a matter of right." The other cases are *Kempner v. Galveston Co.*, 73 Tex. 216, 11 S. W. 188; *Sifford v. Morrison*, 63 Md. 14; *March v. Fidelity & Deposit Co. of Maryland*, 79 Md. 309, 29 Atl. 521; *Cochise Co. v. Ritter*, 3 Ariz. 208, 73 Pac. 448; *U. S. Fidelity & Guaranty Co. v. Peebles*, 100 Va. 585, 42 S. E. 310. As before remarked, there is no provision in any of the statutes of these states permitting or requiring the principal to show cause why the surety should not be discharged, and this differentiates them from the case at bar. It would certainly be an anomaly if a party should be required by law to appear and show cause why the court should not make an order which it was imperatively commanded to enter, no matter what showing the party cited might be able to make.

The views here announced render unnecessary a consideration of the other questions discussed on the hearing.

The judgment is affirmed.

MOORE, BENSON, and BEAN, JJ., concur.
McCAMANT, J., not sitting.

CROWDER v. YOVOVICH.

(Supreme Court of Oregon. April 10, 1917.)

1. FRAUD §64(1)—EVIDENCE—QUESTION FOR JURY.

In a suit for damages for deceit in the sale of lands, the value of furniture owned by plaintiff and given in exchange as a part of the consideration for the conveyance of defendant's land, held for the jury.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 66½, 67, 71.]

2. APPEAL AND ERROR §1002 — REVIEW — FINDINGS.

A jury finding on conflicting evidence will not be disturbed on appeal, if there is any evidence to sustain it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937.]

3. FRAUD §29—PRINCIPAL AND AGENT §143(3)—UNDISCLOSED PRINCIPAL—RIGHT TO SUE FOR DAMAGES FOR DECEIT.

As the rule that an undisclosed principal may sue upon a contract made by his agent to the same extent as if its relation to the contract was known at the time it was entered into, does not apply to the case where an alleged agent made affidavit that he was the owner of personal property exchanged for real estate, and gave a promissory note in his own name, and in every way acted as principal in making the contract,

and hence the undisclosed principal cannot sue for deceit practiced upon the agent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 25; Principal and Agent, Cent. Dig. § 504.]

4. EVIDENCE \Leftrightarrow 400(3)—PAROL EVIDENCE TO VARY WRITTEN AGREEMENT.

Where the agent of an alleged undisclosed principal annexed to his bill of sale of the personal property exchanged for real estate, an affidavit that he is the owner of such property, parol evidence tending directly to contradict the terms of the bill of sale was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1787, 1791, 1793.]

5. ESTOPPEL \Leftrightarrow 75—UNDISCLOSED PRINCIPAL—RIGHT TO SUE FOR DAMAGES FOR DECEIT.

Where the owner of personal property permitted an alleged agent to contract for the exchange of such property for real estate, and represent himself as principal in the contract as owner of the property, and to give his personal obligation as such, such owner was forever barred from contradicting the alleged agent's misrepresentations, and had no cause of action for deceit practiced upon the agent.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192–195.]

6. PARTIES \Leftrightarrow 75(5)—PLEADING—PLEA IN ABATEMENT.

Where a complaint in an action for deceit practiced on plaintiff in exchange of personal property for real estate stated a cause of action, and did not state that the contract was made by or through an agent, or alleged representations were made to an agent of plaintiff, the defense in such exchange dealt with another person who purported to act as principal, and that plaintiff had no capacity to sue as undisclosed principal, was not in the nature of a plea in abatement.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 115.]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Bertha M. Crowder against Yanko Y. Yovovich. Judgment for plaintiff, and defendant appeals. Reversed and remanded for proceeding not inconsistent with the opinion.

This is a suit to recover damages for deceit in the sale of lands. The complaint alleges that on June 17, 1914, plaintiff owned certain furniture, including bedroom suites, chairs, etc., situated in a rooming house in the city of Portland, and that defendant was the owner of a certain 40-acre tract of land situated in Lane county, Or.; that at said date defendant by reason of false representations as to the character and capabilities of the land, all of which are particularly set forth in the complaint, induced plaintiff to purchase the same and to give in exchange therefor the personal property described in the complaint, and to execute to defendant a note for \$295, secured by a mortgage upon the land conveyed; that the land was practically worthless, and that upon discovery of his fraudulent representations she tendered back to him a warranty deed to the same, and demanded a restoration of the property conveyed to him, but defendant refused to accept such conveyance or to restore said property; that by reason of defendant's fraudulent conduct she

has been damaged in the sum of \$2,500. The defendant answered, denying the alleged fraudulent representations, and asserting the property transferred to him was not worth to exceed \$400 over and above an indebtedness of \$295 due thereon. The answer denied plaintiff's ownership of the personal property assigned to him, and alleged that he conveyed the land to one J. A. Barnes, and that the furniture and fixtures were in the name of J. A. Barnes. On the trial the plaintiff testified that she was the actual owner of the property; that it was held in the name of J. A. Barnes; that she had several conversations with defendant during the negotiations; that she did not remember telling him that Barnes was the owner of the furniture; that she was trying to keep her name out of it; that all the money invested in the lodging house and furniture was hers absolutely; and that Barnes had never contributed a cent toward its purchase. Barnes testified to the same effect—that Mrs. Crowder purchased the property from Nellie Stacey with her own money, that the bill of sale was made to him at plaintiff's request, and that he held it as trustee for her. De Forest testified that it was listed for sale in his office by Barnes, but that he had always supposed until the bill of sale to defendant was made out that plaintiff was the real owner of the property. The bill of sale of the furniture, etc., was executed by Barnes, and to it was attached the following affidavit:

"State of Oregon, County of Multnomah—ss.: I, J. A. Barnes, being first duly sworn on oath, depose and say that I am the sole and lawful owner of the goods mentioned in the within bill of sale, and that same are free from all incumbrances except the sum of \$295 due Edwards Company of the city of Portland, Oregon, as set forth within the bill of sale. J. A. Barnes.
"Subscribed and sworn to before me this 18th day of June, 1914. Carl J. Wangerien, Notary Public for Oregon."

At the same time and as a part of the same transaction defendant executed and delivered to Barnes, as grantee, a warranty deed to the land described in the complaint, and Barnes executed a promissory note in favor of defendant for the sum of \$295, with interest at 7 per cent. per annum, payable three years after date, and also executed and delivered a mortgage upon the land to secure the same. Prior to the commencement of this action he executed a conveyance of the land to plaintiff. Upon the trial there was a verdict and judgment for plaintiff for the sum of \$600 damages, from which defendant appeals.

Geo. C. Johnson, of Portland (Johnson & Mathews, of Portland, on the brief), for appellant. Fred W. Hummel, of Portland (Wilbur, Spencer & Beckett, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). [1, 2] The testimony as to the false representations and as to the value and char-

acter of the land is very conflicting. Plaintiff's witnesses place it all the way from a mere nominal value up to not in excess of \$400, while defendant's witnesses value it from \$1,000 up to \$7,500, including the timber; and this estimate, if we were to credit it, would indicate that defendant was badly worsted in the trade. On the other hand defendant's witnesses place a value as low as \$300 upon the furniture, etc., while some of plaintiff's witnesses place it as high as \$1,800. All this was for the jury, and we are not permitted to disturb the verdict in that respect if there is any evidence to sustain it, as there certainly is.

[3] The principal contention here centers around the admission of the oral testimony of plaintiff and Barnes tending to show that she was the real owner of the property traded to defendant, and that Barnes was acting as her agent. The testimony does not disclose that defendant was ever informed that plaintiff was the real principal, but rather that this fact was kept in the background; plaintiff testifying, "I wanted to keep my name out of it." It is a familiar rule that an undisclosed principal may sue upon a contract made by his agent to the same extent as if his relation to the contract were known at the time it was entered into. 2 Mechem on Agency (2d Ed.) § 2059, and cases there cited. It would seem logically to follow that the undisclosed principal can recover damages for a deceit practiced upon his agent in the course of a transaction in any case in which he would have a legal right to enforce the contract if no deceit had been practiced. But to the rules above announced there are exceptions as firmly supported by precedent as are the rules themselves, and we are of the opinion that this case comes within these exceptions, which are thus stated by Mr. Mechem:

"Sec. 2070. Principal cannot sue where terms of contract exclude him or where contract is solely with agent personally. The right of the principal to sue upon the contract made by the agent in his own name flows from the fact that the agent made the contract in reality, though perhaps this may have been unknown to the other party, as the agent of the principal, and by his authority; and the principal is therefore entitled to enforce the contract, not only upon the ground that the benefits of his agent's acts accrue to him, but also upon the ground that he is himself, when discovered, liable upon the contract to the other party. If, however, as is competent to be done, the other party has (1) dealt with the agent as being in fact the principal and upon terms in a written contract which exclude the existence of any other principal, or (2) with knowledge of the agency has elected to deal with the agent alone, and the agent has pledged his individual credit, there it is held that the undisclosed principal is not a party to the contract, and cannot enforce it. To permit the principal to enforce the contract in the first case is to contradict the writing; and, in the second, to deny to the other party the benefit of his choice of parties. Every man has a right to determine for himself what parties he will deal with, and if the other party has expressly dealt with the agent, as the party to the contract, to the exclusion of a principal, he cannot be made liable to the principal."

Here the contract is expressly with the alleged agent. The credit for the deferred payment is extended to him. His promissory note is taken for it, and his mortgage secures the note, and with the knowledge and acquiescence of his alleged principal he annexes to his bill of sale of the property an affidavit in which he swears that he is the owner of the property.

[4] The oral evidence offered tended directly to contradict the terms of a written instrument, and was inadmissible. The leading English case on this subject is *Humble v. Hunter*, 64 Eng. C. L. Rep. 310. In this case the plaintiff sued the defendant on a charter party executed by her son, as her agent, in his own name without disclosing to the defendant that he was such agent. The contract read:

"It is mutually agreed between C. J. Humble, Esq., owner of the good ship or vessel called the *Ann*," etc.

The court refused to hear evidence that the son was not the real principal, distinguishing the case from the ordinary one of an undisclosed principal suing on a written contract, on the ground that the son in this case expressly stipulated that he was the owner of the ship and the principal in the transaction, and that, therefore, the evidence contradicting the writing was inadmissible; saying, among other things, that the doctrine that an undisclosed principal may demand the benefits of a contract made by his agent "cannot be applied where the agent contracts as principal; and he has done so here by describing himself as 'owner' of the ship." The same rule was announced by Mr. Chief Justice Marshall in *Graves v. Boston Marine Ins. Co.*, 6 U. S. (2 Cranch) 419, 438, 2 L. Ed. 324, a case in equity to correct a policy by reason of an alleged mistake, whereby it was claimed that the names of some of the real principals had been omitted. See, also, *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Moore v. Vulcanite, etc., Co.*, 121 App. Div. 667, 106 N. Y. Supp. 393; *Darrow v. Horne Produce Co. (C. O.)* 57 Fed. 463; *Kelly v. Thuey et al.*, 102 Mo. 522, 15 S. W. 62, overruled in *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, by a divided court; *Thomas v. Kerr*, 66 Ky. (9 Bush) 619, 96 Am. Dec. 262; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9. None of the cases cited by plaintiff contradict or question the doctrine announced in *Humble v. Hunter*, or in *Graves v. Boston*, etc., *supra*, but they are all cases where the alleged agent has not affirmatively represented himself as owner.

[5] Another reason why plaintiff should not be allowed to stand in the position of an undisclosed principal is that she stood by and allowed Barnes to represent himself as principal, and to contract and give his personal obligation as such. As remarked in *Humble v. Hunter*, *supra*, such a rule would deny to the other party the benefit of his

choice of parties. Every man has a right to determine for himself what parties he will deal with, and if the other party has expressly dealt with the agent as the party to the contract to the exclusion of a principal, he cannot be made liable to the principal. *Boston Ice Co. v. Potter*, supra. In order to uphold the judgment in the case at bar we would be compelled to ignore the sworn representation of Barnes, made with the acquiescence of plaintiff, that he was the owner of the furniture described in his bill of sale, as well as of the negotiable note and mortgage given by him, and to require defendant to litigate his contract with a person with whom he had no intention of contracting. We are of the opinion that the plaintiff cannot maintain this action.

[6] It is further contended that the defense urged was that the plaintiff had no legal capacity to sue, and that such defense was in the nature of a plea in abatement; and, not having been so pleaded, it was waived. This contention is not sound. The complaint did not in any form state that the contract was made by or through an agent, or that the alleged misrepresentations were made to an agent of plaintiff. It stated a good cause of action. The proof showed a state of facts which, as we hold, showed that plaintiff did not at the commencement of the suit have any cause of action. The fact that defendant traded with another person and in the course of the trade made material false representations to him could not under any circumstances "give plaintiff a better writ," nor enable her at any time in the future to prosecute an action. If A. assaults B. and injures him, and C. brings an action for damages, asserting that he was the person assaulted, and that fact is denied, this does not raise an objection predicated upon his want of capacity to sue, but upon his right to recover. There is a failure of proof as to the fact of his being injured. So here there was no legal right in plaintiff to recover, and the nature of the transaction was such that she could adduce no legal evidence that she was the person injured. In *Dewey et al. v. State*, 91 Ind. 173, 182, the court states the distinction above enunciated as follows:

"It is settled by the decisions of this court that the second statutory cause of demurrer, namely, 'that the plaintiff has not legal capacity to sue,' has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact * * * that the complaint fails to show, upon its face, a right of action in the plaintiff."

To the same effect is *Pence v. Aughe*, 101 Ind. 317, and many other cases. See, also, 1 *Corpus Juris*, p. 28, § 9, where the rule is thus stated:

"Matter in abatement, which goes merely to defeat or suspend the present suit, and does not conclude plaintiff from maintaining an action upon the cause stated, and which is, therefore, to be set up by plea or answer in abatement, is to be distinguished from matter in bar, which goes

to the merits and shows that plaintiff has no cause of action."

In the case at bar the plaintiff having permitted Barnes expressly to contract as owner of the property was forever barred from contradicting his written representations to this effect, and therefore had no cause of action which she could enforce by an action at law.

The judgment is reversed, and the cause remanded to the circuit court for proceedings not inconsistent with this opinion.

MOORE, BEAN, and McCAMANT, JJ., concur.

HAMILTON v. NORTH PAC. S. S. CO.

(Supreme Court of Oregon. April 17, 1917.)

1. LIMITATION OF ACTIONS § 2(3) — CAUSE ARISING IN OTHER STATE — SHIP ON HIGH SEAS.

Under the rule that a state's territorial sovereignty extends to a vessel of the state when it is upon high seas, the vessel being deemed a part of the territory of the state to which it belongs, an action by a resident of the state of Washington for injury on the high seas on a vessel owned by a California corporation, nonresident of Oregon, is governed by L. O. L. § 26, as to time to sue on actions arising in another state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 7.]

2. PLEADING § 403(1) — ALLEGATION OF DEFENDANT'S RESIDENCE — AIDER BY COMPLAINT.

Defendant's answer in action for servant's injury while employed on defendant's steamship, alleging that the steamship referred to "is owned in California," and that defendant "is a California corporation," sufficiently alleged non-residence at time cause of action arose when aided by allegations of complaint that defendant was a California corporation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347.]

3. PLEADING § 177—REPLY—ADMISSION OF DEFENDANT'S NONRESIDENCE.

Plaintiff's reply to defendant's allegation that it was a California corporation, in admitting "that the owner of said steamship resides in the state of California," did not admit non-residence, but merely admitted the conclusion which the law would draw from the fact that defendant was a foreign corporation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 354, 355.]

4. CORPORATIONS § 668(1)—FOREIGN—DOING BUSINESS WITHIN STATE—PROCESS.

A foreign corporation doing business within the state is a resident to such an extent that it is amenable to process of state courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2606, 2618.]

5. LIMITATION OF ACTIONS § 88 — ABSENCE FROM STATE—FOREIGN CORPORATION—"OUT OF THE STATE."

A foreign corporation maintaining an agent within the state is not "out of the state," within meaning of L. O. L. § 16, providing that, when a cause of action has accrued against any person who shall be "out of the state," such ac-

tion may be commenced within terms specified after return of such person.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 463.

For other definitions, see *Words and Phrases*, First and Second Series, Out of the State.]

6. LIMITATION OF ACTIONS § 2(2)—FOREIGN CORPORATION — DOING BUSINESS WITHIN STATE—"RESIDENT"—"NONRESIDENT."

A foreign corporation is a "nonresident," although doing business within this state within meaning of L. O. L. § 26, providing that, when actions between nonresidents arising in another state are barred by statute of limitation of such state, no action thereon can be here maintained, such corporation being only a resident of the state incorporating it, the word "resident" not meaning "one found within the jurisdiction."

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 5.

For other definitions, see *Words and Phrases*, First and Second Series, Resident; Nonresident.]

7. LIMITATION OF ACTIONS § 2(3) — ACTION FOR SERVANT'S INJURY — PLEADING CALIFORNIA STATUTE OF LIMITATIONS.

Where employe, resident of Oregon, sued his employer, a California corporation, for injuries sustained while on the high seas on a steamship owned by employer in California, the employer could plead the one-year California statute of limitations in view of L. O. L. § 26, providing that, when actions between nonresidents arising in another state are barred by the statute of limitations of such state, no action thereon can be here maintained, and the Oregon two-year statute (L. O. L. § 8) did not apply.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 7.]

Department 1. Appeal from Circuit Court, Multnomah County; Lawrence T. Harris, Judge.

Action by H. D. Hamilton against the North Pacific Steamship Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action brought to recover damages for a personal injury sustained by plaintiff on June 21, 1912. Plaintiff suffered the injuries complained of while working for the defendant on the steamship Roanoke and while the steamship was on the high seas. The pleadings admit that the Roanoke at the time in question was owned and operated by the defendant, and that the defendant is a corporation organized and existing under the laws of the state of California. This action was brought on the 22d day of November, 1913, more than one year after plaintiff sustained his injuries. The defendant pleads the statute of limitations of the state of California as a defense, and offered to prove on the trial that under the California Code such an action as this must be brought within one year from the accrual of the cause of action. The offer of proof was excluded by the lower court. The Oregon statute of limitations permits such an action as this to be brought at any time within two years after the accrual of the cause of action. Section 8, L. O. L. A verdict was rendered for plaintiff,

on which judgment was entered, and the defendant appeals.

F. C. Howell, of Portland (Wilbur, Spencer & Beckett, of Portland, on the brief), for appellant. A. M. Dibble, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

McCAMANT, J. (after stating the facts as above). [1] There is but one question presented by this appeal: Did the lower court err in excluding evidence as to the California statute of limitations applicable to this character of litigation; in other words, does the California statute or the Oregon statute apply for the purpose of fixing the time within which plaintiff was required to bring his action? It is elementary and is conceded by both parties to this appeal that the law of the forum ordinarily determines the time within which plaintiff must sue. The defendant relies wholly on section 26, L. O. L., which is as follows:

"When the cause of action has arisen in another state, territory, or country, between nonresidents of this state, and by the laws of the state, territory, or country where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

Plaintiff's cause of action arose on board a steamship owned in the state of California.

"The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas; the vessel being deemed a part of the territory of the state to which it belongs." *International Navigation Co. v. Lindstrom*, 123 Fed. 475, 476, 60 C. C. A. 649, 650.

To the same effect see *Deslons v. La Compagnie Generale Transatlantique*, 210 U. S. 95, 28 Sup. Ct. 664, 680, 52 L. Ed. 973; *Old Dominion Co. v. Gilmore*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; *La Bourgogne*, 139 Fed. 433, 438, 71 C. C. A. 489; *The Hamilton*, 146 Fed. 724, 726, 77 C. C. A. 150; *In re Clyde Steamship Co. (D. C.)* 134 Fed. 95, 99; *The E. B. Ward, Jr. (C. C.)* 17 Fed. 456, 459.

This case therefore stands on the same footing as if plaintiff had been injured in the city of San Francisco.

[2] It appears that plaintiff is a citizen and resident of the state of Washington. The case therefore falls within the operation of section 26 of the Code, if it shall be held that the defendant is a nonresident of Oregon within the meaning of this section. The defendant's allegation on the subject of its residence is as follows:

"That the said steamship Roanoke referred to in the complaint and owned by this defendant is owned in the state of California, and not within the state of Oregon, and that the said defendant is a California corporation, and that said steamship is registered in the state of California."

Plaintiff claims that this allegation is insufficient on the ground that it covers the residence of the defendant only at the time when the answer was filed, and that there is no allegation that the defendant was a

resident of California when the cause of action arose. In the respect criticized the answer is aided by the allegations of the complaint. It is alleged therein:

"That at all times hereinafter mentioned the defendant, North Pacific Steamship Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the state of California and doing business in the state of Oregon, having an agent or agents at Portland, Or.

"That at all times hereinafter mentioned the defendant, North Pacific Steamship Company, was the owner of, and engaged in operating as a common carrier, that certain steamship known as the steamship Roanoke."

We think it sufficiently appears from the pleadings that the defendant was a California corporation on the day when plaintiff sustained his injuries, and it could not by any possibility have become an Oregon corporation as the result of anything which has since transpired. If the incorporation of the defendant under the laws of California makes it a nonresident of the state of Oregon within the purview of section 26, L. O. L., the defendant should have been permitted to prove the California statute of limitations.

[3] The defendant contends that the pleadings admit that the defendant is a nonresident, and that for this reason the judgment should be reversed. This contention of the defendant is based upon the following allegation contained in plaintiff's reply:

"The plaintiff admits that the steamer referred to in plaintiff's complaint was registered at the city of San Francisco, Cal., and that the owner of said steamer resides in the state of California."

The foregoing allegation merely admits the conclusion which the law would draw from the fact that the defendant is a California corporation. Plaintiff contends that, although the defendant resides within the state of California, it was also a resident of the state of Oregon at the time when the cause of action arose, as it was doing business in Oregon and maintained an agent at Portland.

The allegation of the complaint above quoted, to the effect that the defendant has been doing business in the state of Oregon and has maintained an agent therein, is sustained by the proof. This case therefore presents the interesting legal question as to whether a foreign corporation doing business in Oregon and maintaining an agent therein is to be deemed a nonresident of the state within the meaning of section 26, L. O. L.

While the briefs are replete with authorities, our attention has been directed by the parties to only two cases arising under facts substantially identical with the case at bar. One of these cases, cited by plaintiff, is *Louisville Co. v. Pool*, 72 Miss. 487, 16 South. 753. This was an action brought in Mississippi to recover damages for the killing of plaintiff's stock in the state of Alabama by the defendant's railroad. The defendant relied on the Mississippi statute corresponding to our section 26. The decision is not in point, because the Mississippi statute is whol-

ly unlike the Oregon statute. It is confined in its operation to cases of parties who remove from one state to another, and by its terms excludes from its operation the case of a corporation doing business in two or more states at the same time. The defendant cites *Northwestern Co. v. Lowry*, 20 S. W. 607, 14 Ky. Law Rep. 600. This case turns on a question of laches, and what was said by the court in construing the Kentucky statute corresponding to our section 26 was not necessary to the decision. Furthermore, the Kentucky legislation is distinguishable from the Oregon statute.

[4] It is settled law in this jurisdiction that a foreign corporation doing business in Oregon is to be deemed a resident of Oregon in such sense as that it is amenable to the processes of the Oregon courts, and a personal judgment may be secured against it based on the service of summons in this state. *Aldrich v. Anchor Coal Co.*, 24 Or. 82, 35, 32 Pac. 756, 41 Am. St. Rep. 881; *Farrell v. Oregon Co.*, 31 Or. 463, 467, 468, 49 Pac. 876. It is believed that these authorities go no further than to hold that a corporation by transacting business in Oregon consents to be found therein for the purpose of service of summons upon it.

[5] Section 16, L. O. L., is in part as follows:

"If, when the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the state, or the time of his concealment."

Within the meaning of this statute it is held that a foreign corporation is not out of the state, provided it maintains an agent therein upon whom service of summons may be made. *Burns v. White Swan Co.*, 35 Or. 305, 308, 57 Pac. 637; 3 Cook on Corporations (7th Ed.) § 757, pp. 2774, 2775. The authorities announcing this latter principle base their conclusions on the fact that the reason which induced the Legislature to enact section 16 aforesaid is inapplicable to any party on whom service of summons may be effected within the state at any time.

It is provided by section 44, L. O. L., that except in certain cases an action shall be commenced and tried in the county in which the defendant resides. In the interpretation of this statute it is held that a foreign corporation in a nonresident, and that it may therefore be sued in any county in which service may be secured upon it. *Cunningham v. Klamath Lake R. Co.*, 54 Or. 13, 21, 101 Pac. 213, 1090. The same conclusion has been reached by the Idaho court. *Boyer v. Northern Pacific Co.*, 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691. In determining the situs of its movable personal property for purposes of taxation, a corporation is held to be a resident of the jurisdiction which incorporates it. *Callender Co. v. Pomeroy*, 61 Or. 343, 351, 122 Pac. 758. Within the meaning of the bankruptcy statute (Act July

1, 1898, c. 541, 30 Stat. 544) a corporation is a resident of the state under whose laws it is incorporated, and of no other state. In re Matthews Co., 144 Fed. 724, 729. The attachment statutes of a number of the states permit the levy of attachments on the property of nonresidents. Within the meaning of these statutes it has been held that a foreign corporation is a nonresident, even though it is transacting business in the state. South Carolina Co. v. People's Institution, 64 Ga. 18, 30. The Missouri court, however, has reached a different conclusion on this question of law. Farnsworth v. Terre Haute Co., 29 Mo. 75. The act of Congress governing the jurisdiction of the federal courts requires that suits in which the jurisdiction is based on diversity of citizenship shall be brought only in a federal district of which either the plaintiff or the defendant is an inhabitant. Within the meaning of this statute it is held that a corporation is an inhabitant of the state which incorporated it, and of no other state. Shaw v. Quincy Mining Co., 145 U. S. 444, 453, 12 Sup. Ct. 935, 36 L. Ed. 768; Averill v. Southern Co. (C. O.) 75 Fed. 736, 740. It has accordingly been held that the Baltimore & Ohio Railroad Company is not an inhabitant of the state of West Virginia, although it maintains and operates extensive lines of railway therein. Martin v. Baltimore & Ohio Co., 151 U. S. 673, 676, 684, 14 Sup. Ct. 533, 38 L. Ed. 311. The federal statutes vest the federal courts with jurisdiction of controversies between citizens and residents of different states. Within the meaning of this legislation, a corporation is deemed to be a resident of the state which incorporates it, and of no other. Koshland v. Insurance Co., 31 Or. 205, 217, 218, 49 Pac. 845; Railroad Co. v. Koontz, 104 U. S. 5, 11, 12, 26 L. Ed. 643; Myers v. Murray (C. C.) 43 Fed. 695, 699, 11 L. R. A. 216. The books are full of general statements in line with the authorities last above cited. 1 Cook on Corporations (7th Ed.) § 1, p. 3, states the rule as follows:

"The domicile, residence, and citizenship of a corporation are in the state where it is incorporated."

In 1 Thompson on Corporations (2d Ed.) § 490, p. 592, we find the following language:

"The first and prime rule is that a corporation is a resident or has its legal domicile in the state or country by and under whose laws it was organized. As said by one court: 'A corporation can exist only within the sovereignty which created it, although, by comity it may be allowed to do business in other jurisdictions through its agents. It can have but one legal residence, and that must be within the state or sovereignty creating it.' The authorities are practically unanimous on this proposition."

In 1 Clark & Marshall on Private Corporations, § 114, p. 352, it is said:

"The settled doctrine is that a corporation, for the purposes for which it may be considered a citizen resident, or inhabitant, is a citizen, resident, or inhabitant of the country or state by or under whose laws it was created or organized,

and that it cannot be a citizen, resident, or inhabitant of any other country or state."

[6] We think the word "nonresident," found in section 26, L. O. L., is to be interpreted in the light of the authorities last above referred to.

For most purposes and under most circumstances it is clear that a corporation resides only in the state where it is incorporated. If it transacts business in another state, it is properly held to be a resident of such other state for purposes of legal process. This rule is followed in order to prevent the intolerable injustice of authorizing the transaction of corporate business without the corresponding responsibility of answering with in the jurisdiction for corporate contracts and torts. It follows, as a corollary, that a corporation transacting business within the state may plead the statute of limitations. These exceptions to the general rule are apparent rather than real. The word "resident" in these authorities means "one found within the jurisdiction." The word is not used in this sense in section 26. To sustain plaintiff's contention in this case is to hold that every corporation, held to answer in an Oregon court, is a resident of Oregon; for no foreign corporation can be sued in this state unless it maintains an agent in Oregon. Aldrich v. Anchor Coal Co., 24 Or. 32, 35, 32 Pac. 756, 41 Am. St. Rep. 831. Section 26 is the concluding section of the chapter of the Code on the subject of the limitation of actions. The purpose of the Legislature in enacting the statute was to remove any possible encouragement which might otherwise be offered for the bringing in the Oregon courts of litigation which more properly belongs elsewhere.

When the cause of action arises in Oregon, the courts of this state are a proper forum in which to litigate the controversy. Inasmuch as the courts of this state exist for the accommodation of its citizens, every opportunity should be given to litigate in our courts controversies to which any citizen of Oregon is a party. Section 26 permits these controversies to be litigated in Oregon courts during the whole period allowed by our statute of limitations. It is the plain legislative intent that controversies arising in other jurisdictions between citizens of other states shall not be litigated in Oregon courts after the causes of action are barred by the statutes of such other states. It is contrary to the policy of the law to encourage the litigation in our courts of controversies which are litigated here for the sole reason that our statute of limitations is more liberal than that of the jurisdiction in which the controversy arose. The word "resident," as used in section 26, is used in the same sense in which Congress uses it in statutes defining the jurisdiction of the federal courts.

[7] Within this definition the defendant is a resident of California, plaintiff is a resident of Washington, and the cause of ac-

tion arose within the jurisdiction of California. The case therefore falls within the operation of section 26, L. O. L., and the defendant should have been permitted to prove that the action is barred by the California statute of limitations.

The judgment is reversed, and the cause remanded.

McBRIDE, C. J., and BURNETT and BEAN, JJ., concur. HARRIS, J., took no part in the consideration of this case.

HOLTZ et al. v. OLDS et al. *

(Supreme Court of Oregon. April 10, 1917.)

1. CONTRACTS ⇨321(4)—AGREEMENT TO PURCHASE STOCK — CONDITION PRECEDENT — BREACH.

Under a contract to purchase from defendants all corporate stock owned by them, "to be issued as hereinafter set out," agreement by defendants therein to make inventory of goods of corporation according to terms, held a covenant and condition precedent to payment, breach of which entitled plaintiffs to recover money deposited with defendants.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1509-1518, 1519, 1519½, 1522.]

2. CONTRACTS ⇨9(1)—AGREEMENT TO MAKE SUPPLEMENTAL AGREEMENT — MEETING OF MINDS.

An agreement to purchase stock providing that purchasers will execute a supplemental agreement satisfactory to sellers guaranteeing purchase, and that buyers and said guarantor on said agreement will deposit satisfactory security to be hereafter determined, is void for uncertainty, in that it fails to specify amount of security.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-15, 17, 19, 20.]

3. CONTRACTS ⇨25 — AGREEMENT TO MAKE CONTRACT IN FUTURE—EFFECT.

An agreement to make a contract in the future is not binding, unless all the terms and conditions are agreed upon, and nothing left to future negotiations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 109-111.]

Department 1. Appeal from Circuit Court, Multnomah County; T. J. Cleeton, Judge.

Action by Max Holtz and another against William P. Olds and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

Mentioned in this litigation is a corporation called Olds, Wortman & King. For convenience it will be styled the corporation. The individual defendants are William P. Olds, Hardy C. Wortman, and Charles W. King, who will be spoken of either as the defendants or by their individual surnames. The dispute between the parties arises out of a contract in writing dated March 11, 1911, between the plaintiffs as parties of the second part and the defendants as parties of the first part, the execution of which is admitted. The corporation is a large and well-known mercantile concern in Portland. The writing recites:

"That for and in consideration of the sum of one dollar (\$1.00) paid by the parties of the second part to the parties of the first part, receipt whereof is hereby acknowledged, the parties of the first part do hereby agree to sell, assign, transfer and set over unto the parties of the second part one-third of the capital stock * * * of the corporation * * * to be issued as hereinafter set out, owned and controlled by them, and further agree to keep and perform such other agreements and acts as are herein set out."

Provisions are then made in the instrument for an accurate inventory by the defendants of the stock of goods owned by the corporation as of July 15, 1911, the value of which was to be determined by the cost price thereof, varied by certain factors not important here. The liabilities of the concern were to be deducted, and the remainder was to constitute the basis for preferred stock afterwards to be issued according to a plan formulated by the contract for an increase of the capital stock of the corporation. The instrument then provides that upon a satisfactory showing on or before July 15, 1911, the date set for the transfer of the property, that the plaintiffs had deposited in a national or state bank in Portland, approved by the defendants, a sufficient amount of cash or New York exchange in escrow to be paid or delivered to the defendants as the first payment required by the stipulation, "then and in that case" the parties of the first part would cause the stock of the corporation to be increased to \$4,000,000, divided into 40,000 shares of \$100 each, of which \$1,700,000, more or less, divided into 17,000 shares, more or less, of \$100 each, should be preferred stock, it being the intention to authorize and issue preferred stock for approximately \$200,000 in excess of the net value of the assets of the corporation. After providing details of the preference of that species of stock the defendants covenanted that they would cause the corporation to issue the same to its stockholders in an amount equal to the net value of the tangible assets of the concern as determined by the rules specified in the contract, and that their common stock should be retired. Then follow these clauses:

"It is further mutually understood and agreed by and between the parties hereto that after such capital stock shall be issued to the present stockholders in an amount equal to the net value of the tangible assets determined as herein provided, that the parties of the first part for the considerations herein expressed agree to sell, and for the same considerations the parties of the second part agree to buy, one-third of the total number of shares of the preferred stock held by the parties of the first part, and agree to pay for the same in cash or New York exchange acceptable to the parties of the first part on or before July 15, 1911, at one hundred dollars (\$100.00) per share, and upon such payment the parties of the first part will cause to have delivered to the parties of the second part certificates representing one-third of their holdings of preferred stock properly indorsed according to the by-laws of Olds, Wortman & King.

"It is further mutually understood and agreed

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on petition for rehearing, see 184 Pac. 1184.

that the parties of the second part do agree to and with the parties of the first part and each of them, that on or before the 15th day of July, 1921, they will purchase from said William P. Olds, Hardy C. Wortman, and Charles W. King, their heirs, executors, administrators or assigns, such preferred stock of the corporation of Olds, Wortman & King as may be in the hands of said parties, or either of them, and further agree that they will pay for the same at the rate of one hundred and ten dollars (\$110.00) per share, with all accrued dividends to date of purchase.

"The parties of the second part hereby agree that they will cause to be made, executed and delivered to the parties of the first part a supplemental agreement, satisfactory to the parties of the first part, guaranteeing to the parties of the first part that the original issue of preferred stock held by them will be on or before the 15th day of July, 1921, purchased by the parties of the second part hereto, as herein agreed, and the parties of the second part and said guarantors on said collateral agreement will also deposit with the parties of the first part collateral security of a kind and character satisfactory to the parties of the first part, but to be hereafter determined."

There are numerous other conditions in the instrument relating to stock in another concern held by the defendants, which are not material to the decision of this case. Near the end of the document appears this provision:

"It is further mutually understood and agreed by and between the parties hereto that the parties of the second part have this day deposited with the parties of the first part cash or approved securities to the amount of twenty thousand dollars (\$20,000.00), which cash and approved securities or the value thereof up to the amount of twenty thousand dollars (\$20,000.00) shall be forfeited to the parties of the first part as stipulated damages in the event the parties of the second part shall fail to complete their purchase of one-third ($\frac{1}{3}$) of the preferred stock to be issued as provided hereunder on or before the 15th day of July, 1911, and in the event the said purchase of one-third ($\frac{1}{3}$) of the preferred stock shall be so completed the cash this day so deposited shall apply on account of the purchase price thereof, and in that event the parties of the first part shall allow to the parties of the second part interest on the cash deposited from the date of deposit to the date of the consummation of this agreement at the rate of four (4) per cent. per annum."

The substance of the complaint is that the contract was executed, which is admitted by the defendants; and that contemporaneously therewith the plaintiffs deposited with the defendants money and approved securities to the amount of \$20,000, to be applied upon the cash payment agreed to be made for the purchase of one-third of the preferred stock of the corporation. The deposit itself is admitted. The plaintiffs then say in substance that they were ready, able, and willing to complete the purchase of one-third of the preferred stock, as stated in the contract, and exhibited to the defendants evidence of that ability; that the "defendants did not require the actual deposit of said sum in cash as a prerequisite for the increase of said preferred stock," but that after prolonged negotiations they and the plaintiffs were unable to agree upon the security contemplated to

insure the purchase of the remaining two-thirds of the defendants' holdings of preferred stock on or before July 15, 1921, in consequence of which the plaintiffs demanded from the defendants the return of the \$20,000 deposited, which was refused. Judgment is demanded for that sum, with interest from July 15, 1911.

It is admitted that the defendants refused to return the deposit, but otherwise, except as hereinbefore stated, the complaint was traversed. The answer states a supplemental agreement made March 17, 1911, admitted by the plaintiffs, reciting the contract already mentioned, and providing that the common stock to be issued to the extent of \$2,300,000, more or less, on the increase of the capital stock of the corporation, should be transferred to the plaintiffs, and that upon the consummation of the agreement of March 11, 1911, Olds, Wortman, and King would in succession resign as directors of the corporation, to be succeeded by a directorate satisfactory to the plaintiffs. The answer further proceeds substantially to allege the construction placed by the defendants on the original contract, and to impute a default upon the plaintiffs in that they refused to carry into effect that portion of the stipulation above quoted providing for the execution of a supplemental agreement guaranteeing the purchase of the original issue of preferred stock still held by the defendants on or before July 15, 1921, and to furnish collateral security as already mentioned. The answer is traversed by the reply. At the conclusion of all the testimony the plaintiffs moved for a directed verdict in their favor for detailed reasons, which will be discussed more fully hereafter, which motion was overruled. After being instructed by the court the jury returned a verdict for the defendants. The plaintiffs appealed from the ensuing judgment.

R. C. Nelson, of Portland (Beach, Simon & Nelson, of Portland, on the brief), for appellants. Chris A. Bell, of Portland (Reed & Bell, C. W. Fulton, and T. M. Dye, all of Portland, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). The plaintiffs assign as errors: (1) The judgment was erroneous because the facts stated in the answers are not sufficient to constitute a defense; and (2) the court erred in overruling their motion for a directed verdict. The principal ground for this motion was that the contracts, the execution of which is admitted, are void for uncertainty in that the nature of the security mentioned was left open for future determination.

There is but little dispute, if any, about the substantial facts of the case. It appears that after signing the contract the plaintiff Max Holtz went to New York to arrange for funds with which to carry out the contract, and returned to Portland some time in June,

1911. Negotiations were then taken up between the parties on the subject of security for the subsequent purchase of the remainder of the defendants' preferred stock yet to be issued, but they were unable to agree on that feature and after protracted discussions, covering some ten days, all further proceedings were abandoned, and later on this action was commenced.

[1] It is disclosed by the testimony that aside from the deposit by the plaintiffs with the defendants of \$20,000, nothing was done by either party about performance of the contract after its execution, except to engage in fruitless discussions about the collateral designed to guarantee the purchase of the remainder of the preferred stock held by the defendants prior to July 15, 1921. It was the evident intention of the parties that the plaintiffs should purchase all the holdings of the defendants in the preferred stock of the concern yet to be issued. In order to arrive at the basis upon which that stock should be called into existence it was necessary to take an inventory of the property of the concern, value it according to rules laid down in the stipulation, and lastly deduct therefrom the liabilities of the firm. This duty rested upon the defendants, and was to be performed before the plaintiffs were required to make the first payment. We note that this was what was required to be paid for the one-third of the holdings of the defendants in the preferred stock. Making the inventory was necessarily a condition precedent, because without it there was no basis within the contemplation of the contract upon which the amount of preferred stock could be calculated. The obligation imposed upon the plaintiffs to deposit the purchase price of one-third thereof in escrow was not required to be performed until the inventory had been taken and the net value of the assets ascertained.

The next step in the process of performance of the contract would have been to augment the stock, and to deliver the preferred part thereof to the stockholders of the corporation, for it is said in the contract, after speaking of the deposit to be made in escrow, that "then and in that case the parties of the first part" will increase the capital stock and distribute the same among the stockholders. The next in order of time was the purchase of a third of what was owned by the defendants, for we find in the contract "that after such capital stock shall be issued to the present stockholders" the defendants agreed to sell and the plaintiffs to buy that portion of the total number of shares of preferred stock held by the defendants, and to pay for the same in cash or New York exchange on or before July 15, 1911. If we should consider the agreement as solely for the purchase of one-third of the stock, the defendants were clearly in default in performance of their part of the contract, for, after the execution thereof, the

first thing to be done by them was the making of the inventory which they utterly failed to perform. The principle is well settled that where something is to be done by the first party before the other is called upon to act it is an independent covenant to be performed before that other can be said to be in default. *Couch v. Ingersoll*, 2 Pick. (Mass.) 292; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *State v. Winona, etc.*, R. R. Co., 21 Minn. 472; *Mill Dam Foundry Co. v. Hovey*, 21 Pick. (Mass.) 417; *Standard Gaslight Co. v. Wood*, 61 Fed. 74, 9 C. C. A. 362. The plaintiffs are entitled to consider the failure of the defendants to perform their part of the contract at the time and in the order required thereby as a breach of the covenant upon which an action will lie in favor of the plaintiffs to recover the money deposited.

[2] But further, as stated, if anything is plain in the contract, it is that all parties intended that it should culminate in the purchase by the plaintiffs of all the holdings of the defendants of the preferred stock yet to be issued by the corporation at the latter's behest. Confessedly, by the testimony on behalf of the defendants, the rock upon which the scheme perished was the stipulation about the security to be posted guaranteeing the purchase of the remainder of their holdings on or before July 15, 1921. This was an integral part of the contract, but it is plain that the writing leaves a wide gap between mere negotiations of the parties and the actual formation of the contract as to that feature. The language used in that respect contemplates that there shall be guarantors accompanying the plaintiffs in the execution of what is there called a supplemental agreement. These underwriters are not specified by name or qualification and unknown though they were, the document required them to deposit collateral security of a "kind and character satisfactory to the parties of the first part, but to be hereafter determined."

Passing the question of whether a stipulation for satisfactory security is sufficiently definite to be binding, we note that there is not a hint about the amount of such security. Indeed, the quantity thereof could not be well specified in advance, because at that time the net value of the assets of the corporation to be ascertained by the procedure laid down in the contract was yet unknown, and consequent upon that fact was the circumstance that the amount of preferred stock of the concern was not yet determined, and still further, it was not disclosed what amount thereof would be apportioned to the individual defendants. With all these factors in mind it is plain why the amount of collateral required by the terms of the guaranteeing contract could not be stated beforehand under the other terms of the agreement as written. That provision is therefore void for uncertainty.

[3] In *St. Louis & S. F. R. R. Co. v. Gorman*, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637, it was held that an agreement to make a contract in the future is not binding, unless all the terms and conditions, are agreed upon, and nothing is left for future negotiations. In *Butler v. Kemmerer*, 218 Pa. 242, 67 Atl. 332, it was held that an agreement must contain all the terms necessary to determine whether the contract had been performed or not; that price is as essential as any other of the terms of the stipulation, and that without this agreed upon no contract exists. In *United Press v. N. Y. Press Co.*, 164 N. Y. 406, 412, 58 N. E. 527, 529 (53 L. R. A. 288) Mr. Justice Gray, speaking for the court, said:

"I entertain no doubt that, where work has been done, or articles have been furnished, a recovery may be based upon quantum meruit, or quantum valebant; but, where a contract is of an executory character and requires performance over a future period of time, as here, and it is silent as to the price which is to be paid to the plaintiff during its term, I do not think that it possesses binding force. As the parties had omitted to make the price a subject of covenant, in the nature of things, it would have to be the subject of future agreement, or stipulation, and, to use the language of the opinion in *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313, if the price each week was to be by future agreement, the contract was not legally binding on either party, as neither could be compelled to agree with the other."

Other precedents pertinent to this point are *Shepard v. Carpenter*, 54 Minn. 133, 55 N. W. 906; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Foot v. Webb*, 59 Barb. (N. Y.) 38; *Dayton v. Stone*, 111 Mich. 196, 69 N. W. 515; *Gaines v. Vandecar*, 59 Or. 187, 115 Pac. 721, 1122; *Jackson v. Alpha Portland Cement Co.*, 122 App. Div. 345, 106 N. Y. Supp. 1052; *Somers v. Musolf*, 86 Ark. 97, 109 S. W. 1173; *Edmondson v. Fort*, 75 N. C. 404. As stated in *Clark on Contracts*, (3d Ed.) p. 52:

"An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."

It is indeed competent for parties to enter into a preliminary agreement looking to the execution of a consequent one in the future. We have daily examples of that kind in bonds for deeds or in contracts for insurance, the policies of which are yet to be issued. But in all cases the minds of the parties must meet on the terms not only of the present convention, but also as to those of the covenants yet to be executed. If this rule be not observed in the stipulation and a substantial part is left open for further settlement without a canon by which the subsequent negotiations may be controlled there is no aggregatio mentium so essential to every contract. Tested by this standard,

under the authorities cited, the admitted document was void for uncertainty in a material particular, and was devoid of obligatory force upon the parties. Under these circumstances, independent of the default of the defendants in failing to make the inventory mentioned, the plaintiffs were entitled to disregard the terms of the document, and to recover the money they had deposited with the defendants. The circuit court should have directed a verdict in favor of the plaintiffs for \$20,000, and rendered judgment thereon. Under the doctrine of *Sargent v. Am. Bank & Trust Co.*, 80 Or. 16, 38, 154 Pac. 759, 156 Pac. 431, and *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Or. 124, 156 Pac. 584, the plaintiffs are not entitled to recover interest on the deposit. The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to enter a judgment for the plaintiffs against the defendants for \$20,000, together with the costs and disbursements of both courts.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

In re RYAN'S ESTATE.

(Supreme Court of Oregon. April 17, 1917.)

1. COURTS \Leftrightarrow 185 — APPEAL FROM COUNTY COURT TO CIRCUIT COURT—TIME FOR FILING TRANSCRIPT.

L. O. L. § 554, requiring filing of transcript within 30 days after perfecting appeal, is mandatory, and, on appeal from the county to the circuit court, all opportunity to confer jurisdiction upon the circuit court passes with the lapse of this 30 days without any extension of time granted before its end.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 603.]

2. COURTS \Leftrightarrow 185—TIME OF APPEAL—COUNTY COURT TO CIRCUIT COURT—NUNC PRO TUNC ORDER.

Where on appeal from county to circuit court transcript is not filed, as required by L. O. L. § 554, within 30 days from perfecting appeal, the circuit court has no power to order that the transcript be filed as of a date within the expired 30 days; the sole purpose of nunc pro tunc order being to make the record speak the truth, never to falsify it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 603.]

3. COURTS \Leftrightarrow 185 — APPEAL FROM COUNTY COURT TO CIRCUIT COURT — VACATION OF JUDGMENT.

An appeal from the county to the circuit court having been dismissed for failure to file transcript in time, the circuit court could not at a subsequent term, without showing of appellant's mistake, inadvertence, or excusable neglect, reinstate the cause for trial, for no court has appellate jurisdiction over its own decrees, and after the term at which a decree is entered the court's power over the decree is restricted to making the record conform to the actual truth of what was done at term time.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 603.]

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

In the matter of the estate of James Ryan, deceased. From an order fixing the fees of the executor and his attorney, the executor appealed to the circuit court. From judgment for the executor, the devisees appeal. Judgment set aside, and cause remanded, with directions.

The chronology of this proceeding is as follows: June 27, 1911, an order of the county court of Multnomah county was entered in the matter of the estate of James Ryan, deceased, fixing the fees of the executor and of his attorney. On the 30th of the same month the executor served his notice of appeal and filed the same with the acceptance thereof with the clerk of the court two days later. His undertaking on appeal was served and filed ten days thereafter. The exceptions to his sureties were overruled on August 2, 1911. The next event was an ex parte order in the matter by one of the judges of the circuit court of Multnomah county, Or., made on July 22, 1912, allowing the transcript on appeal to the circuit court to be filed as on August 29, 1911. A motion of April 1, 1914, to dismiss the appeal on the ground that the transcript was not filed within the time required by law was sustained on July 15th of that year. On October 28, 1915, the executor moved the circuit court to cancel the order dismissing the appeal on the ground that the same was entered through the mistake, inadvertence, or excusable neglect of his counsel. No showing, by affidavit or otherwise, appears in the record supporting this motion, but on March 31, 1916, the circuit court vacated the order dismissing the appeal and reinstated the cause upon the docket to be tried upon its merits. When it came on for hearing on April 6, 1916, the residuary legatees and devisees objected to the trial of the cause for several reasons, among others, because the court never acquired jurisdiction thereof, and because the attempted appeal had been dismissed. The objection was overruled, and the case proceeded to trial and judgment in favor of the executor, for an increased amount on account of attorney's fees. The devisees appeal.

Emmons & Webster, of Portland, for appellants.

BURNETT, J. (after stating the facts as above). Within 10 days from service of notice of the appeal the appellant must serve and file his undertaking on appeal with the clerk of the court. Within 5 days thereafter exceptions to the sufficiency of the sureties must be filed or be considered waived. The appeal is deemed effective from the expiration of the time allowed for exceptions to the sureties or the overruling of such objections. L. O. L., 550.

[1, 2] We find the following in section 554, L. O. L.:

"Upon the appeal being perfected, the appellants shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the questions to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal; and thereafter the appellate court shall have jurisdiction of the cause, but not otherwise. * * *

It will be noted that the appeal became perfect on August 2, 1911, the date when the exceptions to the sufficiency of the sureties were denied. In order to confer jurisdiction upon the circuit court, the transcript should have been filed within 30 days thereafter, as required by section 554, L. O. L., or at least by September 1st of that year. With the lapse of this 30 days without any extension of time granted before its end passed all opportunity to confer jurisdiction upon the circuit court. The order of July 22, 1912, directing that the transcript be filed as of a date in the previous year, was utterly void and of no effect. It was in the nature of an order nunc pro tunc, concerning which Mr. Justice Bean very pithily said in *Grover v. Hawthorne*, 62 Or. 75, 116 Pac. 100, 121 Pac. 807:

"When a judgment has been actually rendered or an order made by the court which is entitled to be entered of record, but, owing to the misprision of the clerk, has not been so entered, the court may order the entry to be made nunc pro tunc. But it is not the function of the court to create an order now, which ought to have been passed at a former time. In ordering an entry made nunc pro tunc, not one jot or tittle should be added to or taken from the original judgment."

[3] If it was not true that the transcript was filed within 30 days after perfection of the appeal, no order of the court can make it true. The sole purpose of a nunc pro tunc order is to make the record speak the truth, never to falsify it. Still further, after having dismissed the appeal on July 13, 1914, the term at which it was made having lapsed, and there being no showing in the matter of mistake, inadvertence, or excusable neglect on the part of the appellant or of his counsel, the court could not rightly make the order of March 31, 1916, reinstating the cause for trial. During the term at which it was rendered a court of record may change its judgment under proper circumstances not disclosed here; but beyond the term there is no sanction for anything more than to make the record conform to the actual truth of what was done at term time. No court has appellate jurisdiction over its own decrees.

This court has very often held that a failure to file the transcript within the time provided by law or within an enlargement thereof by an order made before the expiration of the legal period will prevent the jurisdiction of the court from attaching. Citation of the precedents would be platitudinous. The statute is plain and mandatory beyond

the need of construction when it says the transcript must be filed within 30 days after the perfection of the appeal, "and thereafter the appellate court shall have jurisdiction of the cause, but not otherwise."

The circuit court was utterly without jurisdiction to hear the cause on appeal. Its judgment is therefore void, and must be set aside and held for naught. The cause is remanded, with directions to the circuit court to dismiss the appeal from the decree of the county court.

GOLDEN ROD MILLING CO. v. CONNELL et al.

(Supreme Court of Oregon. April 24, 1917.)

1. PLEADING \S 261 — CHANGE OF CASE — AMENDMENT.

Where original answer set up defense of violation of Bulk Sales Law (L. O. L. $\S\S$ 6069-6072), the court had no power, under L. O. L. \S 102, to allow defendant to file an amended answer after trial, alleging actual fraud in the transfer; that being a material alteration not allowable at such time.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 794-800.]

2. FRAUDULENT CONVEYANCES \S 43(1) — SALES IN BULK—LIABILITY OF BUYER—FIXTURES—STATUTE.

Tools and machinery in mill purchased by plaintiff in 1911, are not subject to execution to satisfy a subsequent judgment secured by creditor against seller, although no notice was given of the transfer; the Bulk Sales Law (L. O. L. \S 6069 et seq.) before amendment in 1913 (Laws 1913, p. 537) not applying to that class of property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. $\S\S$ 95, 99, 100.]

Department 1. Appeal from Circuit Court, Multnomah County; Wm. Galloway, Judge.

Suit by the Golden Rod Milling Company, a corporation, against Joseph Connell and Tom M. Word, Sheriff. Judgment for defendants, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

This is a suit to restrain proceedings under a writ of execution. The substance of the complaint is that on February 20, 1914, defendant Joseph Connell obtained a judgment against Acme Mills Company, Incorporated, a corporation, for a total of about \$5,800, and on April 15, 1914, the defendant sheriff attempted to levy upon certain tools and machinery in plaintiff's mill and then used by it in the manufacture of cereal breakfast foods; that the sheriff placed a caretaker over such property and left the same in place as installed and operated in plaintiff's mill, but that defendants now threaten to tear out such machinery and appliances and remove the same for sale under said execution. It is then alleged that the claim of defendant Connell is substantially to the effect that the property attempted to be levied upon was formerly a part of the plant and property operated by the Acme Mills

Company, which sold and transferred it to Acme Mills Company, Incorporated, some time in the year 1910; that thereafter in 1911, the latter sold the same to plaintiff; and that he contends that it is the property of the Acme Mills Company and the Acme Mills Company, Incorporated. Then follow allegations of irreparable injury and of absolute ownership and possession in plaintiff for more than three years, and a prayer for a perpetual injunction. After some admissions and denials, the defendants set up an affirmative answer, wherein they pleaded the judgment of the defendant Connell against the Acme Mills Company and the Acme Mills Company, Incorporated, the issuance of the execution; and that the sheriff levied upon the property described in the complaint by taking it into his possession. It is then alleged that the sale of the property levied upon was made in violation of the Bulk Sales Law, by reason of the fact that it was effected without notice to the defendant Connell, who was at the time a creditor of the Acme Mills Company to the extent of the judgment afterward obtained. On December 18, 1914, the cause was tried, and on February 25, 1915, the court made and filed findings of fact and conclusions of law, and on the same day defendants filed an amended answer, containing a second further and separate answer, which alleged actual fraud in the transfer of the property from the Acme Mills Company, Incorporated, to the plaintiff. On March 25, 1915, a decree was entered in favor of defendants, from which plaintiff appeals.

Thos. G. Greene, of Portland (Bauer & Greene and A. H. McCurtain, of Portland, on the brief), for appellant. Chester A. Sheppard, of Portland (Sheppard & Brock, of Portland, on the brief), for respondents.

BENSON, J. (after stating the facts as above). [1] The sole issue upon which the trial of the cause was based was the question as to whether or not the sale of the property in question had been made in violation of the statute known as the "Bulk Sales Law." After trial the defendants sought to set up the additional defense of actual fraud in the transfer. This they were not entitled to do, and the trial court had no power to permit such amendment. Section 102, L. O. L.; Foste v. Standard Ins. Co., 26 Or. 449, 38 Pac. 617; Carnahan Mfg. Co. v. Beebe-Bowles Co., 80 Or. 124, 156 Pac. 584.

[2] We come then to a consideration of the defendants' right to prevail under the provisions of the Bulk Sales Law. It will be remembered that the sale involved in this controversy occurred in 1911, before the amendment of that statute. The original law (section 6069 et seq., L. O. L.) was

amended in 1913 (Laws 1913, p. 587), and it has since been held by this court that property of the character described in the complaint was not affected by the act prior to such amendment. *Rice v. West*, 80 Or. 640, 157 Pac. 1105. Consequently, under the issues upon which the cause was tried, the plaintiff was entitled to the relief sought. The decree will therefore be reversed, and one entered here in accordance with the prayer of the complaint.

MCBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

McCOY v. THOMPSON.

(Supreme Court of Oregon. May 1, 1917.)

1. DEDICATION \Leftrightarrow 1—COMMON LAW.

Common-law dedications may be either express or implied.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 8, 10-12.]

2. DEDICATION \Leftrightarrow 54—STATUTORY.

A statutory dedication generally operates as a grant.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 96, 97.]

3. DEDICATION \Leftrightarrow 28—WHAT CONSTITUTES.

An unsuccessful attempt at statutory dedication of a street, if followed by sales according to the plat, may result in a completed common-law dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 61.]

4. DEDICATION \Leftrightarrow 15—INTENT.

The dedicator's intent is the basis of all dedications and in statutory dedications is generally shown by the plat and writing.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13.]

5. DEDICATION \Leftrightarrow 15—COMMON LAW—INTENT.

In common-law dedications, the dedicator's intent is gathered from his acts and conduct and what he said in making the dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13.]

6. DEDICATION \Leftrightarrow 51 — WHAT CONSTITUTES — PLAT—"STREET."

The intent to dedicate a "street" 40 feet wide is clearly indicated where the plat contains the words "street forty ft. wide."

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 95.]

For other definitions, see Words and Phrases, First and Second Series, Street.]

7. DEDICATION \Leftrightarrow 31—NECESSITY OF ACCEPTANCE.

Neither a formal acceptance by the county nor the immediate opening and improvement of a street is essential to an irrevocable dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65.]

8. DEDICATION \Leftrightarrow 19(5)—WHAT CONSTITUTES — SALE OF LOTS.

A landowner's action in filing a plat containing the words, "street forty ft. wide," and selling lots according to such plat, constitutes a completed dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 46.]

9. DEDICATION \Leftrightarrow 48—PERSONS BOUND BY.

A completed street dedication binds the dedicator's successors in interest.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 114.]

10. ADVERSE POSSESSION \Leftrightarrow 60(5)—STREETS—HOSTILE HOLDING.

The inclosure of a part of a street for some 17 years does not establish title by adverse possession under the 10-year statute, where the holding was permissive except for the last 6 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 303-305.]

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Injunction suit by Alice McCoy against E. A. Thompson. Decree for defendant and plaintiff appeals. Reversed.

Alice McCoy is prosecuting this suit in an attempt to enjoin E. A. Thompson from inclosing and occupying a strip of land 40 feet in width, which the latter claims to own and the former asserts is a street. The controversy arises out of the platting of an addition to the unincorporated town of Mill City. H. J. Hadley owned a considerable tract of land, which was bounded on the south by the Santiam river. Hadley platted the south end of the tract and left the remainder unplatted. The plat delineates 12 lots arranged in a single row extending east and west with lot 1 as the east end of the row. All the lots except lot No. 4 are 100 feet deep, and, with the exception of lot No. 4, all have a frontage of 50 feet on Front street. The Santiam river pursues a westerly course, and the entire space between the north bank of the Santiam river and the frontage of the 12 lots is labeled Front street. In brief, the plat portrays a row of 12 lots facing Front street which runs east and west, and is parallel with and next to the Santiam river. While the plat does not expressly state that it is drawn to a scale, it nevertheless appears to have been so drawn.

The land in controversy adjoins lot No. 1 on the east. It will be recalled that lot No. 1 is the east end of the row of lots. A single line is drawn on the plat to the east of, parallel with, and approximately the same length as the east side line of, lot No. 1. The open space between this single line and the east side of lot No. 1 is labeled thus: "Street 40 feet wide bears north." The plat contains the caption: "Hadley's Addition to Mill City." The plat, together with a writing signed by Hadley and a jurat signed by a notary public, was recorded on February 14, 1889, by the county recorder. The writing signed by Hadley is here set out:

"Hadley's Addition to Mill City. Laid out on my land Feb. 1, A. D. 1889. The southeast corner of lot No. 1 is on the north side of the Santiam river 47 links north and three chains and ten links west of the N. W. corner of the Mill lot, of the Santiam Lumbering Company, which N. W. corner aforesaid is on the W. side of section 30 T. 9 S. R. 3 E. Wil. Mer. The lots

are 50 by 100 feet and the first three are to the cardinal points, No. 4 is fractional 64 feet next to the river and 34½ feet, back end. The south ends of lots 4 to 12 have a bearing N. 73° 2' W. and their sides are at right angles thereto or N. 16° 58' E. 100 feet. Front street occupies all the land between the lots and the river not more than 50 feet, situated in Marion county, state of Oregon. I herewith submit this plot and description for record."

The jurat bears date February 4, 1889, and reads thus:

"Personally came before me a notary public in and for the aforesaid county and state, the above-named H. J. Hadley, to me personally known to be the identical person who signed this instrument and who acknowledged to me that he executed the same freely and for the uses and purposes therein mentioned."

The plaintiff owns lot No. 1, and she traces her title through mesne conveyances to a deed made by Hadley. Under date of April 18, 1889, Hadley conveyed by warranty deed to Angus Scott Shaw "Lot No. 1 one in block No. 1 one in Hadley's addition to Mill City in the county of Marion and state of Oregon as it appears on the recorded plat of said Hadley's addition to Mill City in the recorder's office at Salem in said Marion county." Shaw and his wife moved on lot No. 1 in 1889 and lived there until 1899, when they sold the property and moved away.

The defendant claims title to the disputed land by virtue of a deed from James M. Wadsworth, who had previously purchased from Hadley. On April 29, 1904, Wadsworth received from Hadley a deed describing 106 acres and also lands described thus:

"The north half (½) of the southeast quarter of section thirty (30) in township nine (9) south of range three (3) east, except Hadley's addition to Mill City."

Subsequently, on March 27, 1915, Wadsworth executed and delivered to the defendant a warranty deed for lands described by metes and bounds including the disputed tract as well as other land.

At some time after he purchased lot No. 1, probably about 1893, Shaw went to Hadley and, according to the testimony of the latter:

"He asked me, if I remember aright, if I thought there would be any objection, or if I objected to him putting a garden in there, and as near as I can remember the answer I gave him that I had no objections if nobody else had."

Shaw constructed a fence across the south end of the 40-foot strip on the north line of Front street, but he also provided a gate so that a team and wagon could be driven in or out of the inclosure. This fence and gate were maintained continuously until about 1910, when both the fence and gate were torn down and removed. During the entire period beginning with about 1893 and ending with about 1910, Shaw and his successors used part of the 40-foot strip for garden purposes. The disputed strip remained open and uninclosed, or as one witness said, "It lay as waste land" from 1910 until July, 1914, when the defendant rented the disputed land from Wadsworth, erected on it a tent, in which he has since lived, and in-

closed it by constructing a fence along the north line of Front street. After Thompson acquired his deed in 1915, he claimed that he was the owner of the 40-foot strip, and denied that the plaintiff or the public had any right to enter upon the disputed premises. The alleged street is of no direct benefit to any persons except the plaintiff, J. W. Jackson, who owns land immediately to the east, and possibly one other person. Some of the witnesses averred and others denied that the strip had been regarded by the public as a street. Two witnesses in addition to the plaintiff and her husband testified that they had used the premises as a street without asking permission from any one; but Wadsworth insisted that the witnesses first obtained permission from him. No part of the disputed strip has ever been improved as a road or street and no public officer has ever asserted or exercised control over it.

The complaint avers that Hadley dedicated the land as a street. The answer denies the alleged dedication, and avers that the defendant and his predecessors have had adverse possession for the requisite period of time. The trial court found that the land had never been laid off or platted as a street, and that the defendant owned the premises in fee simple. The decree followed the finding, and the plaintiff appealed.

W. H. Trindle, of Salem (C. Z. Randall, of Salem, on the brief, for appellant. John H. McNary, of Salem (L. M. Curl, of Albany, and McNary & McNary, of Salem, on the brief, for respondent.

HARRIS, J. (after stating the facts as above). Although the plaintiff contends that a street extends from Front street for a distance of 160 feet, or 60 feet beyond the rear or north end of lot No. 1, yet, since there is no evidence to sustain a finding that a street extends farther than 100 feet or the length of lot 1, we shall confine our attention to the question of whether a street 40 feet wide extends from Front street along the east side of lot No. 1. If Hadley did not, by his acts and conduct, dedicate the disputed strip as a street, then plaintiff cannot prevail, and therefore the first inquiry is whether there was a dedication.

The inquiry will not be influenced by the parol testimony given by Hadley to the effect that he intended to dedicate the land as a street. We do not undertake to determine whether that testimony was competent, since it is in no wise necessary to a decision of this suit; and, while there is a contrariety of judicial opinion concerning that character of evidence, we content ourselves by merely noting some of the relevant authorities and assuming that the evidence is incompetent. *Hobson v. Monteith*, 15 Or. 251, 256, 14 Pac. 740; *Spencer v. Peterson*, 41 Or. 257, 260, 68 Pac. 519, 1108; 1 *Elliott on Roads and Streets* (3d Ed.) § 173; *Los Angeles v. Mc-*

Collum, 156 Cal. 148, 103 Pac. 914, 23 L. R. A. (N. S.) 378.

[1, 2] Dedications are of two general kinds; statutory and common law. *Nodine v. Union*, 42 Or. 613, 616, 72 Pac. 582. Common-law dedications may either be express or implied. 1 *Elliott on Roads and Streets* (3d Ed.) § 133. Generally by reason of the terms of the statute, a statutory dedication operates as a grant. 8 R. C. L. p. 897. Some authorities declare that common-law dedications always operate upon the principle of an estoppel, while others go no further than to say that such a dedication is of itself a distinctive common-law doctrine based upon principles analogous to those underlying estoppels. The theory usually accepted is: That to reclaim land would be a violation of good faith to the public and to those who have acquired private property with the expectation of enjoying the use contemplated by the dedication; and in case of the sale of a lot with reference to a plat there is the added feature that an easement indicated by the plat constitutes a part of the consideration passing to the purchaser. 8 R. C. L. p. 906; 13 Cyc. 437; 1 *Elliott on Roads and Streets* (3d Ed.) § 125.

[3] Upon examination of the writing accompanying the plat it will be observed that there are no words of grant, and although Front street is mentioned, no direct reference is made to any other street. Obviously it was the purpose of Hadley to comply with the requirements at that time exacted by the statute. The writing is not in the form usually adopted, and it may well be the subject of debate as to whether it constitutes a perfect statutory dedication. We do not attempt to decide, however, whether the plat and writing as recorded produced a statutory dedication; but, for the purposes of this discussion we shall assume, without deciding, that a statutory dedication was not effected. An unsuccessful attempt to dedicate land under a statute if followed by sales with reference to the plat may result in a completed common-law dedication. 8 R. C. L. 893, 897; 13 Cyc. 441; 1 *Elliott on Roads and Streets* (3d Ed.) § 124.

[4, 5] The intent of the dedicator is the foundation and life of all dedications, and the intent must be clearly manifested. Where the dedication is statutory in character, the plat and writing generally furnish the means by which to ascertain the intent, and these, like all other writings, must be construed by the terms contained in them. In the case of a common-law dedication, the intent is to be determined from what the dedicator said in making the dedication and by his acts and conduct; and the rule of construction is to give effect to the intent manifested. *Christie v. Bandon*, 162 Pac. 248; *Carter v. Portland*, 4 Or. 340, 343; *Lewis v. Portland*, 25 Or. 133, 134, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772;

Kuck v. Wakefield, 58 Or. 549, 553, 115 Pac. 428; *Jones v. Teller*, 65 Or. 328, 332, 133 Pac. 354; *Parrott v. Stewart*, 65 Or. 254, 259, 132 Pac. 523; *Eugene v. Lowell*, 72 Or. 237, 143 Pac. 906; *Harris v. St. Helens*, 72 Or. 377, 143 Pac. 941, Ann. Cas. 1916D, 1073; 8 R. C. L. pp. 890, 896; 4 *Ency. of Ev.* 110; 13 Cyc. 452; 1 *Elliott on Roads and Streets* (3d Ed.) § 130.

[6] We now turn to the plat and the writing accompanying it for the purpose of discovering whether Hadley intended to dedicate the 40-foot strip next to lot No. 1 as a street. At the time of filing the plat Hadley owned all the land including the disputed premises. No street existed on any part of the Hadley land until the plat was filed. There is no evidence to indicate that the 40-foot strip had ever been used as a right of way, or a road, or as a street at any time prior to 1889, and therefore the words "street 40 ft. wide" did not describe a street previously existing, but, on the contrary, they refer to a street which in no way existed until delineated on the plat. The space made by the line drawn to the east of and parallel with the east line of lot No. 1, and the words "street 40 ft. wide" express in plain and unmistakable terms an intent to make a street of the 40-foot strip. The word "street" has a definite meaning. When the owner of land makes a plat and refers to a "street," he does not mean a private way; but the word signifies a public way in all that the term implies. 1 *Elliott on Roads and Streets* (3d Ed.) § 21; *City of Denver v. Clements*, 3 Colo. 472; *Smith v. City of Goldsboro*, 121 N. C. 350, 28 S. E. 479. The plat and writing clearly manifest an intention on the part of Hadley to dedicate the disputed land as a street; and, indeed, the 40-foot strip appears upon the plat in such a manner as to be entirely inconsistent with any other theory. *Oregon City v. Ore. & Cal. R. Co.*, 44 Or. 165, 74 Pac. 924.

[7] It is true that the disputed premises were never improved as a street nor formally accepted by the county; but the well-recognized rule is that neither a formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication. *Carter v. Portland*, 4 Or. 340, 347, 348; *Meler v. Portland Cable Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Hogue v. Albina*, 20 Or. 182, 186, 25 Pac. 396, 10 L. R. A. 673; *Spencer v. Peterson*, 41 Or. 257, 260, 68 Pac. 519, 1108; *Oregon City v. Ore. & Cal. R. Co.*, 44 Or. 165, 178, 74 Pac. 924; *Christian v. Eugene*, 49 Or. 170, 173, 89 Pac. 419; *Oliver v. Synhorst*, 58 Or. 582, 585, 109 Pac. 762, 115 Pac. 594; *Moore v. Fowler*, 58 Or. 292, 297, 114 Pac. 472; *Silverton v. Brown*, 63 Or. 418, 424, 128 Pac. 45; *Harris v. St. Helens*, 72 Or. 377, 387, 143 Pac. 941, Ann. Cas. 1916D, 1073; *Barton v. Portland*, 74 Or. 75, 79, 144 Pac. 1146; *Nicholas v. Title & Trust Co.*, 79

Or. 226, 244, 154 Pac. 391, Ann. Cas. 1917A, 1149; Elliott on Roads and Streets (3d Ed.) §§ 124, 129.

[8] The offer made by Hadley to dedicate the street became a completed and irrevocable dedication when he delivered the deed to Shaw. The conveyance was made with express reference to the recorded plat, for lot No. 1 is described as being lot No. 1 "as appears on the recorded plat of said Hadley's addition to Mill City in the recorder's office at Salem in said Marion county." *Portland v. Whittle*, 8 Or. 126, 129; *Carter v. Portland*, 4 Or. 340, 346; *Meter v. Portland Cable Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Steel v. Portland*, 23 Or. 176, 184, 31 Pac. 479; *Mutual Irr. Co. v. Baker City*, 58 Or. 306, 321, 110 Pac. 392, 113 Pac. 9; *Moore v. Fowler*, 58 Or. 292, 297, 114 Pac. 472; *Kuck v. Wakefield*, 58 Or. 549, 552, 115 Pac. 428; *Jones v. Teller*, 65 Or. 328, 332, 133 Pac. 354; *Spencer v. Peterson*, 41 Or. 257, 260, 68 Pac. 519, 1108; *Oregon City v. Ore. & Cal. R. Co.*, 44 Or. 165, 176, 74 Pac. 924; *Christian v. Eugene*, 49 Or. 170, 172, 89 Pac. 419; *Hogue v. Albina*, 20 Or. 182, 186, 25 Pac. 386; *Nicholas v. Title & Trust Co.*, 79 Or. 226, 244, 154 Pac. 391, Ann. Cas. 1917A, 1149; 8 R. C. L. 890.

Usually the dedicator employs language to the effect that he dedicates all his interests in the streets shown by the plat, and an examination of the Hadley plat and writing will disclose that neither this nor equivalent language is used; but, as said in *Oliver v. Newberg*, 50 Or. 92, 96, 91 Pac. 470, 472:

"Even where such words of dedication are omitted, and the street is shown by the plat, the sale of lots by the proprietor with reference to such plat is sufficient to complete such dedication."

Ordinarily the sale of a single lot completes the dedication, and more especially does the sale of a single lot effect a dedication of a street upon which the lot abuts; and consequently the sale of lot No. 1 to Shaw operated as an acceptance of the offer of Hadley to dedicate the adjacent land as a street, and rendered the dedication irrevocable. *Roberts v. Mathews*, 137 Ala. 523, 34 So. 624, 97 Am. St. Rep. 56; 1 Elliott on Roads and Streets (3d Ed.) § 128.

[9] The deed delivered by Hadley to Wad-

worth on April 29, 1904, expressly excepts "Hadley's addition to Mill City," and therefore Wadsworth acquired no greater rights than Hadley owned; and Thompson, who purchased from Wadsworth, does not own more than his immediate grantor. The dedication, which was effected by the sale of lot No. 1 to Shaw on April 18, 1889, not only bound Hadley, but it also bound his successors in interest, Wadsworth and Thompson. *Parrish v. Stephens*, 1 Or. 75, 76; *Portland v. Whittle*, 3 Or. 126, 129.

[10] The defense of adverse possession relied upon by the defendant must fail. It is true that Shaw inclosed the premises and used the land for a garden, and this use was continued by his successors until about 1910. Hadley did not sell to Wadsworth until 1904. The testimony of Hadley demonstrates that the use made of the land by Shaw did not constitute adverse possession. If any person claimed the land adversely, it was only after Wadsworth purchased in 1904. The uncontradicted evidence is that the fence was torn down and removed in 1910, and after that time the premises "lay as waste land" until July, 1914. The evidence fails to show adverse possession for 10 years.

There is, however, an additional circumstance affecting the claim of adverse possession. In 1895 the Legislature declared that all streets in unincorporated towns were public highways, and jurisdiction over them was conferred upon the county courts of the various counties. Laws 1895, p. 57. At the same session of the Legislative Assembly an act was passed preventing the extinguishment of highways by adverse possession (Laws 1895, p. 57); the statute was re-enacted in 1903 (Laws 1903, p. 279), and is now codified as sections 6371 and 6372, L. O. L.

Hadley dedicated a strip 100 feet long and 40 feet wide as a street as shown on the plat, and the dedication became irrevocable when the abutting lot was sold to Shaw; and, since the completed dedication was not subsequently defeated, the plaintiff as the owner of lot No. 1 is entitled to use the disputed strip as a street. The decree is reversed.

McBRIDE, C. J., and BURNETT and McCAMANT, JJ., concur.

LAMB DAVIS LUMBER CO., Inc. v. STOWELL et al. (No. 13871.)

(Supreme Court of Washington. April 27, 1917.)

1. EXECUTORS AND ADMINISTRATORS §109(1) —MANAGEMENT OF ESTATE—NECESSARY EXPENSES—HARVESTING OF CROPS.

Under Rem. & Bal. Code, § 1534, providing that the executor or administrator shall take into his possession all the estate, real and personal, and section 1547, providing that he shall be allowed all necessary expenses in the care, management, and settlement of the estate and for his services such fees as the law provides, etc., as the cultivation of growing crops and harvesting, conservation, and marketing of matured crops differs from keeping a business venture going, and as an administrator would be liable for neglect and nonfeasance should he permit crops growing upon the estate to go to waste and be lost, expenses incurred by an administrator for apple boxes necessary for the harvesting and marketing of a crop of apples grown on the estate was an expense for which the administrator had power to bind the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 435.]

2. EXECUTORS AND ADMINISTRATORS §433—ACTIONS—DEFENSES—FAILURE TO INCLUDE CLAIM IN FINAL ACCOUNT.

In an action against an administrator de bonis non on a claim properly incurred by the former administrator in the management of the estate, it was not material that the former administrator had failed to include the expense or claim in his final account rendered to his successor, since the creditor could not compel him to do so, except upon a hearing after rejection of the claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1692-1697.]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by the Lamb Davis Lumber Company against E. F. Stowell, administrator de bonis non of the estate of Maude E. French, deceased, and others. From a judgment sustaining a demurrer to the complaint and dismissing the action, the plaintiff appeals. Reversed and remanded, with instructions to overrule the demurrer and reinstate the cause, and for further proceedings consistent with the opinion.

W. F. Whitney, of Wenatchee, for appellant. C. F. Wallace, of Cashmere, and Hughes, Sumner & Adams, of Wenatchee, for respondents, and E. F. Stowell.

HOLCOMB, J. The principal question to be determined upon this appeal is this:

"Has an administrator the power to bind the estate for necessary supplies purchased by him in his representative capacity, which supplies were necessary to the preservation of the estate and without which the estate would suffer loss and damage?"

Connected with that is the question of the jurisdiction of the subject-matter as raised by respondents' demurrer to the appellant's complaint, which demurrer was sustained by the court and the action dismissed.

[1] The facts stated in the complaint are as follows: Maude E. French died intestate on June 1, 1911, and on December 27, 1911, her husband, J. H. French, was appointed and qualified as administrator of her estate. He continued so to act until on or about March 30, 1915. The estate consisted of an apple orchard in full bearing. On March 12, 1915, French was, by order of court, removed, and Stowell was appointed administrator de bonis non. On March 30, 1915, letters of administration de bonis non were issued to Stowell, and he forthwith qualified as such, and proceeded to administer the estate. Between August 10 and October 30, 1914, upon the request of J. H. French as administrator, appellant sold and delivered to the estate approximately 7,350 apple boxes for which the administrator, as such and for and on behalf and for the benefit of the estate, agreed to pay \$803, no part of which was ever paid. These apple boxes were used by the administrator during the fall of 1914 to harvest and market the apple crop of the estate, and without them the crop could not have been harvested and marketed, and the entire apple crop would have been lost to the estate and no returns or proceeds derived therefrom. After French was removed and Stowell was appointed and had qualified as administrator de bonis non, appellant presented its verified claim against the estate to Stowell, who rejected it. This suit was thereupon brought to establish the claim against the estate as though it had been allowed by the administrator de bonis non, and asking that he be required to pay the claim in due course as other claims against the estate were paid. The administrator de bonis non rejected the claim, on the sole ground that the prior administrator had no authority in law to contract such obligation on behalf of the estate and could not thereby bind the estate. The statutes provide:

"The executor or administrator shall take into his possession all the estate, * * * real and personal," etc. Rem. & Bal. Code, § 1534.

"He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides. * * * " Id. § 1547.

The "care and management of the estate" may, and often does, include the cultivation of growing crops received by the administrator, and the harvesting, conservation, and marketing of matured crops. An administrator would assuredly be liable for neglect and nonfeasance should he permit crops growing upon the estate while in his charge to go to waste and be lost. His actual expenses in caring for the crops and harvesting them are expenses of the estate. This particular kind of management (the conservation of growing crops) differs widely from that of keeping a business venture going as a going concern, or from embarking on a new enterprise with the estate. Such proceedings are entirely

at the hazard and upon the personal responsibility of the executor or administrator, unless when for the security or benefit of the estate the same is authorized by the will or by the court having control of the administration, and then only under peculiar and special circumstances. In this instance it is shown by the complaint that the apples were the crop of the estate; that it was necessary to box them in order to market them; that the boxes were bought for that purpose and were so used. It goes without saying that it was the positive and imperative duty of the administrator to harvest the crop grown on the estate; and, if it was necessary in order so to do to obtain boxes and box them, as is admitted by the demurrer to the allegations of the complaint, he would have been most derelict in his duty had he failed to do so. The expense, therefore, was indubitably an expense of the estate. Not every "expense of estate" is necessarily one accruing from some act, agreement, or default of the testator or intestate during life; for example, taxes for current years while in process of administration, or insurance upon buildings during such administration.

[2] Neither do we deem it material that the former administrator failed to include the expense or claim therefor in his final account when he rendered same to his successor. Appellant could not have compelled him so to do except upon a hearing after rejection of the claim, and the only object of such hearing is to be obtained in this, namely, the establishment of the amount and its allowance as a claim of certain rank against the estate.

Reversed and remanded, with instructions to overrule the demurrer and reinstate the cause and for further proceedings consistent herewith.

ELLIS, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

NELSON et ux. v. PACIFIC COAST CASUALTY CO. et al. (No. 13832.)

(Supreme Court of Washington. April 27, 1917.)

1. APPEAL AND ERROR \Leftrightarrow 979(5)—DISCRETIONARY ORDERS—NEW TRIAL.

An order granting a new trial because of inadequate damages cannot be reviewed, where the evidence bearing upon the question of damages is not available.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3873.]

2. NEW TRIAL \Leftrightarrow 163(1) — SUFFICIENCY OF ORDER.

Under Rem. Code 1915, § 399, authorizing new trials where inadequate damages were given under influence of passion or prejudice, a new trial order need not recite the apparent presence of passion or prejudice, since the court's order is presumably correct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 330.]

3. LICENSES \Leftrightarrow 26—JITNEY BUS BOND.

Under Rem. Code 1915, § 5562—39, providing that every person injured by jitney bus drivers may recover against the surety to the amount of the bond, each person injured can recover up to the full amount of the bond.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 330.]

En Banc. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by A. R. Nelson and wife against Emma Bowen and others. Judgment for plaintiffs, and defendant Pacific Coast Casualty Company appeals. Affirmed.

Geo. McKay and Henry S. Noon, both of Seattle, for appellant. Jay C. Allen and Philip Tindall, both of Seattle, for respondents.

MAIN, J. This is the case, in which a new trial was granted, referred to in the opinion in the recent case of Salo v. Pacific Coast Casualty Co., 163 Pac. 384. After a verdict for \$500 had been returned, the plaintiff made a motion for a new trial, one of the grounds of which was:

"Inadequate damages appearing to have been given under influence of passion and prejudice."

After a hearing upon this motion, the same was granted by the trial court, conditioned, that, if the defendant elected within 15 days to consent to a judgment for \$1,500, then and in that event the motion for a new trial would be denied. The election to consent to the larger judgment was not made, but an appeal was taken from the order.

[1] The evidence as to the injuries sustained by the respondent Emma Nelson is not embodied in the bill of exceptions brought to this court. One of the statutory grounds for which a new trial may be granted is:

"Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice." Rem. Code, § 399.

In Aboltin v. Heney, 62 Wash. 65, 113 Pac. 245, it was held that both the granting and the refusal to grant a new trial are matters within the sound discretion of the trial court, and the judgment of that court will not be disturbed, except in cases where such discretion has been abused, and that the trial court has the same discretion to set aside a verdict for inadequate damages as it has to set one aside for excessive damages. Since the evidence bearing upon the question of the amount of the damages is not before us, the question whether the order of the trial court, granting a new trial, was an abuse of discretion, cannot be reviewed.

[2] There is some argument in the appellant's brief to the effect that the order granting the new trial is ineffectual, because it does not make a finding or recital that, in the opinion of the trial court, the verdict for inadequate damages had been caused by passion or prejudice. No requirement of the law, making such recital necessary to the

validity of the order, has been called to our attention. The presumption is in favor of the correctness of the judgment entered by the trial court.

[3] The chief argument urged for reversal of the judgment seems to be based upon the assumption that the bonding company is only liable to the extent of \$2,500, regardless of the number of persons injured, and the respective verdicts which they may obtain. It is unnecessary to review this question here, since, in the case of *Salo v. Pacific Coast Casualty Company*, supra, the extent of the liability of the appellant is discussed and determined adverse to this contention.

The judgment will be affirmed.

ELLIS, C. J., and HOLCOMB, PARKER, and WEBSTER, JJ., concur.

MOTTINGER v. REAGAN. (No. 13818.)

(Supreme Court of Washington. April 18, 1917.)

APPEAL AND ERROR ⇨1011(1) — REVIEW — FINDINGS.

Where a controversy involved only questions of fact upon which the trial court made findings upon conflicting oral testimony, and review of the evidence does not warrant the appellate court in holding that it preponderates against the findings, judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

Department 2. Appeal from Superior Court, Chelan County; Bert Linn, Judge.

Action by G. H. Mottinger against Ellis Reagan. Judgment for plaintiff, and defendant appeals. Affirmed.

Parker & Holden, of North Yakima, for appellant. Moulton & Jeffrey, of Kennewick, for respondent.

PER CURIAM. This is an action wherein the plaintiff, Mottinger, seeks recovery of damages which he claims resulted to him from the defendant's allowing sheep to graze upon lands owned and held by him under lease, and thereby injuring the pasturage thereof. Trial before the court without a jury resulted in findings and judgment in favor of plaintiff awarding him damages in the sum of \$75, from which the defendant has appealed.

There are no questions involved in this controversy other than of fact, which the trial court was called upon to determine from oral testimony much of which was in sharp conflict. A review of the evidence convinces us that we would not be warranted in holding that it preponderates against the court's conclusion. We do not feel called upon to discuss it in detail.

The judgment is affirmed.

STATE ex rel. TALENS v. HOLDEN, Judge. (No. 14008.)

(Supreme Court of Washington. April 20, 1917.)

1. MORTGAGES ⇨528(1) — FORECLOSURE BY ACTION—CONFIRMATION OF SALE.

Confirmation of a mortgage foreclosure sale is a judicial, and not merely a formal, act, even when no contest is made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1530, 1531.]

2. JUDGES ⇨51(4)—DISQUALIFICATIONS—OBJECTIONS.

Under the statutory provisions prohibiting superior court judges from trying actions where their prejudice is established by motion and affidavit, the motion and affidavit when made in proper time are conclusive, and no inquiry into the facts is permissible.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 229-231.]

3. JUDGES ⇨51(2) — DISQUALIFICATION — TIME OF OBJECTION.

A motion and affidavit of prejudice filed as soon as relator knew the judge objected to would preside over the court in which his cause is pending is made in sufficient time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 226.]

Department 2. Original application for writ of prohibition by the State of Washington, on the relation of M. Talens, against George B. Holden, as Judge of Department No. 1 of the Superior Court for Yakima County. Writ issued.

Lee C. Delle, of North Yakima, for plaintiff.

FULLERTON, J. This is an application for writ of prohibition made originally in this court. The facts are these: On November 4, 1916, M. Talens, the relator, began an action in the superior court of Yakima county against one T. R. Anderson to foreclose a real estate mortgage executed upon lands situated in the county named. Default was made by Anderson, and a decree of foreclosure was duly entered on January 6, 1917. On the same day an order of sale was issued on the decree, under and by virtue of which the mortgaged property was later sold by the sheriff in the manner prescribed by the statute, the relator becoming the purchaser at such sale. On February 17, 1917, the sheriff made return of the sale to the clerk of the court, who entered the cause on the motion docket, where it stood for confirmation on the motion of the relator.

There are two departments of the superior court in Yakima county. At the time of the commencement of the foreclosure suit and at the time of the entry of the decree therein and the issuance of the order of sale on the decree, department 1 of the court was presided over by the Honorable E. B. Preble, and the proceedings were all had in that department of the court. On January 8, 1917, Judge Preble was succeeded in office by Judge Holden, the respondent in this proceeding.

who was assigned to preside over the department theretofore presided over by Judge Preble. Prior to the time the return of sale was made by the sheriff and prior to the time the respondent was called upon to take any action in the cause, the relator through his attorney filed an affidavit of prejudice against Judge Holden under the act of March 18, 1911 (Rem. Code, §§ 209—1, 209—2), moving that the cause be transferred to department 2 of the court. This motion was called on for hearing before the respondent on February 19, 1917, when the same was denied by a formal written order signed by the respondent as judge. It was at this stage of the proceedings that the application now before us was made. In the return of the respondent to the alternative writ issued by this court the following appears:

"In the case of Talens against Anderson, the court denied the motion for a change of venue conditionally, on no other question excepting formal confirmation of sale appearing to be passed upon in said action, and caused to be entered on the journal of the court of the proceedings for February 19, 1917, the following order therein: 'M. Talens v. T. R. Anderson. Motion for change of judges was argued under the rule by Lee C. Delle, attorney for plaintiff. Motion denied on the ground the cause has been tried on its merits, and there are no questions remaining to be passed upon involving discretionary action, and the motion is frivolous and capricious; that if any such question shall arise, said action shall be forthwith transferred to department 2 of the court.'

"(2) That on the 5th day of March, 1917, there appeared on the motion docket of department No. 1, over which the respondent was then presiding, said case of M. Talens v. T. R. Anderson. Upon the calling of the motion docket, the following order was made in said cause and entered upon the journal of the court: 'M. Talens v. T. R. Anderson. Motion for Confirmation. There being no objection filed or presented and the proceedings therein appearing to be regular and according to the practice of the court, it is ordered that said sale be confirmed, and that formal order confirming the same will be signed upon presentation to the court at any of its regular daily sessions, subject only to the alternative writ of prohibition issued by the Supreme Court in the case of State ex rel. M. Talens v. George B. Holden, Judge.'

"(3) That the said cause of M. Talens v. T. R. Anderson has been 'heard' or 'tried,' judgment and decree entered for plaintiff by default, for the full amount of his claim, sheriff's sale had and returned, more than ten days elapsed since the return of sale filed in the clerk's office, no objections filed or presented, and all proceedings therein being regular and according to the practices of the court, there remains nothing further to be done in said action excepting to present a formal order confirming the sheriff's sale in said cause, which order respondent is now and at all times has been ready and willing to sign, and has at all times so informed the attorney for the plaintiff, and that if any other question shall arise in said cause to be passed upon by the court, said cause will be, conformably to the order of February 19, 1917, entered upon the journal of the court, forthwith transferred to department No. 2 of the superior court for Yakima county, Wash.

"(4) That respondent has not attempted to and does not intend to exercise his jurisdiction as judge of said court to 'hear' or 'try' any question whatever that may arise in said cause or do any other act, as judge of said court, in said cause excepting to sign an order of confirmation

therein whenever the same is presented by the plaintiff or his attorney, and does not now intend to and never has, nor will, 'hear' or 'try' any other question whatever therein. That instead of plaintiff having no other plain, speedy or adequate remedy excepting a writ of this court prohibiting respondent from signing said order of confirmation, the plaintiff has a full, complete and speedy remedy, namely, the presenting of an order of confirmation of sale in said cause, which will be signed upon presentation."

It will be observed from the language of the return and from the journal entries the respondent caused to be entered quoted therein, that the learned judge regarded the confirmation of the sale, since no objections were filed thereto, as a mere ministerial act, not involving discretionary action, and that in sitting to hear the motion to confirm he was not sitting "to hear or try an action or proceeding" within the meaning of the statute before cited, concluding therefrom that the affidavit of prejudice and the motion to transfer the hearing was necessarily frivolous and capricious, and not such an affidavit and motion as he was required to regard.

The view taken by the learned judge of the nature of a confirmation proceeding had upon a sale of real property pursuant to a decree of foreclosure finds support in the language used by this court in the case of State ex rel. Steele v. N. W. & P. H. Bank, 18 Wash. 118, 50 Pac. 1023. In that case it was said that under our practice a foreclosure sale is not, strictly speaking, a judicial sale, and in so far as confirmation is required, the proceeding partakes more of the nature of ministerial proceedings than of judicial action, although it was elsewhere stated in the opinion that "the effect of the order of confirmation is to conclusively establish the regularity of the proceedings concerning such sale." In the later case of Otis Bros. & Co. v. Nash, 26 Wash. 39, 66 Pac. 111, a wider view of such an order was taken. The case was on appeal from an order setting aside an execution levy and sale because of irregularities in the sale after an order of confirmation had been entered. Judge Hadley, pronouncing the opinion of the court, used this language:

"If any such irregularity existed in this case, it should have been suggested by way of objection to the confirmation. * * * This objection was made for the first time in the amended petition. All these irregularities were cured by the order of confirmation. Having regard to the stability of real estate titles, an order confirming a sheriff's sale must be held to be more than a mere formal order. It is the solemn declaration of the court that the sale has been regularly and legally made, and those who would be in the position to avoid the consequences of such an order must pursue the method outlined by statute by making objections in time, so that the entry of the order may be prevented, or, if entered, may be reviewed by the appellate court if desired."

This language was quoted with approval in the similar case of Terry v. Furth, 40 Wash. 493, 82 Pac. 882, where the same view of an order of confirmation was taken. See, also, Johnson v. Bartlett, 50 Wash. 114, 93

Pac. 833; Strand v. Griffith, 63 Wash. 334, 115 Pac. 512; McHugh v. Conner, 68 Wash. 229, 122 Pac. 1018.

[1, 2] There is some confusion in our cases as to the questions that may be considered on a motion to confirm an execution sale (Scott v. Gulberson, 72 Wash. 36, 129 Pac. 886); but they all agree that an order of confirmation is conclusive of the regularity of the sale itself, and precludes any subsequent inquiry as to such regularity. The act of confirmation is therefore something more than a mere formal or ministerial act. It clearly involves judicial discretion when objections thereto are made, and when the effect of the order is considered, it must do so we think even though standing unopposed. Clearly, the court may in such a case inquire into the regularity of the proceedings and refuse confirmation if he finds that the prescribed method of making the sale has not been substantially pursued. It is as much in the nature of a judicial act therefore as is the act of entering a judgment or decree in an action where the defendant duly served made default, and certainly no one will contend that the entry of a default judgment is either a formal or ministerial act, or that a judge sitting to hear such an application would not be sitting to hear or try an action or proceeding.

The statute provides that no judge of a superior court of the state of Washington shall sit to hear or try an action or proceeding when it shall be established that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in the cause; and provides that such prejudice may be established by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes he cannot, have a fair and impartial trial before such judge. The statute was intended to do away with the necessity, existing under prior statutes, of establishing actual bias or prejudice on the part of the sitting judge in order to obtain a trial before another judge. The statute permits of no ulterior inquiry; it is enough to make timely the affidavit and motion, and however much the judge moved against may feel and know that the charge is unwarranted, he may not avoid the effect of the proceeding by holding it to be frivolous or capricious. As we said in State ex rel. O'Phelan v. Superior Court, 88 Wash. 609, 153 Pac. 1078:

"Where an affidavit of prejudice is filed under this law, and the same is timely, and in a proper manner called to the attention of the judge against whom it is directed, such judge is thereby disqualified from proceeding further with the case, except in the particulars mentioned in the statute;" and that the judge was thereafter empowered to do but "one of four things: (a) Transfer the action to another department of the same court; (b) call in a judge from some other court; (c) apply to the Gov-

ernor of the state to send a judge to try the case; and (d) if the convenience of witnesses or the ends of justice will not be interfered with, and the action is of such a character that a change of venue may be ordered, he may send the case for trial to the most convenient county."

[3] The affidavit of prejudice and motion in the present case was filed as soon as the relator knew that Judge Holden would preside over the department of the court in which his cause was pending, and was thus timely. State ex rel. Jones v. Gay, 65 Wash. 629, 118 Pac. 830; State ex rel. Beeler v. Smith, 76 Wash. 460, 136 Pac. 678.

It follows, we think, that the court erred in denying the motion to transfer the cause. Let the peremptory writ issue.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

STATE ex rel. GEISSLER et al. v. TRUAX,
Superior Court Judge. (No. 14004.)

(Supreme Court of Washington. April 18, 1917.)

1. DEPOSITIONS \Leftrightarrow 19—COMMISSION TO TAKE
— ORAL OR WRITTEN INTERROGATORIES —
STATUTE—DISCRETION OF COURT.

Under Rem. Code 1915, § 1240, authorizing a commission to take depositions, and providing that depositions may be taken upon written interrogatories or oral questions, or partly upon oral and partly upon written interrogatories, the duty of determining the mode of examination devolves upon the court, and is to be determined from the facts presented at the hearing, subject to review only for manifest abuse of discretion.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 30.]

2. DEPOSITIONS \Leftrightarrow 24—ORAL OR WRITTEN INTERROGATORIES—STATUTE—CONSTRUCTION.

Even where statutes permit an oral examination under a commission, that method is not favored, and will be allowed only in clear cases of necessity, where it is apparent that an examination by interrogatories and cross-interrogatories will be inadequate.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 35.]

3. MANDAMUS \Leftrightarrow 40—PROCEEDINGS OF COURTS
—DEPOSITIONS.

Where matters occurring at hearing of an application for a commission to take a deposition are not before this court and it is not shown by application or affidavit filed here that knowledge of witness could not be elicited by interrogatories framed in advance of examination, it cannot be said that judge abused his discretion in requiring written interrogatories to be prepared before issuing a commission, and mandamus will not lie to compel him to issue a commission allowing examination by oral questions.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 85.]

Holcomb, J., dissenting.

Department 2. Original proceedings for a writ of mandamus by the State, on relation of Frank J. Geissler and others, against John Truax, as Judge of the Superior Court in and for the County of Adams. Alternative writ heretofore issued quashed, and peremptory writ denied.

Merritt, Lantry & Merritt, of Spokane, and W. M. Nevins, of Odessa, for plaintiffs. Zent & Powell, of Spokane, for defendant.

FULLERTON, J. Agnes Geissler died testate in the state of Washington, and her will was duly admitted to probate in the superior court of Adams county. Within due time after the admission of the will to probate, one Agnes M. Weber, an heir at law of the testatrix, filed a petition under section 1307 of the Code (Rem.), seeking a contest of the will, averring therein that the testatrix was lacking in the necessary capacity to make a will and was subjected to undue influence by her husband, one of the beneficiaries of the will and the person named therein as executor, at the time the same was executed. After issue had been joined on the petition the contestees applied to the superior court for a commission to take the deposition of one Linne Thompson, who resided in the state of Iowa, before a notary public named in the application. In the affidavit filed in support of the application it was averred that the witness named was the nurse who attended on the testatrix during her last illness; that by her the contestees expected to disprove the allegations of the contestant as to the capacity of the testatrix to make the will; that since the proceeding was begun none of the contestees nor their attorneys had personally talked with the witness; and that it was therefore impossible for such attorneys to frame written interrogatories to be propounded to the witness which would elicit such knowledge as she had on the question involved. In the application it was asked that the witness be examined upon oral interrogatories to be propounded to her at the time and place of her examination. After a hearing on the application for the commission, the court found from the records and the representations of counsel that the witness named may be a necessary and material witness in the proceeding, and directed a commission to issue. The court refused, however, to permit the deposition of the witness to be taken on oral interrogatories as requested, but directed that the deposition be taken upon "written interrogatories, direct and cross, without there being present any of the interested parties to this proceeding or their counsel," further directing that any such interrogatories as the parties desired to be submitted to the witness be prepared and served, and noticed for settlement before the court upon any regular law and motion day if objections thereto be made. The proceeding in this court is an application by the contestees for a writ of mandamus to compel the court to issue a commission permitting an examination of the witness on oral interrogatories as requested by the contestees in the court below.

In this state the proceeding to take the

deposition of a witness to be used as evidence in the courts thereof is governed by statute. If the witness whose testimony is desired is within the state, the moving party has a choice of modes for taking his deposition; he may take the deposition before a designated officer after the service of a prescribed notice on the adverse party, or he may apply to the court for a commission to take such deposition. Where the witness is without the state, the mode permitted is by commission only. The applicable provision of the statute relating to the taking of depositions by that mode is found at section 1240 of Remington's Code, and reads as follows:-

"Any superior court in this state, or any judge thereof, is authorized to grant a commission to take depositions within or without this state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it may be taken upon written interrogatories or upon oral questions or partly upon oral and partly upon written interrogatories. Before any such commission shall be granted, the person intending to apply therefor shall serve upon the adverse party a notice of his intention to make such application, stating the time when and the place where such application will be made, which notice shall be served in the same manner and for the same time as provided in section 1233, unless the court or judge, for sufficient cause shown by affidavit, prescribe a shorter time. At the time the application is presented, the court or judge shall settle the interrogatories, if any have been served and the parties have not settled the same. The clerk, upon issuing the commission, shall attach the interrogatories thereto, if any have been agreed upon or settled by the court, and immediately forward the same to the commissioner. At least five days' notice must be given to the party or witness to be examined out of the state, in case such examination shall be had upon oral interrogatories, and the person before whom the deposition of the witness shall be taken shall have the same power to compel the attendance of such parties or witnesses as any person authorized to take such deposition within this state."

With reference to the manner in which a witness without the state may be examined on a commission issued for that purpose, it was the view of the learned trial judge that it was within the discretion of the court to whom the application for a commission was made to permit it to be done in any one of three ways: (1) Wholly upon written interrogatories settled in advance of the issuance of the commission; (2) upon interrogatories propounded to the witness at the time and place of the examination; and (3) partly upon written interrogatories settled in advance of the issuance of the commission and partly upon interrogatories propounded to the witness at the time and place of the examination; holding, in conformity with this view, that it was the duty of the court to exercise this discretion as the facts might appear on the hearing provided for by the statute when the application for the commission is made. We have not been favored with a brief from counsel who represented the contestees at the hearing at bar, but if

We have correctly gathered his meaning, he makes the alternative contention: First, that the court is without discretion of any kind in the matter, that it is its duty to issue the commission when a reasonable cause therefor is shown, and that it is the privilege of the party applying for the commission to examine the witness in any one of the three methods provided by statute; or, second, that if an option as to the method of examination exists at all and this option must be expressed in the commission, it is the privilege of the applicant for the commission to exercise the option when the commission is applied for.

[1] It is our opinion that the construction put upon the statute by the court presents the sounder view. The language of the statute, it may be conceded, is not entirely clear, but the Legislature, in requiring the examination to be made upon commission and in requiring notice to the adverse party of the application for the commission, must have had a purpose, and that purpose we think was to enable the court to insure to each of the parties an equal opportunity in the presentation of evidence. A case can be conceived where the necessary witnesses may reside at widely separated places. If it were at the option of the moving party to examine them on a commission without interrogatories attached, it can readily be seen that it might amount to a denial of justice to the adverse party, since such a party, without knowing in advance the interrogatories that were to be propounded to the several witnesses, could not intelligently frame proper written cross-interrogatories, and his want of means might prevent him from either appearing in person at the hearing or procuring a proper representative. We think that the rights of the adverse party in the premises are as coextensive as the rights of the moving party, and that neither the one nor the other can claim any special privileges under the statute not granted in express terms. It must follow that, since there is a choice of modes for making the examination and the rights of the parties are equal, the duty of determining the mode devolves upon the court to whom the application for the commission is made, and is to be determined from the facts presented at the hearing, subject to review only for manifest abuse of the discretion involved in the determination.

[2] The right to take the deposition of a witness for use in an action at law is a statutory right, and, owing to the diversity of the statutes, the authorities from one state do not aid much in determining the practice applicable to another. The general rule seems to be, however, that, even in states where the statutes, like our own, permit an oral examination under a commission, that method of examination is not favored, and will be allowed only in a clear case of necessity where it is apparent that an examination

by interrogatories and cross-interrogatories will be inadequate. 13 Cyc. 891.

Our own case of *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470, while not directly in point, has some bearing upon the question. There a deposition taken upon a commission with interrogatories annexed had been suppressed by the trial court because of the conduct of the attorney for the moving party. It was not contended that the attorney had been guilty of any fraud or wrongful act, other than that he was present when the deposition was taken and had been in intimate association with the witness for some hours before. This court affirmed the order, quoting from *Beverly v. Burke*, 14 Ga. 70, where it was said:

"There must be no circumstances of unfair advantage obtained by one party over the other, in having testimony taken by depositions."

Another case bearing upon the question of fairness is *Donaldson v. Winningham*, 54 Wash. 19, 102 Pac. 879. It was there held that, although the statute did not in express terms require it, the name of the witness sought to be examined upon notice within the state must be stated in the notice. In that case this language was used:

"The naming of the witness in the notice, if not within the letter is within the spirit of the statute. One of the canons for the construction of statutes is that whatever is within the spirit of the statute is as truly within the statute as if it were expressed in words. Any other view might work great prejudice to the adverse party. If the name of the witness is given, the adverse party has an opportunity to investigate and determine whether he desires to attend the hearing and cross-examine. He cannot prepare for examination when the name of the witness is not given."

[3] But the applicants contend that, conceding that the selection of the mode of examination to be pursued rests with the court to be reviewed only for manifest abuse, there was such an abuse in this instance. The question is before us on the application for the issuance of the commission and the affidavit in support thereof filed in the court below. The matters occurring at the hearing are not in the record. As we have stated, the papers mentioned show nothing more than the fact that the witness sought to be examined attended upon the testatrix as a nurse during her last illness, and the further fact that neither of the contestees nor their attorneys have personally talked with the witness since the institution of the proceedings to contest the will. While these facts indicate that the witness might give valuable testimony as to the condition of mind of the testatrix during the period the witness waited upon her, they plainly do not disclose that such knowledge as the witness possesses could not be elicited by interrogatories framed in advance of her examination. It is doubtless true that an unwilling witness—one disposed to suppress the truth—can be examined to better advantage orally than by written interrogatories. But even that rea-

son is not available here; it is not shown that this witness is of the designated class. We cannot conclude, therefore, that the order of the court shows any abuse of discretion.

The alternative writ of mandamus heretofore issued is quashed and a peremptory writ denied.

ELLIS, C. J., and MOUNT and PARKER, JJ., concur. HOLCOMB, J., dissents.

WOMACH et al. v. SANDYGREN et al.
(HOLLAND BANK et al., Interveners).
(No. 13849.)

(Supreme Court of Washington. April 20, 1917.)

1. TRUSTS \Leftrightarrow 88—RESULTING TRUST—ESTABLISHMENT BY PAROL.

The trust arising from title to land purchased being taken in the name of another than the one paying the purchase price is not an express trust, but a resulting trust, which may be established by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130, 131, 133.]

2. PARTITION \Leftrightarrow 17(2) — DETERMINATION OF TITLE.

Under Rem. Code 1915, § 844, the court in a partition suit not only has power, but is required, to determine title, when put in issue.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 54-59.]

3. TRUSTS \Leftrightarrow 89(1)—RESULTING TRUST—SUFFICIENCY OF EVIDENCE.

Evidence in partition held sufficient to establish a resulting trust in deceased.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134.]

4. PARTITION \Leftrightarrow 88—ADJUSTMENT OF LIENS.

One who purchased the interest in intestate's estate of one of the heirs is in partition of the real estate properly charged with the amount of the mortgage which the heir for his own benefit placed on land standing in his name, but on a resulting trust in favor of intestate.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 254.]

5. APPEAL AND ERROR \Leftrightarrow 1073(9)—AFFIRMANCE.

Judgment as modified by a correction of an admitted error can be affirmed, even if the trial court had no power to make the correction, as it did, after notice of appeal; this not requiring a modification of the record in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4247.]

Department 2. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Action by Emma Womach and another against Amanda Sandygren and others; the Holland Bank and others intervening. From the decree, defendants appeal. Affirmed.

See, also, 162 Pac. 354.

Martin & Jesseph, of Davenport, for appellants. G. E. Lovell, of Ritzville, for respondents.

FULLERTON, J. This is an action by the respondents Emma Womach and Anna Salt against Amanda Sandygren, Bert Anderson,

and Axel Anderson, for the partition of real property. From the decree directing a partition, the defendants appeal.

The appellants and the respondents are the children and heirs at law of Thilda Anderson. Mrs. Anderson died intestate on July 23, 1910. Her daughter, the appellant Amanda Sandygren, was appointed administratrix of her estate on September 14, 1910. The estate was closed on March 3, 1915, by a decree which settled the final account of the administratrix and which directed the distribution of the property of the estate among the heirs at law in equal proportions. There were some 21 separate tracts of real property set forth in the final account of the administratrix as belonging to the estate. The legal title to all of these, however, did not stand in the name of Mrs. Anderson at the time of her death. The tracts were acquired at different times, and upon the acquisition of a particular tract it was conveyed to some one or another of her several children, the parties to this action; it appearing that each of the heirs had been possessed at some time of the legal title to one or more of the tracts. In their complaint the respondents set forth three other tracts which they averred belonged to their common ancestor, which were not administered upon as a part of the estate. These tracts the trial court refused to partition, but dismissed the action as to them without prejudice on the ground that it was without jurisdiction in this proceeding to determine the several rights of the parties to them. The other tracts the court directed to be partitioned among the heirs in accordance with the decree of distribution entered in the probate proceeding; that is, a one-fifth interest to each of the heirs, with the modification that Amanda Sandygren take the interests of Bert Anderson, she having purchased his interest in the property of the estate prior to the entry of the decree.

In this court the appellants question the decree as to some 6 of the tracts ordered partitioned. In their answer to the complaint the appellants put in issue the respondents' allegation of ownership of the lands in question, averring in substance that they were each entitled to a one-tenth interest instead of a one-fifth in certain described tracts of the lands, and were without ownership or interest of any kind in certain other described tracts. The evidence of the parties was directed to these issues, and consisted on the part of the respondents of oral evidence tending to show the sources from which the money used in the purchase of the property was derived; of oral declarations of the persons in whose names the legal title stood, inconsistent with absolute ownership; certain writings executed by several parties indicating title in the common ancestor; and the fact that the administratrix administered upon the property as prop-

erty of the estate of the common ancestor and included the property in her final account with the estate as property belonging thereto and subject to distribution to the heirs in equal proportions.

[1] The appellants' first contention is that the oral evidence was inadmissible because tending to establish an express trust, which, under the rule in this state, cannot be established other than by a writing. But this contention mistakes the effect of the evidence. The effect of the evidence was to establish a resulting trust—to establish the fact that the purchase price of the property was paid by the ancestor and the title thereto taken in the name of one of her children—which under all authority may be established by parol. Cases from other jurisdictions need not be cited to support the principle. Our own cases conclude the question. *Bowen v. Hughes*, 5 Wash. 442, 82 Pac. 98; *Denny v. Holden*, 55 Wash. 22, 103 Pac. 1109; *Croup v. De Moss*, 78 Wash. 128, 138 Pac. 671; *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090.

[2] It is next contended that the principal issue here is one of title, and that title cannot be determined in an action brought for the partition of real property. This undoubtedly was the rule of the common law. Under that practice the rule was to stay the partition proceedings until the plaintiff obtained a judgment for possession at law, whenever the pleadings of the defendant disclosed an adverse claim. The practice has, however, been modified by our Code, and now the court not only has power but is required to determine title in a partition proceeding whenever the issue is presented. *Rem. Code*, § 844; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219; *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113.

[3] The principal contention is that the evidence does not justify the decree entered by the trial court. The evidence we shall not review in detail. An examination, however, convinces that the trial judge did not err in his conclusion. While the oral evidence was conflicting and not in itself sufficient perhaps to comply with that rule of certainty required in the establishment of a resulting trust, there are writings in the record which to our minds do not leave the matter in doubt. There is, first, the mother's declaration made just prior to her death, in which she expressed the desire that the property be equally divided among all of her children; second, a written agreement made while the estate was in process of administration, signed by each of the several heirs, by which they purported to convey the property to the administratrix with an agreement on her part that she should, at the close of the administration, retain a specifically described tract as her share of the estate and

convey severally to the other parties to the agreement other specifically described tracts; and, third, the final report of the administratrix in which she included all of the property as property of the estate and subject to distribution among the heirs of the estate as their interests might appear. The interests of the appellants in the property were as well known to them when these several instruments were executed as they were when this cause was on trial, and it would seem that if the truth was that this portion of the property belonged to them severally and not to the estate, as they now claim, they would then have made the facts known. Their claims thus seem to be rather an afterthought, and we cannot think the preponderance of the evidence is with them.

In discussing the rights of the parties we have not adverted to the decree of distribution entered in the probate proceedings. This decree was somewhat indefinite in its recitals as to the property belonging to the estate, and the trial court for that reason did not regard it as controlling the question of title. For a like reason we have not so considered it, but in so far as it is definite and certain it tends, contrary to the contention of the appellants, to support the respondents' view of the ownership of the property rather than their own.

[4] Bert Anderson, while in possession of the title to certain of the property, mortgaged it and applied the proceeds of the mortgage to his own use. Amanda Sandygren, as we have said, purchased the interest of Bert in the estate. It is contended that, since the court directed this property to be distributed to all of the heirs, it should be charged with the lien of the mortgage, and that the court was in error in refusing so to do. But we think the judgment right. The amount of the mortgage was properly chargeable against the interests of the mortgagor, and, as Mrs. Sandygren stands in his shoes with reference to the property, it is properly chargeable to her.

[5] It is admitted that the court was in error in its decree of partition in so far as it affected lot 3 of block 14 in the city of Sprague. In fact, the court corrected the decree when the fact was called to its attention on the motion of the respondents. The correction was made after the notice of appeal from the decree had been served, and the appellants question the power of the court to act after that time. This fact, however, conceding the objection to be well taken, does not require any modification of the record in the court below. The judgment can be affirmed as modified.

Our conclusion is that the decree appealed from is without error, and that it should stand affirmed as modified. It is so ordered.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

PACIFIC POWER & LIGHT CO. v. WHITE
et al. (No. 13880.)

(Supreme Court of Washington. April 20, 1917.)

1. CORPORATIONS ⇨116—SALE OF STOCK—EXECUTED OR EXECUTORY CONTRACT.

A contract of September 8th in terms: Articles of agreement between named persons witnesseth that the parties of the first part have bargained and agreed to sell and do hereby sell to the party of the second part all the stock of a certain company for \$25,000, of which \$1,000 is to be paid at once, and balance on or before September 17th, and on receipt of stock, and the parties of the first part agree and warrant that the company's liabilities did not on September 1st exceed \$11,500, after allowing for claims then due it, and if they do exceed it, the excess shall be deducted from the purchase price, and the parties of the first part will on or before September 13th furnish a statement of the liabilities, and then the party of the second part shall have the privilege of verifying it by books, accounts, and other papers and records of the company, so that, if possible, it may be done by September 17th—was not, when an audit was furnished, an executed contract passing title, but still an executory contract, as regards consideration for the warranty of September 19th, that the liabilities did not exceed the amount shown by the audit, which before proceeding further with the consummation of the purchase the party of the second part required certain of the parties of the first part to execute; the party of the second part not being required to consummate the purchase till protected in some satisfactory way against any undisclosed liabilities of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496.]

2. CORPORATIONS ⇨120—SALE OF STOCK—WARRANTY AS TO LIABILITIES—CONSIDERATION.

A warranty that there are no undisclosed liabilities against a company given by part of owners of its stock, whereby one having an executory contract of purchase thereof is induced to proceed to a consummation of it when not legally bound to do so, has consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504.]

3. CORPORATIONS ⇨120—SALE OF STOCK—WARRANTY—"LIABILITIES."

"Liabilities" of corporation, warranted in a contract of sale of its stock and in a separate warranty not to exceed a certain amount, are not limited to contractual liabilities, but include those for torts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504.]

For other definitions, see Words and Phrases, First and Second Series, Liability.]

4. CORPORATIONS ⇨120—SALE OF STOCK—LIABILITIES—CONTINUING WARRANTY.

A warranty on which sale of the stock of a corporation is made against its liabilities, undisclosed or contingent or otherwise, exceeding a certain amount, is continuing.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504.]

5. PRINCIPAL AND AGENT ⇨143(3)—WARRANTY—UNDISCLOSED PRINCIPAL.

A warranty on which sale is made to one in fact acting as agent inures to the benefit of the undisclosed principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 504.]

6. GUARANTY ⇨4—WARRANTY.

A contract inducing consummation of purchase of the stock of a corporation, whereby part of the sellers warrant that the corporation's liabilities do not exceed a certain amount, is one of warranty, and not of guaranty, being an absolute undertaking in present, as well as in futuro.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3-6.]

7. CORPORATIONS ⇨121(1)—WARRANTY—ACTION—PARTIES.

Though sale of the stock of a corporation is by all the stockholders, only those stockholders who execute a warranty against liability that the corporation's liabilities do not exceed a certain amount, whereby the purchaser is induced to consummate his purchase, are necessary parties to action on the warranty.

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the Pacific Power & Light Company against W. H. White and another. From an adverse judgment, plaintiff appeals. Reversed and remanded.

Kerr & McCord, of Seattle, for appellant. Charles E. Patterson and Tom S. Patterson, both of Seattle, and Hurlbut & Neal, of Belingham, for respondents.

PARKER, J. This is an action to recover damages upon a warranty. The demurrer of the defendants, White and Campbell, to the complaint of the plaintiff, Pacific Power & Light Company, having been sustained by the superior court, and the plaintiff having elected to stand upon its complaint and not plead further, judgment of dismissal was rendered against it. From this disposition of the cause, the plaintiff has appealed to this court.

Counsel for appellant amplified its complaint to a considerable extent in response to a motion and demand in that behalf made by counsel for respondents. This was done before the ruling of the trial court upon respondents' demurrer. We therefore view the complaint as so amplified, as the superior court did, in determining the question of the sufficiency of the facts so pleaded to constitute a cause of action entitling appellant to relief. The controlling facts so appearing may be summarized as follows: In the negotiations leading up to and in the making of the two contracts here involved, Chas. D. Fullen was acting as agent for appellant. This fact of Fullen so acting as agent for appellant, we assume, was then unknown to respondents and all the other parties to the contracts, since the contracts themselves and the pleadings are silent upon that question. The first of the contracts, so far as necessary to here notice its terms, reads:

"Articles of agreement made and entered into this 8th day of September, A. D. 1910, by and between W. H. White, Thos. F. Jack, of Seattle, Wash., for themselves and A. H. Campbell, of Toppenish, Wash., for himself and as agent for Herbert Wright and W. P. Taylor, parties of the first part, and Chas. D. Fullen, of Seattle, Wash., party of the second part, witnesseth: That the

parties of the first part have bargained and agreed to sell and do hereby sell unto the said party of the second part the entire capitalization and all of the stock of the Reservation Electric Company, a corporation, organized under the laws of the state of Washington and engaged in operating and conducting an electric light plant in the town of Toppenish, Wash., said stock carrying with it the entire assets of every kind and nature of the said Reservation Electric Company, together with all the rights, franchises, privileges, and good will belonging thereto, for and in consideration of the sum of \$25,000, of which the sum of \$1,000 is paid at the time of the signing of this agreement, and the balance of said sum, to wit, \$24,000, is to be paid on or before September 17, A. D. 1910, and on the receipt by said party of the second part of the shares of stock representing the capitalization hereinbefore referred to.

"The said stock shall be deposited with the Scandinavian-American Bank of Seattle, Wash., and when the entire amount thereof is so deposited, the said party of the second part shall pay the said sum of \$24,000 to the parties of the first part on or before the 17th day of September, A. D. 1910.

"The parties of the first part agree and warrant that the liabilities of said corporation did not and shall not exceed the sum of \$11,500 on the 1st day of September, A. D. 1910, after allowing for all accounts and claims due to the said corporation on that date; and in the event that said liabilities exceed said amount, then the same, so far as the excess over \$11,500 is concerned, shall be deducted from the purchase price of said stock. The parties of the first part, through A. H. Campbell as secretary and manager, are to furnish to the party of the second part a statement showing the said liabilities as hereinbefore mentioned, on or before the 13th day of September, A. D. 1910, and then the said party of the second part shall have the privilege of verifying the same by examination of the books, accounts, and other papers and records of the said Reservation Electric Company, so that if possible the same may be done before September 17, 1910. If the indebtedness as above determined is less than \$11,000, then the said party of the second part is to pay to the said parties of the first part the difference between \$11,000 and the indebtedness as determined, the understanding being, that the entire cost of said plant to said party of the second part, including the liabilities of said corporation, shall not be less than \$36,000. * * *

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"W. H. White. [Seal.]
 "Thos. F. Jack. [Seal.]
 "A. H. Campbell. [Seal.]
 "Chas. D. Fullen. [Seal.]"

After this contract was entered into an audit was made of the books of the Reservation Electric Company which showed liabilities of that company to the extent of \$12,506.03. Appellant, before proceeding further with the consummation of the purchase of the stock required respondents to execute and deliver a contract of warranty reading as follows:

Seattle, Sept. 19, 1910.

"Mr. Chas. D. Fullen, Seattle, Wash.—Dear Sir: We have examined the statement of Price, Waterhouse & Co., certified public accountants, as to Reservation Electric Company, dated September 17, 1910, a copy of which was furnished to us, and we are prepared now to say and warrant that at the close of business for the month of August, 1910, the accounts and bills payable, after deducting the accounts re-

ceivable, did not and do not exceed the sum of \$12,506.03.

"In addition thereto, we represent and state to you that then there were no other undisclosed or contingent liabilities existing against said company in excess of said amount.

"We further represent to you that there has been no unusual or unnecessary expenditures made during the month of September other than those in the ordinary course of business and which were necessary for carrying on the business of said Reservation Electric Company, as no increase has been made in the liabilities of said company, of which you have not been fully advised.

Respectfully yours,

"W. H. White.
 "A. H. Campbell.
 "Thos. F. Jack."

This is the warranty here sued upon. We quote from the contract of September 8th as bearing upon the question of the consideration for the execution of this warranty contract. The sale of the stock was thereupon on that day consummated by delivery thereof to Chas. D. Fullen and the payment of the purchase price as contemplated by the contract of September 8th. Appellant "was induced to purchase said stock, and did purchase said stock, and pay said valuable consideration therefor, by reason of said statements, warranties, and representations made by said defendants, and believed that said statements, representations, and warranties were true, and relied thereon."

In January, 1910, the Reservation Electric Company became liable to one White for damages for personal injuries received by him as the result of the negligence of that company, which liability was unknown to Chas. D. Fullen and appellant, his principal, at the time of the consummation of the sale of the stock on September 18th, and was not included in the \$12,506 liabilities of that company then disclosed by respondents and warranted by them to be all the liabilities of that company. Thereafter, in October, 1910, an action was commenced against the Reservation Electric Company by White to recover damages for which it was so liable to him. Trial of that action in the superior court resulted in a judgment against that company in favor of White for the sum of \$3,000, which judgment was thereafter affirmed by this court. White v. Reservation Electric Co., 75 Wash. 139, 134 Pac. 807. Immediately upon the commencement of that action in the superior court appellant notified respondents and each of them of the fact of its commencement, and called upon them to defend the Reservation Electric Company and save it harmless from that liability. The Reservation Electric Company was ultimately compelled to pay that judgment. It is for damages so resulting to appellant in the impairment of the value of the stock of the Reservation Electric Company purchased by appellant from respondents that recovery is sought in this action upon the warranty contract of September 19, 1910.

[1, 2] It is contended by counsel for respondents that:

"The contract of September 19th is a nullity, because prior to that time the contract of sale was completed, and title to the property had passed, so that there was no consideration whatever for this contract."

It is true that the sale contract of September 8th contains the words "have bargained and agreed to sell and do hereby sell." Should we look no further to the provisions of that contract, it might well be argued that it became an executed contract passing title upon its being signed by the parties thereto. There are, however, other provisions therein which we think render it plain that both the vendors, and the purchaser had something more to do before that contract could be regarded as executed and passing title. Respondents did not make delivery of the stock nor were they required to do so until the final payment of the purchase price was made by appellant. This of itself might be regarded as merely the retention of control over the stock for the purpose of securing the purchase price, and therefore not inconsistent with the passing of title upon the signing of the contract. But respondents also had something to do as a prerequisite to the perfection of their right to have the purchase of the stock consummated. By the terms of that contract they and their associates warrant that the "liabilities of the Reservation Electric Company did not exceed the sum of \$11,500. They also agreed to furnish evidence of the amount of the liabilities of that company. They also agreed that the amount of such liabilities was to become finally determinative of the exact amount of the purchase price; \$25,000 being only tentatively stated as the amount of the purchase price in the contract. Plainly by the terms of the contract appellant was not compelled to blindly accept the information to be furnished by respondents as conclusive. It was before the acceptance by appellant of this information to be furnished by respondents and their associates, before payment of the balance of the purchase price, and before delivery of the stock that appellant demanded and received from respondents the warranty contract of September 19th, which induced it to consummate the purchase. Assuming for the present that the liability of the Reservation Electric Company to White was one which respondents and their associates were required to disclose and warrant against under the contract of September 8th, it is plain that appellant was not required to consummate the sale under that contract until it was protected against liabilities of the nature which White had against that company, either by deducting the amount of such liabilities from the purchase price or in some other manner satisfactory to appellant, and the fact that that liability was not known to appellant at the time surely did not lessen its right to be protected against it. Such expressions as "do sell," "have sold," and "hereby sell," used in a contract

of sale, and which, standing alone, might indicate a present sale and passing of title, are not conclusive upon that question when used in a contract of sale other provisions of which negative the idea of title passing upon the signing of such a contract. As to when title passes under such a contract becomes a question of intention to be gathered from all of its terms. It seems clear to us in the light of the things which by the terms of the contract respondents were required to do before appellant was required to consummate the sale that the contract of September 8th did not become an executed one or pass title until after the execution of the warranty contract of September 19th and that when that warranty contract was executed respondents' rights had not become so fixed and determined that they could have compelled the consummation of the sale without the doing of anything further on their part.

In the early case of *Meeker v. Johnson*, 3 Wash. 247, 257, 28 Pac. 542, 545, Judge Dunbar, speaking for the court touching the effect of the word "sold" upon the question of passing title, as used in a sale contract, said:

"It is true that the formal word 'sold' is used in this contract; * * * but so it is in a great majority of contracts of this kind where it is not claimed by either party that they are anything more than executory contracts. This may be, and doubtless is, one expression among others to indicate the intention of the parties; but it is only one, and is not conclusive when the other conditions in the contract indicate a different intention."

See, also, *North Pacific, etc., Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595; *Pacific Coast Elev. Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544; *North Idaho Grain Co. v. Callison*, 83 Wash. 212, 145 Pac. 232; 6 R. C. L. 590; 35 Cyc. 281.

Having concluded that the sale contract of September 8th was still executory and had not resulted in the passing of title to the stock at the time of the execution of the warranty contract of September 19th, we think it follows that there was ample consideration to support the latter contract, since it appears by the allegations of the complaint that appellant was induced to proceed to a consummation of the sale contract by the execution of the warranty contract at a time when it was not legally bound to do so. That is at a time when respondents had not done all they were required to do under the terms of the sale contract entitling them to have the sale consummated. *Congar v. Chamberlain*, 14 Wis. 279.

[3] It is contended in respondents' behalf that the warranties contained in the contracts of September 8th and September 19th have no reference to any liability of the Reservation Electric Company other than contractual liabilities. The provision in the contract of September 8th for the furnishing by respondents of a statement of the liabilities of that company and the privilege of

appellant to verify the same by an examination of the books of that company before the consummation of the sale and the fact that the determination of the total amount of the liabilities of the company was to control the exact amount of the purchase price might seem to furnish some ground for this contention; but, when the contract of September 8th is read as a whole, we think it is rendered plain that appellant was induced to purchase the stock of the Reservation Electric Company in reliance upon the fact that every liability of that company should be disclosed before the consummation of the sale by the payment of the purchase price. It is plain that liabilities of the Reservation Electric Company growing out of torts would lessen the value of the stock, which was the subject of the sale, just as effectually as liabilities growing out of contract. It seems quite plain to us that appellant entered into the contract of sale with respondents, having in view that every liability of every nature which would affect the value of the stock would be disclosed before the consummation of the sale, and that all parties to the contract were proceeding upon that theory. We think that the word "liabilities," as appearing in both contracts, is there used in its broad sense, and was intended by all parties to the contracts to include every debt or obligation of the Reservation Electric Company which would impair the value of the stock of that company. Bouvier defines "liability" as "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action." Plainly according to the allegations of the complaint White's cause of action for damages was then such a liability against the Reservation Electric Company and one which materially impaired the value of the stock of that company.

[4] It is contended by counsel for respondents that the warranties contained in the contracts are not continuing warranties. Looking alone to the sale contract of September 8th, there might be some ground for this contention in view of the fact that the terms of that contract seemed to contemplate that the total amount of the liabilities should be first ascertained and the purchase price determined accordingly. It seems to us, however, that the warranty in the contract of September 19th is plainly a continuing warranty. Indeed it was manifestly not for the purpose of warranting against then disclosed liabilities, since they were to be then taken into consideration in the fixing of the purchase price. It could serve no purpose if not a continuing warranty looking to the future protection of appellant against other existing liabilities. Even if the warranty in the contract of September 8th was not strictly a continuing warranty, the uncompleted duty of respondents and their associates under that contract to disclose all the liabilities of

the Reservation Electric Company constituted sufficient consideration for the execution of the warranty of September 19th, which plainly is a continuing one.

[5, 6] We have assumed so far for convenience of discussion that appellant is in fact the purchaser under the contract of September 8th. It is contended by counsel for respondents that appellant can in no event have the benefit of the warranty it here sues to recover upon, because it is not the beneficiary named therein, and, its interest in the transaction being only that of an undisclosed principal, it has no greater rights than an assignee of its agent, Chas. D. Fullen. Counsel invoke the general rule that a warranty in the sale of personalty does not run with the property, and the assignee of the purchaser cannot avail himself of such warranty as against the original seller, citing 35 Cyc. 370. It seems to us that appellant does not stand in the shoes of an assignee or grantee of its agent, Fullen, in view of the fact that Fullen was at the time of the execution of both contracts in fact acting for appellant as its agent. This fact appearing by the allegations of the complaint, we think appellant's rights are controlled by another rule of law well stated in 2 C. J. 873, as follows:

"As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, it is a well-established general rule that, where an agent on behalf of his principal enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal, who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party."

Of course, the rights of the other contracting party as against the agent with whom he thinks he is dealing as principal might impair the undisclosed principal's rights. This, however, is not a question to be here considered. As the facts here appear, respondents' burdens and obligations under their contract of warranty of September 19th are not increased in any respect by appellant, as the undisclosed principal, claiming under that warranty, any more than as if Fullen himself were claiming under it. Respondents are not going to be subjected to successive suits for any one breach of their warranty by successive assignees or grantees of the purchaser of the stock, which is apparently the main reason for the rule of not allowing recovery upon a warranty other than by the one to whom it was given as pointed out by Justice Lamar in *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. In this connection counsel also invoke the rule that no one can acquire any rights under a special "guaranty" other than the one who is expressly referred to or necessarily embraced in the description of the persons to

whom the guaranty is addressed, citing 20 Cyc. 1429. We think it plain, however, that the contract here involved is one of warranty and not of guaranty. While these words are often somewhat indiscriminately used, they do not carry the same meaning or refer to obligations of the same legal nature. In 12 R. C. L. 1056, the difference in legal effect between a "warranty" and a "guaranty" is stated as follows:

"It seems that derivatively the words 'warranty' and 'guaranty' import the same kind of transaction, and they are still loosely employed as though they were synonymous. In legal conception, however, a guaranty is distinguishable from a warranty. Each is an undertaking by one party to another to indemnify or make good the party assured against some possible default or defect in the contemplation of the parties; but a guaranty is understood, in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in the future, whereas the term 'warranty' is generally understood as an absolute undertaking in present as well as in futuro, against the defect, or for the quantity or quality contemplated by the parties in the subject-matter of the contract. In the sale of a commodity an undertaking by the seller to answer for defects therein is construed as a warranty, though the seller uses the term 'guaranty'."

A guarantor might be quite willing to enter into a contract guaranteeing payment of an obligation in the future by one person, and yet be quite unwilling to guarantee such payment by another. In other words, the guarantor's burden might be quite different in the one case from what it would be in the other. So it will not be presumed that he intends to be bound except for the obligation of the person named in the guaranty contract. There has not come to our attention any decision or other authority holding to the view that an undisclosed principal to a contract of warranty like that here involved cannot have the benefit of such warranty to the same extent as if it were any other simple contract obligation on the part of the warrantor. We are of the opinion that appellant is entitled to the benefit of this warranty if the allegations of its complaint are true, and respondents have no affirmative defense impairing such right either against it or its agent Chas. D. Fullen, assuming that it dealt with Fullen without knowledge of his agency for appellant.

[7] Some contention is made in respondents' behalf that there is a defect of parties. This contention, however, proceeds upon the theory that this action is based upon the sale contract of September 8th as well as the warranty contract of September 19th, it being conceded by counsel for respondents that, if the action rests upon the warranty contract of September 19th alone, there is not a defect of parties. What we have said, we think, leads to the conclusion that the cause of action is and can be rested upon the warranty contract of September 19th. The sale contract of September 8th is of no conse-

quence here except as having a bearing upon the question of consideration for the execution of the warranty contract of September 19th. In other words, the first contract is here to be considered only for the purpose of determining whether or not it was completely executed and had passed title to the stock before the execution of the warranty contract.

We conclude that the facts stated in the complaint are sufficient to constitute a cause of action entitling appellant to recover upon the contract of warranty executed by respondents on September 19, 1910.

The order sustaining the demurrer to appellant's complaint and the judgment of dismissal are reversed, and the cause remanded for further proceedings.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

BOSTON TRUST CO. v. EVELON CO. (No. 13889.)

(Supreme Court of Washington. April 20, 1917.)

1. FRAUDS, STATUTE OF ~~§ 44~~(4)—ORAL LEASE OF LANDS.

An oral agreement for the lease of a house for a period of years is not enforceable.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66.]

2. DAMAGES ~~§ 28~~—MEASURE OF DAMAGES—RENTAL VALUE OF CONTEMPLATED BUILDING.

In a suit to foreclose a mortgage given for the purchase price of lands under agreement whereby the seller was to improve certain streets in the vicinity of the property, the mortgagor could not offset against the mortgage the rental value of a residence which he did not build because of the failure of the mortgagee to make the contemplated street improvements; such damages being remote and uncertain.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 70.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action to foreclose a mortgage on real estate by the Boston Trust Company against the Evelon Company. From a decree of foreclosure, the defendant appeals. Affirmed.

Winfield R. Smith, of Seattle, for appellant. Farrell, Kane & Stratton, of Seattle, for respondent.

MOUNT, J. This action was brought by the respondent to foreclose a mortgage upon certain real estate in the city of Seattle. On a trial of the case, the court entered a decree of foreclosure. The defendant has appealed.

The facts are, in substance, as follows: On May 5, 1913, the Seaboard Security Company sold to the appellant, Evelon Company, blocks 17 and 18, in Laurelhurst Heights addition to the city of Seattle. The purchaser

paid part cash for these blocks, and gave its note for \$15,000, secured by a mortgage upon the land. Thereafter, on the 11th day of February, 1916, the Seaboard Security Company sold and assigned the note and mortgage to the respondent. This action was brought by the respondent to foreclose the mortgage. The appellant, as an affirmative defense and counterclaim to the action, alleged, in substance, that as a part of the same transaction as the sale of the property the Seaboard Security Company contracted to improve, with sewers, watermains, and paving, certain streets in the vicinity of the property by November 30, 1913; that appellant had a binding agreement with one A. S. Taylor that when said street improvements would be completed, the blocks would be improved with a residence, plans for which had been drawn and approved; that Taylor agreed when the residence was completed he would lease the same for a period of years, paying a rental of \$300 per month; that these facts were in contemplation of the parties when the sale took place; that the Seaboard Security Company failed to make the street improvements by November 30, 1913, as agreed, and such improvements would not be completed until November, 1916; that by reason of the failure of the Seaboard Security Company to make the improvements the appellant lost the difference between the rental value of the property, with the improvements as contemplated, and the rental value, without the improvements, amounting to \$5,250. Upon the trial of the case the appellant attempted to prove the facts alleged. The trial court sustained objections thereto, upon the ground that the damages sought to be proved were speculative and remote.

[1, 2] A mere statement of the facts, we think, conclusively demonstrates the correctness of the ruling of the court. It is not claimed by the appellant that any dwelling house or improvement was made upon the lots purchased. It is, in fact, conceded that the residence which it intended to build was never built, and no further investment was made by the appellant except the mere purchase of the land. The rule applicable to this kind of a case is stated in 13 Cyc. p. 157, as follows:

"Where there has been a delay in the performance of a contract, the owner of the property may recover as damages the value of its use during the period covered by the delay; and such damages have usually been measured by a sum equal to the rental value of the property during the period of delay."

The trial court in this case allowed such damages as an offset. It refused to allow damages for the rent of a building which was contemplated to be placed upon the land, which building was never placed thereon.

If the appellant, in reliance upon the contract which it alleges was made, and was in contemplation of the parties, at the time of the purchase of the blocks, had erected a dwelling house upon the property, and if, by reason of the failure of the seller of the blocks to comply with its contract to improve the streets, appellant had been unable for that reason to lease or use the building and the lots, it might then be in position to ask for the reasonable rental value of the property as damages in offset of the purchase price. But it is conceded that appellant never erected the house, and never did anything toward erecting it, except to prepare plans and specifications, and obtained the consent of a party who was willing to rent it at \$300 a month, when it was completed. The record very conclusively shows that there was no lease by the person who intended to rent it. There was simply a verbal agreement which, of course, was incapable of enforcement. That fact, however, is not material here, because it would tend only to show the reasonable rental value of the dwelling, if the dwelling had been built, as contemplated. The appellant relies upon the rule announced by this court in the cases of *Skagit Railway & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077, and *Revett v. Globe Navigation Co.*, 68 Wash. 300, 123 Pac. 459, and other cases of a similar nature; but those cases are based upon a state of facts which would be parallel and applicable if the appellant had built its residence as contemplated, and had been unable to lease or use the same by reason of the failure of its vendor to make the street improvements. But the appellant did not build the residence, and it follows, as a matter of course, that, not having done so, appellant cannot claim damages for loss of rental for a building which was never built. As was said in *Webster v. Beau*, 77 Wash. 444, at page 452, 137 Pac. 1013, 1016 (51 L. R. A. [N. S.] 81):

"A clear distinction is manifest between an interruption of, or an injury to, an existing business which has been successfully conducted for a considerable period of time, and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain, and conjectural to become a basis for the recovery of damages in an action for the subsequent loss of such profits."

Without further referring to the authorities cited in the briefs, we are satisfied that the damages here sought to be offset against the mortgage are too remote and uncertain in their character.

The judgment of the trial court is therefore affirmed.

ELLIS, C. J., and PARKER, FULLERTON, and HOLCOMB, JJ., concur.

WEST v. JESSE A. LINNEY & CO. et al.
(Civ. 1660.)

(District Court of Appeal, Second District, California. March 3, 1917.)

1. MASTER AND SERVANT — 279(9) — INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Evidence that shingles on a roof to which a painter's scaffold was attached slipped, causing the scaffold to fall and injure plaintiff employé, sustains a finding that the master was negligent, in not providing a safe place to work, where the scaffold could have been tied to a chimney.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958.]

2. MASTER AND SERVANT — 265(14) — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Where defendant employer's negligence has been established, defendant has the burden of proving plaintiff employé's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 893, 908.]

3. MASTER AND SERVANT — 281(12) — CONTRIBUTORY NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

A finding that plaintiff employé was not guilty of contributory negligence while upon a painter's scaffold is sustained under St. 1911, p. 796, providing that an employé's slight contributory negligence shall not bar recovery, etc., where his alleged negligent actions were completed before the accident, and would not necessarily have caused the scaffold's fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 905.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Benjamin West against Jesse A. Linney & Co. and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Robt. T. Linney and Ralph W. Schoonover, both of Los Angeles, for appellants. Harri-man, Ryckman & Tuttle, of Los Angeles, for respondent.

CONREY, P. J. In this action it was alleged by the plaintiff that he was employed by the defendants as a house painter upon a certain house in the city of Los Angeles; that, while working in the course of that employment upon a scaffold supplied and erected by defendants and suspended by ropes and hooks from the building, the scaffold suddenly and without warning and through the negligence of the defendants fell and precipitated plaintiff to the ground below, whereby he received the described injuries. It was pleaded that the negligence of the defendants consisted in failure to provide plaintiff a secure and sufficient scaffold upon which to work and proper and sufficient supports for said scaffold. Defendants appeal from the judgment and from an order denying their motion for a new trial.

It is conceded that the ropes, hooks, jacks, and platform constituting the scaffold were supplied by the defendants to the plaintiff and two other workmen who were co-operating with him as fellow workmen in painting

the house. It was also shown without conflict in the evidence that the scaffold fell suddenly and without warning and thereby the plaintiff received his injuries. The scaffold was erected by workmen of the defendants who put the materials in place and swung the platform into the position where it was when it fell. It was clearly shown by the evidence and is not disputed that the scaffold was of a kind commonly used and well approved in the painting business, and that the particular materials were superior of their kind and in first-class condition. The method of erecting the scaffold was as follows: The ropes were hung from hooks which were fastened to roof jacks which rested upon the shingles of the roof. The upper end of each jack was thrust under an upper course of shingles, and the jacks were prevented from slipping by certain rows of screws the points of which were arranged so as to catch upon the shingles of the roof. Two shingles at the lower side of the roof and upon which one of the jacks rested slipped out of place and fell to the ground. At the same instant the jack and hook slipped off, thereby causing the rope and platform to fall.

[1] In his testimony the plaintiff described the staging and the materials by which it was upheld, and stated that when the staging was put up he tested the falls by swinging upon each of the ropes attached to two of the hooks "before we put the scaffolding on." Lee Wilson, a witness for the defendants, was one of the men working with the plaintiff. Wilson testified that, with the assistance of one Doremus, he placed the hooks on the roof and tested them; that he waited at each hook until it was tested, and this one looked perfectly safe; that in this particular case he had no doubt of its safety, but because of the appearance of the shingles he made an extra test; that he made an examination of the shingles to see if they were nailed or loose, and they were not loose at the time he put down the jack. The plaintiff did not take part in placing the hooks on the roof or share in putting up the apparatus, except that he tested the falls as above stated. As to the safety of the shingles and of the placing of the hooks thereon, he relied upon the defendants and upon his fellow workmen; also a member of defendant partnership was present when the scaffold was put up. The roof was old and weather beaten. Immediately after the accident some pieces of shingle of that character, apparently corresponding to the shingle space left vacant on the edge of the roof, were found lying on the ground where the scaffold fell. These were exhibited to the court in connection with the testimony, but are not before us.

It was possible to have secured the scaffold against slipping of the shingles and a consequent fall by fastening a rope to the

hooks and tying it to a chimney on top of the roof. This actually had been done while they were painting another side of the house. Under the circumstances shown, we cannot say that there is no evidence tending to prove that the defendants negligently failed to provide plaintiff a safe scaffold upon which to work.

[2, 3] The accident occurred on the 16th day of October, 1912. At that time there was in effect a statute relating to the liability of employers for injuries of this kind. Stats. 1911, p. 796. Section 1 of that act provided that in actions of this class:

"The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé."

It was further provided that it shall not be a defense that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. Negligence of the defendants having been shown, the burden was upon the defendants to establish their plea of contributory negligence. In order to establish such plea, it must have been made to appear not only that the plaintiff was negligent, but that such negligence was a proximate cause of the accident; and even if these conditions were established, the plaintiff's cause of action could not be entirely defeated if the court or jury found from the evidence that the contributory negligence of the plaintiff "was slight and that of the employer was gross in comparison." Applying the evidence in this case to the rules governing contributory negligence under this statute, we cannot say that the court was not justified in its finding that plaintiff's injuries were not proximately caused or contributed to by his own negligence or fault. There is some testimony tending to show that the plaintiff, in some of his movements to and fro upon the scaffold, violated certain rules current among painters which are usually observed for the purpose of avoiding accident. But these acts of the plaintiff had been completed prior to the time of the accident, and were not such as to require the court to find that they were the acts which caused the scaffold to fall.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. KITLEY. (Cr. 662.)

(District Court of Appeal, First District, California. March 12, 1917.)

CRIMINAL LAW §1151—APPEAL—REVIEW—VERDICT.

Where it does not appear that prejudice resulted to defendant from the refusal of his request for a postponement of the trial, and the

evidence amply sustains the verdict, the conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

James Kitley was convicted of crime, and he appeals. Affirmed.

Walter Stingley and J. C. Thomas, both of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Upon an investigation of the record, and after listening to the oral argument of the appellant, we are not satisfied that the trial court abused its discretion in denying the defendant's request for a postponement of the trial, and at any rate it does not appear to us that any prejudice resulted to the defendant.

As to the appellant's criticisms of the charge of the court, that charge is in our opinion clear and correct; nor do we find any merit in the point that the testimony of the prosecutrix is inherently improbable and therefore insufficient to support the verdict and judgment. On the contrary, an inspection of the record convinces us that they are amply sustained by the evidence.

The judgment and order appealed from are therefore affirmed.

PEOPLE v. SMITH. (Cr. 671.)

(District Court of Appeal, First District, California. March 12, 1917.)

LEWDNESS §10—EVIDENCE—SUFFICIENCY.

In a prosecution for the felony defined by Pen. Code, § 288, which punishes lewd and lascivious conduct with minor children, evidence held to sustain a conviction of an attempt to commit the act charged.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

William Smith was convicted of crime, and he appeals. Affirmed.

Knapp Orton and W. C. Tupper, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged with the commission of the felony defined by section 288 of the Penal Code, which punishes lewd and lascivious conduct with minor children; and the point that the appellant makes in his appeal from the judgment and order appealed from is that, because defendant's conviction was of an attempt to commit the act charged, there is no evidence warranting the verdict, for the reason that the information charges that the defendant placed his hands upon certain parts of a mi-

nor female child, and there is no direct evidence to that effect. It is argued that he could not be convicted of an attempt, because the prosecution did not show specifically that he had made any move to place his hands upon the parts in question. The appellant also contends that the evidence does not show his guilt beyond a reasonable doubt.

Considering the latter point first, we think it sufficient to say that the jury by its verdict has decided it contrary to appellant's contention. As to the first point urged, the evidence introduced at the trial was direct and circumstantial. There is circumstantial evidence of the defendant taking the child into a barn or vacant house, and that the child's clothing was disarranged. There is the admission on the part of the defendant that he did touch the child's clothing, and there is the testimony of the police officer that the defendant stated to him that he allowed his passion to get the best of him and that he played with the child. Upon the whole evidence the jury rendered its verdict of an attempt to commit the act charged; and we are satisfied from a review of the record that the evidence is sufficient to support the verdict and judgment.

For that reason the judgment and order appealed from are affirmed.

COMPTON LAND CO. v. VAUGHAN et al. (Civ. 2203.)

(District Court of Appeal, Second District, California. Feb. 28, 1917.)

VENDOR AND PURCHASER § 18(4)—OPTION TO PURCHASE—CONSTRUCTION.

An agreement contemplating the purchase of land, reciting part payment, but providing that the agreement was an option exclusively, and that the prospective purchaser has no rights in the property until a second payment, and that on default of such payment both parties were released, and the prospective vendor should retain the initial payment as liquidated damages, upon which there were indorsements extending the date of the second payment upon consideration of smaller payments, which indorsements confirmed the terms of the original agreement as an option merely, the payments made being the consideration upon which the option to purchase rested, and upon the lapse of the time fixed by the contract, and extension indorsements, and default in second payment, neither the purchaser nor his assignee could recover any of the payments made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action to remove cloud from title by the Compton Land Company against John A. Vaughan and another. Judgment for plaintiff, and defendant Henry S. Woolner appeals. Affirmed.

Albert M. Norton and Henry S. Woolner, both of Los Angeles, for appellant. John G. Munholland, of Los Angeles, for respondent.

JAMES, J. The appeal in this case is taken from a judgment entered in favor of the plaintiff. In the complaint facts were set out showing that plaintiff, on or about the 14th of December, 1911, executed in favor of defendant John A. Vaughan a certain writing, which is in the complaint called "an option agreement." This agreement related to certain realty. It is alleged that defendant Vaughan failed to comply with the terms and conditions of the agreement and failed to complete the purchase of the real property which was described. It was then alleged that the defendants "claim an estate or interest in said premises adverse to plaintiff by and through said option agreement, which in truth and in fact is void and of no effect." Allegation is made that the option agreement was recorded in the office of the county recorder and remained as a cloud upon plaintiff's title. The prayer was that the option agreement be adjudged void and canceled and satisfied of record, and "that the cloud created thereby be removed," and for general relief. An answer was filed and the case proceeded to trial, with the result as stated.

There was no dispute as to the terms of the writing, which was set out in full, together with certain extension indorsements, as an exhibit in the complaint. The agreement was dated December 14, 1911, and recited that the plaintiff had received from Vaughan the sum of \$300 "as part payment for the following described real property." (Here follows a description of the realty affected.) The agreement then contained the following recitations:

"The entire price to be paid for the above described real property is \$28,500 and to be paid as follows: \$300 cash as hereinbefore mentioned, \$6,200 on or before ninety days after date. The balance of \$22,000 to be divided in six equal payments."

The time of the maturity of the notes was then set forth, and further on in the document it was recited as follows:

"It is distinctly understood that this instrument is an option exclusively, and that the holder of said option has no right to enter on or in any manner assume ownership or possession of any part of said above-described property until above-mentioned \$6,200 is paid and said John A. Vaughan has executed above-mentioned notes, and the agreement for sale of real estate as herein called for is duly escrowed. A good and sufficient agreement for sale of real estate, with a resolution of the board of directors, deed to be executed and delivered by the said Compton Land Company, * * * on or before the 14th day of March, 1912. * * * If the said payment of \$6,200 is not paid or tendered on or before the said 14th day of March, 1912, then this contract to be void and of no effect, and both parties released from all obligations herein, and in that event the said \$300 paid on this date is to be retained by the Compton Land Company as liquidated damages."

The alleged option agreement was duly signed by the plaintiff corporation and by John A. Vaughan, defendant. On March 11, 1912, an indorsement was made on the writing, signed by both parties, which recited that:

"The within option agreement is hereby amended by mutual consent of both contracting parties, as follows, viz.: First, in lieu of \$6,200 cash payment on March 13, 1912, that upon the receipt of \$300 cash on or before March 13, 1912, \$5,900 being balance of the \$6,200 cash payment, together with the interest on said \$5,900 and on the \$22,000 from March 13/12 at 7% per annum, to be extended to June 13, 1912, on which date \$5,900 and all accrued interest to be paid."

Some additional conditions were stated affecting the notes, and the indorsement concluded with the following words:

"All the items and terms mentioned and referred to in the within original option to obtain as therein written."

Again, on June 13, 1912, the following indorsement was made and signed by the parties:

"The foregoing amendment to option is hereby continued to December 1, 1912, by mutual consent of both parties thereto, in consideration of the receipt this day of \$1,000 by the Compton Land Company; the cash payment of December 1, 1912, to be \$4,900, and all interest accrued on the above-mentioned \$1,000 and \$4,900, and on \$22,000 from March 13, 1912; the six semiannual notes of equal amounts, aggregating \$22,000, are to be dated December 1, 1912."

A further indorsement, dated 11-25-12, being one of assignment of the rights of the option holder to the defendant H. S. Woolner, appeared. There was no contention, as shown by the testimony heard, that on December 1, 1912, the person in whose favor the option was issued, or his assignee, had made the payment required, and it was admitted that no money was paid, except that shown by the writing and the indorsements appearing as before mentioned. More than two months after the expiration of the last mentioned date this action was filed. Defendant Woolner first asserted by his answer that certain incumbrances existed against the land which made it impossible for the plaintiff to comply with its agreement; and, secondly, set up a counterclaim contending that there should be returned to him all of the money paid under the agreement. It is sufficient to say that the findings of the trial court which determined that there was no incumbrance which would prevent full compliance being made by the plaintiff with its agreement, are supported by the evidence. As to whether the defendant was entitled to have returned any part of the money paid upon the written agreement depends altogether upon the determination as to whether the contract as drawn constituted of itself or by the indorsements made thereon, an agreement of sale or a mere option to purchase. It will be noted that the proposed vendor sedulously asserted in the agreement that the instrument was an "option exclusively." It further appeared that it was contemplated that only after the \$6,200 had been paid was the vendor to execute "a good and sufficient agreement for sale." The contract in its original form, and without the indorse-

ments, purported only to extend to Vaughan an option to have later executed in his favor an agreement of sale which would bind both parties. It is said in the agreement that, in the event the payment of \$6,200 was not made on or before the 14th of March, 1912, "then this contract to be void and of no effect and both parties released from their obligations herein."

Quite plainly it appears that if Vaughan, at the time the \$6,200 payment became due, had failed to pay and no extension had been granted to him, the vendor would not have had the right to sue Vaughan to recover that payment, or to compel him to purchase the property at the price and according to the terms set forth in the agreement. If the vendor had not this right, then, as there was no mutuality of remedy, the contract is at once given the impression of being an option merely, the benefits of which Vaughan might or might not, at his election, take advantage of. The mere fact that the initial payment was to be applied upon the purchase price does not change the condition of the contract in the respect just considered. Such was also the case in the contract before the court in *White v. Bank of Hanford*, 148 Cal. 552, 83 Pac. 698. And see, also, *Briles v. Paulson*, 170 Cal. 196, 149 Pac. 169. Neither can it be gathered from the indorsements made upon the contract, whereby it was extended upon the consideration of the payment, first of \$300, and then of \$1,000, that there was any intent upon the part of the parties to change the character of their contract relations. It was merely provided that the dates of payment should be changed, and that portion of the contract remained in force which postponed the execution of a formal agreement of sale until the time when the \$6,200 payment, or the reduced amount thereof, should fall due. If the money paid was, and we so hold, the consideration upon which the option to purchase only rested, then upon the lapse of the time fixed by the contract and the extension indorsements, the vendor meanwhile holding itself ready to fulfill its obligations, the option holder would have received all the consideration bargained for. He got what he paid for, and there was nothing to be returned to him. It is even held, where there have been considered contracts which admittedly constitute agreements to purchase and sell realty binding upon both parties, that the vendee in default may not recover payments made by him under his contract, although in that case the remedy of the vendor, where he chooses to be the actor in the litigation, is generally that of foreclosure. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

The foregoing propositions are the only ones which are properly presented by this appeal, or which require or merit attention of the court. We think that the trial judge

was correct in the findings and judgment as made.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; SHAW, J.

CONSOLIDATED LUMBER CO. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2312.)

(District Court of Appeal, Second District, California. Feb. 28, 1917.)

JUSTICES OF THE PEACE § 159(6)—APPEAL—SURETIES—EXCEPTIONS.

Code Civ. Proc. § 978a, referring to undertakings on appeal from justices' courts and exceptions thereto, declares that the adverse party may except to the sufficiency of the sureties, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party to the amount stated in their affidavits, the appeal must be regarded as if no undertaking had been given. Section 948, referring to exceptions to sureties on appeals from the superior court, in terms requires that notice of exception to sureties be served upon the appellant. *Held*, that notice of exception to sureties on appeal from justice court must be filed with the justice and served on the appellant, and in case of failure to serve the same on the appellant, such exceptions are unavailing, and, though the sureties do not justify, furnish no ground for dismissing the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555.]

Original petition by the Consolidated Lumber Company, a corporation, for a writ of prohibition against Superior Court of the State of California in and for the County of Los Angeles and others. Alternative writ discharged, and petition for peremptory writ denied.

McClure & Turner, of Los Angeles, for petitioner. H. E. Gleason, of Los Angeles, for respondents.

PER CURIAM. An alternative writ of prohibition was issued herein under which the respondent superior court was required to show cause why it should not be prohibited from proceeding further in a certain action entitled Consolidated Lumber Company v. F. A. Shorey, where, after judgment in a justice's court, the defendant appealed to the said superior court. Within five days after the defendant Shorey had filed in the justice's court his undertaking on appeal, the plaintiff filed in the justice's court a notice of exception to the sureties who executed the undertaking on appeal, but did not serve upon the defendant or his attorney any notice of such exception. No justification of sureties was had, and upon that ground the plaintiff moved the superior court to dismiss the appeal. The superior court denied the

motion, and has set down the case upon its calendar for trial.

Section 978a of the Code of Civil Procedure, referring to undertakings on appeal from justices' courts and the exceptions thereto, states that:

"The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

The same words were formerly contained in section 978. It will be observed that the statute is silent as to the manner in which the exception shall be taken, and if the matter had not been determined by decision, we would be inclined to hold that such exception might be taken in a justice's court orally, and that it would be sufficient to have the fact noted in the justice's docket without service or filing of any notice whatever. The corresponding provision (Code Civ. Proc. § 948), referring to exceptions to sureties on appeals from the superior court, in terms requires that notice of exception to sureties be served upon the appellant. The omission to state any such requirement in section 978a strongly argues that a less formal mode of exception was intended in the case of an appeal from a justice's court. However, this question was before the Supreme Court in *Reynolds v. County Court of San Joaquin County*, 47 Cal. 604, where the court said:

"The mere filing of such an exception with the justice of the peace after appeal taken does not seem to be authorized by the statute, and it is of course unreasonable to hold the appellant in default when he had no notice, in law or fact, that further justification of sureties had been required by his adversary."

In *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628, this court held that the notice of exception to sureties must be filed with the justice, and that no such exception will be deemed to be complete until such notice is filed. With that ruling and the reasons for it as there stated, we are satisfied; but it is not inconsistent therewith to further hold that the notice must be served upon the appellant. In *Budd v. Superior Court* it was intimated that such service upon the opposite party of the notice of exception to sureties is not essential, and we repeated that suggestion in *McCarty v. Superior Court*, 30 Cal. App. 1, 159 Pac. 736. But in these decisions the only question directly at issue was upon the contention that the notice of exception must be filed. Basing our decision upon *Reynolds v. County Court*, supra, we now hold and determine that the notice must be served as well as filed, but that the exception is not complete until both served and filed.

The alternative writ is discharged, and petition for peremptory writ is denied.

SACRAMENTO COUNTY v. CHAMBERS,
State Controller. (Civ. 1945.)

(District Court of Appeal, Third District, California. March 1, 1917.)

1. COUNTIES ⇐1—STATES ⇐119—POLITICAL FUNCTIONS — USE OF STATE MONEY FOR COUNTIES.

Counties are not municipal corporations, or, strictly speaking, corporations of any kind, as they are obviously lacking in the essentials which chiefly characterize and distinguish municipal corporations, but are local subdivisions of the state created by the sovereign power of the state without consent or action of the people who inhabit them, although they may be classed as quasi corporations and may be within the inhibitions of Const. art. 4, §§ 22, 31, relating to use of state money.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; States, Cent. Dig. § 118.]

2. STATES ⇐119—FUNDS—USE — CONSTITUTIONAL PROVISIONS.

St. 1915, p. 1530, providing for a bureau of tuberculosis under the direction of the state board of health and the granting of state aid to cities and counties for the support and cure of persons afflicted with tuberculosis, and giving the state board of health authority over all institutions, public and private, where tuberculosis patients are treated, is not violative of Const. art. 4, § 22, providing that no money shall be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital or other institution not under the exclusive management or control of the state as a state institution, although Pol. Code, § 4223, gives county supervisors authority to establish and maintain a county hospital, section 4041, subd. 7, gives such board power to purchase and acquire water rights, and section 4307, subd. 7, enumerates county charges.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118.]

3. STATES ⇐119—LOAN OF CREDIT—CONSTITUTIONAL PROVISIONS.

St. 1915, p. 1530, is not violative of Const. art. 4, § 31, providing that the Legislature shall have no power to lend or authorize the lending of the credit of the state or of any county or other political corporation or subdivision of the state, etc., for the payment of the liabilities of any individual, association, municipal or other corporation, etc.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118.]

4. CONSTITUTIONAL LAW ⇐60—DELEGATION OF POWER—BOARD OF HEALTH.

St. 1915, p. 1530, is not violative of Const. art. 11, § 13, providing that the Legislature shall not delegate to any special commission, private corporation, or individual any power to appropriate, supervise, or in any way interfere with any county, city, or other municipal government, money, property, or effects.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93.]

5. HEALTH ⇐21—POLICE POWER.

St. 1915, p. 1530, is a valid exercise of the sovereign power and police power of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make regulations essential to the protection of the state and the people thereof against the prevalence of disease, as the true purpose of county government organizations is to perform functions which belong to the state itself, and the state may employ them jointly with itself or alone as instrumentalities in aid of the ad-

ministration or carrying out of its own general governmental functions and policy.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 25.]

Original application for a writ of mandate by the County of Sacramento against John S. Chambers, as Controller of the State of California. Writ granted.

Hugh B. Bradford, Dist. Atty., of Sacramento, for petitioner. Kemper B. Campbell, of Los Angeles, for State Board of Health. U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for respondent.

HART, J. This is an original application for a writ of mandate to compel the respondent, as state controller, to draw his warrant in favor of the petitioner for the sum of \$2,290.30, in payment of the claim of said petitioner arising under an act of the Legislature of 1915, entitled:

"An act to provide for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; defining its powers and duties; providing for the granting of state aid to cities, counties, cities and counties and groups of counties for the support and care of persons afflicted with tuberculosis; making an appropriation therefor; and repealing certain acts of the Legislature of the state of California." Stats. 1915, p. 1530.

The first section of said act provides:

"The state board of health shall maintain a bureau of tuberculosis for the complete and proper registration of all tuberculosis persons within the state; for supervision over all hospitals, dispensaries, sanatoria, farm colonies and other institutions for tuberculosis, both public and private; for advising officers of the state penal and charitable institutions regarding the proper care of tuberculosis inmates, and for such educational and publicity work as may be necessary; for administration of the fund for state aid to cities, counties, cities and counties and groups of counties for the care of patients who are county charges in city, county, or city and county tuberculosis wards or hospitals or in tuberculosis wards and hospitals maintained by any group of counties, and for the performance of such other duties as may be assigned by the said board."

The second section provides that the state board of health shall appoint a director, who shall be duly qualified and trained in public health work. In addition to the administration of the bureau, under the supervision of the said state board, it is by said section made the duty of the director, "and he is hereby vested with full power," to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated. "He shall prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for proper food, and such other matters of administration as may be designated. Administration of the fund for the care of pa-

tients who are county charges in city, county, and city and county tuberculosis wards and hospitals and the tuberculosis wards and hospitals maintained by any group of counties shall be based upon his reports and under the rules and regulations of the board."

Section 3 provides that any city, county, etc., establishing a tuberculosis ward or hospital shall receive from the state \$3 per week for each person in the active stages of tuberculosis, cared for therein at public expense, who is unable to pay for his support, and who has no relatives legally liable and financially able to pay for his support, and who has been a bona fide resident of such city, county, etc., for one year; provided, that the city, county, etc., shall not become entitled to receive such state aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the state bureau of tuberculosis. "The medical superintendent of each hospital receiving state aid under this act shall render semiannually to the state bureau of tuberculosis a report under oath showing, for the period covered by the report, (1) the number of patients in the active stages of tuberculosis cared for therein at public expense, unable to pay for their own support and having no relatives legally liable and financially able to pay therefor, and (2) the number of weeks of treatment of each of such patients."

The refusal of the respondent to draw his warrant in favor of the petitioner for the amount named in the petition is based entirely upon the claim that said statute, in so far as it authorizes the payment of the sums specified therein to cities, counties, etc., for the purposes stated in the act, is in violation of sections 22 and 31, art. 4, and section 13, art. 11, of the Constitution. His position, more specifically stated, is that the maintenance and support and the control of county hospitals constitute duties and burdens which the law casts upon the supervisors and the taxpayers of counties, and that the expense necessary to be incurred in supporting such hospitals is a county charge, citing sections 4223, 4041, subd. 7, and section 4307 of the Political Code. It is hence argued that, since county hospitals are not under the exclusive management and control of the state as state institutions, the proposed payment of money drawn from the treasury to counties, etc., for the purpose mentioned in the said act is in contravention of section 22, art. 4, of the Constitution; (2) That counties are municipal corporations, and that therefore the payment of such moneys to counties would involve a gift of the same, contrary to section 31 of said article; (3) that the act, in violation of section 13, art. 11, of the Constitution, attempts to delegate to the bureau of tuberculosis or the state board of health the power to control and supervise, and thus interfere with the affairs of a county, to the extent to which the bureau or board may require the tuberculosis ward or hospital of

such county to conform, in the management thereof, to the regulations established by said bureau, and to make reports thereto, as prescribed by the act.

[1] Referring first to one of the several points made by the petitioner in support of the claim that the act in question impinges upon none of the provisions of the Constitution within the inhibitions of which the respondent insists the act in question falls, it may be remarked: That it is well settled that counties are not municipal corporations or, strictly speaking, corporations of any kind. They are obviously lacking in the essentials which chiefly characterize and distinguish municipal corporations, and it has often been said that they do not come within the latter class of corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at variance. "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority."

* * * With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." 1 Dillon on Municipal Corporations (5th Ed.) § 35. Counties, however, possess some corporate characteristics. Like all involuntary political or governmental subdivisions of the state, they are classed as quasi corporations. But whatever may be their proper classification, we are not prepared to say that counties are not within the inhibitions of sections 22 and 31 of article 4 of the Constitution against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual, municipal or other corporation of whatsoever kind or character. It is undoubtedly true that the design of the sections of the Constitution invoked against the act in question was to prevent the appropriation of the moneys of the state for any purpose other than that which pertains to the state, and that an appropriation by the Legislature of money from the state treasury for a purpose wholly foreign to any of the essential func-

tions of the state government would clearly and unquestionably amount to a gift within the plain meaning and intent of section 31, art. 4. *Stevenson v. Colgan*, 91 Cal. 649, 651, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203.

[2-4] But we do not hesitate to express the opinion that the provision of the act in question, authorizing the payment to counties of the sums to be used for the purpose therein specified, is not in contravention of the sections of the Constitution just adverted to. Nor are we impressed with the argument that said provision of said act is obnoxious to the objection that it offends section 13, art. 11, of the Constitution, in that it involves an attempt by the Legislature to delegate to "a special commission," etc., the power to interfere with or supervise the affairs of counties or to "perform any municipal function whatever."

[5] It has never been, nor will it ever be, questioned that among the first or primary duties devolving upon a state is that of providing suitable means and measures for the proper care and treatment, at the public expense, of the indigent sick, having no relatives legally liable for their care, support, and treatment, those who are infirm and helpless from the ravages of advancing years and without means of their own or relatives upon whom the law places responsibility for their care and support, and the insane, likewise situated as to means necessary for their care, support, and safe-keeping. *Cooley on Taxation*, p. 204. Nor can it for a moment be doubted that it is the duty of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make such regulations as may be conceived to be essential to the protection of the state and the people thereof, so far as such result may be attained, against the visitations and prevalence of deadly epidemical and endemical diseases, and to take and prosecute such health and sanitary steps and measures as will result in stamping them out, or, by recognized methods of scientific treatment, reducing to the lowest possible minimum the percentage of fatalities following therefrom. These are duties which the state owes to its inhabitants for the protection, promotion, and the preservation of their general happiness and welfare; and, as is true of the duty of the state in the matter of taking proper care of the impecunious or indigent who are afflicted with disease and who have no means for caring for themselves or relatives legally responsible for such care, they are duties which the state may perform in the exercise of its sovereignty, even in the absence of direct constitutional authority therefor—indeed, duties which it may discharge under its inherent power of police.

But we do not understand that it is claimed by the respondent that the duties to which we refer do not rest upon the state, or that

the state is without the power to execute them. In fact, as we understand the position of the respondent, it is not claimed by him that the sections of the Constitution invoked against the validity of the legislation involved in this dispute were intended to have the effect of prohibiting the state from performing the duty or exercising the power of which we have been speaking. In such a case, these questions may arise, however: Whether the state has shifted the burden of those duties upon the counties, and, if not, whether, in the exercise of the power whereby it may perform those duties, the state has adopted a mode or method of doing so which is not discountenanced by any of the provisions of the Constitution. In this case, the fundamental proposition upon which the respondent builds up his argument against the constitutional propriety of that provision of the act in question which authorizes the payment of certain sums to the counties for the purpose stated therein is that the state has made it the duty of counties to maintain hospitals for the care, support, and treatment of the indigent sick, and that therefore the burden of supporting such hospitals is upon the counties and not upon the state. The Constitution nowhere places the burden of maintaining, supporting, caring for, and treating the indigent sick upon the counties of the state. The Legislature, however, in the exercise of its duty and power to establish a system of county governments (section 4, art. 11, Const.), has, in fixing and enumerating the powers of boards of supervisors of the counties, authorized said boards to establish and maintain county hospitals, prescribe rules for the government and management thereof, and appoint county physicians and the necessary officers and employees thereof, who shall hold office during the pleasure of the board (Pol. Code, § 4223), to build or rebuild, furnish, or refurnish hospitals and almshouses (Pol. Code, § 4041, subd. 7), and has further provided that the necessary expenses incurred in the support of the county hospitals, almshouses, and the indigent sick and otherwise dependent poor, whose support is chargeable to the county, constitute county charges. Pol. Code, § 4307, subd. 7.

As stated, upon the foregoing provisions of the Political Code the argument is erected that, the state having transferred to counties the duty and burden of maintaining hospitals for the care, support, and treatment of the indigent sick, an appropriation of any moneys from the state treasury for the support of such afflicted persons amounts to a gift, and is therefore in violation of the Constitution, and that the statute in question not only runs up against that inhibition of the Constitution, but violates the other sections of the organic law above referred to for the reasons heretofore stated. There is no doubt that the Legislature, by the legislation above referred to, intended to and did transfer from its own shoulders, and so plac-

ed upon the counties, the duty and burden of caring for, supporting, and treating the classes of persons mentioned. But this does not mean that the state has thus forever surrendered all control over those matters or the right itself to exercise full and complete and exclusive jurisdiction and control over hospitals for the indigent sick and helpless paupers. As before stated, the Constitution does not require this burden to be borne by the counties. The state may so transfer it to counties, however, in the exercise of its sovereignty. As we have seen, counties are mere agencies of the state, the functions of whose organization are, to the extent of the territorial limits of their geographical divisions, concerned with the administration of the general governmental policy of the state, "and are, in fact, but a branch of the general administration of that policy." All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because, as stated, such administration involves, to the extent of the geographical limits of a county, the administration of the affairs and policy of the state. The state may, through its Legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. On the other hand, the state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies; and, in some cases, particularly those having reference to the state's police power, we know of no reason, constitutional or otherwise, why the state and the counties may not act conjointly and synchronously in carrying out the policies of the former. Indeed, an analogy to the latter situation may be found in the matter of the regulation by the state of the right to pursue and kill wild birds and animals. By an act of the Legislature of 1909 (Stats. 1909, p. 663), the authority to issue licenses for such hunting and killing is vested, not only in the state board of fish commissioners, but also in the county clerks of the various counties of the state. The act requires the last-named officials, upon application therefor, to issue such licenses, to receive the fees therefor, to account for the same to the state controller every three months, and pay all sums so received into the state treasury, they (the clerks) to receive as their compensation for the services so performed out of the state "game preservation fund" 10 per cent. of the amounts accounted for. *County of Sacramento v. Pfund*, 165 Cal. 84, 130 Pac. 1041. This so-called "game law" does not, it is true, make the collection of the licenses therein provided for a function of the county or-

ganization. But it is very clear that it does employ a part of that organization's machinery for carrying out its policy with respect to a branch of its own functions, and we doubt not that it could have devolved that duty upon the counties themselves, designating the particular officers thereof to discharge it, and have provided that the compensation for such service should be paid into the treasury of the county from the state fund mentioned in that act, in which case it would not be contended or held, as it has never been contended or held under the provisions of the present game law, that the payment for the service so performed for the state out of moneys in the state treasury would involve a gift of such moneys within the inhibition of section 31, art. 4, of the Constitution or an appropriation or the drawing of money from said treasury in violation of section 22 of said article. The game law, however, as before suggested, stands as a concrete example of the proposition above explained, viz.: That the true purpose of county government organizations is to perform functions which belong to the state itself, and that the latter may employ them, either jointly with itself or alone, as instrumentalities in aid of the administration or the carrying out of its own general governmental functions and policy.

The act in question does not, it seems to us, go any further than the act regulating the right to pursue and kill wild game and animals, above referred to. It does not purport to nor does it involve an appropriation of money for the support or in aid of the support of county hospitals. As a matter of fact, there is no such institution as a county hospital as a separate entity. As has been shown, the Legislature has authorized, or empowered the supervisors of counties to establish and maintain, at the expense of taxpayers of counties, hospitals at which the indigent sick and infirm, otherwise eligible to the public bounty in that particular, may receive proper care, support, and medical treatment. The power to maintain such establishments, like that whereby the counties may build and maintain public roads and highways, or administer public justice, is only a part of the general scheme established by the Legislature, whereby those political subdivisions are required to exercise and perform certain of the functions of the state which the latter, for convenience and economy, has elected to commit to them. As above declared, the state may, if it so elects, assume entire control of the matter of caring for and supporting and administering aid to the classes of persons for whose benefit county hospitals are established and maintained. It has the right and the power to establish and maintain, under its own exclusive control and management, hospitals for such purposes, and so entirely relieve counties of that duty and burden. And, having the right and the power to take upon itself entire responsibility for the support and the treatment of all such persons, it

has the undoubted right and power to take exclusive or only partial control and assume corresponding liability for the care, treatment, and support of a portion or a certain class of such persons, or those only who are afflicted with a particular kind of malady. By establishing state hospitals, under its exclusive control and management, where the insane and feeble-minded are maintained and given medical treatment, the state has exercised this very right and power. And it is in effect what it has done in this case.

Tuberculosis is a deadly disease, fatal almost in every instance, unless, in its earliest stages, its progress is arrested and the tubercle bacilli are destroyed. That it is a contagious disease, or one that is by contact transmissible from a victim of the malady to one not so afflicted, is a thoroughly established scientific fact. By health statistics and data gathered and published by the public health department of the state government, it has been shown that over one-seventh of all the deaths in California, prior to the passage and enforcement of the law here under attack, were caused by this dread and justly dreaded disease, and that, down to the time mentioned, the ratio of deaths from tuberculosis was constantly increasing. Incidentally, it may be observed that, according to verified and authentic statistics gathered and prepared by the same official authority, there has been in California a marked and readily noticeable decrease in deaths from said cause since the passage and enforcement of this statute.

There are still in California, however, as we learn from the official reports of the said health department, large numbers of persons suffering from this deadly disease, mostly in the form of attacks upon the pulmonary organs, very many of whom are without financial means to pay for their own support and medical treatment and without relatives legally liable or financially able to give them support and the care and treatment indispensable in such cases. The existence of such conditions is obviously a positive menace to the health of the inhabitants of the state.

But it has been demonstrated that by special scientific treatment, under favorable sanitary and general health conditions, tuberculosis, when not advanced to its final stages, may be cured, but that, unless such conditions are established and uniformly maintained, the difficulty of securing restoration of the patient, however able, persistent, and scientific may be the medical treatment, becomes in most cases insuperable.

Considering and finding all these facts, as we must assume that it did, the Legislature has adjudged that drastic or at least more than the usual or ordinary precautions taken to guard and protect and preserve the public health should be provided for and taken against the spread of this well-nigh implacable destroyer of human life. That

body conceived, as certainly there was real, substantial, and alarming occasion for conceiving, that measures should be adopted requiring the subjection of the disease to the strictest surveillance, to the end that spread of the disease by the indiscriminate intercommunication of its victims with the public at large might be prevented, and to special medical treatment and scientific nursing, under such scientifically arranged and maintained conditions as the latest and most scientifically conducted investigations and experiments have demonstrated to be all-essential to successful treatment of the malady. The manifest purpose of the statute is therefore twofold: (1) To succor those indigents who are afflicted with tuberculosis and who have no relatives legally liable for their support, maintenance, and treatment, or, if legally liable, having no financial means to discharge the liability; (2) to prevent the spread of the disease.

The state, to attain these ends, has, by the statute in question, and in the exercise of its sovereignty—indeed, in the exercise of its police power—assumed the right and authority to control the matter of the care and treatment of those indigents who are legally entitled to be cared for and treated at public expense, and who are afflicted with tuberculosis; but, in the place of erecting and maintaining hospitals or sanatoria for that purpose in various parts of the state, which it would have a right to do, it has employed the counties, its agents in the administration of certain of its functions of government, as instrumentalities for or aids in controlling and managing that branch of its governmental duties and policy. That this is the true analysis and exposition of the object and intent of the statute in controversy here is evidenced by the provisions that, as conditions to the payment to the counties of the money therein provided for, the latter must establish tuberculosis wards or hospitals in compliance with regulations established by the state bureau of tuberculosis, that the medical superintendent of such wards or hospitals must render, semiannually, to the said state bureau, a report under oath, showing the number of patients in the active stages of tuberculosis legitimately cared for therein at public expense and the number of weeks of treatment of each of such patients, and that the director of the state bureau may have full power to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated, and must prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for food, and such matters of administration as may be designated, etc. The latter provision, giving the state's agents the authority to inspect and investigate private tuberculo-

als hospitals, is indicative of the importance attached by the state to the exercise of special care in the matter of the treatment of tuberculosis and the maintenance of the most favorable sanitary conditions and surroundings wherever victims of that disease may be cared for and treated. The state undoubtedly has the right, under its police power, to adopt sanitary or other appropriate regulations, applicable to the whole state and to private as well as to public tuberculosis sanatoria, looking to the stamping out of the disease and the prevention of its increase, and thus to the protection of the public health. With respect to county tuberculosis wards or hospitals, it proposes by the law in question to do no more than this. In authorizing the payment by the state of the sum named in the act to counties maintaining such wards or hospitals according to regulations formulated and promulgated by its health department, the Legislature did not intend nor was it the object of the act to appropriate the state's money to or for the benefit of counties, but only to facilitate the proper execution of its scheme to control in part or itself supervise the matter of the treatment of indigent tuberculosis patients, legally entitled to be taken care of at public expense. Obviously, the counties, to which these moneys are authorized to be paid, are, as to such money, mere trustees of an express trust, with absolutely no authority or right to divert the use of the same to any other than the purpose or object for which it has been expressly appropriated by the state. As repeatedly herein declared, we can perceive no sound reason for holding that it is not within the competence of the state to enter into such an arrangement with the counties under its broad and comprehensive and essential sovereign power, that power, unhampered by constitutional restrictions, except, perhaps, as to the mode and manner of its exercise, under which the state is not only authorized, but it is its duty, to make and enforce all such reasonable rules and regulations as may be necessary and conducive to the promotion and preservation of the general health, happiness, and welfare of its inhabitants. Thus it is very clear that, in enacting the law with which we are here concerned, and thereby making an appropriation of the state's money for the proper carrying out of the plan therein set forth for the cure and suppression of a dangerous contagious disease, the state has not transcended, but has remained within its rights as a sovereign commonwealth. Thus it does not make a gift of the public money in contravention of the thirty-first section of article 4 of the Constitution, nor appropriate the money of the state to the use or benefit of the corporations or associations or institutions specified in section 22 of said article. Nor, under our view as above set forth as to the nature of the power under which the state

has proceeded in the enactment of the law in question, should it be necessary to suggest that the provision of the last-named section of article 4 of the Constitution expressly authorizing the state to grant aid to institutions conducted for the support and maintenance of certain classes of persons (minor orphans, half orphans, etc.), even when viewed by the light of the rule of construction, "*Expressio unius est exclusio alterius*," does not preclude the state from the exercise of the right to apply its police power on all proper and appropriate occasions, and to pass laws, such as the one before us, whose purpose is to protect the lives, health, and general happiness of its inhabitants. And it is equally patent, for reasons already given, that the act does not authorize the state bureau of tuberculosis or the state board of health to interfere with or supervise counties, their property or affairs. As stated, the supervisory control exercised by the state under the act is over the tuberculosis patients in the hospitals of those counties conforming in their treatment of those cases to the regulations of said state bureau.

It is conceded that the petitioner maintains a tuberculosis ward in connection with its county hospital conforming in all particulars to the rules established by the state bureau of tuberculosis for the regulation thereof.

In accordance with the foregoing views, the demurrer interposed by the respondent to the petition is hereby overruled, and a writ of mandate is hereby ordered to issue out of this court directed to said respondent, commanding him to issue to and in behalf of the petitioner his warrant for the amount named in the petition.

We concur: CHIPMAN, P. J.; BURNETT, J.

Ex parte SMITH. (Cr. 531.)

(District Court of Appeal, Second District, California. March 3, 1917.)

LICENSES § 6(5) — SUBJECT OF LICENSE — "BUSINESS TRANSACTED IN CITY."

For one engaged in carrying passengers between two points, both outside a city, along a route extending through the city, to drive through it, without therein stopping or doing any of the other incidental acts of such transportation, does not constitute "a business transacted and carried on in such city," which under the Charter of Cities of the Sixth Class, section 862, subd. 10 (Deering's Gen. Laws 1915, p. 1123), it may license for purpose of revenue and regulation; but is a mere incident of the business.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6.]

Application by F. L. Smith for writ of habeas corpus. Petitioner discharged.

C. E. McDowell, of Los Angeles, for petitioner. Hartley Shaw, of Los Angeles, for respondent.

SHAW, J. An ordinance of the city of Tropic, which is a city of the sixth class, among other things, contained a provision in effect making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of said city in carrying passengers for hire from one point to another, both of which points are outside the boundaries thereof. Upon a complaint charging petitioner with the violation of this ordinance, in that on November 21, 1916, he did "unlawfully operate a motor vehicle engaged in the business of carrying passengers for hire, which said motor vehicle was then and there operated and run over a particular route and between particular points, to wit, between the city of Bakersfield and the city of Los Angeles, through the city of Tropic and over San Fernando boulevard, a public street in said city, without first paying a license fee and obtaining a license therefor from said city of Tropic, contrary to the provisions of ordinance No. 119 of said city," a warrant was issued upon which he was arrested and held in custody by the city marshal.

Petitioner contends that the provision of said ordinance with the violation of which he is charged is invalid for a number of reasons, chief among which is the claim that a city of the sixth class is not vested with authority to enact an ordinance imposing a tax by license or otherwise upon motor vehicles conducting the business of transporting passengers from Los Angeles to Bakersfield over public highways a small part of which extend through the city of Tropic, where, as here conceded, no stops are made for the purpose of either taking on or discharging passengers in such city, nor any soliciting of business had therein. While under its police power such city may adopt and compel the observance of all reasonable measures intended for the regulation of traffic over the streets by all persons operating motor vehicles thereon, its sole power to levy a tax of this character is found in subdivision 10, section 862, of the charter for cities of the sixth class (Deering's Gen. Laws, Ed. 1915, p. 1123), which provides that the board of trustees of said city shall have power "to license, for the purpose of revenue and regulation, all and every kind of business authorized by law and transacted and carried on in such city or town, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Under this provision the power of the city to impose a license upon a business is clearly limited to that only which is "transacted and carried on in such city." That by virtue of this section the city of Tropic may require persons, companies, or corporations who therein conduct the business

of transporting passengers for hire to be licensed, admits of no question. It is the occupation, however, not an act which is merely incidental thereto, which is subject to the tax. *Merritt v. State*, 19 Tex. App. 435; *Well v. State*, 52 Ala. 19; *Merced County v. Helm*, 102 Cal. 159, 36 Pac. 390. Business is defined as that which occupies the time, attention, or labor of men for the purpose of profit or improvement. *Trustees of Columbia College v. Lynch*, 47 How. Prac. (N. Y.) 273. It may be said to embrace all things necessary to be done to fully accomplish the purpose implied by the undertaking. The business conducted by petitioner, as alleged in violation of the ordinance, is that of transporting passengers for hire, not in the city, but between termini both of which are outside thereof, incidental to, connected with, and as a part of which a number of acts other than transportation, such as soliciting business, taking on and discharging passengers, collecting fares, and caring for their welfare en route, are necessary to be performed. The transportation of the passengers over any particular part of the public highway is one of the incidents of the business, but it no more constitutes the business than does the collection of their fares. Hence it cannot be said that the carrying of passengers for hire from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropic where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business "transacted and carried on in such city." Adopting the contrary view urged by respondent, the conclusion must logically follow that a physician, grocer, plumber, indeed, every one engaged in a professional calling or business in one city, having occasion to make a professional call or deliver goods to a purchaser, to do which required him to travel upon the highways through other cities, could under a like provision of the ordinance to that here involved be subjected to a tax in the guise of a license levied upon the theory that such use of the streets constituted "a business transacted and carried on" in the different cities through which he passed. While the use of the streets may be regulated, the city has no power to convert them into toll roads, and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways.

For the reasons given, the provision of the ordinance in question, for the violation of which petitioner is deprived of his liberty, is invalid. It is therefore ordered that he be discharged from the custody of the city marshal.

We concur: CONREY, P. J.; JAMES, J.

STEWART et al. v. STEWART HOTEL CO.
et al. STEWART ESTATE CO. v. STEWART
HOTEL CO. (DETWILER et al., In-
terveners). (Civ. 1620.)

(District Court of Appeal, Third District, Cal-
ifornia. March 5, 1917. Rehearing De-
nied by Supreme Court May 3, 1917.)

1. CORPORATIONS \Leftrightarrow 80—CAPITAL—CONVEY-
ANCES.

Where a corporation transferred to its stock-
holders a leasehold and personal property, the
conveyance was a transfer of the corporation's
capital or assets within Civ. Code, § 809, which
is equivalent to capital stock.

[Ed. Note.—For other cases, see Corporations,
Cent. Dig. § 162.]

2. CORPORATIONS \Leftrightarrow 186—TRANSFERS—VALID-
ITY OF CONVEYANCES.

Under Civ. Code, § 809, declaring that di-
rectors of corporations must not make dividends,
except from the surplus profits arising from the
business thereof, nor must they create any debts
beyond their subscribed capital stock, nor must
they divide, withdraw, or pay to the stockhold-
ers or any of them any part of the capital stock,
nor reduce or increase the capital stock, but
that nothing shall prevent division and distribu-
tion of the capital stock of any corporation
which remains after the payment of all its debts,
upon the dissolution or expiration of its term
of existence, a corporation, to save itself from
loss, may, in view of section 843, allowing cor-
porations to acquire their own stock under the
assessment scheme provided by law, transfer as-
sets in consideration of a delivery to it of its
own stock.

[Ed. Note.—For other cases, see Corporations,
Cent. Dig. §§ 695-701.]

3. CORPORATIONS \Leftrightarrow 186—TRANSFER OF AS-
SETS TO STOCKHOLDER.

A corporation conducting a successful hotel
business acquired a lease upon other hotel
property and equipped it at a large expense.
The venture proved unprofitable; the second
hotel being conducted at a loss which practi-
cally equalled the profit derived from the first
hotel. Most of the equipment was unpaid for,
and creditors were pressing the corporation,
threatening it with ruinous litigation. There-
upon stockholders of the corporation who own-
ed the demised premises offered upon assign-
ment of the lease and transfer of the furniture
and equipments to surrender their stock and as-
sume all indebtedness incurred by reason of the
equipment of the second hotel. Held that, as
the venture had proved a loss and was threaten-
ing the corporation with ruin, and as the value
of the property did not exceed the amount of
the debts assumed by the stockholders, the trans-
action was not subject to attack under Civ.
Code, § 809, declaring that directors shall not
divide, withdraw, or pay to the stockholders
any part of the capital stock.

[Ed. Note.—For other cases, see Corporations,
Cent. Dig. §§ 695-701.]

Appeal from Superior Court, City and
County of San Francisco; Geo. A. Sturtevant,
Judge.

Suit by Charles A. Stewart and another
against the Stewart Hotel Company and oth-
ers, in which Caroline B. Detwiler and oth-
ers intervened, and, together with the de-
fendant, cross-complained, consolidated with
an action by the Stewart Estate Company
against the same defendants, in which sim-
ilar cross-complaints were filed. There were
judgments for plaintiffs, and defendants and

cross-complainants appeal from the same and
an order denying new trial. Affirmed.

William P. Hubbard, of San Francisco, for
appellants Stewart Hotel Co., Noah W. Gray,
and Charles E. Linzee. Stratton, Kaufman &
Torchiana, of San Francisco, for appellants
Caroline B. Detwiler, De Etta A. Detwiler,
A. K. Detwiler, and J. R. Harrison. Edgar
C. Chapman, of San Francisco, for appellants
J. W. Mason and Rose Mason. Lillenthal,
McKinstry & Raymond, of San Francisco, for
appellant John G. Barker. Brittain & Kuhl,
of San Francisco, for respondents Charles A.
Stewart, Margaret Stewart, and Stewart Es-
tate Co.

CHIPMAN, P. J. The transcript concerns
two actions, commenced in the superior court
of the city and county of San Francisco,
namely, one numbered 39900, Charles A. Stew-
art and Margaret Stewart v. Stewart Hotel
Company et al., and one numbered 39901,
Stewart Estate Company v. Stewart Hotel
Company et al. The actions were consolida-
ted and tried together under stipulation that
the evidence taken should apply interchange-
ably to each of said actions. Both are in
form the ordinary actions to quiet title—the
action 39900 to the title to a certain leasehold
interest in the real estate referred to in and
the subject of the action 39901 and also cer-
tain furniture and equipment constituting
what is spoken of as the hotel plant of the
Hotel Stewart, situated on Geary street be-
tween Mason and Powell streets, in said city.
The controversy is between plaintiffs in both
actions and the defendants, the Stewart Hotel
Company and certain of its stockholders.

The Stewart Hotel Company was incorpo-
rated in June, 1906, for the purpose of con-
ducting a hotel soon after the great fire and
earthquake of April, 1906. The corporation
acquired certain leasehold interests in some
improved lots situated at the corner of
Gough and Eddy streets, in said city. There
were six incorporators, each of whom con-
tributed \$5,000, which appears to have been
the only cash contributions to the corpora-
tion. They were plaintiffs Charles A. Stew-
art and Margaret Stewart, his sister, and de-
fendants John W. Mason, John G. Barker, T.
W. Nowlin, and A. K. Detwiler. Up to Jan-
uary 14, 1908, the Stewart Hotel Company
had issued 6,000 shares of its authorized
capitalization of 7,500 shares of the par value
of \$10 each. The buildings on these lots
were reconstructed and put in condition for
hotel purposes and were opened to the public
under the name of Jefferson Hotel. Charles
A. Stewart was president of the corporation,
and both he and Margaret Stewart were at
all times members of the board of directors
until shortly after May 12, 1908, and jointly
owned 2,000 shares or one-third of the issued
shares of the Stewart Hotel Company. They
also owned a lot on the southerly side of
Geary street, near Powell, upon which they

erected an eight-story building to be known as the "Hotel Stewart." During the progress of the construction of this building the Stewart Hotel Company entered into negotiations with the Stewarts, Charles and Margaret, for a lease of the Hotel Stewart, and in the latter part of September, 1907, the work of installing the furniture and equipment was commenced, and the hotel was opened for business the latter part of November or early in December, 1907. On January 2, 1908, a lease of the Hotel Stewart premises was entered into between the Stewarts individually and the Stewart Hotel Company "for the full term of ten years from and after the 1st day of January, 1908," at the monthly rental of \$3,500, containing the usual covenants found in such leases, and requiring the lessees to furnish a surety bond in the sum of \$15,000 to secure the payment of rents and the keeping of the terms of the lease. The books of the Stewart Hotel Company showed net profits of the Jefferson Hotel as follows: In January, 1908, \$1,566.56; in February, \$2,991.25; in March, \$1,901.37; in April, \$1,474.86. The Hotel Stewart was fitted out at an expenditure of \$106,528.69 on account of which there had been paid by said company, prior to May 12, 1908, as found by the court, "only the sum of \$24,328.12," and that on that date the company was indebted to various creditors about the sum of \$90,000, and, in addition thereto, \$2,000 on a promissory note to Ella R. Ransom and \$3,528.60 to the Stewarts for rent of the Hotel Stewart. It appeared that the Hotel Stewart, to the close of April, 1908, suffered operating net losses as follows: January, 1908, \$5,516.45; February, \$1,864.25; March, profit, \$420.70; April, loss, \$1,369.95. The statement of accounts payable showed an indebtedness at the end of January of \$122,764.88 and at the end of April of \$133,054.13.

The court made the following finding:

"XIII. The court finds that on the 12th day of May, 1908, and for two or three months prior thereto said defendant Stewart Hotel Company owed to W. & J. Sloane Company, one of its creditors, a sum in excess of \$50,000 for furniture and carpets installed in said hotel; that said W. & J. Sloane Company, together with other creditors, had been pressing said defendant Stewart Hotel Company for some months previous for payment of their debts; that said W. & J. Sloane Company had shortly prior to the 12th day of May, 1908, threatened that unless their indebtedness was immediately or quickly adjusted they would institute litigation and either attach all the property of the defendant Stewart Hotel Company or involve it in expensive and ruinous litigation; that defendant Stewart Hotel Company endeavored to raise funds to meet the obligations of said W. & J. Sloane Company, but was unable to do so; that said defendant Stewart Hotel Company endeavored to obtain terms and time from said W. & J. Sloane Company and its other creditors, but was refused any and all concessions or indulgence or additional terms or time or credit; that said defendant Stewart Hotel Company was unable to obtain financial assistance from either its stockholders or from banks in San Francisco."

There had been much discussion in the board of directors as to the financial stress under which the Hotel Stewart was being

operated, and on May 2, 1908, the president called a special meeting at which the minutes show the following, all directors being present except Barker:

"The purpose of the meeting was announced to be for the purpose of considering and acting upon a proposition for the disposal of this company's lease of the Hotel Stewart together with the hotel plant consisting of furniture and fixtures and all personal property, as a whole.

"Charles A. Stewart and Margaret Stewart, as individuals, asked the board if the company would accept a proposition from them to take the Hotel Stewart off the hands of the company and assume all the liabilities of the company incurred in promoting the same, in consideration of \$20,000 of the capital stock of the company held by said Chas. A. and Margaret Stewart to be turned back to the treasury of the company.

"A general discussion of said proposition was had, and the board expressed a willingness to accept such a proposition, substantially as offered, if the details could be equitably adjusted between the parties, and in order to act intelligently it was suggested that the offer be put in writing and submitted to the board. Adjourned.

"T. W. Nowlin, Sec."

The minutes for May 12, 1908, show as follows:

"The board met pursuant to notice, at the office of the company, No. 848 Gough street, San Francisco, Cal., this 12th day of May, 1908, at 8 o'clock p. m. Present: Chas. A. Stewart, president; Margaret Stewart; John G. Barker; John W. Mason; T. W. Nowlin. Mr. Noah W. Gray met with the board. The minutes of the last regular and adjourned and special meetings were read and duly approved. * * *

"The following proposal, in writing, was submitted to the board by Chas. A. Stewart and Margaret Stewart:

"San Francisco, Cal., May 12, 1908.

"Board of Directors, Stewart Hotel Company—Gentlemen: The undersigned, Charles A. Stewart and Margaret Stewart, hereby offer and tender to the Stewart Hotel Company the following proposition: We will take an assignment of the lease of the Hotel Stewart on Geary street near Powell and a bill of sale of all the furniture and fixtures and hotel plant therein, from the company, and in consideration therefor will transfer to the company all of the capital stock which we own in the Stewart Hotel Company, being 2,000 shares of the par value of \$20,000. We will assume and pay all the liabilities incurred and now outstanding in promoting and operating the Hotel Stewart and hold the company harmless therefrom and will assume and pay the note of Ella R. Ransom for the sum of \$2,000. The company to assume and pay all the liabilities incurred and now outstanding on account of the Hotel Jefferson and hold us harmless therefrom, all accounts to be brought up to May 1, 1908, and this offer to take effect as of that date. Very respectfully, Chas. A. Stewart, Margaret Stewart."

"Upon motion of Director Jno. W. Mason and second of Director T. W. Nowlin, it was resolved that the said proposal of Chas. A. Stewart and Margaret Stewart, as submitted, be accepted by this company, and that the president and secretary be, and they are hereby, instructed and empowered to execute on behalf of the company whatever instruments may be required to effect the transfers covered by said proposal, and that the stock received from said Chas. A. Stewart and Margaret Stewart on account of said transfer be turned into the treasury of this company. Said resolution was unanimously adopted by the vote of the directors present, excepting the directors Chas. A. Stewart and Margaret Stewart."

art, who abstained from voting on said resolution. Adjourned. T. W. Nowlin, Secretary."

The transaction was consummated by bill of sale of the furniture and equipment of the Hotel Stewart executed by the corporation to the Stewarts, taking date, however, of May 1, 1908. The bill of sale recited that the conveyance "is made without reservation on the part of said first party [the corporation], but subject to all outstanding claims for the purchase of said described personal property or any part thereof, which said claims the second parties [the Stewarts] have assumed and agreed to pay holding said first party free from all liability therefor." The assignment of the lease declared that it was "intended as a cancellation of said lease and merger of the same in the said parties of the first part therein named [the Stewarts]." The proposition of the Stewarts was that "all accounts to be brought up to May 1, 1908, and this offer to take effect as of that date"; and this was the date at which the relation of the corporation to the business of the Hotel Stewart ceased. At this point it may be stated, as found by the court, that the Stewart Estate Company, plaintiff in action 38901, "since the 30th day of April, 1908, has been a corporation duly organized," etc., and that on May 20, 1908, the Stewarts conveyed to the Stewart Estate Company by grant deed the said lots and hotel buildings on Geary street and the leasehold property. The Stewarts, Charles and Margaret, hold all the stock in the Stewart Estate Company and went into possession and control of the Hotel Stewart at the date of the transfer by the Stewart Hotel Company, and ever since have been in possession and control of said property, receiving to its use the issues and profits thereof. Says the brief of appellants:

"The principal legal question involved is whether the transaction of May 12, 1908, between the defendant Stewart Hotel Company, on the one hand, and the plaintiffs Charles A. Stewart and Margaret Stewart, on the other, while acting as directors and stockholders of that corporation, violated section 309 of the Civil Code."

This section provides as follows:

"The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as herein specially provided. * * * Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

In their answers and cross-complaints it is sought to have the transfer of said lease to the Stewarts declared to be a nullity, that plaintiffs be required to account for the rents, issues, and profits of said real and personal property from the 1st day of May, 1908, for

reasonable attorney's fees, for judgment against plaintiff Stewart Estate Company and the cross-defendants, Charles A. and Margaret Stewart, for the amount found due upon such accounting, and quieting the title of defendants to said leasehold and personal property.

The court adjudged the plaintiffs to be "the absolute owners of the property described in the complaint herein, and are entitled to the exclusive possession thereof," and that "defendants have not, nor has either or any of them, any right, title, interest, or claim in or to the property described in the complaint." Defendants appeal from the judgment and from the order denying the several motions for a new trial.

It becomes necessary to state such further findings of fact as formed the basis of the court's conclusions of law and judgment. We quote from the findings in action 38901. Following finding XIII, above quoted, the court found:

"XIV. The court finds that if attachment proceedings had been instituted by said W. & J. Sloane Company or the other creditors, or bankruptcy proceedings had been instituted by them, it would have involved the defendant Stewart Hotel Company in heavy loss and possible ruin.

"XV. The court finds that on said 12th day of May, 1908, and for some time prior thereto, the lease that defendant Stewart Hotel Company had of said Stewart Hotel property was proving a heavy burden and a liability, which said Stewart Hotel Company was at that time unable to meet."

The court found that at the time the Stewarts' proposal was acted upon all the stockholders of the Stewart Hotel Company were present "save and except (interveners) Caroline B. Detwiler and De Etta A. Detwiler," and as to them the court found that they "had notice and knowledge of said sale of said property and the assignment of said lease and the circumstances surrounding the same, within a short time, not exceeding 90 days, after the 12th day of May, 1908, and that said interveners, Caroline B. Detwiler and De Etta A. Detwiler, did not at any time protest or object thereto and did, by their failure to protest and object thereto, acquiesce in said transaction."

As to the motive for entering into the transaction the court found as follows:

"XXI. The court finds that for the purpose of saving the defendant Stewart Hotel Company from financial loss and ruin, and for the purpose of relieving said Stewart Hotel Company from the burden of the indebtedness incurred in the equipment of the Hotel Stewart, and for the purpose of relieving said Stewart Hotel Company from the burden and liability of the lease held by it, and for the purpose of saving to the defendant Stewart Hotel Company the valuable and profit-paying asset of the Hotel Jefferson, and for the purpose of making said Stewart Hotel Company a going profit-making concern instead of a financially burdened corporation, the proposal made by said Charles A. Stewart and Margaret Stewart, hereinbefore in these findings referred to, was accepted by the defendant Stewart Hotel Company after a full and fair discussion."

Also as follows:

"XXV. The court finds that the consideration paid by said Charles A. Stewart and Margaret Stewart for the conveyance and delivery to them of said hotel plant, furniture, furnishings, and equipment, together with the assignment, cancellation, and surrender of said lease, was a full, fair, and adequate consideration, and was at the time believed by all the stockholders of said Stewart Hotel Company to be such.

"XXVI. The court finds that all the stockholders and directors present at the meeting of May 12, 1908, believed said proposal and its acceptance and the transfers made in pursuance thereof to be for the best interests of the defendant Stewart Hotel Company, and believed them to be absolutely necessary to save said Stewart Hotel Company from serious loss or financial ruin, and they acted upon said belief in accepting said proposal.

"XXVII. The court finds that immediately after the 12th day of May, 1908, there was a complete novation of all the indebtedness of the defendant Stewart Hotel Company arising out of the equipment, furnishing and operation of the Hotel Stewart, by and through which the Stewart Hotel Company was relieved of all of its debts aggregating, as hereinbefore found, more than \$90,000; and said debts were, with the knowledge and consent and ratification of the creditors of the Stewart Hotel Company, assumed by said Charles A. Stewart and Margaret Stewart personally, and were fully paid by them prior to the time of the commencement of this action. * * *

"XXIX. The court finds that the capital stock of defendant Stewart Hotel Company was not reduced or withdrawn or divided or paid over in any manner, or in any sum, by reason of the proposal and acceptance of May 12, 1908, or by reason of the bill of sale, transfer, or delivery of the furniture, equipment, furnishings, and hotel plant, or by reason of the assignment, cancellation, or surrender of the lease or the transfer to the defendant Stewart Hotel Company of said 2,000 shares of stock, and further finds that it was not reduced, divided, or withdrawn in any manner or for any amount, by reason of any fact alleged in any of the pleadings in this action.

"XXX. The court further finds that neither the capital stock nor the assets of said corporation were divided, withdrawn, paid over, diminished or impaired in any manner, and further finds that the leasehold of said Hotel Stewart had no value of any kind."

It was further found that the Stewart Hotel Company continued in business for more than three years after said proposal and agreement, "and no objection was at any time made to said proposal and agreement and the consummation thereof by any of the stockholders of said corporation until the year 1912"; that all the terms and conditions of said proposal and its acceptance long prior to the commencement of this action "were fully performed, kept, discharged and executed"; that all the debts of the Stewart Hotel Company owing by it on May 12, 1908, have since said time and before the commencement of this action been fully paid and discharged; that all of the outstanding stock of said company amounts to 5,660 shares; that there is not now in the treasury of said company the 2,000 shares which were transferred to it by the Stewarts; and that said stock so transferred "has, since the transfer thereof, been in whole or in part reissued by defendant Stewart Hotel Company." It was

further found that the transactions done under the proposal of May 12, 1908, "were not void nor voidable, but that each of them was duly and regularly and legally done without fraud or fraudulent intent and for a full, fair and adequate consideration"; that the Stewarts conveyed said property to the Stewart Estate Company on May 20, 1908; that said company acquired said property "with full knowledge of the facts in these findings made"; and that said conveyance to said company was not made in collusion with said Stewarts or either of them, "nor was it made to defeat the claims of defendants or interveners, or any one else."

[1] It cannot be disputed that in transferring to its stockholders Charles and Margaret Stewart the lease and plant of the Hotel Stewart the directors of the Stewart Hotel Company were disposing of the company's capital stock, that is to say, of its capital or assets. Among the numerous cases cited by appellants as explanatory of the statute are *Martin v. Zellerbach*, 38 Cal. 309, 99 Am. Dec. 365; *Kohl v. Lillenthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Tapscott v. Mexican Colo., etc., Co.*, 153 Cal. 667, 96 Pac. 271; *Schulte v. Boulevard, etc., Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013.

[2] The general rule is so thoroughly well settled that any discussion concerning its application ordinarily would be superfluous. Meeting the position of respondents that the facts here furnish an exception to the rule, appellants say:

"Let it be conceded for purposes of the argument only that the transaction by which a corporation attempts to exchange its assets for certificates of stock held by a stockholder might be beneficial from the standpoint of the corporation; yet nevertheless we insist as a proposition of law that it is no more valid than if such transaction were a detriment to the corporation, for the simple reason that it is a transaction prohibited by statute."

As we view the case, and as appellants seem to view it, this statement presents the principal question submitted for decision. Appellants cite *Martin v. Zellerbach* and *Kohl v. Lillenthal*, *supra*, as decisive of the question. On the other hand, respondents, while conceding the general rule to be as claimed by appellants, contend that, "like all general rules, however, it is subject to certain well-recognized exceptions," which, "instead of weakening or destroying the rule, indicate most clearly the philosophy of it"; that "in this state we have no law in terms forbidding a corporation to acquire its capital stock," i. e., its shares; that "the acquisition by the corporation of its capital stock is not ipso facto void." It is pointed out that the statute (Civ. Code, § 843) provides that a corporation may acquire its own stock under the assessment scheme provided by law; that a corporation may likewise acquire its own stock in payment of a debt owing by a stockholder to it, or to secure it

from loss (*Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476), and it may be compelled to buy back its own capital stock if at the time of its issue it contracted to do so. (*Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. [N. S.] 156, Ann. Cas. 1914B, 1013).

In the *Zellerbach Case*, 38 Cal. 300, 99 Am. Dec. 365, two corporations, the Eureka Lake Company and the Miners' Ditch Company, owning in severalty several water ditches, and having no interests in common, agreed to form a new corporation, to be called the Eureka Lake Water Company, to which each should convey all its property; the stock of the new corporation to be distributed in certain proportions to the stockholders of said two old corporations. The Eureka Lake Company was indebted to plaintiff in the action, who obtained a judgment against it and became the purchaser of its property under execution sale, obtaining the sheriff's deed therefor. Before plaintiff obtained the judgment the defendant recovered a judgment against the new corporation and became the purchaser of the whole of its property upon execution and obtained a sheriff's deed therefor. Plaintiff sued to recover possession of the property which he had bought, and the foregoing facts were set up as an equitable defense. It was the property of the Eureka Lake Company that was in controversy. The court, after saying that the transaction as agreed upon and attempted to be carried out, if effectual in law, would of necessity have resulted in an alienation of the entire property and capital of the Eureka Lake Company, and that not a dollar would have remained to satisfy the demands of creditors, said:

"The contract was that this stock [in the new corporation] was to be issued, and it was afterwards issued, directly to the stockholders of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been that, on the transfer of the property, the Eureka Lake Water Company would pay to the stockholders of the Eureka Lake Company \$100,000 in cash as the price of the property, the legal proposition involved would have been precisely the same as in this case. In either case the consideration would have been paid, not to the trustees, as a fund primarily liable to creditors, but to the stockholders, for their own use."

It will be observed that the point decided was that the shares of the new company representing, as they did, the capital or assets of the corporation, could not be divided or distributed to the stockholders; for it would in effect be a distribution of the capital and was expressly forbidden by statute. The court said:

"We wish it to be expressly understood that our decision is limited to the precise facts, as disclosed by the record. That it may not be regarded as covering broader grounds than intended, we deem it proper here to say that we express no opinion upon the question whether property of the kind in question may be transferred by parol and the delivery of possession,

or whether, if there are two rival corporations, like the Eureka Lake Company and the Miners' Ditch Company, organized for the same purpose of supplying water to a mining region where the demand is limited, which, in consequence of the greater expense of managing the two separately, and the competition, are both doing business at a loss, and are liable to become insolvent, it would not be lawful, in pursuance of their interests, to form a new corporation for the same purpose, and convey the property of both to such new corporation in the manner pursued in this instance, provided the new corporation, as a part of the arrangement, should assume and become obligated to pay all the debts of the old corporation. Such an arrangement might be for the interest of all parties, creditors as well as stockholders, and, if lawful, would be valid as to all. The personal liability of the stockholders in such case would continue, and no property would be withdrawn from liability to the creditors' demands. The prohibition of the thirteenth section of the act concerning corporations is directed against the trustees, and seems designed to protect creditors as such, and also to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends, with a view of holding out the idea that the corporation is more prosperous than it is, for the purpose of promoting some unlawful object. If all parties interested are secured from injury, and the purpose is a lawful one, the object of the provision would seem to be accomplished, and there would be no one entitled to complain. Such a transaction was regarded as lawful in *Treadwell v. Salisbury Manufacturing Co.*, 7 Gray (Mass.) 393 [66 Am. Dec. 490]. But we do not intend to express any opinion on these grave questions now, for no sufficient facts are presented in the pleadings or findings to require it, and we only allude to the questions in order to guard our opinion in so important a case, from misconstruction or misapprehension."

The *Lillenthal Case*, 81 Cal. 373, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, involved a similar question. There two mining corporations, the Head Center Consolidated Mining Company, a California corporation, and the Tranquility Mining Company, a New Jersey corporation, owning contiguous mining claims, formed a new corporation, to which they severally conveyed their mines, the new corporation, called the Head Center & Tranquility Mining Company, paying therefor 100,000 shares of the stock of the new company to each of the two corporations. The case related to the shares issued to the Head Center Company. The ground conveyed by this company to the new company did not comprise all the property of the Head Center Company, and it still continued to carry on corporate business and reducing ores. It was not free from debt, and afterwards levied an assessment and paid up its then existing indebtedness. Its term of corporate existence had not expired, and the company had not discontinued. Plaintiff Kohl and others commenced the action against the Head Center Company and certain of its officers, alleging ownership in certain of the 100,000 shares of the new company so received for the sale of the property of the Head Center Company. Defendants claimed that these shares were the property and assets of the Head Center Company, that the company had no right under the law to dis-

tribute them to its stockholders, and that its directors were entitled to represent and vote them at all meetings of the new company. Plaintiffs had judgment in the lower court, and on appeal the judgment was reversed. Among other things, the court said:

"There is, however, one other fact found by the court necessary to the support of its judgment, if under the law it could be supported at all, but which finding we do not think is supported by the evidence. That finding is that it was 'mutually understood and agreed by and between the stockholders of both the old companies that the stock of the new company should be equally divided between and belong to the stockholders of the old companies.'"

It was not decided that the consolidation was illegal. The point decided was that the stockholders of the old Head Center Company (plaintiffs being such) were not entitled to have their proportion of the stock of the new company distributed to them for the reason, given in the Zellerbach Case, that it would in effect be distributing the capital or assets of the Head Center Company.

So it was held in San Francisco, etc., *R. R. Co. v. Bee*, 48 Cal. 398, 405:

"It was certainly not competent to the members of that corporation to dissipate this fund and place it beyond the reach of creditors by merely going through the process of reincorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and issuing the capital stock in the new corporation to the holders of the capital stock of the old corporation. This transaction involved a breach of positive statute law."

We will next notice two of the many cases cited by respondent.

In *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476, one Baum held a certificate for 60 of defendant's shares which provided that no transfer of the stock would be made on the books until payment of all indebtedness due the bank from the stockholder in whose name the stock might stand. In 1881 Baum transferred the stock to Sather, who on September 13, 1886, demanded the transfer of the stock. Baum was then indebted to the bank beyond the value of the stock. The demand was refused. Soon after Sather died, and in April, 1888, said shares were distributed to plaintiffs in trust under Sather's will. On March 10, 1887, the bank sold and transferred to Greenebaum & Co., at a large discount, the indebtedness held by it against Baum. On July 3, 1888, plaintiffs demanded registry of the transfer of the stock, which was refused unless plaintiffs would pay the balance of its claims against Baum above the amount received from Greenebaum & Co. The action was in trover for the conversion of the shares. Defendant recovered in the trial court, and on appeal the judgment was reversed, and a judgment directed in favor of plaintiffs for the value of the shares at the time the second demand was made and interest from that date. We quote from the opinion:

164 P.—40

"The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, § 359), and hence further that such conversion is legally impossible because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal. *Ex parte Holmes*, 5 Cow. [N. Y.] 426. With the same purpose in view the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiffs, be more obnoxious to public policy than by contract in the case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued. *Cook on Stocks & Stockholders*, § 314; *Morawetz on Corporations*, § 434; *Bank of San Luis, Obispo v. Wickersham*, 99 Cal. 655 [34 Pac. 444]."

The court said it would be legal for a corporation to take the shares of a stockholder in discharge of his indebtedness. Now, the stockholder's liability to the corporation is an asset—an account or bill receivable. If he is solvent and able to pay, the bank would have no more right to exchange this asset for his stock than to buy the stock outright. What the court meant and in fact said was that to save itself from loss the bank might do this, though under a strict application of the rule it would violate section 309 of the Civil Code. In short, here was an exception to the rule.

Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, was a case where, coincidentally with his subscription to the stock of defendant company, a written agreement was entered into between the latter and plaintiff that the company would repurchase the stock subject to the terms stated. The action was on the contract; plaintiff offering and being in a position to restore the shares. Defendant had judgment on its demurrer to the complaint, and plaintiff appealed. The Supreme Court reversed the judgment and ordered that the demurrer be overruled with leave to defendants to answer. As stated in the opinion:

"The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section."

After showing that the phrase "capital stock," as used in the section, means the assets and not the shares, and also pointing out that, "although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts," citing cases, the opinion proceeds:

"In other jurisdictions the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. Cook on Corporations (6th Ed.) § 311. But, in view of the Code provisions to which we have referred, it cannot be doubted that in this state a corporation is not authorized to make such purchase, since the result would be to illegally withdraw, and pay to a stockholder a part of the 'capital stock.' Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (Ralston v. Bank of California, 112 Cal. 208, 213, 44 Pac. 476), but the general rule is, as above stated, that the purchase is unauthorized. Thus this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder the right, upon 60 days' notice, to withdraw from the corporation, and to receive, upon surrender of his stock, the amount paid therefor. Vercoutere v. Golden State L. Co., 116 Cal. 410, 48 Pac. 375."

It would serve no useful purpose to review all of the many cases, English and American, cited by counsel in their elaborate briefs. The entire field of the law upon the question seems to have been swept clean of cases and text-books bearing upon it. The inquiry is simmered down, we think, to the basic question: Does the general rule, as to which there is no controversy, admit of no exceptions? If not, the decision of the lower court was wrong. If the rule admits of exceptions, the question is: Do the facts here constitute an exception?

We need go no further than to *Ralston v. Bank of California*, supra, and *Schulte v. Boulevard Gardens Co.*, supra, to find exceptions to the rule. In the *Ralston* Case the court said:

"If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal."

In the *Schulte* Case, after having stated the general rule, the court said:

"The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss."

What did the court mean when it said that a corporation not only might take its stock in satisfaction of a loan or when otherwise necessary to save itself from loss? We feel authorized to assume that the court meant to say that circumstances might arise other than such as appeared in those two cases where the corporation would be justified in taking over the shares of one of its stockholders, and that each case must be governed by its own peculiar facts; that the general rule, though well settled in this state, is not inflexible and unyielding.

[3] The benefit or loss to the corporation in the present case must be determined from the situation of the parties and the property involved at the time the proposal of the

Stewarts was accepted. The contract was fully executed, and no objection from directors or stockholders was suggested for nearly four years, and then only by the Detwillers, who, the court found, had notice of the contract shortly after it was entered into. And all liabilities existing at that time have been fully paid. Clearly the court, from its view of the contract, did not err in refusing defendants the right to go into the question of the profits and losses to the Stewarts in operating the Hotel Stewart. It is now quite impossible for defendants to place the parties back where they stood in May, 1908, and they do not offer to do so. They say that this is not required of them because the transaction was absolutely void ab initio. What, then, were the facts upon which the learned trial judge based his decision?

Briefly epitomized, the facts were as follows: The Stewart Hotel Company was operating the Hotel Jefferson at a large profit monthly. The net earnings for January, February, March, and April, 1908, amounted to about \$8,000. Believing it could extend its hotel business profitably by operating the Hotel Stewart, it leased the premises from the owners, the Stewarts, and proceeded to equip the hotel at a cost of over \$106,000. It opened the Hotel Stewart in the latter part of November, 1907, and operated it about five months at a loss of over \$8,000. In April, 1908, it found itself indebted about \$90,000 for furnishings, and one of its largest creditors, Sloane & Co., whose claim amounted to about \$50,000 was pressing payment and threatening to close the hotel or otherwise proceed to collect its claim through suit. All efforts to obtain further extension of credit or obtain loans from banks had failed. The corporation also owed the Stewarts one month's rent and \$2,000 on a promissory note past due. In this situation of its financial affairs the Stewarts made the proposal, which was consummated, to take over this lease and to assume the liabilities above referred to and surrender to the corporation their 2,000 shares of its stock, of the par value of \$20,000. These shares were not extinguished nor were they distributed to the stockholders, but were placed in the treasury, and, as the court found, have since that time been "in whole or in part reissued or used by defendant Stewart Hotel Company." The testimony of Mr. Rich, manager of the Palace Hotel, was that the plant transferred to the Stewarts "might possibly have been worth \$70,000." Mr. Woods, manager of the Hotel St. Francis, testified:

"In view of the conditions that obtained at that time, I would place the value of what the equipment cost, less 25 per cent. In other words, if the equipment cost \$106,000, I would deduct from that 25 per cent, and I would call that the value of the entire plant, including the leasehold and everything of the kind."

There was evidence and the court found "that the leasehold of said Hotel Stewart

had no value of any kind." The value of the equipment and the supplies on hand, according to the testimony of Rich and Woods, was several thousand dollars less than the amount of the liabilities which the Stewarts assumed and paid. The books of the company showed liabilities amounting to over \$110,000, while the assets, as testified to by Woods and Rich, had a value of about \$86,000. The Stewarts not only took over and subsequently paid these liabilities, but surrendered their 2,000 shares in the company. Had the Stewarts retained these shares, no possible question could have arisen as to the legality of the transaction; for it was within the powers of the corporation and apparently very beneficial. It is beyond question, too, that in the surrendering to the corporation by the Stewarts of their 2,000 shares the benefit to it was increased to the extent of their value. We cannot see that the transfer of this stock effected a diminution or reduction of the assets of the corporation, nor can it reasonably be said to have been a trafficking or bargaining by the company in its capital stock. The complexion of the transaction must be judged in its entirety. There was no evidence of overreaching or unfairness, no semblance of fraud in the transaction. Mr. Stewart, acting with other directors, made every reasonable effort without avail to obtain extensions of credit or effect a loan to tide over the emergency, and it was only by mortgaging the fee to the real property as well as the personal property that the Stewarts were able to make satisfactory arrangements with creditors. The principal asset of the corporation remaining after the transfer of the Hotel Stewart plant was the Jefferson Hotel, fully equipped and operating at a profit. The company was solvent. Its monthly profits about equaled its losses on the Hotel Stewart. Unquestionably the transaction not only brought a substantial benefit to the corporation, but was "necessary to save itself from loss" and threatened bankruptcy. The corporation relieved itself and its stockholders of a large indebtedness and of a losing venture, and had remaining its only asset of value, which value was increased by taking the Stewarts' shares. Without going further into the surrounding circumstances, we think the facts furnish an exception to the general rule and that the transaction was valid.

Other questions are presented in the briefs covered by the findings, but as all parties seem to agree that the case must turn upon the legality or illegality of the contract between the directors and the Stewarts, our conclusion on the point renders further consideration of the case unnecessary.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

PEOPLE v. SWEETMAN. (Cr. 516.)

(District Court of Appeal, Second District, California. Feb. 1, 1917. Rehearing Denied by Supreme Court April 2, 1917.)

1. BURGLARY \S 41(2)—EVIDENCE—SUFFICIENCY—CORPUS DELICTI.

Evidence which, exclusive of confession of defendant, shows without contradiction that fixtures were taken from premises of owner without his knowledge or consent and were afterwards found installed in another house, is sufficient to establish corpus delicti on a charge of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 95.]

2. CRIMINAL LAW \S 1172(2) — APPEAL AND ERROR—HARMLESS ERROR.

Although it is the province of the court to determine whether a confession should be received in evidence, an instruction that jury should disregard confession if not voluntarily made is without prejudice to one indicted for burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8155.]

3. CRIMINAL LAW \S 1172(2) — APPEAL AND ERROR—HARMLESS ERROR.

Conceding that there was no occasion for the instruction and no evidence showing that accused had stolen property in his possession, an instruction with reference to possession by defendant of stolen property unexplained and the effect of such proof held without prejudice to defendant charged with burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8155.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George Sweetman was convicted of burglary, and appeals from the judgment and an order denying his motion for a new trial. Judgment and order affirmed.

For opinion in Supreme Court denying rehearing, see 164 Pac. 628.

Wm. M. Morse, Jr., of Los Angeles, and S. M. Johnstone, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. The defendant, having been convicted of the crime of burglary, appeals from the judgment and an order of court denying his motion for a new trial.

[1] The subject of the larceny was certain plumbing fixtures, consisting of two laundry tubs and a kitchen sink, which had been installed in a house at No. 1211 North Mariposa street, in the city of Los Angeles, which was owned by the prosecuting witness. The evidence, exclusive of a confession made by defendant, without contradiction shows that the tubs, which were installed upon an uninclosed porch of the house, and the sink installed in the kitchen, the door of which was locked, were, without the owner's knowledge or consent, by some person unknown to him, taken and removed therefrom between 4:30 o'clock p. m. on June 21st and 8 o'clock a. m. the next day. The tubs were found

installed in a house located at No. 803 North Wilcox avenue, in the city, the contract for the installation of plumbing fixtures in which had been let to defendant. This evidence was amply sufficient to show the commission of the crime (*People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649); hence there is no ground for appellant's contention that the court erred in admitting evidence of his confession for the reason that the corpus delicti was not established.

Neither does any ground exist for the suggestion that the confession of defendant was procured by promise of reward or immunity. On the contrary, the evidence conclusively shows that defendant freely and voluntarily, and without menace, duress, or promise of any kind, made and subscribed a written confession wherein he stated that he entered the house at about 8 o'clock p. m. and took therefrom the tubs and sink, which he installed in the other house.

[2] The court instructed the jury:

"That before an admission or confession of a defendant can be used against him as evidence it must appear that the statement was made voluntarily, and not under duress, menace, the hope of reward or the fear of punishment. If you find from the evidence that the confession admitted in evidence was made under the promise of reward, or menace, duress, or the fear of punishment, then you must disregard the confession entirely, and unless you find from the evidence, after disregarding the confession, that the defendant committed the offense charged against him, it will be your duty to acquit."

As an abstract proposition of law, the first sentence of the instruction is correct, but it is the province of the court, not the jury, to determine whether or not a confession offered in evidence should be received or rejected. *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115; *People v. Gibson*, 28 Cal. App. 334, 152 Pac. 316; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. Hence it was error to submit to the jury the question as to whether or not the confession was obtained by promise of reward, menace, or duress, and to submit to the jurors the question as to whether or not it should have been admitted in evidence; for, if not voluntarily made, as determined by the court, it was inadmissible. Conceding the instruction to have been erroneous, in no event could it have prejudiced defendant in his substantial rights. On the contrary, the jury might have overruled the court by finding that the confession was extorted from defendant by unfair means, and in such case, following the instruction of the court, disregarded it entirely, and acquitted defendant for want of sufficient evidence.

[3] Complaint is also made that the court instructed the jury with reference to the possession by defendant of stolen property, unexplained, and the effect of such proof; the objection to this instruction being that there was no evidence showing that defendant had the stolen property in his pos-

session. If it were conceded there was no occasion for giving the instruction, and that there was no evidence tending to show that defendant had the property in his possession, yet the giving of it could not be prejudicial. The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. SWEETMAN. (Or. 2075.)
(Supreme Court of California. April 2, 1917.)
In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

On petition for rehearing.

For opinion, see 164 Pac. 627.

U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People. Wm. M. Morse, Jr., of Los Angeles, and S. M. Johnstone, of San Francisco, for respondent.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District we deem it proper to say that our opinion is not to be taken as an approval of that portion of the opinion which holds that the trial court erred in its instructions to the jury relative to the confession of the defendant. See *People v. Thomson*, 145 Cal. 717, 725, 79 Pac. 435; *People v. Luis*, 158 Cal. 196, 110 Pac. 580; *People v. Profumo*, 23 Cal. App. 378, 138 Pac. 109. The District Court of Appeal was undoubtedly correct, however, in holding that, assuming the instruction to have been erroneous in the respect referred to, the error was not prejudicial.

DEL MONTE RANCH DAIRY v. BERNARDO. (S. F. 6904.)

(Supreme Court of California. April 7, 1917.)

1. **APPEAL AND ERROR** \S 1011(1)—**FINDINGS OF COURT — CONFLICTING EVIDENCE — REVIEW.**

Findings of the trial court, based on conflicting evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3983-3988.]

2. **SALES** \S 52(5)—**FINDINGS OF COURT—EVIDENCE—SUFFICIENCY.**

In an action to recover for breach of contract to deliver milk, in which defendant filed a counterclaim for milk delivered, evidence held to sustain a court finding that defendant sold to plaintiff 320 gallons per day for 13 days at 16 cents per gallon.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 136, 137, 139.]

3. **PLEADING** \S 142—**SUFFICIENCY OF PLEADING TO SUPPORT FINDINGS AND JUDGMENT.**

Complaint having been filed in July, an averment in counterclaim, filed in December, that milk was furnished within two years last past, together with evidence that transaction occurred in June of the same year, is sufficient

as a basis for judgment that plaintiff is indebted to defendant for milk, as against objection that answer failed to state that counterclaim was existing at commencement of action, as required by Code Civ. Proc. § 438, subd. 2, where there was no demurrer to answer, and evidence of delivery and price came from plaintiff's witness without objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300.]

4. APPEAL AND ERROR §1056(4) — EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where court found against plaintiff on the contract set up, exclusion of evidence as to measure of damages for breach was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190.]

5. WITNESSES §275(2)—CROSS-EXAMINATION OF PARTY—SCOPE—ASSIGNMENT OF CAUSE OF ACTION.

Where defendant in his counterclaim relied upon a claim for goods sold, refusal to allow plaintiff to show, on cross-examination of defendant, that claim had been assigned, is reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 968, 974.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Del Monte Ranch Dairy, a corporation, against J. S. Bernardo, in which defendant filed a counterclaim. From a judgment for defendant, and an order denying its motion for a new trial on bill of exceptions, plaintiff appeals, which appeal was ordered to be heard by this court after judgment of the District Court of Appeal. Judgment and order denying new trial reversed as to counterclaim, and affirmed in all other respects, and remanded, with directions.

Robert P. Troy, of San Francisco, for appellant. Randolph V. Whiting, of San Francisco, for respondent.

LAWLOR, J. The appeal was ordered to be heard by this court after judgment in favor of the defendant by the District Court of Appeal for the Third Appellate District. Upon considering the points made by the petitioner, we have adopted the following portion of the opinion:

"Plaintiff charges in its complaint that defendant, on or about April 4, 1910, entered into a contract with plaintiff whereby he 'agreed to furnish to said plaintiff, in the city and county of San Francisco, 360 gallons of pure milk on each and every day of the year immediately following said 4th day of April, 1910'; that, in accordance with said contract, defendant furnished plaintiff with 320 gallons of pure milk for a period of 69 days, commencing on the 4th day of April, 1910, and ending on the 12th day of June, 1910, and that ever since said last-named date defendant has failed, neglected, and refused to deliver any milk to plaintiff, though frequently called upon so to do; that plaintiff has performed its part of said agreement; that plaintiff is engaged in the business of selling and delivering milk at retail in said city and county, and by reason of the said failure of defendant has been unable to supply its customers with milk, and has suffered loss to the extent of \$5,000, which

said sum is due and owing and unpaid from defendant.' A general demurrer was overruled, and defendant answered the complaint, denying 'generally and specially all and singular each and every allegation therein contained,' and for a 'further and separate defense and counterclaim' alleged that within two years last past plaintiff became indebted to defendant in the sum of \$669.76 'for goods, wares, and merchandise sold and delivered to said plaintiff by said defendant, at said plaintiff's special instance and request, for which said goods said plaintiff agreed to pay said defendant the said sum of \$669.76; that, though demand therefor has been made, said plaintiff has refused, failed and neglected to pay said amount to defendant, and the whole thereof is now due, owing, and unpaid to defendant.' Defendant prays judgment for said amount.

"The cause was tried by the court without a jury. The court found as facts: 'That it is not true that defendant entered into the contract as alleged in the complaint; that it is not true that plaintiff has been damaged in the sum of \$5,000, or any other sum, by reason of any failure of defendant to furnish plaintiff with milk; that plaintiff is indebted to defendant in the sum of \$669.76 for milk sold and delivered to plaintiff, at plaintiff's special instance and request, between the 1st day of June, 1910, and the 15th day of June 1910'; that said sum of \$669.76 has not been paid, and the whole thereof is now due, owing, and unpaid 'from defendant to plaintiff' (sic). As conclusion of law the court found that defendant is entitled to judgment against plaintiff for the sum of \$669.76 and his costs of suit. Judgment was accordingly entered. Plaintiff appeals from the judgment, and from the order denying its motion for a new trial on bill of exceptions.

"[1] 'Upon the question of the existence of the contract as alleged in the complaint, the evidence is conflicting. There was evidence sustaining the finding, which, under the familiar rule, we are not at liberty to disturb. There was evidence that the parties entered into an oral agreement by which defendant was to furnish plaintiff with milk to June 1, 1910, at an agreed price, and that all milk delivered to that date had been paid for. There was evidence that after June 1st the price was to be the going market value, but that the agreement was temporary, and for no stated period. Witness Kelly, secretary of plaintiff corporation, testified, 'Mr. Bernardo was supplying that milk at 16 cents per gallon after the 1st of June;' and again, 'I received 32 tanks of 10 gallons of milk each during the time we received milk from Mr. Bernardo; we received these 32 tanks up to the 13th or 14th of June.' Elsewhere he testified, 'Mr. Bernardo sent his last consignment of milk to us on the 13th of June.' The complaint alleges that defendant delivered milk for 69 days from April 4, 1910, which would imply delivery in June to nearly the 13th day.

"[2] 'Appellant claims that the evidence is insufficient to support the finding of the court that plaintiff is indebted to defendant in the sum of \$669.76 for milk sold and delivered by defendant to plaintiff. The evidence might, and perhaps should, have been more specific; but such as it was went to the court uncontradicted, and was, we think, sufficient to establish a sale to defendant of 320 gallons of milk per day, at the rate of 16 cents per gallon, for 13 days—the last consignment being on June 13th, amounting in all, as we figure it, to \$665.60, instead of \$669.76.

"[3] 'Appellant makes the point that the averments in the answer fail to state that the counterclaim was 'existing at the commencement of the action,' as required by subdivision 2, section 438, of the Code of Civil Procedure. The averment was that the milk was furnished with-

in two years last past. The complaint was filed July 11, 1910, and the answer December 19, 1910, and the evidence was that the transaction occurred in June, 1910. There was no demurrer to the answer, and the evidence as to the delivery of the milk and the price to be paid came from plaintiff's witness without objection. Whether viewed strictly as a counterclaim, or as a common count by way of answer alone, as plaintiff claims it is, we think, under the circumstances shown, it was sufficient as a basis for the finding and judgment.

"Appellant makes the further point that the findings are contradictory; the last finding having stated that the amount 'is now due, owing and unpaid from *defendant to plaintiff*.' The findings show very clearly that this is a mere clerical error. * * *

[4] "Appellant reserved exceptions to a large number of rulings on the admission or refusal to admit certain testimony. Substantially all these rulings related to the measure of damages, and had reference to plaintiff's claim for damages arising out of defendant's breach of the alleged contract. The court found against plaintiff on the contract set out in the complaint. The question, therefore, as to the true measure of damages, had the contract as alleged been established, became immaterial. No such contract having been entered into, as the court found, there were no damages to be measured. * * *

[5] It is claimed by the plaintiff that prejudicial error was committed by the trial court in rejecting its offer to prove that the defendant had assigned the claim constituting the counterclaim to one D. A. Curtin, who, subsequent to the commencement of this action, had sued the plaintiff for the amount thereof. It was because of this matter that the order of transfer was made. The defendant appeared as a witness in his own behalf and gave testimony tending to establish his counterclaim. On cross-examination, the plaintiff propounded several questions seeking to elicit that the assignment had been made to Curtin, to which the objection that it was not proper cross-examination was, in each instance, sustained. The offer of plaintiff was thus stated:

"I offer to prove that * * * this witness sold and assigned and transferred a claim against the plaintiff in this action to Mr. Curtin, and that this witness is now attempting to recover in this action as a counterclaim against the plaintiff the very claim that under the oath of Mr. Curtin it appears was sold to Mr. Curtin."

The refusal to allow this line of proof was clearly error, for it was proper, in response to the testimony of the defendant tending to establish his counterclaim, to cross-examine him as to whether he had parted with the claim. The inquiry was material to the issues and proper cross-examination. The assignment was referred to during the trial, and, touching the identity of the counterclaim with the claim sued upon by Curtin, this occurred between the court and counsel for defendant:

"The Court: You admit that the claim is the same?"

"Counsel: Yes; it is an assignment which we will offer in evidence later."

But the assignment was not offered in evidence, and, as we have seen, the plaintiff was not permitted to elicit proof concerning it. The record plainly shows that enough was elicited by one statement of defendant, and the admissions of his counsel, to indicate that an assignment of the claim had in fact been made by the defendant to Curtin. It is true that in the same connection defendant said substantially that the assignment was only for purposes of collection; but if it was absolute in terms, was in fact an absolute assignment, even though the unexpressed purpose was to obtain collection, it of course transferred the claim, and left defendant without any right of action thereon against plaintiff. Clearly, therefore, the plaintiff should have been permitted to show all the facts in this connection, as it endeavored to do. It must be kept in mind, too, that Curtin had commenced an action against plaintiff on this very claim, and that such action was pending, and was in fact being tried at the same time before the same judge, and with a stipulation that the evidence in one case might be considered as evidence in the other. But it is not shown that the cases were actually consolidated. Nor does it appear in the record what disposition was made of the Curtin case by the lower court, or what, if anything, has since become of that case. It seems clear that, if the evidence actually introduced sufficiently showed an absolute assignment, the finding of indebtedness to defendant is not sustained by the evidence, and that, if it does not show such an assignment, the court erred to the substantial prejudice of plaintiff in refusing to allow the showing in that behalf attempted to be made. In either event there must be a reversal as to the alleged counterclaim. It is conceivable that on a new trial such a state of facts may be developed as will warrant a recovery by defendant; but as to that, of course, we cannot now express any opinion.

The judgment is reversed, as is the order denying a motion for a new trial, in so far as the issues made in regard to the counterclaim are concerned. In all other respects the order denying a new trial is affirmed, and the cause is remanded, with directions to the trial court, after all issues regarding the counterclaim are determined, to enter judgment in favor of defendant on the cause of action set up in the complaint, upon the findings already made in regard thereto, and such judgment in regard to the matters set up in defendant's counterclaim as it may conclude to be proper in view of the showing made on the new trial.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

O'BRIEN v. KING. (S. F. 7811.)

(Supreme Court of California. April 7, 1917.
Rehearing Denied May 7, 1917.)

1. LIMITATION OF ACTIONS —24(1)—STATUTE APPLICABLE—"FOUNDED ON INSTRUMENT IN WRITING."

A cause of action is "founded on an instrument in writing," within Code Civ. Proc. § 337, subd. 1, limiting such actions to four years, when the contract, obligation, or liability grows out of written instruments, not remotely or ultimately, but immediately.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112, 115, 117.]

2. LIMITATION OF ACTIONS —25(6)—INSTRUMENT IN WRITING.

An instrument reading, "Received from [plaintiff] * * * \$450 in U. S. gold coin, at 5 per cent. interest," signed by defendant, is an instrument in writing, barred only after four years, under Code Civ. Proc. § 337, subd. 1.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 123.]

3. APPEAL AND ERROR —1011(1)—SCOPE OF REVIEW—FACT FINDINGS.

The trial court's findings of fact, on which the evidence is in sharp and substantial conflict, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

4. WITNESSES —275(5)—CROSS-EXAMINATION —SCOPE—LIMITATIONS.

Where defendant, on direct examination, went into certain matters, allowing cross-examination relating to the same matters did not show abuse of discretion, merely because defendant was thereby confused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 971.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Hannah O'Brien against Jeremiah King. Judgment for plaintiff, with order denying new trial, and defendant appeals. Affirmed.

Rehearing denied; MELVIN, J., dissenting.

F. J. Klerce, of San Francisco (Walter Christie, of San Francisco, of counsel), for appellant. Daniel O'Connell, of San Francisco, for respondent.

SLOSS, J. The appeals in this case were originally taken to the District Court of Appeal for the First Appellate District. There the judgment of the trial court, and its order denying the defendant's motion for a new trial, were affirmed, on grounds stated in an opinion prepared by Richards, J. One of the questions discussed was the validity of the defendant's plea of the statute of limitations. There being some doubt in our minds regarding this point, an order was made transferring the cause to this court for hearing. Upon further examination, we are convinced that the District Court of Appeal made proper disposition of the appeals. While agreeing with all the conclusions reached by Mr. Justice Richards, we have thought it well to

treat the point of the statute of limitations somewhat more fully than he did. With respect to all other subjects the following statement and discussion is taken almost verbatim from the opinion filed in the District Court of Appeal:

In this action the plaintiff recovered judgment against the defendant for the sum of \$450, with interest and costs. The facts of the case, as shown in the plaintiff's proof and as briefly found by the court, are these:

The plaintiff is an unlettered working woman, who had saved up about \$900 by working out. The defendant and one Cain Foley, the plaintiff's son-in-law, were desirous of becoming partners in the saloon business, but had no money. They went to the plaintiff, and persuaded her to let them have \$900 with which to buy a saloon. She had the money in cash, and, dividing it into two piles of \$450 each, delivered one of these to the defendant and the other to Cain Foley, taking from each a separate writing which they prepared in the following form:

"San Fran., June 21st, '11.

"Received from Miss Hannah O'Brien, on June 21st, 1911, \$450 (four hundred and fifty dollars) in U. S. gold coin, at 5 per cent. interest.

Jeremiah King,

"[Signed] "987 Folsom St., San Fran."

The saloon was purchased, but its operation was not a financial success, and the plaintiff, as she testified and as the court found, was not repaid her money. Thereupon she brought suit against the defendant for the sum of \$900. To her first complaint the defendant demurred, both generally and specifically, alleging a number of grounds of uncertainty, most, if not all, of which were good, and which demurrer the court sustained. The plaintiff then filed an amended complaint in three counts, which plunged the nature of the transaction between the parties into still profounder depths of uncertainty than before. The first two counts of this amended complaint were on motion stricken out by the court, which overruled a demurrer to the third count, although the latter was, if anything, more obscure as to the nature of the transaction than the former complaint or the counts which were stricken out of the amended complaint had been. The defendant then answered, and pleaded the bar of the statute of limitations. The case went to trial upon the issues as thus imperfectly framed, and the plaintiff and her witnesses testified in substance to the facts of the transaction as above set forth.

At the close of the plaintiff's case the defendant moved for a nonsuit, which the court refused to grant, a ruling which the defendant now asserts to be one of his grounds of error. Thereupon the plaintiff asked leave of the court to file a further amended complaint to make her pleading correspond with her proofs. The court granted this motion, and this the appellant also asserts was er-

ror. After some further testimony was taken the cause was submitted for decision, and the court presently filed its findings and judgment in plaintiff's favor, and also expressly found that the cause of action was not barred by the statute of limitations.

The first of the appellant's contentions is that his motion for nonsuit should have been granted. This motion was made by the appellant for the reason and upon the theory that, as he says, the action as originally outlined in the plaintiff's first complaint, and as more dubiously shadowed forth in the third count of her first amended complaint, was an action to recover against one of two partners and upon a partnership liability; whereas, the proofs proffered by the plaintiff went to show an individual liability upon the defendant's part. It must be admitted that the plaintiff's pleadings in this regard are pervaded with a degree of vagueness which would have rendered them properly subject to a demurrer upon the ground of uncertainty; but, notwithstanding this, we think that the original complaint and the third count of the first amended complaint do dimly foreshadow the idea that the obligation and liability of the defendant was an individual rather than a partnership one. This being so, we think the court was justified in denying the defendant's motion for nonsuit, and also in permitting the plaintiff to make her proofs and pleadings correspond through the filing at the trial of her second amended complaint. And, for the reasons above set forth, we are also of the opinion that the plaintiff's second amended complaint was not subject to the objection that it set forth a new and different cause of action.

[1] The next contention of the appellant is that the court erred in not finding in his favor upon his plea of the statute of limitations. The loan was made on June 21, 1911. The action was begun on December 20, 1913, more than two years after the accrual of the cause of action. The question is whether the action was brought upon a "contract, obligation or liability founded upon an instrument in writing executed within this state." If it was, the period of limitation was four years (Code Civ. Proc. § 337, subd. 1), and the action was not barred. If it did not fall within this description, the period was two years (Code Civ. Proc. § 339, subd. 1), and the plea of the statute should have been upheld. A cause of action is "founded upon an instrument of writing" when the contract, obligation, or liability grows "out of written instruments, not remotely or ultimately, but immediately." *Chipman v. Morrill*, 20 Cal. 130, 137; *Ashley v. Vischer*, 24 Cal. 322, 85 Am. Dec. 65; *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777; *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; *McCarthy v. M. T. L. & W. Co.*, 111 Cal. 328, 43 Pac. 956; *Thomas v. Pac. Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Scrivner v. Woodward*, 139 Cal. 314, 73 Pac. 863. "A cause of action is not

upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought." *McCarthy v. M. T. L. & W. Co.*, supra.

In *Ashley v. Vischer*, supra, there were two papers signed by the defendant. Action on one was held to be covered by the two-year statute, while the other fell under the statutory provision subsequently carried into subdivision 1 of section 337 of the Code of Civil Procedure. The first instrument read as follows:

"Received of John Morrison, Esq., the sum of two thousand seven hundred and fifty dollars. San Francisco, February 24, 1855.
"(\$2,750.) Edward Vischer."

The holding was that this was a mere receipt for the amount of money specified, and that it neither expressed nor imported any obligation to pay. It was pointed out that "the presumption of law is that money, when paid, is in liquidation of an antecedent debt."

[2] The writing in the present case is more than the mere receipt embodied in the first paper under consideration in *Ashley v. Vischer*. It reads:

"Received from Miss Hannah O'Brien, on June 21st, 1911, \$450 (four hundred and fifty dollars) in U. S. gold coin, at 5 per cent. interest."

The words "at 5 per cent. interest" import into the writing an additional and significant element. The paper is not a mere declaration that money has been received by the defendant from the plaintiff. It embodies the statement that it has been received at a given rate of interest. The reasonable—indeed, the only reasonable—meaning of these words is that the money was received as a loan at the specified interest rate. A loan being established by the writing, a promise to repay is implied by necessary inference of law and fact. Such promise is embodied in the language of the writing, although not expressed in the words "I promise to pay."

It is generally held, in states having statutes similar to our own, that under similar facts the action is covered by the period of limitation applicable to suits founded upon written instruments. Thus, in Indiana, it has been held that an instrument reading: "Received of L. \$1,600, on deposit, in national currency. [Signed] S. Bros."—is a written contract for the payment of money, and that the statutory limitation for actions on such contracts was applicable. *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; *De Vay v. Dunlap*, 7 Ind. App. 690, 35 N. E. 195. The holding was likewise where the instrument read as follows: "Re-

ceived of H. Doane for Samuel A. Reyburn, one hundred and eighty dollars. * * * [Signed] J. H. Casey." Reyburn v. Casey, 29 Mo. 129. "The broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes, or to such instruments as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed." The theory of these cases was that the paper, in each instance, acknowledged the existence of facts necessarily and directly importing the obligation which was made the basis of suit, and this was held to be sufficient. See, also, Sannickson v. Brown, 5 Cal. 57; Ashley v. Vischer, supra.

None of the cases decided in this state, and cited above, will be found to conflict with this view. They all had to do with writings which did not, in and of themselves, express the obligation sued upon, or a state of facts from which such obligation necessarily and directly flowed. In each instance the obligation could be established only by evidence of facts and occurrences outside of those appearing on the face of the instrument. A situation of this kind was in the mind of the court when it said, in *Scrivner v. Woodward*, supra, that "promises merely implied by law, and not supported by any express promise or stipulation in the written instrument, do not fall within the provision of section 337, relating to contracts in writing," and that any language to the contrary in *Ashley v. Vischer*, supra, employed in discussing the second paper there involved, must be disregarded as in conflict with later decisions. We adhere to the declaration that promises "merely implied by law" from a situation evidenced by a writing—i. e., quasi contracts—are not within the statutory provision under discussion. The promise must be one arising directly from the writing itself, and included in its terms. But in determining whether the obligation is "supported by an express promise or stipulation in the written instrument," we must regard, as included in the terms of the writing, all obligations and promises which its words necessarily import. The distinction which we have tried to point out is well stated in *Long v. Straus*, supra, where the court, upon rehearing, discussed the question exhaustively. The following language from the opinion in that case is in point here:

"Where there is an express contract there can be no implied one. An express written contract contains the only competent evidence of the agreement of the parties. There is here an express written contract, and therefore there is no implied one. But this written contract is to be given legal effect, and to give it effect the

courts must consider it as embodying all the legal obligations implied from its language. These obligations, we repeat, are part of the written contract. The law imported into the contract does not create an independent agreement, but makes the instrument express the full agreement of the parties. * * * All contracts have imported into them legal principles which can no more be varied by parol evidence than the strongest and clearest express stipulations. * * * The authorities all agree that the regular indorsement of a promissory note is as perfect a contract as though the liability which the law implies were written out in full. * * * Into the contract before us the law enters and makes it an agreement to repay the money received on deposit. * * * Our conclusion reaches further than that there is an implied promise to pay the depositor his money, for it goes to the extent of affirming that this promise is created by law as an element of the contract, and as such enters into and forms part of the written agreement. We do not regard the promise as an independent one, existing outside of the written contract, but as a promise forming one of the terms of the contract."

[3] The appellant further contends that the evidence is insufficient to support the findings and the judgment of the court. The defendant in his answer to the second amended complaint admits the original indebtedness, and relies upon two defenses—the plea of payment, and the statute of limitations; and as to the first of these the evidence of the parties is in sharp and substantial conflict, and we shall not, for that reason, disturb the findings of the court.

[4] The appellant finally urges that the court erred in permitting the plaintiff's counsel to cross-examine the defendant at great length and with much iteration upon certain immaterial matters which were very prejudicial to him and to his case; but an inspection of the record discloses that this portion of the defendant's cross-examination relates to the existence or nonexistence of certain facts which the defendant had himself put forward in support of his plea of payment of his loan. We think that the court did not abuse its discretion in extending the scope of this inquiry, and that the mere fact that the defendant was unable to extricate himself therefrom with credit would not of itself warrant a reversal of the case.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.

PEOPLE v. RINDGE et al. (L. A. 3752.)
(Supreme Court of California. April 7, 1917.)

1. HIGHWAYS —5—PUBLIC ROADS—PUBLIC USE.

A landowner's use of a beach road within the confines of defendant's property for the purpose of reaching his premises does not establish the beach road's character as a public road any more than his use of a private way.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 6, 7.]

2. DEDICATION \Leftrightarrow 20(5)—WHAT CONSTITUTES —USER OF HIGHWAY.

Where one owning a strip of land along a beach allowed property owners in the vicinity to use the beach as a road according to a custom of the country, there was no dedication of a highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 18, 26, 27.]

3. HIGHWAYS \Leftrightarrow 17 — ESTABLISHMENT — EVIDENCE—SUFFICIENCY.

In a suit to abate an alleged nuisance maintained by defendants upon and across a public highway, evidence held to warrant findings that no such highway had been established.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24.]

Department 2. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by the People of the State of California against May K. Rindge and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Anderson & Anderson, Edward F. Wehrle, and O'Melveny, Stevens & Millikin, all of Los Angeles, for appellants. J. D. Fredericks, Dist. Atty., Hartley Shaw, Thomas Lee Woolwine, Dist. Atty., George E. Cryer, Chief Deputy Dist. Atty., and Haas & Dunnigan, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought to abate alleged nuisances maintained by defendants upon and across a public highway in the county of Los Angeles. The nuisances were gates and fences. The purpose of the litigation is to obtain a decree declaring that a public highway exists through the Malibu ranch along the shore of the Pacific Ocean. The Malibu ranch is about 22 miles long and contains about 13,000 acres. Thus it is quite narrow, varying in width from $1\frac{1}{2}$ miles to $2\frac{1}{2}$ miles. Its length is easterly and westerly. Its southern front is bounded and washed by the waters of the Pacific Ocean. The inland boundary line extends along the southerly slope of a rugged, inhospitable mountain chain, cut by deep ravines and canyons. At the foot of these mountains is a stretch of country narrow and comparatively level and known as mesa lands. The "shore of the Pacific" along which it is declared this highway extends is a shore characteristic of many hundreds of miles of California's littoral. Nearest to the ocean is a gradually sloping sandy beach between the lines of high and low tide. At low tide this beach is uncovered and the sand wet and compacted affords a firm passageway for footmen and vehicles. Above this is a stretch of loose shifting sand, washed and blown above the line of ordinary high tide. This sand is dry, and passage over it, though possible, is difficult. The footman sinks to his ankles, the horse to his fetlocks, the vehicle which he is dragging half way or more to the hubs. Be-

yond this loose sand is a bluff varying in height from 30, 60, to 100 feet. Eroded from this bluff and lying at the foot of it is the talus. This bluff marks the seaward end of the comparatively level mesa lands of which we have spoken. These mesa lands in turn are channeled by ravines or arroyos, in winter carrying the mountain waters down the gulches to the ocean. In summer they are dry. Their banks usually are quite precipitous. The beach, of course, is likewise pierced in places by these short mountain streams, although in summer when these streams are not flowing the ocean frequently restores the sand washed away by the winter torrents. Still further the beach is broken by small promontories and rocky headlands jutting out into the ocean and by rocky outcrops here and there along its line. As is well known to any one at all conversant with the primitive life of California, these beaches afforded the customary routes of travel up and down the coast. They were smooth and level, as compared with the mesa lands, which were cut by numerous gullies, difficult of descent and equally difficult of ascent. Thus travel sought the beach and followed along the line of the hard sand uncovered by the ebbing tide. As a promontory was approached the traveler was compelled to leave the beach, climb to the mesa uplands, cross the promontory, descending to the beach on the further side. Where the winter rains converted the arroyos into torrential streams progress was impossible. When the rising tide covered the hard beach the traveler was compelled to make his laborious way through the soft sands above, or, as was usually the practice, he interrupted his journey and remained where he was until the tide had again ebbed. Little or no construction work was ever done upon these roads, if roads they could be called. The traveler, usually on horseback, when it became necessary to leave the beach, sought the least precipitous place in the bluffs up which he rode or led his horse. Where this was impossible, the earth bank of the bluff was graded down.

Such are the general characteristics of many such ancient shoreways along the Pacific Ocean; such were the general characteristics of this ancient way. In those early days the principal towns or pueblos to the north and west of that of Los Angeles were San Buena Ventura, in Ventura county, and Santa Barbara, in the county bearing the same name. Both of these counties, like the county of Los Angeles, are coast counties. There were several routes of travel between Los Angeles and these northerly pueblos through the mountain passes, in addition to the shore route just described. This shore route, beginning at a settlement on the ocean near the mouth of Santa Monica canyon ran about five miles through another grant, Boca de Santa Monica; then entered

upon the Malibu grant, ran along its coast line, and a mile or two beyond it to a gulch known as Yerba Buena or Little Sycamore canyon, when it struck inland up this gulch and over the mountains and so to the towns in Ventura county. Travel over the whole of this route was possible only to the footman or to the horseman. Wheeled vehicles could not be dragged over it, and indeed there were in those early days but few wheeled vehicles, carretas, clumsy carts with solid wooden wheels, drawn by oxen.

The Malibu ranch was a Spanish grant, patent to which was issued to Matthew Keller in August, 1872. It was, as the foregoing description of its character at once makes plain, a stock range for the pasturing of sheep or cattle, and for this purpose it was used. Some of the surrounding lands were also Spanish or Mexican grants, but to the north of the Malibu was an unsurveyed strip of government land. In some of the upper reaches of the streams leading through the Malibu were small tracts of government land fitted for agriculture, and these were taken possession of by settlers. In the streams were trout, in the valleys quail, in the hills deer, and the country was therefore attractive to the fisherman and hunter. All of these people entering the ranch traveled, as it was necessary for them to travel, along the shoreway above described, until, reaching the gulch or canyon which they desired to ascend, they left the beach and struck inland. At the time when Matthew Keller received his patent and for some time thereafter the only persons actually living on the Malibu ranch were Matthew Keller and his family, with his overseer and vaqueros looking after his stock. Their home was in the Malibu canyon, off from the line of the beach road, which they themselves used in reaching their home. The Malibu canyon was about two miles westerly from the easterly boundary of the ranch. Further to the westward and about three miles from the western boundary of the ranch is Lechuza canyon. In this canyon lived the Tapias family in their adobe home. The Tapias were Spanish. They claimed ownership to a part of the Malibu ranch, and were there living under their assertion of right. Neither they nor their visitors were apparently interfered with by Matthew Keller. From Lechuza canyon eastward to Santa Monica it was possible to drag a carreta, and it had been done from time to time by the Tapias. They left the ranch in 1876. Nor did Matthew Keller's successors interfere with the settlers who used the beach road until they came to their selected canyons, either in their use of the beach road or of the primitive private trails or rough roads which they constructed to reach their locations. Very few of them made a pretense of residing on their selected lands. Nor did he interfere with the travel along this beach road which sought to traverse the ranch en route to Ventura county,

He did, however, interfere with and restrict the use of the ranch, and, to a certain extent, of the road, to fishermen, hunters, and campers, and this because in many instances they killed his cattle, in others they made their camps near the springs which the cattle frequented for water, and so drove them away, and, finally, they occasioned not infrequent and destructive fires. The entry of the settlers came after Matthew Keller's death in 1881.

We have thus fairly epitomized the conditions existing when in 1875 Matthew Keller filed a petition with the board of supervisors of Los Angeles county offering to dedicate a public highway over his lands. This offer, upon which great reliance is placed by respondents, demands, therefore, somewhat detailed consideration. In November, 1875, a petition was filed by Matthew Keller purporting to come from the owners of the lands along the route of the proposed highway, asking the supervisors "to lay out a public road along the beach fronting on said ranches, being the only possible way said ranches can be approached. Said projected road runs for the greater part along the beach of the Pacific Ocean, but at intervals is found impassable by reason of projecting points and rocks that make said highway impassable at high water. The necessity for such a road for the convenience of public travel will be quite obvious to any one authorized to view the same, as well as the nature of the improvements to be made." By way of description the petition set forth that "from the city of Santa Monica the road is a natural road along the beach for a distance of about six miles. The first obstruction to travel commences at the point of an arched rock, within half a mile of the canyon, called Topanga, fronting on the Santa Monica ranch. The other obstructions to the public travel for wagons are found at intervals only between the aforesaid arched rock and the range line between 17 and 18 west township," etc. (this range line runs a little to the west of Malibu canyon where was Mr. Keller's home), a distance of about six miles in length. "This road will connect the city of Santa Monica with an immense body of agricultural and horticultural lands, partly government land, for a distance of twenty miles along the beach, and to fishing grounds of great value to the community. The probable cost is about \$300." This proposed road, as shown by its description, was merely the old beach road which we have described. Viewers were appointed and their report followed. It declared that the road from Santa Monica for a portion of the distance westerly was in good condition. It followed the beach. Certain obstructions were then noted, the necessity in one case of grading from the beach to the mesa lands, in another for blasting out obstructing rock in the line of the beach proper. Arriving at the Malibu ranch, the viewers declare that there are two places along the beach between the easterly line of the

ranch and Malibu lake (at the mouth of Malibu canyon) that need improvement, "and then the passage along the beach from Santa Monica City will be open to travel for a distance of 25 miles, opening thereby a scope of country fit for settlement to the amount of over 4,000 acres. We estimated the whole cost of improvement at \$650 in all so as to make the road passable in all seasons of the year." The report then recommended the adoption of the petition and the immediate improvement of the road as suggested. The field notes accompanying this report showed, as does the report itself, that the doing of no work was contemplated west of Malibu lake. The field notes were carried no further than Malibu lake and concluded, after fixing the easterly line of Malibu ranch, with "and following the beach to the lake in said rancho." The bond accompanying the Keller petition and executed by Keller was conditioned on "the opening of a road from Santa Monica to the rancho Topanga Malibu."

There is one conspicuous infirmity in the Keller petition which impairs its legal effect as an offer of dedication, and that is that his offer contemplates a road from Santa Monica westward to (or through) his ranch. But in fact he did not own the land between the easterly line of his ranch and the town of Santa Monica, and had no authority to offer a right of way as and for a public highway over those lands. Nor yet did the owners of those lands ever join in his petition. But let it be assumed that the offer at least was an expression of willingness and desire upon the part of Matthew Keller to dedicate a public road or highway across his whole ranch; the question remains: What resulted from this? It appears from the report of the viewers that they contemplated only the construction of a way from Santa Monica to Malibu canyon; that this way was to follow the beach, saving in one place where it was necessary to leave it to cross a headland. The projecting rocks in the beach sands were to be blasted out. The talus in some places was to be graded. Something of this work was to be done within the boundaries of the Malibu ranch to the west of Malibu canyon. The major portion of it was to be done to the westward of Malibu ranch. Keller was interested in securing a road on his ranch at least up to Malibu canyon, where the ranch buildings were situated. But nevertheless it is fairly deducible, and the court originally found, that Keller's offer contemplated a beach highway through his ranch, his petition, it will be noted, setting forth the "obstructions to the public travel for wagons," and declared that such obstructions existed only between Santa Monica and Malibu lake. At this time, however, there were no settlers whose rights call for consideration. The entries which they later made upon the public domain did not begin until 1882-1885, after Keller's death. Nor does it appear that the viewers' report was ever adopted, or that

there was ever any formal acceptance of the Keller offer, and the situation thus presented is and can only be that which respondent adopts, namely, that the "offer of dedication contained in the Keller petition was of a road already in existence, used and traveled throughout the entire length of the ranch." Under this view respondent contends that the petition should be regarded rather as one for the improvement of an existing road than as an offer to dedicate a new road.

This elimination of the Keller offer from the consideration of the case leaves it for present purposes as though that offer had not been made; that is to say, we are brought back to a contemplation of the question as to whether or not, within the meaning of our law, there was at the time of Keller's offer, or thereafter, a public highway across the Malibu ranch.

Under the findings which the court originally made and the judgment which it first gave, the existence of such a highway was declared and decreed, the court basing its conclusions, in part at least, upon the fact that this route was a recognized mode of access to the settlements in Ventura and the other northern counties. Upon motion for a new trial the court's views suffered a modification in that it granted the motion as to the existence or nonexistence of such a highway from the westerly line of Malibu to Lechuza canyon, where the Tapias formerly resided. It denied the motion as to the remainder of the asserted highway, and from its order this appeal is taken.

Matthew Keller, as has been said, died in 1881. In 1874 Louis Sentous was on the ranch as foreman and overseer. In the following year he leased the ranch, and he and his brother remained as tenants for 17 years. There were no settlers upon the government land to the north and west of the ranch until after Matthew Keller's death. This is conceded. The Tapias had departed, and, aside from the occasional traveler who passed along the beach and through the rough trail over the Ventura mountains, travel on the beach road there was none, saving that which pertained to the operations of the ranch and the activities of hunters and fishermen, who were, of course, either licensees or trespassers, with rare visits from peace officers in pursuit of offenders against the law. Moreover, no change was made in the road. No public improvements of any kind were constructed. Whatever may have been done to facilitate access to the ranch houses in Malibu canyon was done by the owner and his tenants, Louis Sentous, testifying as to road conditions west of Malibu canyon as late as 1879, when he as tenant controlled the ranch, tells that he was assisting in establishing windmills which he had ordered at certain places on the ranch. He says:

"From Malibu canyon and Ramirez canyon [some six or seven miles westward from Malibu canyon] we traveled on the beach, and at Ramirez canyon the vaqueros assisted with their lar-

ists in pulling the wagon up the bluff. There was a trail on the mesa which we followed wherever we could, but at places it was too steep to follow. A man went ahead on horseback and picked the way for us. This is the first and last trip I ever made with a wagon beyond Malibu canyon. Before that time I had never seen a wagon traveling beyond that canyon, but I have seen them since. During those early years I did not see any travelers on the ranch. We gave strict orders not to allow any one to go through there without permission either from Mr. Keller or ourselves. I know the order was carried out. Those orders were given a few years after I rented the ranch upon receiving information that some cattle had been shot by hunters."

In 1882 Guthrie and Harris, coming over the Ventura mountains, located on government land west of the Malibu. In 1884, three years after Matthew Keller's death, they drove a wagon across this beach road from Santa Monica, and thereafter went back and forth on several and perhaps numerous occasions. While Keller was alive his tenant, Sentous, asked him if he might prevent strangers from going onto the ranch, and was told that he could do so. He asked because he had heard something about a county road, but "Keller told me that nothing had been done in the way of an agreement between himself and the county. I told him I was going to stop people passing through, and he said that I might do so."

Neither during the period of the Sentous tenancy nor thereafter, when the title to the ranch passed by purchase to Mr. Rindge, whose widow is the defendant in this action, was there any interference (saving as hereinafter noted) with the use of the beach road by the settlers upon the government domain and those who had business with them. After 1884 a number of locations were made upon the government lands. It is within the facts to say that the public had absolutely no use for this beach road, since it led to an impasse in the Ventura mountains, saving as that public was represented by these settlers. The conduct of the owners of the Malibu was certainly not unneighborly, since they freely allowed these settlers the use of this beach road, and, more than that, permitted them to construct their roads and trails from the beach road over the lands of the Malibu to their locations on the government land to the north. The first of these settlers beginning at the westerly line end of the ranch were Harris and Guthrie. To make possible a means of communication between their lands to the west of the ranch and the town of Santa Monica, and thus to avoid the necessity of crossing the almost impassable Ventura mountains to the north, they did some work of grading in the arroyos, barrancas, and canyons on the western part of the ranch, and in 1884, for the first time in its history, they drove, as has been said, a two-horse wagon from Santa Monica to their locations. They lived upon their claims until the year 1900, when they sold to Mr. Rindge, the then owner of the Malibu. Thereafter there was no location and no set-

tler on the lands immediately to the west and to the north of the westerly end of the Malibu. In 1886 one Sweeney made his location on government land in the upper reaches of Nicholas canyon, some two or three miles east of the westerly line of the ranch. He sold to Nicholson, and in 1904 Nicholson's holdings passed by purchase to Mr. Ringe. There has since been no occupancy nor need of use for this beach road by any person west of Encinal canyon. Between Encinal canyon and Nicholas canyon lies Lechuza canyon, but, as has already been said, the Tapias, there located, moved away in 1876, and there has been no settlement in Lechuza canyon, either on or off the ranch. In 1886 Marion Decker located upon a claim in Encinal canyon immediately to the north of the line of the ranch. He came to his location over the Ventura mountains. After establishing himself he built his private road down the canyon to the beach road. Decker retains his holdings, and is one of the principal witnesses for the plaintiff in its contention for a public highway. Decker testifies to the purchase by Mr. Rindge, beginning in 1895, of the settlers' claims until by 1901 "there were left only myself and Drake."

[1] Decker's road to the beach road was unquestionably a private way, constructed with the acquiescence of the owners of the Malibu, and his use of the beach road to Santa Monica would no more establish its character as a public road than would the use of his road from his claim to the beach road fix the character of that as a public highway. *United States v. Rindge* (D. C.) 208 Fed. 611. Las Trancas canyon lies a little over three miles east of Lechuza canyon, at which latter canyon, under the order granting a new trial, the public highway in the present state of the record now ends. Claims were taken up in this canyon by two men, who, in turn, sold to Mr. Rindge. The testimony of Mr. Decker is that there are claims on government land in Escondido canyon, which lies approximately half way between Lechuza canyon and Malibu canyon, owned by Schumacher, Mellus, Gillis, and Diss, and that they have done some work constructing a private road from their claims to the beach road. No one of these presented himself as a witness in the case. It appears, then, that even before the commencement of this action Decker and Drake were the only two persons who had any use for the beach road, and the contention of appellant is that the use which they have made and are making of it is precisely the use which they have made and are making of the private road from their claims to the beach road—a permissive use for a private way under the sanction of the owners of the ranch.

Appellants further rely upon the failure of the county of Los Angeles ever to declare this road a public highway, or ever to exercise any dominion or control over it, or ever to expend any money in its maintenance, care or betterment. It was not declared a public

highway by the court of sessions under the statutes of 1850 (Stats. 1849-50, p. 200). It did not become a public highway under the provisions of the act of 1855 (Stats. 1855, p. 192), which declares public highways to be those so designated by the court of sessions or board of supervisors, or which may be hereafter so declared by the board of supervisors. Nor yet did it become a public highway by virtue of the provisions of sections 2618 and 2619 of the Political Code as they read when that Code took effect in January, 1873. Nor, finally, did it become a highway by virtue of the special road laws applicable to the county of Los Angeles, found in the statutes of 1877-78 (Stats. 1877-78, pp. 6 to 17), both of which acts contemplate that the supervisors, before any such road shall be or be decreed to be a public highway, shall "cause said roads to be properly located and declared as public or county roads," and in this connection reference also is made to section 2621 of the Political Code, which declares that "no route of travel used by one or more persons over another's land shall hereafter become a public road or way by use, or until so declared by the board of supervisors, or by dedication by the owner of the land affected."

The testimony of the settlers, whose occupancy of the government lands began about 1884, is to the general effect that they were not disturbed by the owners of the Malibu ranch in their use of the beach road; that in many places it was, of course, no road at all. The settlers themselves, for their own convenience, made improvements in the natural conditions where it was necessary to leave the beach. The mesas were not cultivated, and one could drive over them at pleasure. "In the early years there was nothing but a bridle trail. We drove where we pleased. There was no injury done. We first found a road or way marked by wagon tracks west of Encinal canyon about 1888 or 1889. During the early years we traveled practically all the way from Malibu to Ramirez on the beach. Whatever patches of road there are which are not in hard sand have been built since that time. There were miles of the way along the Malibu ranch where, during the time we lived there, the only convenient way to travel was where the sand was made hard by the water." Such, and much more to like effect, is the concurrent evidence of plaintiff and defendants. It is to be noted that all such parts of the road as ran along the beach between high and low tide—and this was much the greater part of it—was not on the ranch at all. It was on tidelands owned by the state. These natural conditions, with the slight improvement which the settlers made in them for their own convenience, continued until after Mr. Rindge acquired title to the ranch and in 1894 erected gates—one at the easterly entrance to the ranch, the other at Malibu canyon. From the first Mr. Rindge insisted

that there was no public way upon the ranch; that the road was only a private road, permission to use which had been accorded to the settlers. He gave to them keys to the locked gates. They, or some of them, insisted that the road was a public highway, and, being advised by their attorneys that the acceptance and use of keys might militate against this position, they caused Mr. Rindge to be cited before the board of supervisors for obstructing a public highway, the citation being that Mr. Rindge show cause "why a certain gate described in said summons should not be removed from an alleged public highway." Mr. Rindge at this time had spent large sums of money in building a road from the eastern boundary of his ranch to Malibu canyon. He made answer that the gate which he was maintaining was on this privately constructed and privately owned road. He conceded the existence of the beach road as a public highway from the eastern boundary of the ranch "to a point on the beach opposite the Malibu lagoon." He declared that none of the neighbors "had ever been hindered or their friends from passing through, and many privileges had been given them." The result of the hearing under this citation was most inconclusive and unsatisfactory. No official action was taken by the supervisors other than an indefinite continuance. It is asserted by plaintiff that this indefinite continuance was the result of a compromise agreement by which, in effect, Mr. Rindge admitted the road through the ranch to be a public highway. On behalf of the defendants it was stoutly insisted that his admission went only to the road from the easterly line to Malibu canyon, and that under this admission he ceased to lock the gate at the entrance to the ranch, but maintained a locked gate at Malibu canyon. He persisted in this for some time, and the settlers, upon the other hand, broke the lock and frequently destroyed the gates. He posted signs and warnings at and near the gates. He published similar warnings in the newspapers. The form of such signs and notice was:

"No passing through the Malibu ranch is allowed. No camping thereon under penalty of the law. Shooting and hunting forbidden."

Mr. Rindge, and Mrs. Rindge after him, continued these interruptions and protests with pertinacity until finally this action was brought.

[2] It is manifest that, if a public highway exists at all, it exists by prescriptive user, and not by official acceptance of an offer of dedication, nor by any official recognition of the existence of the highway. Indeed, it is quite plain that any county would be extremely slow to take into its charge and burden itself with the care of such a strip of ocean beach, which from the very nature of the country would have slight use and less value. In opening the water front of their ranch to the travel of foot and horsemen the

owners were but following the custom of the country. When that travel of necessity sought the mesa uplands, it would have been unneighborly to the last degree to have checked it or turned it back, and the owner's failure to do so no more established an intent to dedicate a public highway than would his reception and entertainment of such a traveler overnight have established his intent that he should take up a permanent residence with him. Dedication under such conditions is not to be lightly inferred. *Harding v. Jasper*, 14 Cal. 642; *Cerf v. Pfeigling*, 94 Cal. 131, 29 Pac. 417; *Niles v. City of Los Angeles*, 125 Cal. 572, 58 Pac. 190. It is quite understandable that the settlers, upon the one hand, because their passage was not interfered with, may have come to the conclusion that they were traveling as of absolute right over a public way, but their belief is not at all inconsistent with the position and proof of the defendants that throughout the history of this primitive trail it was but a private way, which developed into a more or less efficient road, in the construction of which the public took no part, and the burden of which construction was largely borne by the owners of the ranch, the settlers, for their own manifest advantage, contributing some of their labor.

[3] It follows herefrom that the findings of the court decreeing the existence of a public highway across the Malibu ranch cannot be sustained, and that the order refusing to grant defendants' motion for a new trial must be reversed. In this connection it is to be noted that the Rindges had constructed upon the uplands and away from the tidal beach a new road to Malibu canyon. Apparently it is conceded that the beach road as far as Malibu canyon is or may be regarded as a public highway. But this admission or concession will not justify in and of itself a finding or declaration that the newly constructed private road is a public substitute for the original beach road.

The order denying a new trial is reversed.

We concur: MELVIN, J.; LORIGAN, J.

In re WALDEN'S ESTATE. (L. A. 5105.)
(Supreme Court of California. April 12, 1917.)
EXECUTORS AND ADMINISTRATORS vs. 216(2)—
CLAIMS—COSTS—"PARTY INTERESTED."

In a succession controversy, an attorney for litigants claiming heirship, who by the final decree were denied participation, was not a "party interested" in the estate, and could not recover against the estate for the costs and attorney's fees in attempting to establish heirship, though their witnesses gave testimony aiding in reaching the decree for distribution in favor of a particular set of claimants, under Code Civ. Proc. § 1720, or any other statute.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 757.

For other definitions, see *Words and Phrases*, First and Second Series, *Party Interested*.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding in the estate of Matilda Walden, deceased, wherein Elon G. Galusha, for William Latimer and others, filed a claim for costs. From an order disallowing the claim, claimants appeal. Affirmed.

Elon G. Galusha, of Los Angeles, for appellants. Neighbours, Hoag & Burke, C. White Mortimer, Mott & Dillon, Ball & Ball, and Trusten P. Dyer, all of Los Angeles, for respondents.

PER CURIAM. Upon the death of Matilda Walden, intestate, a controversy over kinship and heirship to her and the consequent right of succession to her estate arose. There were three sets of claimants, who for convenience may be designated the *Monro* claimants, the *Latimer* claimants, and the *American* claimants. The contest was decided in favor of the *Monro* claimants to the exclusion of the *Latimer* and the *American* claimants. From the decree determining heirship against them, the *Latimer* claimants appealed and were unsuccessful on their appeal. *Estate of Walden*, 166 Cal. 446, 137 Pac. 35. The result of necessity was that the decree determining heirship in favor of the *Monro* claimants became and is final and conclusive. Thereafter and in the matter of the estate of Matilda Walden, Elon G. Galusha filed a petition and claim which he entitled "claim against the costs of administration of the estate of Matilda Walden, deceased." His petition and claim asserted that he is the attorney at law for the *Latimers*, and presents to the administrator of the estate "his claim against the costs of administration of said estate; and states that the testimony of the witnesses produced by the defendants *Latimer* have materially contributed to the finding by the court that *Martha Monro* and her sister's children are entitled to the estate of the decedent." The petition and claim proceeded further to expound that the *Latimers* expended about \$2,000 in securing the attendance of witnesses upon the trial of the contest to determine heirship, and that the testimony of these witnesses was valuable to the *Monros'* case; still further, that his own services to the *Monros'* case were worth about \$6,000. He then demanded payment to him of this sum. The court refused to entertain the petition, refused allowance to the claim, and this appeal followed. The bare statement of the facts above given demonstrates the correctness of the court's determination, and before this court the case presents rather one for the imposition of costs for the taking of a frivolous appeal than for the allowance of the costs contended for.

This claim is presented in his own name and on his own behalf by the attorney for

litigants claiming heirship, whose heirship by final decree has been conclusively denied. This attorney is not a "party interested" in the estate (*Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; *Estate of Kruger*, 143 Cal. 141, 76 Pac. 891), nor are the Latimers, the unsuccessful claimants to heirships, parties interested in the estate (*Estate of Blythe*, 108 Cal. 125, 41 Pac. 38; *Estate of Walden*, supra). Upon the merits, the curious contention is advanced that the estate of Matilda Walden, deceased, became liable for these costs and these attorney's fees incurred by the unsuccessful litigants because the evidence which they produced and the services which this attorney rendered aided in defeating the claims of the American pretenders. If this be so, it forms no just basis of any legal claim under section 1720 of the Code of Civil Procedure, nor under any other provision of the law. And if these Latimers have any equitable standing it cannot in the nature of the case arise from any service which they rendered to the estate of Matilda Walden, deceased, but solely from the services which they may have rendered to the Monro claimants to that estate. If such services were in fact rendered, under convention or agreement of the parties, the claim, whatever may be its validity, is no more than a private demand against the Monro heirs. So plain must this be that it would be a waste of time to continue the discussion.

The order appealed from is affirmed.

In re MARX'S ESTATE. (S. F. 7623.)

(Supreme Court of California. April 7, 1917.
Rehearing Denied May 7, 1917.)

1. WILLS §221—REVOCATION—EXECUTION OF LATER WILL.

A later will, containing no express revocation of the earlier, but disposing of the entire estate, revokes the earlier.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457.]

2. WILLS §183—REVOCATION—EXECUTION OF LATER WILL—INVALID PROVISIONS.

Where testatrix made two wills, but the later did not revoke the earlier expressly and contained charitable bequests in excess of one-third of the estate, and the excess was sufficient to pay all bequests of the first will not repeated or cut off in the second, both instruments would stand as the will, and the invalid bequests of the second would be applied to the valid gifts of the first, and any balance would go as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 461.]

3. WILLS §183—REVOCATION—EXECUTION OF LATER WILL.

Invalid dispositions in a subsequent will do not revoke valid dispositions in the earlier will, not expressly revoked, and are ineffective for any purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 461.]

4. WILLS §221—PROBATE—TWO INSTRUMENTS.

Where a later will is probated, and thereafter an earlier will is discovered, but the valid provisions of the two do not conflict, the probate of the later will should not be revoked, since, so far as it is valid, it is conclusive, and the earlier will should be admitted only when invalid provisions of the later would, in the absence of earlier, permit partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539-541.]

Angellotti, C. J., dissenting.

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Proceedings in the estate of Johanne Augusta Emily Marx, deceased. From an order admitting two instruments to probate as the last will of deceased, Stephanie Henke, a niece, appeals. Affirmed.

Rehearing denied; ANGELLOTTI, C. J., and HENSHAW, J., dissenting.

Wm. Loewy and Walter Loewy, both of San Francisco, and Wallace Rutherford, of Napa (Garret W. McEnerney, of San Francisco, amicus curiae), for appellant. Clarence N. Riggins and U'Ren & Beard, all of Napa (Edmund Nelson, of San Francisco, amicus curiae), for respondent.

SHAW, J. The record presents an appeal by Stephanie Henke, a niece of the decedent, and her only heir at law, from an order admitting to probate, as constituting together the last will of the decedent, two documents testamentary in character, executed at different dates.

The decedent died on May 14, 1914. One of the documents in question was dated March 8, 1910, the other March 26, 1913. The latter was found immediately after her death, and, on petition of the persons named therein as executors, was duly admitted to probate on June 8, 1914. Several months after their appointment as executors, upon examining the other papers and effects of the decedent, they discovered the document dated March 8, 1910. Being in doubt whether the document of 1910 constituted a part of the will of the decedent, or was revoked by the will already admitted to probate, they filed a petition, upon which the order appealed from was made, alleging the probate of said will of 1913, the subsequent discovery of the will of 1910, together with the other facts made essential by the Code to a petition for the probate of a will, and praying, in the alternative, that the two documents be admitted to probate together as the last will of the decedent; or, that the will of 1910 be admitted as the last will, or that the will of 1913 alone be declared to constitute the will; also that if the court found that the will of 1910 constituted any part of the will of the decedent, it revoke the order previously made admitting the will of 1913 to probate. Upon the hearing of this petition the court made an order declaring that the decedent left

the said two wills dated, respectively, March 8, 1910, and March 26, 1913, that they together constituted the last will of the decedent, and admitting the same to probate as such last will. The order also declared that the previous order of June 8, 1914, admitting to probate the document of March 26, 1913, alone, as the last will of the decedent, "be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

The will of 1913 contained no declaration as provided in section 1292 of the Civil Code revoking the will of 1910. The appellant contends that it was wholly inconsistent therewith, and consequently operated as a revocation by implication, under the rule prescribed by section 1296 of the Civil Code, which is as follows:

"A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[1] The authorities support the proposition that a later will containing no express revocation of former wills, but which, in fact, disposes of the entire estate, leaving nothing upon which the former will could operate, is, in effect, a revocation thereof. If the later provisions were carried out it would consume the entire estate, and the prior will could have no effect. On this point Mr. Jarman says that in all cases where a later will is adequate to the disposition of the entire property of the deceased the case "rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first." 1 Jarman on Wills (6th Ed.) *138; other authorities to the same effect are Page on Wills, § 269; 1 Underhill on Wills, § 251; 1 Redf. on Wills, *362, *365.

[2] The respondent in answer to this proposition presents the point that although the dispositions of the will of 1913, if carried out literally, would consume the entire estate, yet that because of the fact that the charitable gifts therein far exceed one-third of the estate, there is a considerable portion thereof which is not lawfully disposed of because of the invalidity of the disposition as to such excess, and, consequently, that the rule that a later will adequate to the complete disposition of the estate revokes a prior will does not apply. The facts support this contention. The gifts to charitable uses in the will of 1913 amount to \$113,610. The value of the estate as shown by the appraisal filed was \$149,141.68. One-third of the estate would, therefore, be \$49,713.89, and this is the full extent of the valid charitable gifts. The gifts not charitable amount to \$61,018.40. As the valid gifts of this will, therefore, amount to \$110,732.29, the balance of \$38,409.29 remains undisposed of by that will. The gifts of the will of 1910 to persons

who are not mentioned in the will of 1913 amount to only \$25,100. The balance undisposed of by the will of 1913 would therefore satisfy the dispositions of the will of 1910, if the respective dispositions of the two wills are not to be cumulated, and the two wills may be probated together, under this theory, without any complications arising from the overdistribution of the estate.

[3] The authorities support the proposition that an invalid disposition in a subsequent will does not operate to revoke a disposition in the prior will, and is ineffective for any purpose. In *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193, the testatrix having only a restricted power to appoint by her will the persons to take under her husband's will, executed a will containing a lawful exercise of the power. Afterwards, by a codicil, she attempted to declare a different appointment as to one share by giving it to persons who were not within the class to which, by the terms of the power, she was confined. The court said:

"A revocation of an earlier disposition of a will by a later one, or by a codicil, is never anything but a rule of necessity, and it operates only so far as is requisite to give the later provision effect. But no revocation could give effect to this codicil."

And, referring to the fact that the later disposition of the codicil was invalid, it further said:

"No violence is done to her intention if, that failing, the disposition of her will is suffered to stand; for I deem it beyond a reasonable doubt that if she had known what we now know, that an appointment to the daughter's children was not within her authority, she never would have made it, but would have suffered the disposition of her will to remain."

So in *Altrock v. Vandenburg* (Sup.) 25 N. Y. Supp. 851, the testator had devised his land to his son for life with remainder to his son's children. The son died, and he then, by a codicil, devised the land to the same children, but in a manner which was void, being in violation of the law of New York against perpetuities. The court held that the codicil did not revoke the former devise of the remainder in fee, saying:

"It would be strange, indeed, if a wholly inoperative attempted disposition should nevertheless have the effect of destroying a prior valid devise, especially when, as in this case, it is apparent that the testator did not wish to die intestate as to his real estate, and that, if he had known he could not lawfully make the disposition last attempted, he would have been content with the first."

The case is analogous to those where a testator, having made a will and desiring to make a new one, cancels the first will preparatory to making the second and thereafter fails lawfully to execute the same or makes therein an invalid disposition of his property. In such cases it is held that the attempted cancellation of the old will is ineffectual because the full intent is wanting, it being conditional upon the execution of a

valid new will. Mr. Underhill, on this subject, says:

"It will be presumed (and the presumption is sanctioned by reason and good sense) that the testator meant the cancellation to operate as a revocation only in the event of the will which he had intended to make being valid. If, therefore, he is prevented from executing any will, or the one he intends to make, or if he executes a will which turns out to be invalid, the will which has been revoked will revive." 1 Underhill on Wills, § 252.

It will perhaps be more accurate to say that the prior will does not revive, but that the attempted revocation will be deemed ineffectual.

These principles apply to the present case. The prior will can be deemed to have been revoked only by reason of the fact that the subsequent will is wholly inconsistent therewith, and would be a revocation if it were effectual to the disposition of the entire estate. But it appears that a large portion of the dispositions made is invalid, and by reason of that invalidity the entire estate is not disposed of. The will of 1913 is inadequate to the disposition of the estate, and to that extent it is not inconsistent with the prior will. Consequently, it is not wholly inconsistent therewith, and does not completely revoke it. It is not necessary upon this consideration of the case, and hence it would be improper, to determine to what extent the legacies given in the prior will are revoked, or whether they are revoked at all by legacies given to the same legatees in the subsequent will. The court below did not err in admitting the two wills as constituting together the last will of the decedent.

[4] The appellant further contends that the portion of the order purporting to vacate the order of June 8, 1914, admitting the will of 1913 alone to probate, and vacating all proceedings thereunder, is erroneous. This contention, we think, is well taken. After a will has been probated and another paper of an earlier date is found which constitutes a part of the last will of the decedent, together with that already probated, it is not necessary to revoke the former order of probate. A different question would be presented if the earlier will had been the one first discovered and probated. In that case, the later will, if admitted to probate, would partially supersede and revoke the prior will if inconsistent in part only, or wholly revoke it if entirely inconsistent. Within the year from the first probate, the later will could be offered for probate in connection with a petition to revoke the probate of the earlier one, if it was inconsistent therewith, on the ground that the later will substantially affected the validity of the will probated, as provided in subdivision 4 of section 1312, Code of Civil Procedure. Code Civ. Proc. §§ 1327, 1328, 1329, 1330. After that period perhaps the probate of the earlier will would be conclu-

sive so far as it disposed of the estate. Code Civ. Proc. § 1333; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. The present petition was filed within the year, and therefore the precise question last mentioned does not arise. Nor is there a question presented affecting the validity of the will of 1913 already probated. That will is the later will. If it lawfully disposed of the entire estate, it would be the only valid will. So far as it does so, it is final and conclusive against any prior will; it cannot be affected thereby. The will of 1910, when probated, takes effect and can take effect only because the will of 1913 is not effective to dispose of the whole estate, and it takes effect only upon property not disposed of by the will of 1913 and as to which that will left the decedent intestate. The will of 1913 must stand unaffected, and must prevail over that of 1910, in any event. It was therefore unnecessary to revoke the probate of the will of 1913 and immediately readmit it to probate. And as rights may have accrued under the proceedings taken in the meantime, it was improper to vacate the previous proceedings. The proper practice was to admit the earlier, but later found, will to probate, as constituting, so far as may be, a part of the decedent's last will. Proceedings already taken would remain effective so far as rights may have vested under them. The facts stated in the petition showed no cause for the revocation of the former probate and did not require or justify the issuance of the citation required by section 1328, Code of Civil Procedure, where a petition to revoke the probate of a will is filed. The part of the order appealed from purporting to revoke the previous probate of the will of 1913, and vacating the proceedings had under the previous order of probate, should not have been inserted therein. This conclusion, however, does not render it necessary to reverse the entire order. All that need be done is to modify it by striking out the objectionable portion. It is therefore ordered by this court that the order appealed from be modified by striking therefrom the following words:

"That the order made and filed herein on the 8th day of June, 1914, admitting the document dated March 26, 1913, to probate alone as the last will and testament of said deceased and appointing Percy S. King and J. E. Beard (also known as Edgar Beard) as executors thereof, and ordering that letters testamentary be issued to them without bonds be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

And that as so modified the order be affirmed; appellant to recover costs of appeal.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.

I dissent: ANGELLOTTI, O. J.

In re STONE'S ESTATE.

GREEN v. STONE.

(L. A. 4955.)

(Supreme Court of California. April 13, 1917.)

1. WILLS \S 360—WILL CONTEST—ASSERTING NEW GROUND OF RELIEF.

Where the sole question was whether the will was the product of undue influence, the contestant could not on appeal raise the question whether the will was duly and formally executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 825.]

2. JUDGMENT \S 282 — ENTRY — REQUISITES — SIGNATURE OF JUDGE.

Where a will was contested on the ground of undue influence, the mere fact that the judgment and order admitting the will to probate was signed by a judge other than the one who presided at the trial was not fatal, since the judge who signed could conceivably have heard proof of execution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 554-556.]

3. WILLS \S 164(7) — PROBATE — EVIDENCE — ADMISSIBILITY.

In a will contest on the sole ground of undue influence, evidence as to the soundness of mind and sanity of the deceased was properly excluded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 414.]

4. WILLS \S 324(3)—PROBATE—DIRECTION OF VERDICT.

Where on the first appeal the evidence was held insufficient to warrant denying probate, and the contestant on the second trial introduced no further evidence, direction of verdict for the proponent was proper.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 769.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Proceeding by Fannie E. Stone for the probate of the will of John Newton Stone, deceased, contested by Leo Stone Green and another. From a judgment on directed verdict for the proponent, contestant appeals. Affirmed.

See, also, 161 Pac. 258.

Ingall W. Bull, of Los Angeles, for appellant. Kemp, Mitchell & Silberberg and Hartley Shaw, all of Los Angeles, for respondent.

PER CURIAM. This is the second appeal in the contest of Leo Stone Green over the admission to probate of the will of her deceased father. The decision of this court upon the first appeal will be found reported in 172 Cal. at page 215, 155 Pac. 992. There the verdict of the jury finding that the will was the product of undue influence exercised over the husband by his wife was reversed as unsupported by the evidence. A second trial was had, a jury was impaneled, and after trial the court instructed the jury to return its verdict in favor of the pro-

ponent of the will. The jury did so, and from the judgment which followed this appeal has been taken.

[1] The propositions advanced upon appeal will be considered seriatim. The first of these is that the evidence fails to show that the will was ever executed by the deceased in the manner required by law. Sections 1308, 1315, 1318, Code Civ. Proc. The sole question before the court and jury in the trial of the contest was as above indicated, whether or not the will (the due execution of which for the purposes of the contest was thus admitted) was or was not the product of undue influence exerted upon the mind of the testator. The record upon this appeal therefore does not disclose, as it would not be expected to disclose, the proceedings in probate touching the due execution of the will. They may either have preceded or may have followed the determination of the contest. In either case they had no place in this record, and appellant's argument as directed to this point is frivolous. Estate of McCarty, 58 Cal. 335; Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233.

[2] It is said in appellant's brief that the judgment and order admitting the will to probate was signed by a judge other than the judge who presided at the trial of the case. Conceding this bare statement of fact to be true—and the brief contains nothing more than this bare statement of fact—it does not follow that this was error or even irregularity. It is quite conceivable, for example, that after the determination of the contest the purely formal evidence in proof of the due execution of the will was heard by another judge sitting in probate, in which case it would have been strictly regular for that judge to have made the final order admitting the will.

[3] It is said that it was error for the court not to submit to the jury "the question of the soundness of mind and sanity of the deceased." But the contestant at the opening of the trial formally abandoned the ground of contest based upon insanity, and declared that there was only one question at issue—the question of undue influence. Still further it is said that the court erred "in excluding testimony regarding the mental condition of the deceased at the time the will was made." But for the reason just above indicated the ruling was strictly proper.

[4] It is finally said that the court erred in directing a verdict. But, as the contestant is not at the slightest pains to show wherein the evidence differed in any respect more favorable to contestant's view from the evidence which had been admitted on the previous trial, which had been passed upon by this court and which had been held to be insufficient, we are bound to conclude that contestant's failure to point out by reference

to the transcript of evidence any specific instance of such difference is a confession that the difference itself does not exist.

The decree appealed from is therefore affirmed.

MERRITT v. MERRITT.

(Supreme Court of Nevada. May 4, 1917.)

DIVORCE \S 124 — BONA FIDE RESIDENCE — EVIDENCE.

Evidence in a suit for divorce held sufficient to establish plaintiff's bona fide residence within the state, though she admitted she was living at a hotel and owned no property within the state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 392-398, 450, 455, 456.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

On rehearing. Former opinion reversing the judgment of the court below adhered to.

For former opinion, see 160 Pac. 22.

M. B. Moore, of Reno, for appellant. Hoyt, Gibbons & French, of Reno, for respondent.

McCARRAN, C. J. On petition of amici curiae in behalf of the district court of the Second judicial district, we granted rehearing in this matter, in order that there might be presented any matter which we inadvertently or otherwise overlooked on the original hearing.

On the former consideration of this case (Merritt v. Merritt, 40 Nev. —, 160 Pac. 22) we reversed the judgment of the trial court, on the rule as settled by this court in the cases of Tiedemann v. Tiedemann, 38 Nev. 501, 137 Pac. 824, and Presson v. Presson, 38 Nev. 203, 147 Pac. 1081; and to these authorities might be added Aspinwall v. Aspinwall, 40 Nev. —, 160 Pac. 253, Harvard Law Review, February, 1917, p. 391.

Counsel in their petition say:

"We believe that no matter of law has arisen in this case upon which there is any difference between this court and the court below. Both courts entertain the belief, in harmony with the doctrine of both the Tiedemann and Presson Cases (38 Nev. 501, 137 Pac. 824, 38 Nev. 203, 147 Pac. 1081), that bona fide residence is just as essential where the length of residence, as in this case, is not important, as where the length of residence is important."

Continuing, they say:

"If, then, an inspection of the evidence in this case fails to disclose that the plaintiff was a bona fide resident, it would follow that one essential was missing, and that the court was therefore justified in finding that 'the proof submitted is not sufficient to give the court jurisdiction.'"

Our inclination is rather to affirm our former judgment without extended comment; but we deem it not inadvisable here to refer to the evidence as presented in this case as to the bona fide residence of appellant. In her complaint for divorce she alleges:

"That plaintiff resides in the city of Reno, county of Washoe, state of Nevada."

In testifying as a witness in her own behalf at the original hearing, the record discloses the following:

"Q. You may state your name. A. Evelyn Woods Merritt. Q. Where do you reside, Mrs. Merritt? A. Reno, Nev. Q. Whereabouts in Reno? A. At the Riverside Hotel."

By the testimony of H. H. Clark it was disclosed that appellant had been a resident of that establishment since January 16, 1916, and continuously thereafter to and including the date of the trial in the court below.

On the hearing in the lower court and after the suggestion of the trial court to the effect that he had very serious doubts as to the jurisdiction of the court in the matter, the appellant was again interrogated, and testified:

"Q. Have you any other home, or claim any other home or residence than in the city of Reno? A. No."

Following this, the court interrogated as follows:

"Q. Do you own any property in Reno? A. No. Q. In the state of Nevada? A. No. Q. Have you any business or profession or anything that engages your attention here at the present time or since you have been here? A. No; I simply live here."

On being further interrogated by her attorney she testified:

"Q. Just one question: Your income is derived from what source principally, Mrs. Merritt? A. Several mortgages, and some bonds. Q. And some stocks? A. Bonds. Q. And when you have been in New York and other sections of the country, where have you lived, at hotels, or have you had a home? A. I have lived at hotels always."

Whatever may have been in the mind of the trial court from which he could arrive at the conclusion that there was a lack of jurisdictional facts presented, the record fails to disclose other than a bona fide residence within the jurisdiction. The trial court apparently took the witness in hand, and her answers in response to his interrogatories were to the effect that she lived at a hotel in the city of Reno; that she owned no property in Washoe county nor at any other place within the state. Neither of these facts would to our mind indicate anything militating against the bona fides of her residence within the state. The time was when hotels and inns were not regarded as permanent places of abode, but in this modern day and age no such intimation or presumption is justified. So far as the showing made in the court below was concerned, the facts disclosed were sufficient, in our judgment, to warrant the court in assuming jurisdiction and rendering the decree prayed for. Both parties were before the court. Service of summons was made within the county. The facts presented in the court below, as disclosed by the record, sustained the allegations in the complaint of appellant, and it is our judgment that the court should have as-

sumed jurisdiction and should have rendered the decree of divorce.

In the case of *Aspinwall v. Aspinwall*, supra, we reasserted the rule that the question of residence is one that may depend on the act and intention of the party seeking to establish the same.

There was nothing disclosed by the testimony of the appellant, neither was there anything indicated by her acts or conduct, as we find them, that would go to say that her residence in the county was other than bona fide, and certainly nothing to justify an inference contra.

The judgment of the lower court is reversed, with instructions to that tribunal to enter the decree of divorce as prayed for.

It is so ordered.

COLEMAN and SANDERS, JJ., concur.

PARKER v. DE BERNARDI. (No. 2242.)

(Supreme Court of Nevada. May 3, 1917.)

1. MARRIAGE §20(2) — COMMON-LAW MARRIAGE.

As the common law prevails in Nevada with reference to the marriage relation, that relation may be formed by words of present assent, and without the interposition of any person lawfully authorized to solemnize marriage, or to join persons in marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 13.]

2. TRIAL §253(8) — COMMON-LAW MARRIAGE — INSTRUCTION.

In an action for restitution of real property, in which the defendant alleged that he was the plaintiff's husband and that the property was community property, an instruction that, as the relationship existing between the parties in another state prior to their taking up their abode in Nevada was illicit and meretricious, that relationship must be by the jury presumed to continue illicit and meretricious throughout all the time plaintiff and defendant continued to live together, unless by a preponderance of proof a valid marriage contract was actually made and actually entered into between the parties within Nevada, was erroneous, as taking all force and effect from evidence in the case tending to establish a marital relation between the parties during their residence in Nevada.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 620.]

3. MARRIAGE §40(4) — COMMON-LAW MARRIAGE — PRESUMPTIONS AND BURDEN OF PROOF.

Where cohabitation between man and woman was illicit in the beginning, though burden of proof is upon those asserting a valid marriage, there is no presumption that the relationship continued to be illicit, it being a matter of proof, and not of presumption, and a valid marriage under the common law may be shown by proof that the parties sustained toward each other the relation of husband and wife after the impediment to their marriage had been removed; the only presumption to be indulged in being in favor of a valid marriage, which may be based on continuous cohabitation alone.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 61, 62.]

4. MARRIAGE §51 — COMMON-LAW MARRIAGE — QUESTION FOR JURY.

While prostitution or immorality might militate against the presumption of a legitimate common-law marriage, such facts are for the jury to consider under proper instructions, since, even though the woman were a prostitute, if a marriage of the highest and most sacramental order had been performed between the parties, it would have had no more binding effect than a common-law marriage per verba de presenti, actually consummated.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 90.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by Constance E. Parker against Rick De Bernardi. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, with instructions to grant a new trial.

James T. Boyd and Roy W. Stoddard, both of Reno, for appellant. M. B. Moore, of Reno, for respondent.

McCARRAN, C. J. Some time during the year 1899 the appellant, Rick De Bernardi, and respondent, who in this action styles herself "Constance E. Parker," took up life together in the city of San Francisco, state of California. Respondent was at that time, according to the record, the wife of one Parker. She was then conducting a place of business in the city of San Francisco. Appellant testifies that it was a rooming house; respondent unblushingly declares it was a house of prostitution. Some time during the year 1900 respondent here secured a decree of divorce from her former husband, Parker. Following this, appellant contends and testifies that they agreed to live as man and wife. The agreement in this respect, if such there were, was after the granting of the interlocutory decree of divorce by the California court, and before respondent had secured her final decree from that tribunal.

In June, 1904, respondent came to Reno, Nev., and, as far as we are able to learn from the record, immediately entered into the business of conducting a house of prostitution in the restricted district of that city under the name of "Hazel Ward." In the year 1906 appellant disposed of his business in San Francisco and came to Reno, Nev.; and, from all that we can learn, the relationship that had theretofore existed between appellant and respondent continued. Some time during the year 1906 appellant purchased, in his own name, a tract of land west of the city of Reno, and within the year following constructed on this tract a house which has since borne the name of "Rick's Resort" or "Rick's Roadhouse." In the construction and furnishing of this house many thousands of dollars appear to have been expended. During the year 1908 appellant made a deed conveying the premises to Constance E. Parker.

This action was commenced in the lower court by respondent, under the name of Constance E. Parker, for the restitution of the premises and for damages for rental and profits thereof. Appellant here, defendant in the court below, by way of answer and defense, alleged that the parties were husband and wife, and that the plaintiff's name was Constance De Bernardi; that the deed from appellant to respondent was without consideration; and that the property in question was community property. A verdict being rendered in favor of plaintiff, and an order denying a new trial being entered, appeal is taken from the judgment and order.

Many assignments of error are submitted to this court for consideration; but, in view of the issues presented, we shall confine ourselves to the alleged error of the trial court in giving certain instructions to the jury. The instructions complained of read:

"The court instructs the jury that marriage may be implied or inferred from cohabitation, when the cohabitation is not illicit in its origin; general reputation among the acquaintances of the parties; their treatment of each other; their speaking of and addressing each other as husband and wife; acts, sayings, and conduct which have a natural tendency to show the existence of the marriage relation.

"You are instructed that cohabitation, illicit in its origin, is presumed to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

"You are further instructed that, if you find from the evidence that the plaintiff had another husband living at the time the plaintiff and defendant commenced to cohabit and occupy the same room in the city of San Francisco, and that the relation of the plaintiff and defendant continued, without any change in the condition or cohabitation of the parties, and that their declarations as to their being married and being husband and wife referred to their cohabitation in San Francisco and at a time when they could not lawfully marry, and not to any marriage contracted after the plaintiff's divorce from her former husband, Parker, then you should find that there was no marriage between plaintiff and defendant.

"You are further instructed that, unless you find that the marriage was in fact entered into and consummated between the plaintiff and the defendant in conformity with the provisions of the laws of the state of California, as hereinbefore defined, and proved in this case that the marriage testified to have existed between the plaintiff and defendant in the state of California, does not constitute a valid marriage, and that no obligations can be held to exist between the plaintiff and defendant from such relations in that state, and that such relations were in fact illicit and meretricious, and are presumed by law to have continued to be so illicit and meretricious throughout all the time plaintiff and defendant continued their relations to each other, unless the proof shows by a preponderance thereof and to your satisfaction that a valid marriage contract was made and entered into between the plaintiff and defendant in the state of Nevada."

[1] We dwell especially upon what we deem to be the error in the last paragraph of the instructions quoted. In the first place, under the law of this state as it has been construed by this court, it is not necessary, in order to constitute a valid marriage, that any ceremony should be performed by any person, or any ceremony had before any person. This court, in the case of *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800, set this question at rest, and held that, as the common law prevails in this state with reference to the marriage relation, that relation may be formed by words of present assent, and without the interposition of any person lawfully authorized to solemnize marriage or to join persons in marriage.

It must be borne in mind that the defense interposed by appellant here in the court below was the marriage relation existing between himself and plaintiff, and his right to possession of the premises in question was based primarily upon the fact, as alleged, that the property was the result of the joint efforts of the parties. The court by this last instruction told the jury in effect that, inasmuch as the relationship existing between the parties in the state of California prior to their taking up their abode in this state was illicit and meretricious, that relationship must be by the jury presumed to continue illicit and meretricious throughout all the time plaintiff and defendant continued to live together, unless by a preponderance of proof a valid marriage contract was actually made and actually entered into between the parties within this state. The force and effect of the language of the trial court, broad and sweeping as it is, was probably lost sight of by the court itself; otherwise, it would not have been couched in such language. The illicit and meretricious nature of the relationship of the parties in the state of California must under this instruction be presumed by the jury to continue, unless the proof established a valid marriage contract made and entered into between plaintiff and the defendant in the state of Nevada. Indeed, if this instruction were given its full force and effect—and the jury is presumed to give full force and effect to every instruction of law—a marriage ceremony performed between these parties in the most sacred tabernacle, by the highest prelate of some constituted church, under license issued in conformity to statute, would be unavailing, if perchance that ceremony were performed in a state other than Nevada. Undoubtedly this was not the intention of the trial court; but the instruction was given to the jury, and we have no right to say that the jury looked upon it in any other sense than that conveyed by the specific language employed.

[2] The instruction given by the trial court in this instance to our mind swept away the force and effect of all of the evidence in this

case going to establish a marital relation existing between the parties. But it did more than that. It struck down that principle of law of which the jury should have been advised by proper instruction, and which principle seems to have been deep-seated in the minds of all writers and jurists when dealing with matrimonial relations from very early times in the law's making. "Semper præsuntur pro matrimonio" was expressive of a doctrine in the early writings of the common law. Indeed, this expression we find made use of in all the ancient discussions bearing upon marriage relation to such an extent that it gained the dignity of being termed a maxim. "Every Intendment of the law leans to matrimony," says Mr. Bishop in this work on Marriage and Divorce. Continuing, the learned author observes:

"When a marriage has been shown in evidence, whether regular or irregular, and whatever the form or the proofs, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. So that this issue cannot be tried like the ordinary ones which are independent of this special presumption." 1 Bishop on Marriage, Divorce and Separation, 957.

This prescription of the law by Mr. Bishop is, as we will later have occasion to cite, supported by eminent writers on the subject from the pioneer days of the common law to the present time.

It is the contention of respondent in the case at bar that, in view of the relationship existing between the parties in the state of California prior to their coming into this state, this instruction was properly given. It is needless to observe that the relationship of the parties in California, at least prior to the time at which the respondent here secured her final decree of dissolution from her former husband, was meretricious and illicit. Respondent contends that not only is this condition presented by the record, but the relationship existing between the parties is made further illicit by reason of the habits and life of the parties themselves, in this: That respondent, while living in the state of California, and indeed during her residence in Nevada, was for a part of the time, at least, the mistress in a house of prostitution, and that the relationship existing between the parties was nothing more than that usually existing between a prostitute and her paramour.

Whatever there may be of merit in the contention of respondent, there is another phase to the case as presented by the record, and one which appellant here was entitled to have fully considered by the jury under proper instructions. The cohabitation or relationship entered by the parties in the state of California was, according to the testimony of appellant, that of husband and wife. He says they there agreed to live together

as such. At that time he was engaged in the hack business in San Francisco, and she conducted a rooming house. Whatever the relationship may have been in California, it was continued after the parties came to this state. The impediment which prevented a legal marriage between the parties in California was removed after the final decree of divorce was granted to respondent in California and after they had taken up their abode in this jurisdiction.

During their cohabitation in this state, certain things appear to have transpired between the parties which to our mind went a long ways toward establishing the marriage relation, and which, were it not for the erroneous instruction, the jury would undoubtedly have regarded as constituting marriage between the parties. The parties here lived together at and in the premises here in question from 1907 until 1911. A daughter of respondent lived with them during a part, if not all, of that time. During a part of the time, an adopted infant, Roy De Bernardi, was maintained and cared for by the parties as their own child, at and in the premises in question. On September 26, 1907, appellant and respondent, as man and wife, executed an instrument of mortgage to the Washoe County Bank, of Reno, Nev., by which instrument the very premises here in question were pledged as security to the bank for a loan of \$7,500, and to which instruments the respondent here signed her name "Constance De Bernardi"; and the notarial acknowledgment to the instrument recites that:

"On the 26th day of September, in the year one thousand nine hundred and seven, * * * personally appeared Rick De Bernardi and Constance De Bernardi, his wife, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they each executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Constance De Bernardi was by me made acquainted with the contents of said conveyance, and she acknowledged to me, on an examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same."

On January 4, 1908, the parties here executed, as man and wife, another mortgage, to Frank Bros. Company, a corporation of Washoe county, by which instrument they pledged certain bar fixtures and appliances in the saloon known and called "Rick's Resort," and other personal property at or about the same place, to which instrument of mortgage the respondent again signed her name "Constance De Bernardi." It appears from the record that on November 30, 1906, and while the parties were living together at Rick's Roadhouse, or Rick's Resort, respondent and appellant instituted proceedings in the district court of Washoe county for the adoption of a child. An excerpt from the petition of the parties in the adoption pro-

ceedings is found in the record and reads as follows:

"That your petitioners are anxious and desirous of adopting the child, Edwin Baker Freeman, as their own, to have said child sustain toward each other the legal relation of parent and child, and said child to have all the rights, including the right of maintenance, protection, education, and inheritance, and be subject to all the duties of that relation, and that the natural parents of said child be relieved of all parental duties toward and all responsibilities for said child and have no right over him."

And another excerpt from the same instrument reads:

"We promise and agree to properly raise, educate, maintain, and care for the said Edwin Baker Freeman as our own child, and to always keep him in the best of surroundings and the best of associations and to comply with the adoption laws of the state of Nevada in each and every respect."

To this instrument we find respondent and appellant signing their respective names "Rick De Bernardi" and "Constance De Bernardi." Pursuant to the proceedings for adoption of the child, it appears that the district court granted the prayer of the petitioners, and the child was thereafter known as "Roy De Bernardi." A significant thing appears in the record in connection with this adoption proceedings, in the form of a post card, which, according to the testimony of respondent, was mailed by her at Stanwood, Wash., while she was visiting with her relatives at that place, on which post card, addressed as it is to "Mr. R. De Bernardi, Reno, Nevada, Box 132," we find the salutation, "Dear Papa." Then, following a scribble, which according to the testimony of respondent was made by the child, we find the words "Love, Roy."

It appears that in 1908 the parties visited the home of the parents of respondent in the state of Washington; that on the occasion of their visit to her father's home there was a family gathering, at which respondent's father, step-mother, brothers, and other members of her immediate family were present. Testifying as to this incident, respondent says:

"Q. Who introduced Rick to the other members of the family? A. Well, I guess I did. Q. How did you introduce him? A. As my husband. Q. As your husband? A. Yes, sir. Q. And if I understand you correctly, you agreed here to go up there and just be husband and wife for that trip, is that right? A. We didn't say just for that trip; we didn't say anything about that. I just agreed to introduce him as my husband to my folks; but I told him that he couldn't come along up to my folks, that we would go along to Seattle together, but that I couldn't take him home. He said, 'Well, you can introduce me as your husband.' So that is how it came that I took him along. Q. Well, did you agree while you were there to act as man and wife, or to live as man and wife? A. That was all, just what I told you, that we agreed to do. Q. And you did live there as man and wife, did you not? A. Under that agreement, just what you heard me say. Q. Did you live at your father's house in Washington with the defendant here, Rick De Bernardi, as man and wife? A. Yes."

From the testimony of the witness W. H. Caughlin, the party from whom the premises here in question were purchased, and who lives in the neighborhood of the place known as Rick's Roadhouse, we find that on the occasion when the witness first met respondent it was on the introduction of appellant at the roadhouse, and on that occasion appellant introduced respondent as his wife. From the testimony of the witness Frank D. King, the attorney who conducted the adoption proceedings in the district court, we learn that on the occasion of those proceedings respondent gave the witness to understand that she was the wife of Rick De Bernardi.

From the record as it is made in the lower court it would appear that the respondent here passed and transacted business and was known by several names. On some occasions she was "Hazel Ward"; on others she was "Constance E. Parker"; and at still other times she was "Constance E. De Bernardi." When it suited her convenience in negotiating a loan with the Washoe County Bank, she was "Constance De Bernardi," the wife of appellant. When it suited her convenience in the adoption of a child, she was "Constance De Bernardi," and the child of her adoption was named after appellant. When it suited her convenience, she took appellant into the sacred presence of her father's home, and there, surrounded by her relatives in the family circle, she introduced this appellant as her husband and lived with him under her father's roof as man and wife. When it suited her convenience, she even trifled with the most sacred sentiments of love, and guided the baby hand of the child of her adoption in addressing appellant as "Papa."

All of these circumstances and conditions were presented to the jury by the evidence adduced at the trial. But the trial court, in its instruction to the jury, swept away all of these matters from their consideration in its statement of the law wherein it declared that inasmuch as the relationship existing between appellant and respondent in the state of California was illicit and meretricious, therefore the law presumed that this condition continued illicit and meretricious, unless the proof showed by a preponderance thereof that a valid marriage contract was made and entered into between the parties in the state of Nevada.

[3] Respondent here contends that the relationship of these parties, even conceding an agreement of marriage entered into in California, was at that time and in that state not only illicit and meretricious, but adulterous; hence the court was justified in asserting the law to be as he stated it in his instructions. In other words, it is the contention of respondent that the agreement by the parties, if such there were, to live together as man and wife, was made in a state and at a time where and when, by rea-

son of the impediment then existing with reference to respondent, such marriage was invalid; and being invalid, and there being no subsequent agreement to live together as man and wife after the impediment had been removed, the relationship between the parties continued, as in the first instance, to be meretricious and illicit. Such contention is not supported by the great weight of authority.

In the very early case in England entitled *Campbell v. Campbell*, Law Rep. 1 H. L. Sc. 182, subsequently referred to as the "Breadalbane Case," the House of Lords adjudged that, notwithstanding the fact that in the beginning the relationship existing between the parties was adulterous, yet a legal marital relation commenced as soon as the parties were, by the removal of the impediment, made capable of contracting marriage. The case then before the House of Lords was one in which a married woman had eloped and lived in adultery with her paramour. Prior and subsequent to the death of her husband, both she and the party with whom she had eloped made public utterances proclaiming that they were married. The Breadalbane Case is again referred to by the House of Lords in a later controversy entitled *De Thoren v. Attorney General*, cited in volume 1 of the Law Reports, Appeal Cases, H. L. Sc., at page 686. In the Breadalbane Case above referred to, Lord Westbury took occasion to remark:

"There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence, at a previous period, of some bar to the interchange of consent."

Continuing, he assumes to assert the rule that:

"There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. * * * I think a sounder rule and principle of law * * * that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."

This language was again quoted with approval in the *De Thoren Case*, *supra*. In establishing the rule applicable to such cases, Lord Chelmsford declared:

"If the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse."

Lord Selborne, in addressing himself to the subject under the Scottish law, said:

"It is, however, an error to suppose that what is called habit and repute is a mere element of proof directed to the establishment of the actual constitution of marriage at some moment of time, supposed to be single and definite, though not precisely ascertained by such mutual declarations as would be necessary for the direct proof of a marriage *per verba de presenti*. Consent to be married persons (it matters not in what manner expressed, or whether expressed at all, otherwise than tacitly, *rebus et factis*) is all that it is necessary to infer in these cases,

from habit and repute—the mutual consent, and not the mode of declaring or interchanging it, being that which, by the law of Scotland, constitutes marriage."

This same doctrine was referred to in the early case of *Hyde v. Hyde*, 3 Bradf. (N. Y.) 509, wherein the court held that, where the intercourse had been in the inception meretricious, there must be evidence to show that the character was subsequently changed, but it was not indispensable to prove a ceremonial marriage. If the parties by their conduct and declarations professed to be bound by marital ties, and thus exhibited the continuation of their cohabitation upon a different footing from what it had formerly been, the conclusion may be in favor of marriage. In the case of *Morris v. Davies*, 5 Cl. & Fin. 163, Lord Lyndhurst, speaking of the consideration to be given in favor of marriage, said:

"The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."

Much of the doctrine asserted by the early case of *Campbell v. Campbell*, *supra*, otherwise known as the Breadalbane Case, has not been universally accepted by the courts of the several jurisdictions in the United States, but in the case of *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865, the Supreme Court, speaking through Mr. Justice Holmes, quoted approvingly from the decision of the House of Lords in that case:

"* * * That cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation."

The Supreme Court of the United States in that case had presented to it facts and circumstances very similar to those presented by the record in the case at bar, and there, as here, the evidence supporting the marriage relation consisted, among other things, in the act of the parties in signing a mortgage as husband and wife, each of the parties signing the surname of the husband.

In the case of *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106, the court was dealing with a case where the evidence established illicit relations between the parties on the occasion of their first cohabitation, and where in the first instance nothing in their conduct or reputation indicated the marriage relation. Later, however, the parties lived openly together as husband and wife, and were recognized as such by their relatives and by parties in business transactions. The court there held that, even though the intercourse

was at first illicit and was not then accompanied by any of the evidences of marriage, yet inasmuch as it later assumed a matrimonial character and was surrounded by the evidences of a valid marriage, a question of fact arose for the determination of the jury. It was for the jury to weigh the presumption arising from the meretricious character of the relationship in its origin, with a presumption arising from subsequent acknowledgments, declarations, repute, etc., and decide whether all of the circumstances taken together were sufficient evidence of marriage.

It will be observed that the instruction here complained of takes from the jury a very salient rule of law, that has found sanction at the hands of most eminent authors, to the effect that every intentment of the law is in favor of matrimony, and, wherever there is room for a presumption, it operates in favor of a valid marriage. *Shepard v. Carter*, 86 Kan. 125, 119 Pac. 533, 38 L. R. A. (N. S.) 568.

The presumption in favor of a valid marriage has been declared to be one of the strongest known to the law. This is especially true where by the declaration of the parties such marriage has been asserted or where by their acts or conduct, together with their continuous cohabitation, such relationship has been established to their friends, relatives, and associates. This presumption of valid marriage is one which, in our judgment, may properly be indulged in, even though, as here, the circumstances indicate illicit relations in the first instance, but where, as here, the parties, after the removal of the impediment by which their relations were made illicit, continued to cohabit; and especially is this presumption to be indulged in where, as in the case at bar, we find the parties transacting business as husband and wife, and otherwise openly and publicly declaring their relationship. To this effect we find the very recent case of *Haywood v. Nichols*, 99 Kan. 138, 160 Pac. 982; and to the same effect are the cases of *Shepard v. Carter*, supra, and *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342. In a leading case which deals at length and learnedly with the subject under consideration, wherein the courts of New York had occasion to pass upon a similar question, it was, as we think, properly held that the common law presumes marriage; that is, it presumes every marriage legitimate until the contrary is shown, as it presumes every man innocent, and that every man obeys the mandate of the law, and performs his social and official duties, until the contrary is shown. *Caujolle v. Ferrie*, 23 N. Y. 90.

In our research for authority on the subject at hand, and for light to guide us in the proper interpretation of the rule, we have found no jurisdiction in which meretricious cohabitation has been dealt with more severely than in the courts of the state of New

York. *Bates v. Bates*, 7 Misc. Rep. 547, 27 N. Y. Supp. 872; *Foster v. Hawley*, 8 Hun, 68; *Wilcox v. Wilcox*, 46 Hun, 32; 10 N. Y. St. Rep. 746; *Chamberlain v. Chamberlain*, 71 N. Y. 423. The tenor of the decisions in these cases is to the effect that, if the cohabitation is meretricious in its origin, its continuance must be presumed until proof of a change and of marriage. Hence, Mr. Watershall, in his work on the Law of Domestic Relations in the State of New York, page 13, asserts the rule 'as established in New York to be that an illicit relation between man and woman is presumed to continue as such. It will never ripen into marriage until the parties by a new agreement make the relation matrimonial. But, notwithstanding the earlier cases as reported from the several courts of New York, which to a greater or less extent support this rule, and notwithstanding the apparent tendency of the courts of that jurisdiction to hold rigidly to such a doctrine, we find what we deem to be a more modern and humane rule, and indeed one which to our mind more correctly conforms with the spirit of the common law as interpreted by the earlier writers, asserted in such cases as *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244, and *Caujolle v. Ferrie*, supra, and in the case of *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677. In the latter case, the Court of Appeals of New York took occasion to remark:

"The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. * * * The law presumes morality, not immorality; marriage, and not concubinage. * * * Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

And in that case we find the learned justice who delivered the opinion of the court quoting with approval the language of Lord Lyndhurst in the case of *Morris v. Davies*, supra. In the case of *Gall v. Gall*, supra, the court, dealing with the question of presumption in such matters, stated the rule to be that, where it is admitted that the cohabitation of the parties was illicit in its origin, the presumption is that it was continuous, and, before it can be characterized as a lawful relation, proof is required of such acts and circumstances as indicate that the relation has ceased to be illicit and becomes matrimony. However the court said:

"It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife."

In the case of *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874, the matter of the application of the rule of presumption as it has been applied by the courts of the state of New York is gone into at length. The doctrine asserted in the case of *Gall v.*

Gall, *supra*, we find approved in the later case of *In re Terwilliger's Estate*, 63 Misc. Rep. 479, 118 N. Y. Supp. 424. In the latter case, sanction is given to the principle that even where the relation in its inception was meretricious, and although there was no proof of any ceremonial marriage or other contract of marriage thereafter, yet subsequent marriage relation may be presumed from the continued cohabitation and from such acts and declarations as indicate the intention of the parties to assume the legitimate marital status.

Hence we may observe that, even under the rigid rule adhered to by the courts of New York, the instruction here given, and which is here assigned as error, would not have received sanction. Under the instruction as given by the trial court in the case at bar, nothing short of a preponderance of the proof sustaining a valid marriage contract made and entered into between the parties in the state of Nevada would support the existence of the marital relation. This instruction, in the way in which it was given, took from the jury the long-established rule of presumption in favor of the legitimacy of the marriage relation. But it did more than that; it called for the establishment by a preponderance of proof of the actual making of a valid marriage contract by and between the parties after the impediment which existed with reference to the respondent here had been removed. The jury could view this instruction in no other light than calling for proof of another and new agreement, either verbal or in writing, entered by the parties after they came to Nevada.

We have referred to the rule asserted by the early writers upon the subject, and we find this supported and sustained by a strong line of modern authority. We think a correct statement of the rule to be that, where the cohabitation was illicit or meretricious in the beginning, the burden of proof is upon those asserting a valid marriage, nevertheless there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status; and the only presumption to be indulged in in such matters is in favor of the legitimacy of the relationship. Moreover, we are of the opinion, in the light of what we deem the weight of recent authority, that the rule would be more correctly stated to say that, although cohabitation between a man and woman was in the first instance illicit or meretricious, a valid marriage under the common law may be shown by proof that the parties sustained toward each other the relation of husband and wife after the impediment to their marriage had been removed. This doctrine we find supported by eminent authority. *Coad v. Coad*, 87 Neb. 290, 127 N. W. 455; *Prince v. Ed-*

wards, 175 Ala. 532, 57 South. 714; *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747. And to the same effect is the case of *In re Fitzgibbons*, 162 Mich. 416, 127 N. W. 313, 139 Am. St. Rep. 570.

In our judgment, the language of the trial court as used in this instruction conveyed an erroneous impression to the jury, by reason of which they were misled; for, even though it may be contended for as a proposition of law that where at the inception the relationship is illegal or illicit, and the presumption of the continuance of such relationship applies until there is a change in the circumstances, yet even then and under such conditions the presumption of marriage is warranted, where a very slight change is indicated by the habits or declarations of the parties. *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362. Even where the only proof in the case is of continuous cohabitation, the jury may be warranted in indulging in the presumption that it is lawful. But where to this is added some affirmative proof of the parties having held themselves out as husband and wife, as in the case at bar, it adds just so much to the force of the presumption. 1 *Andrews, American Law* (2d Ed.) § 486.

In the case of *Drawdy v. Hesters*, *supra*, the question was considered under circumstances presented by the record somewhat similar to the matter at bar. An instruction was offered containing the words:

"I charge you that marriage arises and exists in contract, and it needs to be proved as other civil contracts, when property rights are involved and depended upon."

The Supreme Court of Georgia, in passing upon the proposed instruction, said:

"The use of the words 'and it needs to be proved as other civil contracts' is rather indefinite, and tends to minimize the value of evidence of general repute and the effect of parties holding themselves out as husband and wife."

In the case of *Darling v. Dent*, *supra*, the court had presented to it the case of a married woman having separated from her husband and having gone into a foreign state, there cohabiting with the man *Darling*, the cohabitation continuing for some time. The impediment to a legal marriage relation with *Darling* was removed only by the death of her husband. The court took occasion to remark that:

"While it is true that, if it be shown that the relations between *Darling* and *Mrs. Williams* were illicit in the beginning, the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterwards entered into, still there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status. Whatever presumptions are indulged are in favor of the legitimacy of such relationship."

Supporting this doctrine will be found the very recent case of *Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, Ann. Cas. 1913D, 538;

and to the same effect is *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568.

The courts of Maryland have held, with a uniformity quite unvarying, that there cannot be a valid marriage without a religious ceremony. *Richardson v. Smith*, 80 Md. 89, 30 Atl. 568. Notwithstanding this, we find in the early case of *Redgrave v. Redgrave*, 38 Md. 93, the court recognized the doctrine that:

"Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married."

In support of this proposition the court referred to the cases of *Hervey v. Hervey*, 2 W. Bl. 877, *Goodman v. Goodman*, 28 L. J. Ch. 1, and *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108. In referring to the usual manner of proof by which the marital status might be established, the court reaffirmed the law as pronounced in *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713, to the effect that:

"The most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment."

The Supreme Court of Colorado, in the case of *Henry v. McNealey*, 24 Colo. 458, 50 Pac. 37, quoted approvingly from *Bishop on Marriage and Divorce* to the effect that:

"When a man and woman are living together in apparent matrimony, so that they are accepted by the community as husband and wife, they are presumed, in the absence of counter presumptions or proofs, not to be violating the due order of society and breaking the law, but to be in fact married."

Continuing, the court said:

"This presumption, it will be seen, is founded upon the maxim that fraud and covin are not generally presumed; the presumption of the law being usually in favor of honesty and morality."

[4] Counsel for respondent contends that, whatever cohabitation there might have been by the parties in this state, such can raise no presumption of common-law marriage, and that their cohabitation in this state was not such as the law requires to raise that presumption; and in this respect much stress is laid upon the fact that the respondent conducted a house of prostitution in Reno and resided therein at times. We are not unmindful of the facts presented by the record as to the private life of both of the parties to the controversy. We know of no rule of law, at least none such as would be applicable here, that would prevent a prostitute from intermarriage with her paramour. Certainly, if under such conditions marriage were not performed by the usual and ordinary ceremony, it might, by reason of the conduct of the parties, require a higher degree of proof. A jury impaneled to determine the question of the marriage status of the parties should be permitted to consider the evidence under a correct rule of law; and while prostitution or immorality might militate against the

presumption of legitimacy, nevertheless such is for the jury to consider under proper guidance. There was evidence in this case going to establish a mode of life which, if taken alone, would not be conducive to the presumption of a marriage relation; but, on the other hand, there was evidence of cohabitation, coupled with utterances and declarations by the parties at times far remote from the occasion of any controversy. The instruction of the court deprived appellant of the force and effect of this evidence.

Speaking on the subject of the proof necessary to establish the marriage relation where the same is claimed *per verba de presenti*, the Supreme Court of the United States, in the case of *State of Maryland v. Baldwin et al.*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822, speaking through Mr. Justice Field, gave expression to a principle of law which we deem quite applicable to the matter at bar; and in that respect the court held that, to meet the considerations of public policy in such matters, public recognition was necessary; and, exemplifying this principle, the court said:

"And it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments. From such recognition the reputation of being married will obtain among friends, associates, and acquaintances, which is of itself evidence of a persuasive character."

The parties are not here, nor were they in the court below, on trial for their moral conduct; and even though she was a prostitute, as she declared herself to be, if a marriage of the highest and most sacramental order had been performed between the parties, it would have had no more binding effect than a common-law marriage *per verba de presenti* actually consummated. If in this union property was acquired which in its nature was community property, his rights therein, as well as hers, are to be settled, not by their moral standing in the community, but by the law. If he declared her to be his wife in her presence and in the presence of others on occasions when to save the property in question they pledged it as security for a loan, and if she on such occasions, and while she lived and cohabited with him on the premises, signed such mortgage as his wife and with his name, and if on that occasion the relationship of husband and wife existed between them under the common law, is the relationship less now that she denies such because by so doing it may be to her advantage? If she was the wife of appellant when they mutually asserted that fact in the giving of a chattel mortgage to Frank Bros., in which instrument other property than the Rick Roadhouse was pledged, and if then they declared that by common law they were married, when did the common law become inef-

fective as binding their connubial relations? If at common law they were man and wife for the purpose of adopting a child and giving it the name which each declared to be theirs, are they now less man and wife when, to gain possession of the premises in which for years they cohabited, one of the parties finds it more advantageous to deny such relationship?

As we view the law applicable to the subject, interpreted by jurists and text-writers from the very earliest times, as well as under the present and more modern theory, the appellant here was entitled to have the facts and circumstances presented in the light of a different instruction. The instruction here complained of set at naught all of the circumstances arising out of the transactions wherein the parties had publicly and privately recognized each other as husband and wife, and where the respondent, in transacting business and in invoking the power of the courts in times past, had given evidence in no uncertain way that she was the wife of appellant. The error complained of was one vital to the issues.

The order appealed from is reversed, with instructions to the lower court to grant a new trial. It is so ordered.

COLEMAN and SANDERS, JJ., concur.

WALKER v. WALKER. (No. 2265.)*

(Supreme Court of Nevada. May 5, 1917.)

1. DIVORCE ⇨249(1)—DISPOSITION OF PROPERTY—STATUTE.

The power of the court given by Rev. Laws, § 5841, to make such disposition of the property of the parties as shall appear just and equitable in granting a decree of divorce, is limited by Const. art. 4, § 31, St. 1864-65, c. 76, and St. 1873, c. 119, determining the property rights of husband and wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-703.]

2. DIVORCE ⇨252—DISPOSITION OF PROPERTY—STATUTE—IMPLIED REPEAL.

Rev. Laws, § 2166, determines the rights of the parties to the community property on dissolution of the marriage, though the earlier statute, section 5941, empowering the court to dispose of the property on granting a divorce, has not been amended or repealed in terms.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715.]

3. DIVORCE ⇨322 — EFFECT ON PROPERTY RIGHTS—STATUTES.

Under Const. art. 4, § 31, St. 1864-65, c. 76, and St. 1873, c. 119, fixing the property rights of husband and wife, the dissolution of the marriage does not of itself operate to change the property rights.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825.]

4. DIVORCE ⇨249(1) — PROPERTY RIGHTS—POWER OF COURT—WIFE'S SEPARATE PROPERTY—STATUTE.

The declaration of Rev. Laws, § 2172, that neither husband nor wife has any interest in the property of the other, is subject to the exceptions of section 2173, allowing either to enter

into any contract with the other subject to the general rules which control the actions of parties occupying relations of confidence and trust towards each other, and under the latter provision, one spouse may acquire an interest, legal or equitable, in the separate property of other which the court, in granting a divorce, can protect under section 5841.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-703.]

5. DIVORCE ⇨249(1) — PROPERTY RIGHTS—POWER OF COURT—RIGHT OF GUILTY PARTY—WIFE'S SEPARATE PROPERTY.

Where a husband whose wife was granted a divorce for his misconduct had settled on her at the time of the marriage property of the value previously agreed on, which had in the meantime enormously increased in value, and which left the husband without property of his own, the court can, under the power to dispose of the property as shall appear just and equitable given by Rev. Laws, § 5841, protect any equity of the husband in such property notwithstanding his guilt, which is only one of the factors to be considered in determining the property rights.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-703.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Suit by Augusta Elizabeth Walker against Chandler Merrill Walker for divorce. From a judgment for plaintiff after motions to strike the answer and a general demurrer thereto were sustained, defendant appeals. Judgment and case remanded for determination of the property rights of the parties.

Ayres & Gardiner, of Reno, for appellant. C. L. Harwood, of Reno, for respondent.

SANDERS, J. Augusta Elizabeth Walker brought her suit in the district court of the Second judicial district of the state of Nevada, in and for the county of Washoe, against her husband, Chandler Merrill Walker, for a divorce on the ground of extreme cruelty. Her complaint, after charging the defendant with numerous cruelties, indignities, and gross misconduct, alleges:

"That there has been no issue of said marriage, and there is no community property; that the plaintiff has independent means sufficient for her own support, and does not desire any alimony from the defendant."

The answer of the defendant denies the acts of cruelty charged in the complaint, and, by appropriate language, justifies, palliates, or explains his own conduct by charging the plaintiff with various acts of misconduct as being calculated to, and which did, bring about the condition of which plaintiff complains; and continues as follows:

"Defendant further alleges: That about two weeks before plaintiff and defendant were married and after they had become engaged to be married, the father of plaintiff came to defendant and urged him to make a marriage settlement upon the plaintiff. That defendant finally agreed to give plaintiff the sum of fifty thousand dollars (\$50,000), which was about one-third of all the property defendant had. That pursuant to said promise defendant gave to plaintiff, shortly after their marriage, one hundred shares of the capital stock of the Canadian

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Motion for rehearing filed May 21, 1917.

Ford Company, Limited, a corporation then and still conducting an automobile factory in Walkerville, Canada. That at said time said stock was worth approximately one hundred dollars (\$100) per share, or ten thousand dollars (\$10,000). That it has since greatly enhanced in value, and that it is now worth the reasonable market value of at least two million dollars (\$2,000,000).

That defendant, in the year 1911, pursuant to said promise, gave to plaintiff certain real property of the value of forty thousand dollars (\$40,000). That about the time of the transaction last mentioned defendant gave to his son the balance of his property and the defendant now has no property nor means of his own, and is dependent upon his son for his support. That commencing almost immediately after marriage, plaintiff failed to manifest any affection for defendant, and with great frequency told him that she married him only for his money, and defendant alleges, upon and according to his information and belief that plaintiff had married defendant only for his money and that prior to the time of the consent of defendant to said marriage settlement it was agreed between plaintiff and her father that plaintiff would, if her father could secure from defendant a settlement of \$50,000, pay to her father the sum of \$20,000, which agreement has never been fulfilled in whole or in part. Wherefore defendant prays that the bonds of matrimony existing between plaintiff and defendant be dissolved; that the court ascertain and determine all property of the parties and of each of them and its value; that the court make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by the divorce, and to the party through whom the property was acquired; that the property given plaintiff by defendant, or such portion thereof as may be equitable, be restored to defendant; for such other and further orders as may be meet in the premises; and for general relief."

Upon the coming in of the answer the plaintiff moved to strike the portion quoted, and also interposed a general demurrer, and directed the demurrer to the paragraphs quoted. The court sustained both. The defendant thereupon declined to plead over, and the court, on the 1st day of August, 1916, granted to plaintiff a divorce, and made no disposition of the property of the parties, or either of them. The defendant appeals to this court from the judgment and from the orders sustaining plaintiff's motions.

[1] The pleadings involve the construction of the first sentence of section 5841, Revised Laws, which is as follows:

"In granting a [decree of] divorce the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children."

This language manifestly intended to confer upon courts power to make an equitable division of the property of the parties upon the dissolution of the marriage. *Wuest v. Wuest*, 17 Nev. 223, 30 Pac. 886. But since the adoption of our Constitution and the enactment of a law more clearly defining and differentiating the property rights of hus-

band and wife (Constitution, art. 4, § 31, St. Nev. 1864-65, c. 76, and St. Nev. 1873, c. 119), it is evident that it is incumbent upon courts, in making disposition of the property of the parties in granting a divorce, to consider the fact that now all property of husbands and wives is held in common or belongs solely to one or the other (*Lake v. Bender*, 18 Nev. 404, 4 Pac. 711, 7 Pac. 74). Keeping in view this fact, in determining what estate is now embraced by section 5841, courts are controlled by the limitations placed thereon by the subsequent law defining and differentiating the property rights of husband and wife.

[2] It is evident that the later act controls the disposition of community property upon the dissolution of the marriage, although section 5841 has not been amended or repealed in terms. *Lake v. Bender*, supra; *Johnson v. Garner* (D. C.) 233 Fed. 756; section 2166, Revised Laws. But no mention is made in the act of the disposition to be made of the separate estate of the parties. We are now asked to do by interpretation what the Legislature has failed to do by express enactment.

[3, 4] So manifest is the intent of the Constitution, and the later law passed pursuant to its requirement, to create, define, and fix the status of a legal separate estate in husbands and wives, that to now hold that the dissolution of the marriage in itself operates to change a rule of property would not only be repugnant to the organic law, but would be abrogative of the law passed pursuant to its injunction. The declaration, however, in the later act, that neither husband nor wife has any interest in the property of the other (section 2172, Revised Laws), is subject to the exceptions therein provided for, namely:

"Either husband or wife may enter into any contract, engagement, or transaction with the other, or with any other person, respecting property, which either might enter into if unmarried, subject in any contract, engagement, or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust towards each other." Section 2173, Revised Laws.

By the latter provision it is manifest that one spouse may acquire an interest, legal or equitable, in the separate property of the other, and when such property is brought under review in a divorce proceeding the court is vested with jurisdiction by the former act (section 5841) to make such disposition thereof as may appear just and equitable; otherwise the injured party is without a remedy. While the later law severs the unity of husbands and wives in their property relations it is not designed to undo all the obligations which depend upon the marriage status, nor is there anything in the act which negatives the power of a court of equity, when the marriage relation is dissolved, to inquire into the existence of the property of either spouse when brought under review; the conditions surrounding it; the transactions, contracts, and obligations

of the parties concerning it, with a view of making such decree as will attain right and justice between the parties under all the circumstances which may attend the particular case.

We conclude that the two statutes may justly and reasonably, in a proper case, operate without antagonism, and that the retention of section 5941, Revised Laws, which has continued its existence since 1861, is a statutory recognition of the power of a court of equity, when the coverture is to be broken and the marriage relation dissolved, to make such disposition of the property of the parties as their interest therein may appear, having regard to the limitations imposed by both statutes. It is insisted by respondent that no facts, defenses, or counterclaim is averred in the answer of appellant upon which to base the relief demanded in its prayer.

[5] The appellant by his pleading admits his own misconduct, and condones that of the respondent by joining with her in her prayer for a divorce. The answer also impugns respondent with constructive fraud, but does not charge it in positive terms, and, confessedly with unclean hands, asks to have restored to him property conveyed to the respondent, voluntarily or involuntarily as the case may be, as a reasonable provision for her support. The respondent, on the other hand, because of domestic differences, now seeks by an action for divorce to appropriate to herself the difference between what may be rightfully hers by virtue of an alleged settlement upon her shortly after the coverture in 1906, and its present enhanced value, upon the ground that in law it is rightfully hers, or that it is justly due her by reason of the appellant's misconduct in making the marital relation impossible. The alleged settlement upon respondent was originally for \$50,000. Its present approximate value is \$2,000,000. The unusual situation here presented leads us to the statute for its solution.

"The statute provides that in case a divorce is granted the court shall make disposition of the property as therein stated. The division of property is but an incident to, or consequence of, a divorce upon which it depends; but the divorce does not depend upon the property." *Lake v. Bender*, 18 Nev. 372, 4 Pac. 715.

The statute contemplates that the division of property, upon the dissolution of the marriage, shall be graduated among other matters by the quality of the offense of the delinquent. *Wuest v. Wuest*, supra. In making division of community property, when the decree of divorce is rendered on the ground of extreme cruelty, the party found guilty thereof is only entitled to such portion of the community property as the court granting the decree may, in its discretion, deem just and allow. Section 2166, Revised Laws.

No reason is suggested why a different

rule should apply in a case where the adjustment of separate property is involved upon the dissolution of the marriage if the court be satisfied from the facts that the complaining party has established such an interest therein as authorizes the exercise of the discretion conferred by the statute.

We conclude that the court erred in striking appellant's answer, and sustaining respondent's demurrer thereto. But as the divorce does not depend upon the property, and the division of property is but an incident to, or consequence of, the divorce, the judgment granting to respondent a divorce from appellant is affirmed, and the cause is remanded for such further proceedings as to the property involved as the parties may be advised.

McCARRAN, C. J., concurs. COLEMAN, J., concurs in the order.

STATE v. MERK. (No. 3945.)

(Supreme Court of Montana. April 17, 1917.)

1. HOMICIDE §109 — JUSTIFICATION — SELF-DEFENSE.

Possession and exercise of right of self-defense by the individual are necessary to personal safety and security, and not incompatible with the public good.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 188, 139.]

2. HOMICIDE §113 — JUSTIFICATION — SELF-DEFENSE.

Under Rev. Codes, § 8301, defining justifiable homicide, and section 8302, stating the requisites of the apprehension sufficient to justify killing in self-defense, if the party committing the homicide was the assailant or engaged in mortal combat, he must really and in good faith have endeavored to decline any further struggle before homicide was committed, or he cannot invoke self-defense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 151, 152.]

3. HOMICIDE §116(2) — JUSTIFICATION — SELF-DEFENSE.

A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant, though in fact he is not in actual peril, if circumstances are such that a reasonable man would be justified in acting as he did.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 159.]

4. HOMICIDE §118(1) — JUSTIFICATION — SELF-DEFENSE — DUTY TO RETREAT.

A person, assailed by another with apparent murderous intent, need not retreat and seek a place of safety.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 168.]

5. HOMICIDE §244(1) — SELF-DEFENSE — EVIDENCE — SUFFICIENCY.

Evidence held to show that deceased was the aggressor throughout the difficulty resulting in his death at the hand of accused, so that accused was justified, in fear of impending great bodily injury, in shooting deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 507.]

Appeal from District Court, Madison County; W. A. Clark, Judge.

William W. Merk was convicted of manslaughter, and from the judgment and order denying his motion for new trial, he appeals. Reversed, and cause remanded.

McCaffery & Tyler, of Butte, for appellant. S. C. Ford, of Helena, and Frank Woody, of Butte, for the State.

HOLLOWAY, J. W. W. Merk was charged with the crime of murder, convicted of manslaughter, and appealed from the judgment and from an order denying his motion for a new trial.

We shall notice but one of the contentions made by the appellant, viz., that the evidence is insufficient to sustain the verdict. There is not any substantial conflict in the evidence. Slight discrepancies as to minor details appear, but these can be accounted for readily without impeaching the integrity of any one. The defendant is apparently the only living witness to all the transactions leading up to the tragedy. Each of several other persons was present during a part of the controversy, and it is necessary to piece together these stories to present a composite picture of the whole, independently of the evidence offered by the defendant.

Benjamin Yarbrough, a saloonkeeper at Silver Star, Mont., and a principal witness for the state, testified that about noon of June 2, 1916, James King came into his saloon, and something more than an hour later the defendant and Steve Jovanetti entered the same place; that two or three other persons were present, and all appeared friendly; that card playing and drinking were indulged in, and after some time Merk and King engaged in conversation with reference to some lambs which King promised to present to Merk's children, and then with reference to some mutton which King claimed he had sent to, or intended for, Merk's family, and which he insisted Merk had received; that Merk denied that he had received the mutton, and King called him a damned liar; that Merk replied in kind, and King remarked that if Merk was not so small, he would slap his face or knock his head off; that Merk then applied to King some vile epithet, and King again remarked that if Merk was not so small, he would hit him; that afterwards Jovanetti induced King to go outside, and Merk followed; that when they returned to the saloon King said, "I am all to blame for it," and invited those present to drink with him; that after they had been served, Merk brought up the subject of their previous quarrel, and used some insulting language to King; that King invited Merk to drink and "let it go and say no more about it"; that after taking this drink Merk again referred to their quarrel, and King said to him in effect, "Call me all the vile names you want to and get it off your mind;" that Merk

desisted, and the two men then joined the proprietor in drinking; that when Merk again referred to the trouble King remarked that he had done everything to satisfy Merk, and immediately seized Merk by the throat and pushed him against the bar; that Jovanetti attempted to interfere, and King released Merk and told Jovanetti to stand back or he would give him some of the same treatment; that King again seized Merk by the throat, and they moved to the end of the bar and behind it, breaking some glassware; that he (Yarbrough) interceded, and the men separated and quieted down; that two small boys, Frank Marvin and James Lewis, came to the door, and he then went to a cellar outside the saloon building for some wine, and while he was in the cellar the shooting occurred. Yarbrough had been drinking heavily during the afternoon.

Louis Anderson testified for the state that he was in the saloon for a short time and heard some foul language pass between Merk and King, and that at one time Merk said to King, "Come out and we will settle it," to which King replied, "If you have anything to settle with me, say it right here."

J. H. Barkell was in the saloon for a time early in the afternoon, and heard some of the conversation detailed by Yarbrough.

L. T. Herman heard very little of the conversation, and testified to nothing new.

Frank Marvin, one of the two boys who came to the door of the saloon just before the shooting, testified that when he reached the door of the saloon, King had Merk by the throat, and was asking Merk if he was going to be a man; that King pushed Merk around the end of the bar and behind the bar, breaking the glasses, and onto the cash register; that King slapped Merk's face, released him, and came from behind the bar and said to Merk, "Come on out now and let us be friends," to which Merk replied, "No, I am going to stay here," to which King responded, "Not if I know it," and started around the bar as if to pull Merk out; that Merk then drew a pistol and told King to stand back, and the witness then ran. He heard one shot distinctly, and then several more in such rapid succession that he could not count them.

James Lewis, the other boy, who was 13 years of age, testified: That when he reached the door of the saloon, King was choking Merk and telling Merk to be a man. That he backed Merk up along the bar and slapped his face. That Jovanetti attempted to interfere, and King said to him:

"Are you in this? If you are I will be around there in a minute and give you some of it."

That King then threw Merk up against the cash register behind the bar and made Merk apologize and say he would be a man. That King then came from behind the bar and said to Merk, "Come on out here," to which Merk replied, "No, sir; I will stay right

here," and then King said, "You won't if I know it," and started around towards Merk. That when King reached the end of the bar Merk drew a pistol and told King to stand back. That he did not know what King was then doing with his right hand. That King stepped back about two steps, and that Merk then fired the first shot and the witness ran, but heard other shots, and heard King fall to the floor and heard groans. The defendant and one of the coroner's jurors testified that at the inquest held on the day following the shooting, this boy, James Lewis, testified that he did not know who fired the first shot.

Otto A. Schultz, King's employer, testified that King usually carried a revolver when he was on the range or about with stock. It was also made to appear that each man emptied all the chambers of his revolver; that Merk probably fired five shots and King six; that three shots from King's revolver entered the back bar and one shot fired by Merk entered the ceiling of the building; that Merk received four slight wounds and King received three wounds, one of which at least was fatal; that King fell to the floor almost immediately after the shooting ceased, and died within a minute or two; that Merk is a small man, while King was 6 feet 3 or 4 inches tall, raw-boned, weighed about 210 pounds, and was about 45 years old.

Jovanetti and the defendant told substantially the same story as detailed by the witnesses for the state. However, they made it appear that King employed more vile language, was rougher in his treatment of Merk, and that he struck Merk two or three times during the course of the quarrel.

Merk testified that he was choked almost to insensibility; that he was thrown with great force against the cash register; that he refused to come from behind the bar because of his fear of King and to avoid trouble. He denied specifically that he had renewed the war of words at any time, or that he invited King outside to settle their trouble. He testified: That he knew that King habitually carried a revolver, and knew that he had one on this day. That he had many opportunities to shoot King while King was choking him, but would not do so and tried to avoid difficulty. That when King started towards him to bring him from behind the bar, King said: "You have got a gun; so have I. Commence shooting." That both drew their guns at about the same time. That he did not shoot until he deemed himself in imminent peril, and that both fired simultaneously or nearly so. He testified also that he knew that King had been drinking heavily during the afternoon, and introduced several witnesses who testified that King was a violent and dangerous man, particularly while drinking. An equal or greater number testified to his good reputation for peace and good order. The defendant him-

self had been drinking considerably during the afternoon and before the shooting occurred.

The foregoing fairly epitomizes the material evidence presented in the record. We have omitted the unspeakably foul language which the deceased and defendant employed. Apparently each exhausted his very extensive vocabulary of vituperation and billingsgate.

[1] The right of self-defense has its foundation in the law of nature. It existed before the formation of society, and while every individual is presumed to have surrendered to society the right to punish for crime and for the infractions of individual rights, the possession and exercise of the right of self-defense by the individual are still deemed to be necessary to personal safety and security and not incompatible with the public good. Society may curtail the right somewhat and restrain its exercise in many particulars, but the right itself is brought by the individual with him when he enters society and is not derived from it. 13 R. O. L. 810. The right was recognized by the common law though the rules which regulated its exercise were rigid in the extreme—so rigid, indeed, that they have been greatly liberalized by statutes in most of the states. During the territorial régime we had statutes designed to secure to every one the right of self-defense, and while these several statutes modified to some extent the rules of the common law, they in turn were superseded by the Codes whose provisions respecting this subject were far more liberal, and doubtless seemed to be more nearly in harmony with the spirit of the age.

[2] A comparison of our present statutory provisions with the provisions of the Compiled Statutes of 1887 (sections 32-34, Fourth Div.) will disclose the changes effected by the adoption of the Codes. Section 8301, Revised Codes, provides that homicide is justifiable when committed by any person in the lawful defense of himself, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished. Section 8302 provides that a bare fear of the commission of either of the offenses just mentioned is not sufficient to justify homicide, but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fear alone. If the party who commits the homicide was the assailant or engaged in mortal combat, he must really and in good faith have endeavored to decline any further struggle before the homicide was committed. In *State v. Rolla*, 21 Mont. 582, 55 Pac. 523, this court said:

"If it appeared to the accused at the time of the homicide, as a reasonable person, that it was necessary for him to slay his assailant in order to save his own life or prevent receiving

great bodily harm, he had a right to act upon such appearances, and slay his assailant, although he was in no actual danger."

In *State v. Houk*, 34 Mont. 418, 87 Pac. 175, we approved an instruction as follows:

"It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person to believe he was in danger of great bodily harm. Upon such appearance a party may act with safety, nor will he be held accountable though it should afterward appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such case is this: What would a reasonable person—a person of ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril and acting upon such appearances."

[3] That instruction the court gave in this case. Of course, the defendant might have awaited further assaults by King, and might have taken his chances that they would not result more seriously than the assaults already committed. He might have awaited until he actually received great bodily harm, but if one who is attacked must restrain himself until subsequent events determine whether the attack will result fatally or in grievous bodily harm, then the right of self-defense is one in name only. This is not the law. A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless.

[4] The rule of the common law that, before any one can be justified in slaying his assailant, he must have retreated to the wall finds no favor with modern courts or text-writers. The defendant was not compelled to seek a place of safety, but in effect he did so. Though it resulted from the brute force of the deceased, the defendant actually found himself behind the bar in a place of comparative safety, and announced his intention to remain there, but was not permitted to do so peaceably.

[5] Giving the opprobrious epithets used by the defendant towards the deceased all the legal effect possible, still the evidence leaves no doubt that the deceased was the aggressor throughout.

This is not a case where the record presents conflicting stories, and where the verdict may be said to rest upon the finding of the jury in favor of the testimony of some witnesses and against the testimony of others. As we have said before, there is not any substantial conflict in the evidence.

That with each succeeding assault made by the deceased his violence increased is apparent from the state's evidence, independently of the testimony of the defendant; that by sheer physical force the deceased was able to inflict great bodily injury is equally apparent; and when to this are added the facts that he was armed with a deadly weapon; that he was, to a greater or less extent, under the influence of liquor and by some of his neighbors at least considered to be a dangerous man when in that condition, and that he drew his gun and emptied all the chambers so nearly directly at the defendant that four shots took effect and three of the six fired were found to have lodged in the back bar near where defendant was standing; and that all the shots were fired so nearly together that the deceased must have drawn his gun before or at the time defendant fired—all lend color to the testimony of the defendant that he shot only when he deemed himself to be in peril, and convince us that it cannot be said beyond a reasonable doubt that a reasonable man in the position of the defendant, seeing what he saw and knowing what he knew, would not have felt justified in doing what he did.

The judgment and order are reversed, and the cause is remanded for a new trial.

BRANTLY, C. J., and SANNER, J., concur.

STATE v. BRODOCK. (No. 3999.)

(Supreme Court of Montana. April 23, 1917.)

1. CRIMINAL LAW §419, 420(8)—ADMISSIBILITY OF EVIDENCE—HEARSAY.

In a larceny prosecution, a sheriff's testimony that some person stated to him, but not in the defendant's presence, that defendant claimed to own the stolen property, is inadmissible because hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983.]

2. CRIMINAL LAW §1169(2) — APPEAL—HARMLESS ERROR.

Where defendant in a larceny trial claimed property taken belonged to him, the admission of hearsay evidence that defendant had made such a claim was harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

3. CRIMINAL LAW §1086(14)—APPEAL AND ERROR—REVIEWING REFUSAL OF REQUESTED INSTRUCTION.

Under Rev. Codes, § 9271, subd. 4, prohibiting reversals for errors in instructions not excepted to before the charge is given, refusal of requested instructions cannot be reviewed where the record does not show the proceedings when the instructions were settled.

4. CRIMINAL LAW §1159(3)—APPEAL AND ERROR — VERDICT ON CONFLICTING EVIDENCE.

The verdict in a criminal case cannot be reversed because contrary to the evidence, where

the evidence is conflicting and the trial court has approved the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

Appeal from District Court, Meagher County; John A. Matthews, Judge.

William D. Brodock was convicted of larceny, and appeals. Affirmed.

Carleton & Carleton, of Helena, and W. F. O'Leary, of Great Falls, for appellant. Frank Woody, of Butte, for the State.

BRANTLY, C. J. The defendant, convicted of the crime of larceny of certain steers and heifers (grand larceny), has appealed from the judgment of conviction and from an order denying his motion for a new trial. It is contended that the trial court committed prejudicial error in admitting one item of evidence, in submitting a paragraph of its charge to the jury, and in denying the motion for a new trial on the ground that the verdict is contrary to the evidence. The record presents no substantial basis for any of the contentions made.

[1, 2] 1. The defendant was charged jointly with one Ducolon, but was awarded a separate trial. The vital issue in the evidence was whether the animals charged to have been stolen belonged to Maggie J. Jenkins, the prosecuting witness, or to the defendant. At the time of his arrest, the defendant not being present, Ducolon made statements to the witness Nagues, the sheriff, in answer to questions by him, to the effect that the defendant claimed the ownership of the animals. Nagues was permitted, over defendant's objection, to rehearse these statements to the jury. It is contended that this evidence was incompetent on the ground that it was hearsay, and that defendant was prejudiced by its admission. The ruling was erroneous because the evidence was clearly hearsay. But its admission was not prejudicial for the reason that, as already stated, the defense was that defendant was the owner of the animals, and that he undertook to establish this claim by his own testimony and that of his other witnesses. The ruling was thus rendered harmless.

[3] 2. Though it be conceded that the instruction criticized by counsel was bad, it cannot, upon the record presented, be made the subject of complaint. Subdivision 4 of section 9271 of the Revised Codes requires the court to settle the instructions about to be submitted, without the presence of the jury, after permitting counsel a reasonable opportunity to examine them—not only those requested, but also those proposed by the court—and to make their objections and reserve their exceptions to the admission or rejection of any requested by counsel or proposed by the court. Counsel must then state the particular ground upon which an instruction is deemed erroneous, and the judge must

pass upon the objections then made, objecting counsel reserving his exception if the ruling is adverse to him. Notes of the proceeding must be taken by the stenographer, embodying all the objections and exceptions to the rulings of the judge in giving or refusing any instruction. At the close of the trial these notes must be extended and filed with the clerk. Thereafter the exceptions reserved may be embodied in a bill of exceptions. If this course is not pursued, the propriety of the giving or refusing of a particular instruction cannot be made a subject of inquiry either upon motion for a new trial or upon appeal. The express provision on the subject, at the close of subdivision 4, is:

"No motion for new trial on the ground of errors in the instructions given shall be granted by the district court unless the error so assigned was specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the Supreme Court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error, and exception incorporated in and settled in the bill of exceptions as herein provided."

The record does not disclose the proceedings had at the time of settlement. It therefore does not appear but that counsel for defendant was satisfied with the instruction as given, and that the contention now made is an afterthought.

[4] 3. The evidence is in hopeless conflict, both as to the identity and ownership of the animals and upon the question how they came in the possession of the defendant. The finding of the jury thereon, approved by the trial court in denying the motion for a new trial, is conclusive upon us. The contention that the verdict is contrary to the evidence must therefore be overruled.

The judgment and order are affirmed.
Affirmed.

SANNER and HOLLOWAY, JJ., concur.

BUCHNER v. BAKER. (No. 7397.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 19, 1916. Further
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS ~~§~~ 182(5)—PLEADING—STATUTE—NECESSITY.

Where the defendant answers by a general denial and does not demur at any stage of the proceedings, the statute of limitations is not available to him as a defense.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 680; Dec. Dig. ~~§~~ 182(5).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Hughes County; John Caruthers, Judge.

Action by F. L. Baker against Al Buchner to recover for breach of covenants of a war-

ranty deed. From a judgment for plaintiff, defendant appeals. Affirmed.

Mann & Diamond, of Holdenville, for plaintiff in error. J. L. Skinner, of Holdenville, for defendant in error.

BURFORD, C. This suit was instituted by F. L. Baker to recover damages from Al Buchner arising from the breach of the covenants of a warranty deed. The defendant demurred to the original petition. The plaintiff then filed an amended petition. Defendant did not demur to the amended petition, but filed an answer which was a general denial. The record does not show that there was any objection or demurrer made at the trial. The plaintiff introduced his evidence, and the defendant rested without introducing any evidence. The court gave judgment for the plaintiff.

The sole assignment of error is that the court erred in rendering judgment for the plaintiff for the reason that the petition shows on its face that the alleged cause of action was barred by the statute of limitation. This defense is not available to the defendant. The statute of limitation is a personal plea, and, unless raised by demurrer or proper objection where shown on the face of the proceedings, it must be pleaded or the party will be deemed to have waived it. *Blumle v. Kramer*, 14 Okl. 366, 79 Pac. 215; *St. L. & S. F. R. Co. v. Bloom*, 39 Okl. 78, 134 Pac. 432.

The authorities cited by plaintiff in error to the effect that the question of the statute of limitations may be raised by demurrer, where sufficient facts to show that the action is barred appear upon the face of the petition, are not applicable here, for the very sufficient reason that counsel did not demur to the amended petition.

The cause is affirmed.

PER CURIAM. Adopted in whole.

STATE BANKING BOARD et al. v. OKLAHOMA BANKERS' TRUST CO.
(No. 6205.)

(Supreme Court of Oklahoma. Feb. 18, 1915.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

STATES ¶191(2) — "SUIT AGAINST THE STATE"—CONSENT.

A suit to mandamus the state banking board is a "suit against the state."

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 181.

For other definitions, see *Words and Phrases*, First and Second Series, *Suit against the State*.]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Mandamus by the Oklahoma Bankers' Trust Company against the State Banking Board of the State of Oklahoma and J. C.

McClelland and another, members of the board, and J. D. Lankford. Peremptory writ of mandamus issued, and defendants bring error. Reversed and dismissed.

Chas. West, Atty. Gen., for plaintiffs in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error.

PER CURIAM. This is an action in mandamus to compel the banking board of the state of Oklahoma to pay to the Oklahoma Bankers' Trust Company \$10,266.67, the amount of its deposit in the Alamo State Bank of Muskogee, Okl., at the time of its failure. The suit was filed in the district court of Oklahoma county on the 19th day of February, 1912, and the alternative writ of mandamus was issued on the same date.

After answer to the alternative writ, there was trial, and judgment making the writ peremptory, and defendant, the banking board, brings the case here. For the reason that this is a suit against the state, the trial court was wrong in letting the writ go. This case is governed by *J. D. Lankford et al., Composing the State Banking Board, etc., v. Platte Iron Works Co.*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316. See, also, *State ex rel. Taylor v. Cockrell*, 27 Okl. 630, 112 Pac. 1000; *Chas. W. Lovett et al. v. J. D. Lankford et al.*, 145 Pac. 767, No. 6059 (not yet officially reported).

Reversed and dismissed.

WICHITA FALLS & N. W. RY. CO. v. COVER. (No. 8174.)

(Supreme Court of Oklahoma. Nov. 28, 1916.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE ¶59—"PROXIMATE CAUSE." An act is the "proximate cause" of an injury when such injury was the natural and probable consequence of the act, and one that ought to have been foreseen in the light of the attending circumstances.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 72.

For other definitions, see *Words and Phrases*, First and Second Series, *Proximate Cause*.]

2. NEGLIGENCE ¶136(25)—PROXIMATE CAUSE—QUESTION FOR JURY.

Ordinarily the question of proximate cause is one of fact for the jury, but where the facts are not in dispute and reasonable men cannot differ on the question, it may become one of law for the court.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 326-332.]

3. MASTER AND SERVANT ¶265(2)—INJURIES—BURDEN OF PROOF.

In order to recover damages for an injury because of negligence, the burden is on the plaintiff, not only to show negligence, but to prove that such negligence was the proximate cause of the injury, which should have been foreseen in the light of the attending circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 878, 895, 896.]

4. CARRIERS \Leftarrow 805(8) — PERSONAL INJURY —
QUESTION FOR JURY—PROXIMATE CAUSE.

Plaintiff intended to leave M. on a train scheduled to depart at 6:45 p. m. He, being up town five or six blocks from the depot a few minutes before 6:40, called the ticket agent over the telephone and asked about the train, and was told that it was late and would not leave "until about 7:15 or later." He started for the station about 6:50, and when he arrived within 60 or 75 feet of the station platform saw the train moving out, and ran and attempted to get upon it. He grabbed the iron railing about the steps with his left hand and the handhold on the gate with his right hand, and succeeded in getting both feet upon the steps, when the gate swung out and he fell off and rolled under the car and was injured. Held that, assuming that the agent gave incorrect information as to the time of the departure of the train, and that the handhold of the gate was defective, and that these acts constituted negligence on the part of the railway company, it does not follow that such negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1136-1139, 1245, 1246.]

Commissioners' Opinion, Division No. 2. Error from District Court, Tillman County; T. P. Clay, Judge.

Action by C. E. Cover against the Wichita Falls & Northwestern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mounts & Davis, of Frederick, for plaintiff in error. V. E. McInnis, of Oklahoma City, for defendant in error.

GALBRAITH, C. This appeal is from a judgment rendered upon the verdict of a jury in favor of the defendant in error and against the plaintiff in error in an action for personal injuries.

The defendant in error presents a motion to dismiss the appeal on the ground that he did not waive the suggestion of amendment to the case-made and was not given an opportunity to do so. We have examined the record and find that the case-made was served within the time as extended by a valid order, and that an opportunity was offered to defendant in error to suggest amendments, and that the case-made was properly settled and filed, and conclude that the motion should be overruled.

It appears that Cover had been employed as a railroad brakeman for seven or eight years, and for about one year by the plaintiff in error; that he voluntarily left its services a few months prior to the accident and followed the vocation of repairing flues in various towns in Southwestern Oklahoma; that he had worked at the city of Mangum for two or three days prior to the 9th day of December, 1914; that on that day he was advised by a railroad man that if he would go to Woodward, the end of the division on the plaintiff in error's line, he could secure a job as a brakeman; that he decided to start to Woodward on train No. 1, which was scheduled to leave Mangum at 6:45 p. m.

This train, however, did not run through to Woodward, but stopped at Elk City, the through train from Mangum to Woodward passed Mangum in the early forenoon. A short time before the time train No. 1, was due, Cover called the agent of the railway company over the telephone and inquired about the train, and was told that it was late. He testified as follows:

"Q. What did he tell you? A. He told me it was due to leave about 7:15 or a little later. Q. What did you then do Mr. Cover? A. Ate supper. Q. What time do you suppose it was when you got through supper? A. That I don't know, about 6:45 I expect. Q. How far was it from the restaurant to the railroad, down to the depot? A. I don't know, but I should judge about five or six blocks. Q. Did you start to the depot then? A. Directly after I got supper. Q. What time do you suppose it was when you left the restaurant and started for the depot? A. I should judge about 6:50."

The witness further testified that when he arrived near the depot, within 60 or 75 feet of it, he saw the train moving out and ran to catch it and attempted to get on. He testified as follows:

"Q. What did you do? A. I grabbed hold like a man would ordinarily. Q. Do you know what coach you attempted to get on? A. No, I do not, for sure. Q. Do you know whether it was the front or rear end of the coach? A. It was the front end of the coach. Q. Which side of the train were you on? A. Left-hand side. Q. The train was going north and you were on the left-hand side? A. Yes, sir. Q. Did you catch hold of the car? A. Yes, sir. Q. How did you catch hold of the car? A. Got hold of the beam with my left hand and caught hold of the gate with my right hand. Q. What happened when you caught hold of the gate? A. I heard a noise of some kind, and the gate come loose and swung out with me. Q. Did you get up on the platform before you heard this noise? A. Yes, sir. Q. Up upon the platform or upon the steps? A. Upon the steps. Q. With one foot or both feet? Describe to the jury what you had done. A. I got up with both feet; I stepped up with one foot first. Q. Which foot did you step up with first? A. Stepped up with my left foot. Q. Did you get your left foot up? A. Yes, sir. Q. During the time you were getting up and your weight pulled against this gate that you had hold of, and did it let loose during the time? A. Not then. Q. It never let loose with reference—when did it let loose with reference to the time that you got up? A. After I got up with both feet. Q. Were you at that time balanced, had you gotten your balance? A. I had just straightened up after I caught hold of the gate and the end came loose. Q. When the gate came loose what happened? A. I fell to the ground and received— * * * Q. What happened to your foot or leg at that time? A. Well I fell to my right side and went under and the wheel went over my leg, that is all."

It appeared that the train was registered in at Mangum on this afternoon at 7:04 and left there five or six minutes later, and at that time of day it was quite dark. None of the train men or employes of the company saw Cover, or knew that he was attempting to get on the moving train, and the employes in charge of the train did not know of the accident until some three hours later, after the train had reached Elk City.

The acts of negligence charged as fixing the liability of the railway company for the injury are the misinformation given by the agent to Cover over the telephone when he inquired about the time of the departure of the train, and the failure of the company to have the gate of the car properly equipped with handholds. It is argued that these were acts of negligence on the part of the railway company, and that they were the proximate cause of the injury, that if the agent had correctly advised Cover as to the time of the departure of the train, he would have gone to the depot earlier, and in time to secure a ticket and board the train before it started, and that if the handhold of the car where he attempted to get on had been in proper condition and safe, he would not have fallen, and therefore would not have been injured.

[1] It is assigned as error that the verdict and judgment are contrary to law, and that the court erred in submitting the cause to the jury. The phrase "proximate cause" has been the occasion of much discussion in the text-books and decisions. There is a practical agreement on the definition that proximate cause is "the immediate, direct, or efficient cause," but the application of the definition to the particular facts of each particular case has been the occasion for much confusion in the decisions of the several courts. Thompson on Negligence, par. 47, expresses the general agreement among the authorities in defining—

"proximate cause to be the ordinary results of negligence, such as is usual and therefore might have been expected."

In fact the defendant in error seems to recognize this definition as correct, and admits that to establish actionable negligence it must be shown that the injury proximately resulted from the acts complained of. In the cases relied upon from our courts (*Lisle v. Anderson*, 159 Pac. 278, L. R. A. 1917A, 128) this definition is recognized in the holding that to establish actionable negligence it is essential to show that the injury resulted as "the natural and probable consequence of the act."

In *O. & P. R. Co. v. McAlester*, 39 Okl. 153, 134 Pac. 661, the same definition of actionable negligence is applied to the facts set out in the opinion. In that case the acts of negligence charged were: Failure to hold the train at the station the usual length of time; and (2) the direction given by the brakeman to jump off. The injury resulted from jumping off a moving train in the dark in that case was clearly the natural and probable result of the negligence complained of, and should have been contemplated.

[2] Another difficulty in this character of cases is to determine whether or not the question of proximate cause is a question of fact for the jury, or a question of law for the court. In *St. L. & S. F. R. Co. v. Davis*, 37 Okl. 345, 132 Pac. 337, it is said:

"The question, What is the proximate cause of an injury? is ordinarily a question for the

jury; but the burden is always on the plaintiff, in an action for personal injuries, to show that the negligence charged was the proximate cause of the injury. In *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256, in this connection it was said: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

In *Midland Valley Ry. Co. v. Bailey*, 34 Okl. 193, 124 Pac. 987, it was held to be a question of law for the court. The third paragraph of the syllabus reads:

"Negligence is a breach of duty. In order for it to exist, there must be both a duty and breach of it. It is the duty of the court in its instructions to advise the jury of the duties which the law imposes upon the parties, and where there is conflict in the evidence, it is the function of the jury to determine whether these duties imposed by the law have been violated. The jury is the judge of the fact, and not of the law."

Under the first paragraph of the syllabus the application is made of this rule to facts of that case as follows:

"The plaintiff entered the defendant's train for the purpose of assisting a sick passenger. The conductor and other employes were not notified that it was her intention to alight from the train after seating the sick person, nor were there any facts or circumstances charging them with notice of her intention. After making the usual stop, the station being clear, the conductor started his train, and the plaintiff alighted from it while it was in motion. Held, that she was not entitled to recover."

In *A. T. & S. F. R. Co. v. St. L. & S. F. R. Co. et al.*, 41 Okl. 80, 135 Pac. 353, 48 L. R. A. (N. S.) 509, it was held under the facts of that case that the question of proximate cause was one for the jury. In *St. L. & S. F. R. Co. v. Dreyfres et al.*, 42 Okl. 401, it was likewise held to be a question for the jury.

[3] In *Hughes v. O. & P. R. Co.*, 35 Okl. 482, 130 Pac. 591, a great many authorities are collected and quotations set out from decisions discussing the question of proximate cause in negligence cases, and it is there held that it was prejudicial error to refuse the following instruction:

"You are instructed that, although you may believe from the evidence that the injury complained of was occasioned by the act of the defendant, still, if you further believe from the evidence that such injury was not the natural result of the acts of the defendant, and could not have been foreseen, or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable."

[4] In the *Southern Kansas Ry. Co. of Texas v. Emmett* (Tex. Civ. App.) 139 S. W. 44, the circumstances connected with the accident were similar in many respects to those in the case at bar. There the person injured had purchased a ticket and inquired of the ticket agent the time of the arrival of the train, and was told that it would be due in 31 minutes. He then went out of the depot to a restaurant, 250 yards distant from the station, to get his breakfast. About 15 minutes later he looked out and saw the train moving away from the station. He then ran

and attempted to get aboard, getting upon the steps at the front end of the passenger coach with his feet on the steps, when the train gave a lurch, releasing his hold, and he fell off and the train ran over him. The negligence charged was the misinformation given by the agent as to the time of the arrival of the train, and negligent management of the movement of the train causing the lurch that caused him to fall therefrom. In that case the court announced the same rule as to proximate cause embraced in the instruction above quoted from the Hughes Case, supra, and held that the agent's misstatement of the time of the arrival of the train, assuming it to have been negligence, was not the proximate cause of the plaintiff's injury. Ordinarily the question of proximate cause is one of fact for the jury, but in those cases where reasonable minds cannot differ upon the question that the injury was not the natural and probable result of the negligence complained of, then it would seem to become one of law which the court may withdraw from the jury.

We are inclined to agree with the contention of the defendant in error, for the purpose of this decision, that Cover, when he asked the agent over the telephone about the arrival of the train, was entitled to correct information, and the failure to give such information was negligence. Whether the company owed him a duty to keep its gates and handholds on its cars so that they would be safe for one to get aboard a moving train is not so clear. He was not a passenger; the company had no notice that he intended to become a passenger on its train; it clearly owed him no duty that it did not owe to every other citizen of the community. But assuming without deciding that the railway owed Cover a duty to have a good, sound handhold on its car, and that such handholds were not on this particular car, and that it was negligent in that respect, the question arises, Does it follow that a liability on the part of the company has been established under the facts of this case? Can there be any disagreement among reasonable minds considering the acts of negligence charged in connection with all the circumstances shown in the record whether or not the injury proximately resulted from such acts, and that it was the natural and probable result and should have been foreseen? Can it be said in any aspect of the case that the natural and probable result of the failure to give correct information as to the departure of the train, and the failure to have a perfectly safe handhold on this particular car, was the proximate cause of the plaintiff losing his leg? Could such a thing have been reasonably contemplated by the agent when he gave the false information, if he gave such, as to the departure of the train, or of the servants when they permitted the handholds to become defective? Would

any reasonable man have expected that a party, wishing to board that train, or nearing the station, after night, and seeing the train moving out, when he is 60 or 75 feet away, would run and attempt to get aboard the moving train? We think not.

It seems clear that the evidence fails to show the injury sustained was the proximate result and natural consequence of the negligent acts complained of, and therefore the judgment is contrary to law.

Wherefore the judgment should be reversed, and the cause remanded for further proceedings.

MILLUS et ux. v. LOWREY BROS.
(No. 5931.)

(Supreme Court of Oklahoma. Feb. 20, 1917.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐719(10) — ATTACHMENT ⇐302 — JURY ⇐16(6) — CLAIM OF THIRD PARTY — CONSTRUCTION OF INTERPLEADER—TRIAL BY JURY—REVIEW.

Where one who is not a party to an action files what she denominates an "interplea in attachment," which, without directly attacking the existence of any of the alleged grounds for the attachment or any proceeding had therein prior to the levy, merely denies that the defendant in the attachment or any other person than herself owns the personal property attached and claims for herself the title and in effect the right to the immediate possession of such property, she will be deemed an interpleader asserting a right in the nature of that of a petitioner in replevin upon the authority of section 3918, Stat. 1893 (section 4701, Rev. Laws 1910), as construed in the Ranney-Alton Mer. Co. v. Hanes & Johnson, 9 Okl. 471, 60 Pac. 284, and not a mere mover asking for a discharge of the attachment as an interested party who assumes that there is no substantial question as to the existence of her interest and who invokes no further inquiry or decision as to her interest than that there is at the time, no substantial question of its existence, upon the authority of section 4426, Stat. 1893 (section 5310, Rev. Laws 1910), as construed in Sparks v. City National Bank of Lawton et al., 21 Okl. 827, 97 Pac. 575, and Shelby et al. v. Ziegler, 22 Okl. 799, 98 Pac. 989, following the rule established by White-Crow v. White-Wing, 8 Kan. 276 (270), Harrison & Willis v. Andrews, 18 Kan. 535, and Long v. Murphy et al., 27 Kan. 375.

(a) The issue made by such interplea and plaintiff's general denial of the allegations therein is properly triable to a jury.

(b) Errors occurring in such trial are not subject to review in this court unless the action of the trial court in overruling the motion for a new trial is assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2979, 2982, 3490; Attachment, Cent. Dig. §§ 1073-1082; Jury, Cent. Dig. § 90.]

2. ATTACHMENT ⇐230—AFFIDAVIT—DENIAL—MOTION TO DISCHARGE ATTACHMENT.

Under section 4118, Stat. 1893 (section 4862, Rev. Laws 1910), construed in the light of section 4119, Stat. 1893 (section 4863, Rev. Laws 1910), the existence of the grounds stated in the affidavit for an attachment may be denied

and put in issue in a motion to discharge the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 788-793.]

8. ATTACHMENT — 250 — MOTION TO DISCHARGE—TRIAL BY JURY—WAIVER.

The issues made by a defendant's motion to discharge an attachment in which the existence of the grounds for the attachment alleged in the affidavit therefor are denied are triable to the judge without a jury; but where the mover does not ask for and insist upon a consideration or decision of the same by the judge, and, after the same are submitted to the jury without objection and a verdict has been returned sustaining the attachment, the judge enters judgment sustaining the same, the moving defendant will be deemed to have waived his right to have the same considered and determined by the judge independently of the verdict of the jury.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 877-889, 893, 895, 897.]

4. APPEAL AND ERROR — 834(2), 1062(1)—ATTACHMENT — 250—EXISTENCE OF GROUNDS — QUESTION FOR JURY — PRESUMPTIONS — HARMLESS ERROR.

It is error to submit an issue as to the existence of grounds for an attachment to the jury for a general verdict, instead of merely for special advisory findings of fact, if at all, and to base a judgment upon such general verdict, instead of upon the findings and opinion of the judge, in the decision upon a motion to discharge such attachment traversing the existence of such grounds.

(a) When the judgment on such motion follows, recites, and is in accord with such general verdict, and it does not affirmatively appear that the judge treated such verdict as merely advisory and gave such judgment upon his own findings and opinion, such judgment will be presumed to be based upon such verdict.

(b) Such error will necessitate a reversal only when, upon an examination of the entire record, it appears that the same has probably resulted in a miscarriage of justice or violates a constitutional or statutory right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777, 4212; Attachment, Cent. Dig. §§ 877-889, 893, 895, 897.]

5. ATTACHMENT — 41 — GROUNDS — FRAUDULENT CONVEYANCE.

A disposition of property with intent to defraud, hinder, or delay creditors, within the meaning of section 4063, Stat. 1893 (section 4812, Rev. Laws 1910), may be effected by means of a mortgage thereon, so as to constitute a ground for attachment under this section of the statutes.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 94, 96, 97, 99, 100, 107.]

6. ATTACHMENT — 103, 125—ALLEGATIONS OF AFFIDAVIT — CONSTRUCTION—CIVIL ACTION.

An allegation in an affidavit for an attachment "that said plaintiff has commenced said action against said defendant for the recovery of \$322; that the defendant is indebted to said plaintiff in said sum; that said claim is just and due, and is wholly unpaid," sufficiently shows that the action in which the attachment is asked is "a civil action for the recovery of money" within the meaning of section 4063, Stat. 1893 (section 4812, Rev. Laws 1910), to permit the attachment.

(a) If the allegation in this regard had been slightly insufficient, either the answers filed or the evidence taken in this case was such as to cure any such defect.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 273-275, 344-350.]

7. ATTACHMENT — 105 — AFFIDAVIT — JUST CLAIM.

The requirement of section 4069, Stat. 1890 (section 4813, Rev. Laws 1910), that an affidavit for an attachment shall show that the plaintiff's claim "is just" is satisfied by merely stating in such affidavit, in the language of the said section, that the same "is just."

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 276-279.]

8. ATTACHMENT — 308(4)—PERSONAL PROPERTY—JUDGMENT.

Evidence examined, and held sufficient to support a judgment sustaining an attachment of personal property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1106-1109, 1111-1113.]

Kane, J., dissenting.

Error from County Court, Pittsburg County; B. P. Hammond, Judge.

Action by Lowrey Bros., a partnership composed of John A. Lowrey and M. C. Lowrey, against L. S. Millus, with attachment of personal property, in which Mrs. M. F. Millus, wife of defendant, filed a denominated "interplea in attachment," claiming title and right to immediate possession of the attached property. Judgment for plaintiffs and against the interpleader, and defendant and the interpleader bring error. Affirmed.

Arnote & Rogers, of McAlester, for plaintiffs in error. Andrews & Day, of McAlester, for defendants in error.

THACKER, J. The plaintiffs in error, L. S. Millus and M. F. Millus, who are husband and wife, will be designated as defendant and interpleader, respectively, and the defendants in error, Lowrey Bros., a partnership, will be designated as plaintiffs, in accord with the titles of these parties in the trial court.

The plaintiffs commenced this action on August 10, 1911, against the defendant, on an account for \$270, with legal interest from that date, and on a promissory note held by them as assignees for \$32, with interest thereon at the rate of 8 per cent. per annum from some time in 1903, making a total of about \$322 at the time this action was commenced; and at the same time the plaintiffs procured the attachment of a stock of goods, wares, and merchandise as the property of the defendant and in his possession, upon an affidavit filed in this case which alleges, among other things:

"That said plaintiff has commenced said action against said defendant for the recovery of \$322; that the defendant is indebted to said plaintiff in said sum; that said claim is just and due and is wholly unpaid.

(5) That said defendant is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors.

(6) That said defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.

(7) That said defendant has property or rights in action which he conceals.

"(8) That said defendant has assigned, removed, or disposed of or is about to dispose of his property, or a part thereof, with the intent to defraud, hinder, or delay his creditors."

The attached property was the stock in trade in a store in the ostensible possession and control of the defendant.

On September 6, 1912, defendant answered by denial of all indebtedness and by alleging that the account sued on was incorrect in respect to its failure to show certain credits, as claimed by him, amounting to a payment of the indebtedness therein charged against him.

On November 25, 1911, the defendant filed his verified motion to discharge the said attachment, in which motion he not only alleged defects apparent on the face of the plaintiff's affidavit for the same, but denies the existence of each and all grounds therefor stated in said affidavit.

On December 10, 1912, plaintiffs filed their general denial of the allegations of defendant's answer.

On December 19, 1912, the interpleader, presumably under section 3918, Stat. 1893 (section 4701, Rev. Laws 1910), came into this case by filing what she denominated her "interplea in attachment," which, after reciting the fact of said attachment, alleges:

"That this affiant claims said property so attached; that affiant's claim to said property arises as follows: That affiant bought the original stock of goods, wares, and merchandise, replenishing the same from time to time as depleted in the usual course of trade, and at the time of the levy of the said attachment writ she was the absolute owner of said stock of goods, wares, and merchandise, and bought and paid for same with her own money, and the same is the property of this affiant and is not the property of L. S. Millus or any other person.

"Wherefore affiant prays that said attachment be dissolved as to said property, and for such other relief as may be just and meet in the premises."

On February 28, 1913, the plaintiffs filed a general denial to the aforesaid interplea.

On April 29, 1913, with the pleadings of the parties and the motion of the defendant to discharge the attachment standing as above stated, this case went to trial to a jury under the judge's instructions upon each and all the issues of fact above shown, including the issue made by the motion to discharge the attachment and the issue made by the aforesaid interplea and answer thereto, and the trial resulted in a verdict as follows:

"We the jury duly impaneled, selected, and sworn to try the above-entitled cause, do find from the law and evidence the issues in favor of the plaintiffs, Lowrey Bros., in the sum of \$188.38, and that the attachment herein shall be sustained, and further find the issues against the interpleader, M. F. Millus."

The court entered a judgment in accord with this verdict; and the defendant and interpleader bring the case here for review upon their separate assignments of error, now to be considered so far as they present questions which this court will review in the

state of the record and in the state of the argument thereon in their brief.

The interpleader does not assign as error the action of the trial court in overruling her motion for a new trial, and, for this reason, her petition in error will not be considered, the determination upon the trial of the issue made by her interplea and the plaintiff's denial of the allegations of the same being the only issue in which she was interested.

[1] She now claims that her interplea, which she entitled her "interplea in attachment," was but a motion to discharge the attachment to be determined by the judge alone, and that its determination was not a trial within the rule requiring a motion for a new trial and an assignment of error in the overruling of the same.

It appears that under section 4426, Stat. 1893 (section 5310, Rev. Laws 1910), one who is not technically a party to an action, but who has an interest in or is affected by the same, as, for instance, one who is interested as owner or otherwise in having the property discharged from the attachment, may move for such discharge without subjecting his claim of interest to the danger of a binding adjudication against him on such motion, although the court has a wide discretion in determining such motion, and should overrule the same if there is any substantial question as to the mover's interest; and the only thing determined as to the mover's interest is the interlocutory question as to whether the same is claimed and is admitted or not seriously questioned in such action, although the decision may be final as to other grounds of the motion (*Sparks v. City National Bank of Lawton et al.*, 21 Okl. 827, 97 Pac. 575; *Shelby et al. v. Ziegler*, 22 Okl. 799, 98 Pac. 989; *Crow v. White-Wing*, 3 Kan. 276 [270]; *Harrison & Willis v. Andrews*, 18 Kan. 535; *Long v. Murphy et al.*, 27 Kan. 375); but, instead of such an anomalous motion to discharge under the section cited, it appears that the interpleader, evidently relying upon section 3918, Stat. 1893 (section 4701, Rev. Laws 1910); without any direct attack upon the attachment proceedings, had, prior to the levy upon this personal property, merely alleged title, and, liberally construing her interplea, claimed the right to the immediate possession of the property, somewhat as if she were proceeding in replevin (*Ranney-Alton Mercantile Co. v. Hanes & Johnson*, 9 Okl. 471, 60 Pac. 284), so that, when the plaintiff filed his general denial thereto, an issue was made, to be tried as in replevin, as to the existence of her alleged right to the immediate possession of this property. *Ranney-Alton Mercantile Co. v. Hanes & Johnson*, supra; *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398; *Spooner v. Ross*, 24 Mo. App. 599; *Stadden Grocery Co. v. Lusk*, 95 Mo. App. 261, 68 S. W. 537; *State ex rel. John Reeves v. Barker*, 26 Mo.

App. 487; *Brownwell & Wight Car. Co. v. Barnard*, 139 Mo. 142, 40 S. W. 762.

The issue thus made by her was tried and decided against her; and, this being the only issue or decision in the case affecting her, her failure to assign as error the action of the trial judge in overruling her motion for a new trial completely eliminates her petition in error and leaves her without any assignment which this court will review. *Avery v. Hays*, 44 Okl. 71, 144 Pac. 624; *Wilson v. Eulberg*, 151 Pac. 1067; *Bice et al. v. Myers et al.*, 45 Okl. 507, 145 Pac. 1150.

The foregoing disposes of the interpleader's petition in error; and we will now proceed to consider the defendant's contentions so far as he has reserved exceptions in the trial court, assigned error in this court, and argued such error in his brief.

[2-4] It does not appear that there is any question for review here touching the trial, decisions, and judgment upon the issue made below as to the defendant's indebtedness to the plaintiff; and the only assignments of error presented for decision in this court relate to the sustention of the attachment against him in the judgment given in the trial court.

It does not appear that the trial judge was ever called upon or in any manner refused to consider or determine the defendant's motion to discharge the attachment independently of the verdict of the jury; but by this instruction he submitted to the jury, with the tacit consent given by the silence of the defendant, the issue as to the existence of any ground for the attachment alleged in the plaintiff's affidavit therefor; and in the final judgment in the case, after reciting the verdict as hereinbefore quoted, he gave judgment for the plaintiff for \$188.38 and sustaining the attachment, in accord with the verdict.

In submitting this issue as to the existence of any ground for the attachment to the jury, the trial judge, without objection, informed the jury in a paragraph of the instructions as to what is alleged in plaintiff's affidavit as his grounds for the attachment, and that the defendant had denied the same, so as to advise the jury of the existence of the issue so made; and in two separate paragraphs he further instructed, without objection, as follows:

(2) "That fraud is never presumed, but must be proven, the law presumes that every person transacts business honestly and in good faith, and the burden of proof of fraud is upon the party who charges, and where the transaction may be fairly reconciled with honesty, and if the weight of the evidence is in favor of the conclusion, it should always be adopted, and if the proof fails to establish any of the material facts by clear preponderance of the testimony, then the plaintiff's attachment should be dissolved;" and (3) "that a debtor may pay one creditor in preference to another or may give one creditor security for payment of his demands in preference to another providing same is done in an honest transaction."

And, in submitting the aforesaid issue, the judge also gave the jury the following instructions to which the defendant took exceptions, to wit: .

"You are instructed in this cause that the burden is upon the plaintiff to show by a fair preponderance of the evidence some one of the grounds for attachment set out in the attachment affidavit. And in determining the question as to the attachment you are to take into consideration all the testimony and circumstances surrounding the transaction."

"You are instructed that one of the grounds alleged in the affidavit for attachment is that defendant has removed or disposed of, or is about to dispose of, his property, or a part thereof, with intent to defraud, hinder, or delay his creditors, and in this connection you are instructed that any assignment, removal, or disposition of any substantial part of his property with intent either to defraud or hinder or delay his creditors would come within this allegation of the affidavit, and you are instructed that a mortgage is a transfer or disposition within the meaning of the law."

It will be seen from the foregoing that the defendant did not object or except to the submission of the issue as to the existence of a ground for the attachment to the jury, but limited his exceptions to two of the five paragraphs of the instructions relating to the same; and the only point against either of these two paragraphs that he argues in his brief even approximately as required by the rules of this court is that it was error to give that portion of the last paragraph which states that "a mortgage is a transfer or disposition within the meaning of the law," which we will notice later.

Some idea of the inharmony between the decided cases in the different jurisdictions and in statements of law writers attempting to follow the same as to the proper procedure to obtain a discharge of an attachment upon grounds dehors the record may be gathered from the text in 2 R. C. L. Attachment, §§ 84, 87, 90, 91, pp. 874-877, and notes thereto.

In 6 Corpus Juris, Attachment, § 1078, p. 463, it is said:

"The issue on a plea in abatement or traverse of the grounds of attachment should be tried by jury unless such trial is waived by the parties." (The italicization is our own.)

In 6 Corpus Juris, Attachment, § 1052, p. 455, it is said:

"On an application for a dissolution of an attachment there must be a hearing and a trial of the questions of fact involved. It is the usual practice for the court or officer to whom a motion to vacate an attachment is made to hear the same without a jury, *whether the motion is based on the original papers or on defects not apparent*, and in some jurisdictions such trial is, it seems, the only proper method. The court may, however, for its better information and satisfaction, frame and submit proper issues to a jury, and there are cases in which it ought so to do." (The italicization is our own.)

In *Wearne v. France*, 3 Wyo. 273, 21 Pac. 703, in which the existence of any ground for the attachment is traversed in a motion to discharge the same, and which is cited in the note as supporting the statement above

italicized in our last quotation from *Corpus Juris*, it is said in the opinion:

"An objection is made by plaintiff in error that the motion to discharge, as supported by affidavits, does not present a triable issue, but that such issue must be made by plea. This objection is not well taken, for the reason that the statute (sections 2910 and 2911, Rev. St. Wyo.) expressly provides that the validity of the attachment shall be tried upon motion to discharge, supported by affidavits or oral evidence. Upon the hearing of the motion in the court below plaintiff demanded a jury, which demand was refused by the court, and the refusal is now assigned as error. The right to trial by jury guaranteed by article 7 of the Constitution of the United States extends only to "suits at common law." An attachment is a special proceeding, auxiliary to an action at common law, and can in no proper sense be considered as a "suit at common law." So the statute (section 2517, Rev. St. Wyo.) provides that issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury in accordance with the constitutional provision. This section does not apply to special proceedings. Clearly the proceeding in attachment is not an action for the recovery of money or real or personal property."

Sections 2910 and 2911, Rev. Stat. Wyo. 1887, are practically identical with our sections 4118 and 4119, Stat. 1893 (sections 4862 and 4863, Rev. Laws 1910), and section 2517, Rev. Stat. Wyo. 1887, is practically identical with our section 4156, Stat. 1893 (section 4993, Rev. Laws 1910).

Section 4157, Stat. 1893 (section 4994, Rev. Laws 1910), which follows and refers to the provision as to issues triable to a jury under section 4156, Stat. 1893 (section 4993, Rev. Laws 1910), reads:

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury, or referred as provided in this Code."

And Laws 1899, p. 194, as revised in section 5318, Rev. Laws 1910, reads:

"Judges of the district, superior, and county courts shall, within their respective districts and counties, be authorized to hear and determine at chambers motions to dissolve attachments. * * *"

In *Barton v. Ferguson*, 1 Ind. T. 263, 37 S. W. 49, where the grounds of the attachment were traversed, the court following *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56, *Platter Co. v. Low*, 54 Fed. 93, 4 C. C. A. 207, and *Holliday v. Cohen*, 34 Ark. 707, held, as stated in the syllabus:

"The matter of the rightfulness of the attachment should be tried and determined by the court upon the issues raised by the affidavit for attachment and the appellee's controverting affidavit."

Although it does not appear that our own court more than once, nor since 1894, has been called upon to decide the precise question as to whether the issue made by a traverse of the grounds for an attachment may properly be embraced in a motion to discharge the same as a matter of right, and is triable to the judge, without a jury, under the above-mentioned provisions of our statutes, the following cases will show that from early territorial days down to this moment

the court has entertained and consistently adhered to the view that such an issue might be made by motion to discharge and is properly triable to the judge without a jury. *Carnahan v. Gustine et al.*, 2 Okl. 399, 37 Pac. 594; *Cassady v. Morris*, 19 Okl. 203, 91 Pac. 888; *Bash v. Howald*, 27 Okl. 462, 112 Pac. 1125; *McComb et al. v. Watt*, 39 Okl. 412, 135 Pac. 361.

In *Carnahan v. Gustine et al.*, supra, where "in the motion to dissolve [the attachment] the defendant in error denied under oath specifically each and every allegation set out and contained in the affidavit of attachment, and on the issues thus joined the court heard testimony and determined the controversy," it is held:

"A motion to discharge an attachment is a proper proceeding under sections 4118, 4119, Statutes of 1893, and such proceeding should succeed or fail upon the truth or falsity of the attachment affidavit."

In *Cassady et al. v. Morris*, supra, where defendant moved to discharge upon the ground that the attached property was the homestead of the family, it was held:

"A motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury."

In the opinion in that case it is said:

"By section 8, art. 2, c. 24, p. 194, Laws of 1899, the judge at chambers is given authority to dissolve attachments. The issue is formed by a denial of the attachment affidavit, or upon the denial of facts set up in a motion to discharge. None of these affidavits or motions are, properly speaking, pleadings. The issues referred to in section 4453, supra, are the issues made by the pleadings in the case. Mere collateral issues that may arise upon motion are not included in the issues triable to a jury. It is evident, taking all the statutory provisions together, that the Legislature did not intend that the issue formed upon a motion to discharge an attachment, or to discharge exempt property from attachment, should be submitted to a jury."

In *Bash et al. v. Howald*, supra, where it does not clearly appear how the question arose, it is held:

"A motion to dissolve an attachment and to have the property restored to the defendant may be heard and disposed of by a judge at chambers."

In *McComb et al. v. Watt*, 39 Okl. 412, 135 Pac. 361, where the motion related to exempt property, it is held that the issue presented by a defendant's motion to discharge an attachment is triable to the judge; and, after quoting the statute expressly authorizing such motion, it is said in the body of the opinion:

"It has been held that this proceeding by motion to discharge an attachment is a proper practice (*Carnahan v. Gustine*, 2 Okl. 399, 37 Pac. 594), and that the issue thus presented is triable to the court, and that the parties are not entitled to a jury (*Cassady v. Morris*, 19 Okl. 203, 91 Pac. 888; *Bash v. Howald*, 27 Okl. 462, 112 Pac. 1125)."

The defendant, in failing to demand a hearing and decision by the judge on his motion to discharge and in allowing the issue presented by the same as to the existence of

any ground for the attachment to be submitted to the jury without objection to such submission, waived his right to such hearing and decision thereon, and is bound by the verdict of the jury to the same extent that he would be bound if the issue had been one upon which a jury trial might have been demanded as a matter of right.

It must be obvious that the judicial power of the jury to determine an issue submitted to them is one thing and the rights of the parties to the litigation in respect to what should be submitted to them in the trial of issues of fact is another and distinct thing; and, although the submission of an issue to the jury may violate the rights of the parties to the litigation, their verdict is not coram non iudice and void if the jury has the judicial power to determine such issue when submitted.

The question as to whether the jury has such judicial power must, of course, be determined by reference to our state Constitution, which does not expressly designate the judicial powers of each nor expressly authorize any legislative or judicial transfer of judicial power from the judge to the jury, and must be construed to vest in judge and jury just such judicial powers as they had in general in the territory of Oklahoma and in our sister common-law states at the time of the adoption of the Constitution, with no other line of demarkation between the powers of each than had been established by general law in such jurisdictions.

There is certainly no express line of demarkation drawn in our Constitution between the judicial power of the judge and the judicial power of the jury; and it appears that, according to general law and the usual practice in common-law jurisdictions, their respective judicial powers, as contradistinguished from the rights of the parties as to how these powers are exercised, were coextensive at the time of the adoption of our Constitution, at least in determining issues of fact upon which legal rights depend.

Section 1, art. 7 (Williams', § 186), of the state Constitution vests the judicial power of the state "in the Senate, sitting as a court of impeachment, a Supreme Court, district courts," etc. (which "district courts" in a broad sense may include judges and juries, 11 Cyc. 855, 856), and section 10, art. 7 (Williams', § 195), of the same gives a district court, which, in its broad sense, may include both judge and jury, original jurisdiction "in all cases, * * * except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court," while section 19, art. 2 (Williams', § 27), of the same provides that "the right of trial by jury shall be and remain inviolate"; but there is no express guaranty as to the right of trial by the judge.

Unless a correct construction of one or more of these provisions of the Constitution limits the judicial power of the jury to ren-

der verdicts upon which judgments may be based to issues of fact which may be made by the pleadings in actions at common law, it seems certain that their verdict upon any other issue of fact upon which a legal right depends, when submitted without objection, is equally as effective when made a basis for a judgment without objection as is their verdict upon an issue of fact in a common-law action; for it is certain that both the original judicial power and the limit of such power in the jury must be found in a correct construction of these provisions of the Constitution, and we have no statute that even attempts to limit such power.

As already stated in effect, the right to demand a trial by jury and the judicial power of the jury to determine what is submitted to them without objection are not coextensive under our Constitution; and, although this constitutional guaranty protects such right from any sort of violation, it nowhere limits the judicial power of the jury, which, in the history of jury trials, has occasionally been effectively exercised beyond the bare right of either party to the litigation to demand the same, both in respect to the issues of fact submitted and in respect to separable questions of law inadvertently or otherwise submitted with such issues without objection.

It would have been very easy to have said in one form or another that the judicial power of this state is vested in the judges, and, upon demand in the trial of an issue of fact in an action at common law, in the juries, if such precise demarcation between their powers had been intended; but, instead of this, it is vested in the courts (section 1, art. 7; Williams', § 186), which includes both judges and juries, without specifying any line of demarcation between the power of the judge and that of the jury; and the only line of demarcation between judge and jury in any respect specified is that the "right of trial by jury [upon demand in actions at common law] shall be and remain inviolate."

In 24 Cyc. 107, it is said:

"Since the constitutional guaranties relating to jury trial are merely restrictive, the Legislature may provide for jury trial in cases where it could not otherwise be claimed as a constitutional right."

This could not be done if the Constitution fixed the precise line of demarcation between the judicial power of the judge and judicial power of the jury; and we need not say that, if there was such constitutional demarcation, a verdict invading the province of the judge would be absolutely void and could not serve as a predicate for a judgment.

The following authorities will suffice to show that verdicts upon issues properly triable to the judge without a jury are not void and that judgments may be based thereon:

In 2 R. O. L. Appeal and Error, § 62, p. 86, it is said:

"A party cannot for the first time on appeal object that the court erred in submitting particular questions to the jury. Thus the fact that a question of law was submitted to the jury for its decision cannot be raised for the first time on appeal."

In 3 Corpus Juris, Appeal and Error, § 817, p. 917, it is said:

"As a rule proper exceptions must be saved to entitle a party to complain on appeal of alleged errors in submitting or in refusing or failing to submit the case or particular questions or issues therein to the jury."

In Von Berg v. Goodman, 85 Ark. 605, 109 S. W. 1006, it is held:

"It was not reversible error to submit to the jury the question as to the existence of grounds of attachment, though the better practice is for the court to determine this issue."

Also see Shrewsbury v. Pearson, 1, 2 S. O. L. R. (1 McCord, 331) 208; Weston v. Jones, 41 Fla. 188, 25 South. 888.

These authorities clearly show that, in respect to such issues of fact as this, there is no want of judicial power in the jury to determine the same, although it is properly determinable by the judge without a jury.

If defendant had not waived his right and had objected to the submission of that issue to the jury, it would seem that such a submission to the jury for a general verdict instead of merely for one or more special findings of fact as advisory to the judge would constitute error which, if an examination of the entire record should show that it probably resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right (section 6005, Rev. Laws 1910), would necessitate a reversal. Although not necessarily reversible error, it is error to so submit such an issue when it does not affirmatively appear that the judge treated the verdict as merely advisory and decided the issue according to his own opinion as to both the facts and the law. Apache State Bank v. Daniels, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520.

Treating this as a jury case, as we must in view of its submission to the jury without objection, it does not appear that there is any reversible error in the above instruction that "a mortgage is a transfer or disposition within the meaning of the law"; that is, any error which has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right" within the meaning of section 6005, Rev. Laws 1910, as we shall now see.

[5] In 2 R. C. L. Attachment, § 31, p. 824, in speaking of statutes authorizing attachments upon this ground, it is said:

"It may also be taken as settled that the application of the statute does not depend upon whether the debtor has disposed of the property by gift, sale, mortgage, or assignment, although the form of the conveyance may be an important consideration in determining whether it was made with fraudulent intent."

As supporting this statement, see Shellbarger v. Mottin, 47 Kan. 451, 28 Pac. 199, 27 Am. St. Rep. 306, and notes.

[6, 7] The only remaining questions presented by the defendant's assignments of error and argument in his brief so as to require a review and decision by this court, with our opinion upon each, may be stated as follows:

First, Does the affidavit for the attachment show "the nature of plaintiff's claim," so that it may be known from reading the same whether this is a civil action for the recovery of money within the meaning of section 4068, Stat. 1893 (section 4812, Rev. Laws 1910), in which an attachment may be had, or an action in which an attachment cannot be had, the allegation in that regard being as follows, to wit:

"That said plaintiff has commenced said action against said defendant for the recovery of \$322; that the defendant is indebted to said plaintiff in said sum; that said claim is just and due, and is wholly unpaid."

We think the description of it as an indebtedness that is just, due, and unpaid sufficiently shows, in the absence of anything to the contrary, that this is "a civil action for the recovery of money," within the meaning of section 4068, Stat. 1893 (section 4812, Rev. Laws 1910), in which attachment proceedings are permissible. Hendrickson v. Brown, 11 Okl. 41, 65 Pac. 935.

Second. Is the allegation, in the language of section 4069, Stat. 1890 (section 4813, Rev. Laws 1910), that the claim "is just," sufficient? We think this is clearly sufficient. Reyburn v. Brackett, 2 Kan. 227, 83 Am. Dec. 457; Robinson v. Burton, 5 Kan. 293 (176). And if there had been any such slight defect in the affidavit as that urged in the two respects above mentioned, the evidence upon the trial was ample to cure the same. Hodson v. Tootle, 23 Kan. 317 (227).

[8] Third. Does the evidence reasonably tend to prove any one or more of the alleged grounds for the attachment, and thus sufficiently support the action of the trial court in overruling the motion to discharge? Upon this question the evidence is sufficient to support the decision in the trial court. It appears that the attached property is a stock of merchandise in a retail store in which the defendant had been in the ostensible possession and control of the business from its commencement about 14 months before the attachment, except that the business was carried on in a way in the name of his wife, who worked in the store some of the time, although he purchased goods for the store from a wholesale grocery concern in her name for a considerable time at first without disclosing the fact that it was not his own, as such concern thought; and the fact that the same was conducted in her name did not appear to be known to all customers residing in the vicinity of the store; that, notwithstanding his claim that his wife owned the

same, he received no salary for his constant service in the conduct of the business, and he rendered the property for taxes in his own name; that, when asked by a customer who resided in the vicinity of the store a short time before the attachment about initials other than his own observed on a box in which merchandise had apparently been shipped to the store, he stated that they were those of his wife, and that he was conducting the business in her name on account of trouble he had gotten into by cutting government timber, that a short time before the attachment he stated in response to an inquiry that he would sell the stock of merchandise without mentioning any want of ownership in himself, and that at some time before the attachment he had stated to a certain party that an outstanding mortgage he had given to another party was "bogus."

The judgment of the trial court is affirmed. All Justices concur, except TURNER, J., who concurs in conclusion, and KANE, J., who dissents.

**LAWTON MILL & ELEVATOR CO. et al.
v. FARMERS' & MERCHANTS' BANK OF
CINCINNATI, IOWA, et al. (No. 7351.)**

(Supreme Court of Oklahoma. Jan. 16, 1917.
Rehearing Denied May 1, 1917.)

(Syllabus by the Court.)

1. RECEIVERS §130—SALE PENDING FORECLOSURE—JURISDICTION.

A court of equity has power, in a suit to foreclose a mortgage on real estate, to order its receiver in charge of the property involved to sell such property, even in advance of a decree determining the rights of the parties, but such power should be exercised with extreme caution, and never unless it is clearly apparent that a sale will be for the benefit of all parties whose rights are involved.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 225, 226.]

2. RECEIVERS §130—SALE PENDING FORECLOSURE—ORDER TO SELL.

Record examined, and held not to justify an order to a receiver to sell real estate.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 225, 226.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Comanche County; J. T. Johnson, Judge.

Suit by the Farmers' & Merchants' Bank of Cincinnati, Iowa, against the Lawton Mill & Elevator Company and Frank E. Humphreys and Flora E. Humphreys, in which the Farmers' State Bank of Promise City, Iowa, and N. A. Robertson filed answers and cross-petitions against the defendants. From the overruling of their objections to and the confirmation of a sale of defendants' property, defendants bring error. Reversed, with direction to set aside the order confirming the sale, and to vacate the order for a receiver's sale, etc.

W. C. Henderson, of Lawton, and H. G. McKeever, of Enid, for plaintiffs in error. W. C. Stevens, of Lawton, for defendants in error.

BURFORD, C. The Farmers' & Merchants' Bank of Cincinnati, Iowa, filed in the district court of Comanche county, its petition to recover upon certain promissory notes, alleged to be executed by the Lawton Mill & Elevator Company and indorsed by Frank E. and Flora E. Humphreys, and to foreclose a mortgage upon certain real property, consisting of a mill and elevator and machinery and appliances thereof belonging to the Lawton Mill & Elevator Company. The Farmers' State Bank of Promise City, Iowa, and N. A. Robertson filed answers and cross-petitions, likewise seeking recovery upon the notes of the elevator company and Humphreys, and the foreclosure of mortgages upon the same property. Defendants, Lawton Mill & Elevator Company and Frank and Flora Humphreys, answered, denying under oath the allegations of the petition and cross-petition, and including the allegations of the execution of the notes and mortgages sued upon, and further setting up that the debt sued upon was not yet due. Plaintiff and the cross-petitioners replied by general denial. Meanwhile, upon application therefor, the court appointed a receiver—

"to take charge of the property covered by and included in the mortgage of the said plaintiff and cross-petitioners * * * and handle, manage, and direct and control and rent the same until the further order of this court."

After the case was at issue, plaintiffs and cross-petitioners applied for an order of sale by the receiver. Over the objection of plaintiffs in error, the order of sale was granted and the property sold. Objection was again made by plaintiffs in error at the hearing upon petition for confirmation, and, their objections being overruled and the sale confirmed, they bring the cause here for review.

[1] The sole question that we find it necessary to decide is whether or not the trial court ought to have ordered the sale of the property. No question is made in the briefs of the propriety of this assignment of error being raised upon this appeal from the motion to confirm, and we therefore treat that as waived and this assignment as properly before us for decision.

Under our statute (section 4982, Rev. Laws 1910) the powers of a receiver under order of the court may be very broad. It is provided:

"The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the courts may authorize."

That a court of equity has power to order its receiver to sell property in process of fore-

closure, prior to final decree, can hardly be disputed. The Supreme Court of the United States, considering such an order of sale in *First National Bank of Cleveland v. Shedd*, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. Ed. 877, said:

"Of the power of the court to make such an order in a proper case we have no doubt."

The doctrine so announced has been uniformly followed in the federal courts, particularly in railway cases, such as was the *Shedd Case*, supra. Examples are found in the decisions in *Central Trust Co. v. Cincinnati, H. & D. Ry. Co.* (C. C.) 169 Fed. 469, *Bowling Green Trust Co. v. Virginia P. & P. Co.* (C. C.) 164 Fed. 757, and *Penn. Ry. Co. v. Allegheny Val. Ry. Co.* (C. C.) 42 Fed. 85. The power has also been upheld and exercised in cases involving other property than railways (*Olmstead v. Distilling Co.* [C. C.] 73 Fed. 44; *Smith v. Burton*, 67 Vt. 514, 32 Atl. 467), but all the courts united in declaring that the power ought to be exercised sparingly and with extreme caution. In this view we heartily concur. The statutes of this state provide an orderly method for the foreclosure of mortgages and for subjecting the mortgaged property to the payment of the debt for which it is pledged. It cannot be conceived that situations might arise where it would be necessary to forestall that orderly procedure and to sell the property by receiver's sale, in order to save anything for the parties. Such might readily be the case as to perishable personal property, or as to live stock, where the cost of maintenance was great. As to railways, the right of the public that they shall be operated frequently requires a speedy sale in order to place the property in a position where these rights of the public can be subserved, but as to ordinary real estate no such condition arises, and it is only in the most extreme cases, where it is clearly apparent that the interest of all parties would be served by the sale that we would give our sanction to such a proceeding. The dangers of even an ordinary exercise of the power are apparent. In perhaps the majority of cases continuing depreciation of the mortgaged property can be shown; some decrease of the corpus available to pay the debt, through charges of maintenance, repairs, receiver's fees, etc., can be established. If upon these grounds alone receivers are to be authorized to sell in advance of a decree of foreclosure, then our whole statutory process for foreclosure may as well be abolished. By such a rule a homestead, mortgaged by the husband without the wife's consent, might be sold and the homestead right made into a mere nothing, before the wife was made a party or had an opportunity to assert her rights. True she might afterward claim the proceeds, but the sale would stand (*Burlington Ry. Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58, 31 L. Ed. 73), and money would not restore the home or preserve the right to real property, which

since our earliest times has been held next to sacred. Again, by such a sale the six-month redemption period given in "an appraisal waived" mortgage could be absolutely destroyed. These and many other considerations lead us to deny to trial courts the right to exercise this power of sale upon any ordinary grounds.

[2] Here the application was based upon allegations of the deterioration of the machinery by nonuse, destruction by rats and mice, and partial cancellation of the insurance on the property. It suffices to say that all these things, if true, were not in any wise sufficient to authorize a receiver's sale in this cause. The cause was at issue, it could only be a few months at most until a proper trial could be had, and, if justified, a decree of foreclosure obtained. If that decree were superseded on appeal, it must be by a bond sufficient to render plaintiffs indifferent as to the fate of the mortgaged property. If not superseded, a sale could be had. Furthermore, in the instant case the execution of the securities relied upon was directly denied. In no such case, so far as our extended research has revealed, has the power to sell prior to a decree establishing the security ever been exercised. Receiver's sales are ordered prior to final decree generally, only where there is a dispute as to priority of the various claimants, and not where the validity of alleged securities against the property is impeached.

Without further elaboration we hold the facts set out in the application for sale entirely insufficient to justify its prayer being granted. The cause is therefore reversed, with directions to the trial court to set aside the order confirming the sale, to direct the restoration of the purchase money to the successful bidder, if it has been paid into court, and to vacate the order for a receiver's sale.

PER CURIAM. Adopted in whole.

QUAKER OIL & GAS CO. v. JANE OIL & GAS CO. (No. 8235.)

(Supreme Court of Oklahoma. April 17, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS \S 406(2).—PRESIDENT—AUTHORITY.

The president of a corporation has no inherent authority, by virtue of his office, to contract for the corporation; his power in that respect being no greater than that of any other director.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 1612.]

2. SPECIFIC PERFORMANCE \S 127(1) — CONTRACT OF SALE—INJUNCTION.

Two corporations, designated as the Quaker Company and the Jane Company, entered into a written contract whereby the latter was given an option to purchase certain storage oil belonging to the former, at such time as the Quaker Company desired to sell the same, and at

such price as should be fixed by it. Thereafter, and while said contract was in force, the president of the Quaker Company attempted to sell said oil to the Carter Company. The latter sale contract, the board of directors of the Quaker Company promptly repudiated. Thereafter suit was brought by the Jane Company against the Quaker Company to compel specific performance of the contract for the delivery of the oil named in the contract between said companies, at the price fixed in the unauthorized contract made by the president of the Quaker Company to the Carter Company; the Jane Company basing its right of action upon the sale to the Carter Company, which was subsequently repudiated by the board of directors of the Quaker Company. *Held*, that the judgment of the court granting a temporary injunction restraining the Quaker Company from disposing of its oil, under the circumstances disclosed by the record, constituted reversible error.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406, 407, 409, 410.]

8. CORPORATIONS §—426(3)—ACT OF PRESIDENT—VALIDITY AND EFFECT.

Where it appears that the action of the president of a corporation in making a contract for the sale of its properties approximating in value \$3,000,000 was promptly repudiated by the board of directors of such corporation, the unauthorized act of the president is not binding upon the corporation in favor of a third person, not a party thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1708.]

4. APPEAL AND ERROR §—954(1)—REVERSAL—GROUNDS—STATUTE.

By statute (section 5236, Rev. Laws 1910) this court may reverse, vacate or modify a judgment of the district court that grants, refuses, vacates, or modifies an injunction. Where, on review of such order or judgment, it appears from the nature of the case and from all the facts properly before the court that the plaintiff was not entitled to an injunction, and that the same should not have been granted, the action of the trial court will be reversed because of the error committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818, 3819, 3821.]

Error from District Court, Tulsa County; Conn Linn, Judge.

Suit for specific performance and for a temporary injunction by the Jane Oil & Gas Company against the Quaker Oil & Gas Company. From an order enjoining the defendant, he brings error. Reversed and remanded.

In a suit to compel specific performance of a contract for the delivery of two tanks of crude oil at the price of 80 cents per barrel, and for a temporary injunction enjoining the defendant company from selling or disposing of the oil in controversy, the court after a hearing had issued a temporary order enjoining the defendant from disposing of the oil stored in tanks numbered 198 and 199, situated on the tank farm of the plaintiff company, and from in any wise interfering with the oil contained in said tanks until the further order of the court. From the order the defendant, Quaker Oil & Gas Company, brings error. Reversed and remanded.

Carroll & Mason, of Tulsa, Samuel W. Hayes, of Oklahoma City, and J. P. O'Meara, of Tulsa, for plaintiff in error. Poe, Hindman & Lundy, of Tulsa, for defendant in error.

SHARP, C. J. Both plaintiff in error and defendant in error are domestic corporations, and will be hereinafter referred to as the Quaker Company and the Jane Company. On June 15, 1915, said companies entered into written articles of agreement, the pertinent provisions of which are that the Jane Company agreed to make pipe line connections with the wooden tanks of the Quaker Company on certain lands in section 5, township 18 north, range 7 east, in Creek county, and to run the oil free of charge from said wooden tanks, as the same was produced, into four certain 55,000-barrel steel tanks, numbered 157, 186, 198, and 199, respectively, owned by the Jane Company on its tank farm near Cushing, in Payne county. The Jane Company agreed to fill said four tanks and to purchase from the Quaker Company, at the posted market price at the time said oil was run, all the oil run into tanks numbered 157 and 186. The third and fifth paragraphs of the agreement, respecting the oil to be run into tanks 198 and 199, are as follows:

"Third. The first party also agrees to store the oil so as to be run as aforesaid into tanks numbered 198 and 199, for a period of one year from date it is so run, without any charges for such storage."

"Fifth. The second party also agrees to grant to said first party the option to purchase the oil to be stored in said two tanks mentioned in third paragraph hereof, at any time said second party may desire to sell the same, and at such price as shall be fixed by said second party."

The oil in tanks 157 and 186 was delivered into the possession of the Jane Company on or prior to July 30, 1915, and is not directly involved in this suit, though it appears that at the time of the hearing there was a balance of about \$12,000 due on account of the sale of said two tanks of oil.

On the part of the Jane Company, it is insisted that the Quaker Company, on October 1, 1915, desired to sell the oil stored in tanks 198 and 199, and fixed the price thereof at 80 cents per barrel; that thereupon on, to wit, October 8th, it exercised its option to purchase the same and gave notice of that fact by letter to the Quaker Company. The only evidence offered at the hearing, of a "desire to sell" or sale, was a written agreement purporting to have been made and entered into between the Quaker Oil & Gas Company and the Carter Oil Company. This agreement included the crude oil stored in tanks 198 and 199 of the Jane Company, located near Cushing, but did not include the tanks or tank sites. The contract was sign-

ed: "Quaker Oil & Gas Company, by E. H. Jennings, Pres." No evidence was introduced or offered to show the authority of Mr. Jennings to make the contract with the Carter Company. The answer of the Quaker Company, while containing certain admissions in respect to the oil delivered in tanks 157 and 186, and that tanks 198 and 199 were filled with oil from its wooden tanks, and which was at the time contained in said tanks, specifically denied under oath each and every allegation of the petition not expressly and explicitly admitted. The effect of the verified answer of the defendant was to place upon the Jane Company the burden of proving a desire or offer to sell, and the fixing of a price for the oil by the Quaker Company, prior to the exercise of its option to purchase on October 8th.

It is not contended that the Quaker Company offered the oil in tanks 198 and 199 to the Jane Company, or that it fixed a price thereon to said company. On the other hand, it is claimed that as the president of the Quaker Company undertook to sell to the Carter Company 62 tanks of oil, including tanks 198 and 199, that said agreement is sufficient to enable the Jane Company, under its option to exercise its right to purchase at the price made the Carter Company. Assuming that if a sale was in fact made to the Carter Company, it would be sufficient to entitle the Jane Company to exercise its option to purchase the two tanks of oil, we must look to see what there is in the record to establish such a sale. The only evidence of the sale was the contract made by the president. Quite naturally the question then turns upon the authority of the president to make the contract, for if he was without authority, and the corporation for which he undertook to act promptly repudiated his attempt to sell, then it cannot be said that his action was binding upon the Quaker Company, or that the Jane Company could acquire any rights thereby. The only evidence of Jennings' authority is that of Theodore O. Lillystrand, who testified that he was a director of the Quaker Company, and that on or about the 20th day of October, 1915, the board of directors of the Quaker Oil & Gas Company repudiated the contract signed by its president with the Carter Company, and denied Mr. Jennings' authority to make it. The purported sale of October 1, 1915, covered 62 tanks of 55,000 barrels each, or a total of 3,410,000 barrels, and included 60 55,000-barrel steel tanks, at the price of 80 cents per barrel, and the sites on which the tanks were located. On January 28, 1916, the Jane Company again notified the Quaker Company of its election to exercise its option to purchase the two tanks of oil at the price named in the contract to the Carter Company, to which the Quaker Company on the following day replied that the oil had never

been sold, but that if the Jane Company chose to exercise its option, it could have the oil at \$1.80 per barrel for all merchantable oil in the two tanks. This offer the Jane Company refused to accept, but instead, on the 4th day of February following, instituted the present suit to compel the delivery of the oil at 80 cents per barrel, or the price fixed by the contract of October 1, 1915, with the Carter Company.

[1] As the case is before us upon an appeal from an order granting a temporary injunction, and as it is yet to be heard upon its merits, it will be unnecessary to determine all of the numerous important questions ably argued in the briefs of counsel. On the record before us the judgment of the lower court must be reversed, upon the ground that it affirmatively appears that Mr. Jennings was unauthorized to make the contract with the Carter Company; and, having been promptly repudiated by the board of directors of the Quaker Company, and there being no other evidence of a desire to sell or sale by the Quaker Company, said contract furnishes no ground for compelling the latter company to sell to the Jane Company the two tanks of oil for 80 cents per barrel. Section 1252, Rev. Laws 1910, provides that the corporate powers, business, and property of all corporations formed under chapter 15, on the subject of Corporations, must be exercised, conducted, and controlled by a board of not less than 3, nor more than 11, directors, to be elected from among the holders of stock. Section 1253 provides for the election by the board of directors of a president, secretary, and treasurer, and that such officers shall perform the duties enjoined on them by law and the by-laws of the corporation. Section 1246 requires that every corporation shall within one month after filing its articles of incorporation adopt a code of by-laws for its government, not inconsistent with the laws of the United States or of the state. Generally speaking, the president of a corporation has no power to buy, sell, or contract for a corporation, nor to control its property, funds, or management. Of course the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract, or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director.

[2, 3] There is no evidence as to the authority of Jennings as president of the Quaker Company to act for it in a transaction involving approximately \$3,000,000. Neither the articles of incorporation of the company, its by-laws, or any resolution conferring authority upon the president is contained in the

record. The president of a company may not, by virtue of the power inherent in his office, dispose of the personal or other property of the corporation for any purpose, at his pleasure, without especial authority from the board of directors. While it may not be uncommon for the board of directors of a corporation to clothe the president with extensive authority over the management of its affairs, either by by-law or special resolution of the board, yet, in the absence of some such affirmative act, the president has no implied authority on account of his position to act as the agent of the corporation, but like other agents must derive his power from the board of directors or from the corporation. There is no evidence of any custom or usage on the part of the Quaker Company, recognizing the right of its president by virtue of his office, to act for and to bind the company, nor any holding out of the president to the public as having any such extended authority. As stated in 7 R. C. L. § 436:

"While the extent of the inherent authority of the president is not clearly defined, it seems to be quite limited; he has no general inherent authority to act as an agent in making contracts, but like other agents, he must derive his authority from the board of directors or from the corporation."

Speaking of the power of the president of a corporation, in *Cook on Corporations*, § 716, it is said:

"The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. But that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director."

Among the authorities supporting the rule announced in the foregoing text are *Groeltz v. Armstrong R. E. Co.*, 115 Iowa, 602, 89 N. W. 21; *Wait v. Nashua Armory Ass'n*, 86 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630; *Lyndon Mill Co. v. Lyndon Lit. & Bib. Ins. et al.*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783; *Walworth County Bank v. Farmers' L. & T. Co.*, 14 Wis. 351; *St. Clair v. Rutledge*, 115 Wis. 583, 92 N. W. 234, 95 Am. St. Rep. 964.

[4] The defendant in error contends that the court below committed no error in granting the temporary injunction, because, it says, this court has on numerous occasions held that the granting or refusing to grant a temporary injunction, involving as it does a matter of discretion, the Supreme Court will not review such order except in case of palpable abuse of such discretion, or a clear showing of error on the part of the trial court. We have frequently held that the granting of a temporary injunction in a proper case rests largely in the discretion of

the trial court. But by "discretion" in such cases is meant a sound judicial discretion. The right of a trial court to grant a temporary injunction in any and all kinds of cases, with or without a reasonable showing, cannot be defended upon the ground that as the court exercised the right to grant the order, its judgment is not subject to review. By statute (section 5236, Rev. Laws 1910), the Supreme Court may reverse, vacate, or modify a judgment of the district court that grants, refuses, vacates, or modifies an injunction. Therefore, when it appears from the record that the court should not have granted a temporary injunction, the granting thereof is error, because unauthorized. In the case at hand, as the record is barren of any evidence that the Quaker Company desired to sell the two tanks of oil, and that it fixed a price on the same, as provided for in the articles of agreement, the court should not have granted the temporary injunction. Until there was evidence of these facts, the Jane Company was not entitled to exercise the option claimed for it on account of said contract. In other words, no cause of action had accrued to it, within the terms of the contract, fairly construed. Hence, if at the time it had no cause of action, it was entitled to no relief, injunctive or otherwise.

The discretion of the trial court, involved in its power to act, was but a legal discretion; a discretion to be exercised in discerning the course prescribed by law, according to principles ascertained by adjudged cases. *Vickers v. Phillip Carey Co.*, 151 Pac. 1023, L. R. A. 1916C, 1155. In hearing and passing upon applications for injunctions, as in other cases, courts are the mere instruments of the law, and can will nothing. Judicial power is not exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law. If, then, the law does not authorize the granting of an injunction, the fact that notwithstanding, the order is granted, the will of the judge or of the court being contrary to law, will be set aside and the order reversed. *Osborne v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204, 234. In *Perry Public Library Ass'n v. Lobsitz*, 35 Okl. 576, 130 Pac. 919, 45 L. R. A. (N. S.) 368, the appeal was prosecuted from an order of the trial court refusing a temporary injunction. It was urged that the granting or refusal of a temporary injunction was a matter resting largely within the discretion of the trial court or judge, and therefore should not be reversed on appeal. Answering the contention, we said:

"This contention correctly states the rule in this jurisdiction. *Reaves v. Oliver*, 3 Okl. 63, 41 Pac. 353. But when it appears by the petition that plaintiffs are entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or omission of which will produce injury to the plaintiffs, a

temporary injunction may be granted to restrain such act; and where only questions of law are presented by the bill upon its face, or by the evidence, errors of the court or judge relative thereto are an abuse of discretion which the appellate courts will review and correct."

While in a certain sense the granting of an interlocutory injunction rests in the discretion of the trial court or judge, yet the discretion may not be exercised arbitrarily or capriciously, but according to law and well established and familiar rules of practice. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected on appeal. If upon the entire record nothing but questions of law are involved, and it appears that the injunction was improvidently issued, it is the duty of this court to promptly reverse the order or judgment. As said in *High on Injunctions* (4th Ed.) § 1496:

"But the rule that the granting or denying of a preliminary injunction involves such an exercise of judgment upon the part of the chancellor, as will not be disturbed upon appeal, does not apply to cases involving questions of law arising upon the face of the bill. And where it appears from the nature of the case and from all the facts that plaintiff is not entitled to an injunction, it is an abuse of discretion to issue the writ, and the action of the court in so doing will be reversed on appeal."

The rule is a very general one, and the authorities supporting it are numerous. Among them are *Campbell et al. v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Penrhyn Slate Co. v. Granville Elec. & L. Co.*, 181 N. Y. 80, 73 N. E. 566, 2 Ann. Cas. 782; *Godwin, Adm'r, v. Phifer*, 51 Fla. 441, 41 South. 597; *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16; *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 118 Ga. 255, 45 S. E. 267; *Eau Claire Dells Imp. Co. v. City of Eau Claire*, 134 Wis. 548, 115 N. W. 155, 159; *Swan v. City of Indianola*, 142 Iowa, 731, 121 N. W. 547; *Louisville, etc., Co. v. Western Union Telegraph Co.*, 207 Fed. 1, 124 C. C. A. 573.

As the court must upon final hearing decide not only upon the validity of the contract, and its proper interpretation, and the defenses thereto urged by the Quaker Company, as well as the right of the plaintiff company to the form of relief invoked, and because of the fact that the case is before us upon an appeal from an interlocutory order, we refrain from any expression that may affect the ultimate rights of the parties, other than those already considered and decided.

For the reasons stated, the judgment of the trial court granting a temporary injunction is reversed, and the cause remanded, without prejudice to the rights of the parties to proceed to a final hearing.

HARDY, TURNER, THACKER, and KANE, JJ., concur.

CRITTENDEN v. STATE. (No. A-2444.)

(Criminal Court of Appeals of Oklahoma. May 5, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW § 770(2) — INSTRUCTION — THEORY OF DEFENDANT.

"On a trial for larceny, where circumstantial evidence is relied on for a conviction, and there is a direct conflict in the testimony, it is error for the trial court to fail and refuse to instruct on the law applicable to a theory of the defense which the evidence tends to support, when the defendant requests it."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806.]

Appeal from District Court, Choctaw County; A. Eddleman, Judge.

John Crittenden was convicted of the larceny of live stock and he brings error. Reversed.

Richardson & Warren, of Hugo, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Choctaw county. The appellant, John Crittenden, was convicted at the October, 1914, term of said court of the crime of larceny of live stock, and his punishment fixed at two years in the penitentiary. From this judgment of conviction he appeals to this court, and asks a reversal of the same for numerous reasons, among which is the failure of the trial court to give an affirmative instruction on the law relative to the defense interposed after such an instruction had been requested to be given.

The state relied for a conviction very largely upon circumstantial evidence. There was proof that the steer was stolen, and that a short time thereafter the appellant and his codefendant, Julius Garland, were seen driving the steer to a slaughterhouse several miles from the place where the alleged taking occurred. The appellant claimed that he in good faith purchased this steer from his codefendant, Garland, that he had no knowledge that the steer had been previously stolen, and in corroboration of the appellant Garland testified that he sold the appellant the steer for \$35, and that the appellant gave him a check signed by one Raines, a butcher at Ft. Towson, Okl. Raines testified that he had authorized the appellant to purchase some butcher cattle for him, and that the appellant brought this steer and a two year old heifer to him, and that the appellant had given a check signing his (Raines') name to it to Garland for \$35 in payment for the steer, but that he (Raines) thought the price was too high and refused to give more than \$30. Garland testified that he afterwards agreed to take the \$30 for the steer, and another check signed by Raines was given to

Garland in that amount. It is also shown by testimony of a woman by the name of Stanley that on the same day that the appellant claims to have purchased this steer for Raines he also purchased a two year old heifer from her, giving a check signed by Raines, which was also turned down, but which Raines afterwards made good. It appears, therefore, that the appellant presented a defense supported by evidence to the effect that he came into possession of this steer by purchasing the same in good faith, believing that Garland had a right to sell it, and that at the time he made the purchase he was acting as the agent for Raines, and, as hereinbefore indicated, there was evidence corroborating the testimony of the appellant which, if believed, when taken in connection with his testimony would authorize his acquittal.

Upon the trial counsel for the defendant requested the following instruction, which was refused and an exception to the action of the court in refusing to give the same properly preserved at the time, and in the motion for new trial and in the petition in error:

"The jury is instructed that, if you believe from the evidence, or have a reasonable doubt thereof, that the defendant John Crittenden bought the steer in controversy in good faith from Julius Garland, not knowing the same to have been stolen, then in that event you will acquit the defendant John Crittenden."

The trial court did not give any instructions in any way covering the defense relied upon. In our opinion, therefore, the refusal to give this requested instruction, or one affirmatively covering the defense interposed, is reversible error.

"The defendant * * * has a right to have a clear and affirmative instruction given to the jury applicable to his testimony, based upon the hypothesis that it is true, and when such testimony affects a material issue in the case." *Payton v. State*, 4 Okl. Cr. 316, 111 Pac. 666; *McIntosh v. State*, 8 Okl. Cr. 469, 128 Pac. 735; *State v. Hill*, 63 Or. 451, 128 Pac. 444; *Harris v. State*, 11 Okl. Cr. 412, 146 Pac. 1086.

In the latter case this court held:

"On a trial for larceny, where circumstantial evidence alone is relied on for a conviction, and there is a direct conflict in the testimony, it is error for the trial court to fail and refuse to instruct on the law applicable to a theory of the defense which the evidence tends to support, when the defendant requests it."

It may also be well to state that on the material element of the offense that the property was taken without the consent of the owner the proof was very slight in support thereof. Upon a second trial we suggest that as to this element there should be more convincing evidence than that disclosed by this record.

For the reason that the court failed to give an affirmative instruction covering the defendant's testimony based on the hypothesis that it was true when requested to do so,

the judgment is reversed, and the cause remanded for further proceeding.

DOYLE, P. J., and ARMSTRONG, J., concur.

MOODY v. STATE. (No. A-2429.)

(Criminal Court of Appeals of Oklahoma.
May 5, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §511(2) — ACCOMPLICE TESTIMONY — CORROBORATION — CONNECTION WITH CRIME.

Evidence corroborative of an accomplice need not directly connect the defendant with the commission of the crime; it is sufficient if it tends to connect him with its commission.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1129.]

2. CRIMINAL LAW §511(3) — ACCOMPLICE TESTIMONY—CORROBORATION.

Evidence corroborating an accomplice and tending to connect the defendant with the commission of the crime need not be direct, but may be circumstantial only.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1130.]

3. CRIMINAL LAW §511(1, 2)—ACCOMPLICE TESTIMONY — CORROBORATION — SUFFICIENCY.

It is not essential that the corroborating evidence shall cover every material point testified to by the accomplice, or be sufficient alone to warrant a verdict of guilty. If the accomplice is corroborated as to some material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. Such corroborating evidence, however, must show more than the mere commission of the offense or the circumstances thereof.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1128, 1129.]

4. HOMICIDE §234(3)—ACCOMPLICE TESTIMONY—SUFFICIENCY OF CORROBORATION.

Corroborating evidence in this case examined, and held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 484.]

5. CRIMINAL LAW §1170½(5) — APPEAL — HARMLESS ERROR—CROSS-EXAMINATION.

A judgment of conviction will not be reversed because of the refusal of the court to permit further cross-examination of one of the accomplices where it is apparent that full opportunity was given for cross and recross examination, and it is not shown that any new or material matter not already covered by the previous cross-examination is to be inquired into.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3133.]

6. CRIMINAL LAW §1111(1)—APPEAL—RECORDED—ARGUMENT OF COUNTY ATTORNEY.

Where the argument of the county attorney is not taken down in shorthand and embodied in the record in full and a dispute arises as to what was said in argument, this court is bound by the finding of the trial court recited in the record as to what occurred.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2894.]

7. CRIMINAL LAW §1171(5) — APPEAL — HARMLESS ERROR—ARGUMENT.

Where the record affirmatively discloses that the argument of the county attorney was not a

comment upon the failure of the defendant to testify, but was a comment upon certain evidence introduced in the case, and was made in reply to argument along similar lines by counsel for defendant, the judgment of conviction will not be reversed. In order to constitute reversible error the argument complained of must amount to a direct or indirect comment on the failure of the defendant to testify in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127.]

(Additional Syllabus by Editorial Staff.)

8. CRIMINAL LAW — § 863(1) — CONDUCT OF TRIAL—RECALLING JURY—STATUTE.

Where all that was said by the bailiff to the jury in a capital case in recalling them into court was "by order of the court" and in the presence of the judge, and where nothing occurred tending to prejudice the defendant's substantial rights, it was within the trial court's discretion under Rev. Laws 1910, § 5906, to recall the jury to give additional instructions or to correct the instructions already given; the defendant being present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2065, 2066.]

Appeal from District Court, Pottawatomie County; Frank Mathews, Judge.

Samuel Moody was convicted of murder, and he appeals. Affirmed.

The appellant, Samuel Moody, and the deceased, W. P. Rausin, were farmers and had lived prior to the date of the alleged homicide on January 1, 1914, for many years on adjoining farms in Lincoln county, Okl. Rausin's farm was directly north of Moody's. Late in the evening of January 2, 1914, Rausin was found dead in a little ravine in his wood pasture northeast of his house, and between a half and three-quarters of a mile northeast of Moody's house. His team, hitched to a wagon half loaded with wood, was found 200 or 300 yards from where the body lay. The tracks of the wagon wheels when followed back toward the body disclosed that the team had been standing for some time near the body. There were evidences of the fact that the horses had been tramping there. An examination of the body of the deceased disclosed that he had been shot in the head; his nose being shot off and his eyes shot out. The wound was apparently a shotgun wound inflicted with No. 4 shot. Very early the next morning shoe prints of human beings were found by certain witnesses near the body. One shoe print and one larger one led to and from a little ravine and thence in the direction of the appellant's house up to his orchard near his house. At that time the appellant had some renters living on his farm in a little house a short distance from his house and between his house and the house of the deceased. On the 1st day of January, 1914, along in the afternoon of that day, persons living in the tenant house on Moody's farm saw Tommie Moody, a boy 13 years old, and son of the appellant, and Alfred or Sammie Fitzhugh, a neighbor negro boy, about 14 years old, go-

ing from the direction of the appellant's house in the direction of where the deceased was found. These parties saw that the Fitzhugh boy was carrying a shotgun at that time, but do not remember of seeing Tommie Moody carrying any weapon at all. On the evening of the 3d of January the appellant and these two boys were arrested and held in the jail at Chandler, the county seat. A few days later the Fitzhugh boy was released and turned over to his father, and on the way back home he confessed the crime to his father and uncle and told them that the defendant had sent his son, Tommie and him (Fitzhugh) out to murder old man Rausin, and that he had furnished him (Fitzhugh) with a shotgun shell loaded with No. 4 shot with which to commit the act. The father of Fitzhugh immediately returned and delivered Sammie to the sheriff. Later Tommie Moody confessed his connection with the crime, testifying that it was committed in the manner as detailed by Fitzhugh. They testified substantially that Alfred (Sammie) Fitzhugh came to the defendant's house on the afternoon of January 1st about 3 or 4 o'clock; that appellant and his son, Tommie, had been away from home a part of that day for the purpose of renting another farm; that the appellant invited Fitzhugh into his house, and a short time thereafter began to talk about the deceased, and demanded that Fitzhugh and his son, Tommie, go and kill the deceased. Tommie at that time was in the kitchen stacking the dinner dishes. His father brought him into the room where Fitzhugh was and told him what he wanted them to do. About that time Tommie looked out of the window and saw the deceased going from his home over into his woods pasture. He called his father's attention to that fact, and immediately his father told them to go and kill Rausin. Fitzhugh had his shotgun with him, and the appellant told Tommie to give Fitzhugh the No. 4 shell, and for him (Tommie) to go along and take his gun and help kill Rausin. In compliance thereto these boys went directly to where the deceased was loading wood, and the Fitzhugh boy shot the deceased in the forehead, and immediately thereafter Tommie Moody shot at the deceased, but the deceased was falling and Tommie's shot went over his head. Thereafter the Fitzhugh boy went directly to his home, which was east of and within sight of the place where the homicide was committed. Tommie Moody went back home and immediately told his father what had happened. Tommie testifies that after dark that evening his father said, "Well, I am going over to see whether Rausin is dead, and if he isn't dead I'll finish him," and that his father took the shotgun and left the house, and that when he returned he, Tommie, was asleep; also that when he got home he said to his father, "I have done an awful dirty trick." His father replied,

"Well, go on and finish up your chores and say nothing about it." Tommie also testified that just before he and Fitzhugh separated after the killing he told Fitzhugh not to say anything about it, or about the fact that his father had told them to kill Rausin. Tommie also testified that on one or two occasions previous to the killing his father had attempted to get him to kill Rausin, but that his nerve failed him.

Harve Rausin, a cousin of the deceased, testified that a short time before the homicide on a foggy morning he was out by a haystack near the line of Moody's and Rausin's farms, and that Moody was out there with a shotgun. Harve Rausin, in addition, testified that after the first trial at the jail in Chandler he had a conversation with appellant about seeing him at the haystack with the shotgun, and the appellant said in substance, "Yes, Harve; I was there; I wouldn't have harmed a hair of your head; it was Old Bill that I was after."

There is evidence tending to show that there had been ill feeling between the appellant and the deceased for a great number of years; that the appellant had made expressions of ill will at various times, and had said on one or more occasions to certain witnesses that he ought to kill the deceased, and that he intended to shoot him into bug dust, etc.; that about a month before the homicide certain mules belonging to the appellant got into the deceased's corn patch, and that the deceased impounded them and charged the appellant \$1.50 as damages. This action on the part of the deceased outraged the appellant very much, and on the second day after the killing appellant said to his tenant, Kelly: "That \$1.50 Rausin charged me for those mules was the cause of his death." There is also evidence in the record tending to show that on several occasions after the killing the appellant made contradictory statements regarding the homicide; also evidence to show that a short time prior to the homicide that the appellant and his son, Tommie, purchased some shotgun shells loaded with No. 4 shot. The testimony discloses that after these tracks were found leading from the body of the deceased that the sheriff and some parties with him took the shoes of Moody and placed them in these tracks, and that his shoes fit the larger tracks exactly.

The defendant was first tried in Lincoln county, and a verdict of guilty was returned imposing the death penalty. A new trial was granted and the venue changed to Pottawatomie county. Upon the second trial a verdict of guilty was returned and punishment fixed at imprisonment for life. The appellant did not become a witness in his own behalf. He asks the reversal of this judgment because of numerous alleged errors, which will be discussed in the body of the opinion.

F. A. Rittenhouse and E. A. Foster, both of Chandler, for plaintiff in error. S. P.

Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., and Streeter Speakman, Co. Atty., of Chandler, for the State.

MATSON, J. (after stating the facts as above). [1] It is alleged that the court erred in admitting testimony of Tommie Moody and Alfred (Sammie) Fitzhugh covering all their acts and statements at the time of the killing of J. W. Rausin before any other evidence was introduced on the part of the state to establish the fact that a conspiracy existed between these witnesses and the appellant to kill the said Rausin. The witnesses Tommie Moody and Fitzhugh were accomplices. Under our statutes they were competent witnesses; the fact that they were accomplices going only to their credibility and requiring proof independent of their testimony and corroborative thereof which tended to connect the appellant with the commission of the offense. There is no rule of law or decision in this state to the effect that an accomplice may not testify to the conspiracy or the facts forming a part of the *res gestae*. Our statutes simply provide that before a conviction can be had upon the testimony of an accomplice there must be corroboration as above indicated, and it is not necessary that such corroboration should be first introduced. The testimony therefore of Tommie Moody and Fitzhugh does not come within the scope of those decisions which hold that the declarations of a conspirator made to third persons in the absence of his coconspirator are not competent against the coconspirator until some independent evidence of the conspiracy is shown. The evidence of these witnesses is controlled by the statutes relating to accomplices, and the cases cited by counsel for plaintiff in error are not in point to support this contention.

[2-4] But it is also contended that there was not sufficient corroboration to justify a conviction. With this contention we are unable to agree. Independent of the direct testimony of Tommie Moody and Fitzhugh connecting the defendant with the commission of this crime, the record discloses a number of circumstances which, when considered together, in our opinion, tend also to connect the defendant with it. Standing alone, these independent facts and circumstances would not be sufficient to authorize a verdict of guilty, but under our statutes the corroboration of an accomplice does not have to be sufficient to establish the guilt of the defendant beyond a reasonable doubt. It is sufficient if it tends to connect the defendant with the commission of the offense. These independent facts and circumstances must go farther than the mere proof of the commission of the offense or proof of the circumstances surrounding its commission.

Counsel for the state have divided the corroborating testimony into four classes, viz.: First, footprints; second, admissions against interest; third, false and contradictory

statements; fourth, expressions of ill will, threats, and hostile acts toward the deceased—and have discussed these various subdivisions in the order above indicated.

The subdivisions above given appear to correctly cover the classes of corroborative evidence adduced upon the trial.

First, as to the footprints:

Tommie Moody testified that after Sammie Fitzhugh and himself had shot the deceased he went immediately home, quoting from his testimony as follows:

"* * * And I went on and done up the chores, and that night about 7 o'clock my father put on his coat and got his gun and says, 'Tommie, I am going to see if Rausin is dead,' and he says, 'If he ain't dead I will finish him,' and he went on out, and I was asleep when he came back."

In corroboration of this statement of Tommie Moody that his father did go from his house the night after the homicide to the body of the deceased the state introduced the witnesses Henry Griswold, G. R. Ellis, and O. C. Burgess. The substance of the testimony of these witnesses is that the next morning after the body was found, very early in the morning, they went to where the body of the deceased had been found and found the footprints of human beings near that place leading to a little ravine, and following the ravine in the direction of the appellant's house and up to the appellant's premises, and near to his house; that these tracks were then marked so as to be identified; that the next day the witness Burgess, together with others who were present, including the witness Kelly, took the shoes worn by the defendant and placed them in these tracks which had theretofore been marked, and that the shoes of the appellant fitted exactly into the larger tracks; that after the first trial of the appellant, while he was still in jail awaiting a second trial, the appellant said to Burgess that his testimony regarding the tracks was correct, but that these tracks were not his tracks, that they were the tracks of Will Kelly, and that Will Kelly had made them there that night, that he had seen Will Kelly go straight in that direction, and that he afterwards came back from there. But the evidence shows that Will Kelly had placed his shoes in the tracks, and that the tracks found were too large for Kelly's shoes, and also Kelly testified that he had not been in that direction the afternoon or the evening of the homicide. Now, it is clear that the uncontradicted testimony of Tommie Moody that his father told him to go over there and murder Rausin, together with his statement that after he came back and told his father that he had murdered him, and his further statement that his father told him that he was going over to the scene of the homicide to see whether Rausin was still alive, and, if not, he would finish him, taken in connection with the fact that tracks were discovered leading up to and away from the scene of the homicide,

which tracks fitted exactly the shoes of the appellant, corroborate Tommie Moody in his statement that his father went over there to see if Rausin was dead, and, if not, to finish him. It also corroborates his statement that his father had knowledge of the commission of the offense or else he would not have gone to the scene of it, and, standing as it does without further explanation, tends to connect appellant with its commission. This circumstance indicates clearly that appellant visited the scene of the homicide either at the time it was committed or subsequent thereto.

If after the crime was committed and after his son had confessed to its commission, if innocent, it must have been for the purpose of ascertaining whether or not his son was telling the truth, and, if not connected with the commission of the crime in any way, it is unnecessary for this court to indicate what an innocent man would have done under such circumstances. And it is well established that the evidence corroborating an accomplice and tending to connect the defendant with the commission of the crime need not be direct, but may be circumstantial only. *State v. Jones*, 115 Iowa, 113, 88 N. W. 196; *Jefferson v. State*, 110 Ala. 89, 20 South. 434; *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971. Indeed, if direct evidence alone were required, it would be practically impossible in 90 per cent. of the cases to corroborate an accomplice, and many persons who aid and abet in crimes secretly committed would escape punishment. In cases where circumstantial evidence is relied upon for a conviction the similarity of footprints found at or near the scene of the homicide with those of the accused or their correspondence with his shoes have been permitted to be shown. *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Jenkins v. State*, 45 Tex. Cr. R. 173, 75 S. W. 312; *Davis v. State*, 126 Ala. 44, 28 South. 617. And why should such evidence be permitted unless tending to connect the accused with the commission of the offense?

If in cases where circumstantial evidence is relied upon for a conviction such footprints may be proven, with what reason may it be argued that the proof of such circumstances does not tend to connect the accused with the commission of the offense when corroborative of the testimony of an accomplice? In either event such evidence is competent only because it tends to connect the defendant with the commission of the offense.

Second, admissions against interest:

The witness Will Kelly testified as follows:

"Q. Did you have a conversation with Moody Friday, evening about Rausin, Friday after New Year's? A. Friday evening as I went up to feed my hogs, after we heard about the killing; it was late, pretty close to night, and I went up to feed my hogs, and as I was going by he says, 'Will, that dollar and a half was

the occasion of old man Rausin's being dead.' Q. You testified awhile ago that Rausin put up your and Mr. Moody's mules or horses? A. Yes, sir; that is right. Q. State, if you know, how much Rausin charged Moody for his horses? A. A dollar and a half."

The foregoing statement of the accused indicates that immediately after the crime became known he was acquainted with the motive underlying its commission, and, taken into connection with the other testimony in the record that the deceased and the accused had a difficulty over the impounding of the accused's mules a short time prior to the commission of the homicide, the remark made to Kelly and tending to corroborate the testimony of the accomplices was a circumstance tending to establish a motive for the commission of the offense, and while the proof of motive is not indispensable in order to prove guilt, yet, where crimes are committed secretly and a motive is shown, any testimony that tends to prove a motive on the part of the accused for committing the crime is competent as a circumstance tending to connect him with it.

Also the witness O. C. Burgess testified regarding a conversation between Harve Rausin and the accused after the first trial as follows:

"I unlocked the jail door and was standing with my hand on the door, and Mr. Harve Rausin came up and was talking to Mr. Moody, and he said, 'Moody, I don't want you to hold any grudge against me.' He says, 'It is all over now,' and he says, 'I stated that you were there at the haystack with a shotgun,' and he says, 'Is that so?' and Moody says, 'It is so, Harve.' (Defendant objects. Overruled. Exception.) He says, 'It is so Harve; I wouldn't have harmed a hair on your head, Harve; it was Old Bill I was after.'"

This testimony, left as it was, unexplained and uncontradicted, tended to establish the fact that prior to the homicide the accused was carrying a shotgun near the premises of the deceased lying in wait for him, tending to establish a desire on the part of the accused to do the deceased some great bodily harm.

In the conversation with Harve Rausin in the presence of Burgess the accused admitted that at the time he was lying in wait at the haystack with his shotgun, on the foggy morning between Christmas and New Year's, he was after "Old Bill."

Was that statement made? Rausin and Burgess both testify that it was. As witnesses neither of them were impeached or contradicted, and if it was true that the accused "was after Old Bill" with a shotgun between Christmas and New Year's, that fact corroborates Tommie Moody's and Fitzhugh's testimony to the effect that the accused directed them to shoot the deceased on New Year's Day. While not directly connecting the accused with the killing, it was a circumstance tending to prove that just a few days prior to the homicide the accused desired the deceased out of his way. It indicated a design on the part of the accused

to kill deceased. This admission of the accused that he was lying in wait at that time with a deadly weapon for the deceased is a circumstance properly admitted in evidence as tending strongly to connect the accused with the commission of the homicide which occurred within a short time thereafter. Admissions similar to this have been held to be sufficient corroboration of an accomplice. *People v. Cleveland*, 49 Cal. 577; *People v. Davis*, 135 Cal. 162, 67 Pac. 59; *State v. Hennessy*, 55 Iowa, 290, 7 N. W. 641.

The testimony of Harve Rausin that the accused was lying in wait with the shotgun shortly before the homicide and the admission afterwards made by the accused that at that time he was "after Old Bill" (the deceased) indicates an intent on the part of the accused to unlawfully take the life of the deceased at that time.

A criminal intent being a material element of the crime charged, corroboration of an accomplice on such element by independent evidence has been held to be sufficient. *People v. Davis*, 21 Wend. (N. Y.) 309; *People v. Josselyn*, 39 Cal. 393.

"Proof of a motive and intent to commit a crime which there was evidence to show had been committed * * * would legitimately tend to strengthen a belief in the statement of the accomplice that they had committed it." *Com. v. Chase*, 147 Mass. 597, 18 N. E. 565.

Third, contradictory statements:

Accused made contradictory statements concerning the tracks leading away from the place where the body of the deceased was found to the premises of the accused. The accused told the witness Newby shortly after he was arrested that he was satisfied he could name the party who did the killing, and indicated Alfred (Sammie) Fitzhugh. Later on during the same day the accused in a conversation with the sheriff (Buzzi) made a different statement conflicting with the statement made to Newby.

The sheriff testified as follows:

"A. He said that if we would get a big negro boy by the name of Asberry that we would have the right man; that he had seen him come up by his place that evening while he was fixing some shafts; that he seemed to be excited and was in a hurry, and walking very fast. Q. Did he say what direction he came from? A. Yes; he said that he came from the north and went right on south from his place towards the road. Q. Anything said about the size of his shoes? A. He said he wore the same size shoe, or about the same size of his, and would make a track about like his."

After the first trial, and some time during the month of September, the accused had a conversation with the witness Burgess with reference to these tracks in which he said:

"A. Moody said that what I swore about the tracks was true; that the tracks were there, and they were Bill Kelly's tracks; that he saw Bill Kelly go from there straight in that direction; and that he came back afterwards from there. Q. Did he say anything further about it? A. No, sir. Q. Now what did you testify? (Objection. Overruled. Exception.) A. Do you mean in the former trial? Q. Yes, sir. A. I had testified that these shoes fitted

the tracks. Q. State whether or not your testimony then was the same as now. (Objection. Overruled. Exception.) A. I think it is."

Burgess also testified that Will Kelly was with him when he measured the tracks leading from the body, and that Kelly put his shoes into those tracks, and that the tracks were too long for Kelly's shoes. Will Kelly testified that he was at home on the afternoon of New Year's Day, and that he did not go in the direction of the place where the body was found that afternoon or evening. There was also evidence in the record that the negro Asberry had left that community on a train about noon of New Year's Day. The accused evidently realized the importance of the necessity to explain away these tracks which were found at and near the scene of this homicide, and the fact that he made contradictory statements concerning these tracks, which statements were afterwards shown to be false, in our opinion was competent evidence to go to the jury as tending to corroborate the accomplices and tending to connect him with the offense.

Fourth, expressions of ill will and threats:

The record also shows certain expressions of ill will and threats made by the accused toward the deceased a short time before this homicide such as "he would shoot old man Rausin into bug dust, if it was the last thing he did," to the witness Berry, and again a similar expression to the witness Kelly on the morning that the homicide was committed.

In the case of *Roberts v. State*, 96 Ark. 58, 131 S. W. 60, it was held:

"On a trial charging accused with being an accessory before the fact to murder, the testimony of a witness that he shot decedent and was hired to do so by accused, who furnished the weapon, is sufficiently corroborated by proof of the ill will of accused towards decedent and of threats by accused to do decedent harm."

Other cases to similar effect: *People v. McLean*, 84 Cal. 480, 24 Pac. 32; *People v. Martin*, 19 Cal. App. 295, 125 Pac. 919; *Commonwealth v. Chase*, 147 Mass. 597, 18 N. E. 565.

We reach the conclusion, therefore, that the testimony of the accomplices in this case was sufficiently corroborated by independent evidence tending to connect the accused with the commission of the offense.

[5] Nor do we believe that the court abused its discretion in refusing to permit the witness Sammie Fitzhugh to be recalled for further cross-examination. The record discloses that this witness was very thoroughly cross-examined on all phases of the case, and it is not shown that it was desired to cross-examine him on any matter not already touched upon; it appearing that counsel for accused merely desired to further cross-examine the witness relative to the conversation he had with his father and uncle when he first disclosed the accused's connection with the offense. This matter was thoroughly gone into on cross-examination already

had, and had counsel desired to impeach the witness relative thereto sufficient ground had been laid to show by other witnesses that he had made false or other contradictory statements concerning what he had said to his father and uncle. Counsel for defendant not only cross-examined this witness, but had already recross-examined him. Where there is no showing made to the court that certain material matter could be elicited by further cross-examination, this court cannot say that the trial court abused its discretion in refusing to permit further cross-examination under such circumstances.

[6, 7] It is also contended that the county attorney committed reversible error in his closing argument to the jury in that he referred to the defendant's failure to take the witness stand in his own behalf. The argument of the county attorney was not taken by the court stenographer. During the course of the argument counsel for the defendant made objection and took exception to certain remarks, and at the time this objection was made a controversy arose between counsel for defendant, the county attorney, and the court as to the exact remarks made. On the next day, in order to settle the matter, the court made a finding of the facts occurring, which finding is embodied in the record, and is as follows:

"Statement of the Court.

"Be it remembered that on December 10, 1914, in the trial of the cause of the state of Oklahoma v. Samuel Moody, during the closing argument of the county attorney, Streeter Speakman, the statement in said argument to which the attorneys for the defendant excepted as shown by the record was as follows: The said county attorney in answer to an argument made by the counsel for the defendant and addressed directly to the county attorney, he being asked in said argument of defendant's counsel why he had not brought the father of Sam Fitzhugh here to testify, that Sam had told him (Sam's father) that the defendant sent him to kill Rausin, and used the following language: 'Sam Fitzhugh has testified before you that he told his father this story, and that testimony is undenied.' And immediately following this, in reply to the argument of the defendant's counsel wherein said counsel said that defendant denied to witness Newby that he was guilty, the county attorney said and used the following language: 'Counsel for the defendant in their argument stated that the defendant had denied to Mr. Newby that he was guilty. I do not blame him for denying it. If I had placed upon the brow of my son the crimson brand of murder, I would deny it; I would deny it; I would deny it.' Signed and made a matter of record in the case in open court this the 11th day of December, 1914, the defendant being present in person and by counsel.

"Frank Mathews, Presiding District Judge."

Counsel for defendant had the right to demand that the argument of the county attorney be taken down in shorthand, and the refusal of the court to permit the same would have been reversible error. *Walker v. State*, 6 Okl. Cr. 370, 118 Pac. 1006; *Lamm v. State*, 4 Okl. Cr. 641, 111 Pac. 1002. Where the argument of the county attorney is not taken

down in shorthand and embodied in the record in full, this court is bound by the finding of the trial court recited in the record as to what occurred. *Buck v. Territory*, 1 Okl. Cr. 517, 98 Pac. 1017; *State v. Hasty*, 121 Iowa, 507, 96 N. W. 1115.

The record discloses that the argument of the county attorney was made in reply to certain argument of counsel for defendant and addressed directly to the county attorney. And it is contended that the argument of the county attorney replying thereto in answer to the inquiry "why he had not brought the father of Sam Fitzhugh here to testify that Sam had told him (Sam's father) that the defendant sent him to kill Rausin," wherein the county attorney said, "Sam Fitzhugh has testified before you that he told his father this story, and that testimony is undenied," was an indirect reference to the failure of the defendant to take the witness stand. We have examined the testimony of Sam Fitzhugh with reference to this conversation, and find that the only parties present at the time were Sam's father and uncle; the defendant at that time was in jail at Chandler. Clearly the defendant could not have denied this testimony had he taken the witness stand, and it would be an imputation of ignorance to the jury to hold that the answer of the county attorney to this argument of counsel under the circumstances of this case had reference to the failure of the defendant to testify, or in any way misled the jury.

Section 5881, Revised Laws of 1910, provides:

"Defendant a Competent Witness.—In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this state, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial."

This court has held that the foregoing statute is mandatory, and any comment either direct or indirect by counsel on the failure of the defendant to testify is ground for new trial. The damage done by such a remark cannot be cured by its withdrawal from consideration by the jury. The statute being mandatory, and in view of the strict construction given to it in favor of the defendant in order to constitute reversible error, the remarks made must either directly or indirectly constitute a comment such as is prohibited by the statute. And, if in this case the evidence shows that the defendant was present and could have denied the statements made by Sammie Fitzhugh in his disclosures to his father and uncle, we would unhesitatingly reverse this judgment.

Counsel for defendant have failed to cite a single authority which holds that a statement of the county attorney to the effect that

certain testimony is undenied amounts to indirect reference to the defendant's failure to testify where the defendant was not present and could not under the circumstances have denied the fact had he taken the witness stand. The argument therefore, in our opinion, was not erroneous.

As to the statement of the county attorney: "Counsel for the defendant in their argument stated that the defendant had denied to Mr. Newby that he is guilty. I do not blame him for denying it. If I had placed upon the brow of my son a crimson brand of murder, I would deny it; I would deny it; I would deny it"—seems also to have been elicited by argument of defendant's counsel wherein said counsel stated that defendant denied to the witness Newby that he was guilty.

The cross-examination of Mr. Newby discloses the following:

"Q. Well, did Moody say that the Fitzhugh boy was running around there that day with a gun? A. Yes; he said he was continually hunting around there, and that he was out there that day with a gun, but he didn't say for them to find the Fitzhugh boy. He said that he could name the party who did the killing, and named this boy that lived east of the dead man. Q. And he told you that he had run him off his place? A. Who? Q. Moody had run him off his place? A. I am not sure about that. He said that Mr. Rausin, the dead man, didn't like to have any hunting on his place, and that the boy was continually running around there with a gun hunting. He said that if they would arrest the Fitzhugh boy he was satisfied he would be the party who did the killing. He wanted them to telephone out to Mr. Buzzi and Mr. Speakman, who were then out holding an inquest, as I understand it. Q. Wanted them to phone out and have the Fitzhugh boy arrested? A. Yes. Q. Mr. Moody said he didn't have anything to do with it, didn't he? A. Yes."

Counsel for defendant saw fit to make the statement that defendant had denied his guilt to Newby. In answer to this argument the county attorney in effect stated that there was nothing unusual in the fact that he had denied his guilt; that under the circumstances any man would deny his guilt. The record discloses that this argument was not a comment upon the failure of the defendant to testify, but was a comment upon certain evidence introduced in the case. It was made in reply to argument along similar lines by counsel for the defendant. If this argument is to be held reversible error, then all argument of a prosecuting attorney must resolve itself into a mere statement of facts. He would be stepping on dangerous ground at any time he undertook to answer the argument of opposing counsel. And, where opposing counsel invite reply as shown by the record in this case, and such reply may sting, this court cannot say that it is reversible error such as would authorize the granting of a new trial unless from the record itself it is made clearly to appear that the argument complained of constitutes an infringement of the defendant's statutory right not to testify. And, where the argu-

ment, when considered and construed in reference to the evidence, shows clearly that the county attorney was confining his argument to the evidence introduced and making certain comments thereon, especially will this court not reverse the judgment on this ground when these comments legitimately followed from the argument of the defendant's counsel and in answer thereto.

[8] Misconduct of the court in that the trial judge in the absence of counsel for defendant instructed the bailiff in charge of the jury to inform the jury to cease deliberating upon their verdict until the court had delivered further instructions is alleged to be prejudicial error. The record on this question is as follows:

"The court wishes to state in regard to the recalling of the jury and giving the instruction requested by the defendant that when this instruction was first presented to the court I was of the opinion that it should not be given, and gave a similar one, drawn by myself. Soon after the jury had retired to deliberate upon their verdict I came to the conclusion that I was in error and should have given the instruction, so within 30 minutes after the jury had retired I went to the door of the jury room and requested one of the bailiffs in charge of the jury to state to them that it was my order that they should not deliberate further on their verdict until the coming into court the next morning, when I would desire to instruct them further. This order was communicated to the jury by one of the bailiffs in my hearing, and I directed both the bailiffs to at once go into the jury room where the jury was and see that they did not discuss the case any further, and go with them to their room where they retired and to have them in court the next morning. I also went in search for counsel for the defendant and went to a hotel, and the proprietor informed me, at the place that— I couldn't find them, and upon the convening of court the next morning I had the jury brought into the courtroom and withdrew from them the special instruction that I had given them the preceding evening, and gave to the jury the instruction requested by the defendant the evening preceding, and the record contains every word said by me or any one else while I was withdrawing the instruction that I had given them and giving the instruction requested by the defendant's counsel. I wish to state further that the jury retired and deliberated for more than eight hours before they returned a verdict into court."

This assignment of error was not directly submitted to the trial court in the motion for a new trial.

Section 5906, Rev. Laws 1910, provides:

"After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

It appears from the record that all that was said by the bailiff to the jury was "by order of the court" and in the presence of the judge. Nothing occurred that in any way tended to prejudice the substantial

rights of the defendant, and it was clearly discretionary with the trial judge to recall the jury from its deliberations to give additional instructions or to correct the instructions already given, the defendant being present. *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Davis v. State*, 122 Ga. 564, 50 S. E. 376; *Patterson v. State*, 122 Ga. 587, 50 S. E. 489; *State v. Tripp*, 113 Iowa, 698, 84 N. W. 546; *People v. Shuler*, 142 Mich. 161, 98 N. W. 936; *Hardesty v. State*, 95 Neb. 839, 146 N. W. 1007.

Where such additional instructions are given in the absence of defendant's counsel, the trial court should on its own motion allow an exception thereto unless the additional instruction or instructions were such as had theretofore been requested by defendant's counsel. It appears from the record in this case that the additional instruction here given was requested by counsel for defendant during the course of the trial, and that the giving of same is not alleged to be error.

In view of the fact that the appellant was convicted of the crime of murder, based to a large extent on the testimony of the accomplices, we have carefully examined this record for prejudicial errors, and were the court convinced that such errors existed, this judgment of conviction would be reversed.

After a careful and full consideration of the record however, we are convinced that the appellant had a fair and impartial trial according to the forms of law, and that the errors complained of and presented in brief of counsel for the appellant were not such as would authorize this court to reverse the judgment.

For the reasons given in this opinion, the judgment of the district court of Pottawatomie county is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

HORN v. STATE. (No. A-2486.)

(Criminal Court of Appeals of Oklahoma. May 5, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §737(1), 1159(3)—APPEAL—QUESTION FOR JURY.

In the trial of a criminal case, questions of fact involving the guilt or innocence of the accused are always for the jury, and when on appeal the record discloses facts which would have been sufficient either to warrant a verdict of acquittal or to support a verdict of guilty, the finding of the jury will not be disturbed. In such cases only errors of law will be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1703, 1704, 3076.]

2. CRIMINAL LAW §829(2) — TRIAL — REQUESTED INSTRUCTIONS — GIVEN INSTRUCTIONS.

When the instructions of the court properly submit all the issues in the case fairly and

impartially, it is not necessary to submit additional requested instructions emphasizing some peculiar phase of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

3. CRIMINAL LAW — 854(2)—TRIAL—KEEPING JURY TOGETHER.

In a capital case, the jury should always be placed in charge of a sworn bailiff and kept together, upon the reasonable request of counsel for either the state or the defendant. It is discretionary with the court, however, to permit the jury to separate at any time before the cause is finally submitted when no such request is made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2040.]

4. JURY — 100—DISQUALIFICATION—EXPRESSION OF OPINION—STATUTE.

(a) Section 5861, Revised Statutes, provides that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him."

(b) Following the rule provided in this section, the testimony of the witnesses examined and the ruling of the court admitting them to the panel upheld, upon the ground that they were duly qualified under the law to sit in the instant case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 405, 449-457.]

5. CASE DISTINGUISHED.

The doctrine in *Turner v. State*, 4 Okl. Cr. 165, 111 Pac. 988, *Scribner v. State*, 3 Okl. Cr. 605, 108 Pac. 422, 35 L. R. A. (N. S.) 985, and *Tegeler v. State*, 9 Okl. Cr. 149, 130 Pac. 1164, distinguished from the doctrine in *Gentry v. State*, 11 Okl. Cr. 355, 146 Pac. 719, followed in the case at bar.

Appeal from District Court, Sequoyah County; John H. Pitchford, Judge.

Lafayette R. Horn was convicted of manslaughter in the first degree, and he brings error. Affirmed.

Frye & Frye, of Sallisaw, and W. A. Carille, of Vian, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Lafayette R. Horn, was tried at the December, 1914, term of the district court of Sequoyah county, upon an information charging him with the murder of Isaac Christie, and convicted of manslaughter in the first degree. His punishment was fixed at imprisonment in the state penitentiary for a term of 20 years.

The homicide occurred on a public highway near the house of the plaintiff in error on the 13th day of June, 1914. It appears that there had been ill feeling existing between the plaintiff in error and the deceased for some time. The plaintiff in error admitted the killing, and undertook to justify the same on the ground of self-defense. Proof was introduced on behalf of the state tending to show that the deceased was shot from his

horse while quietly riding down the public road molesting no one; that the plaintiff in error fired on deceased out of a desire for revenge and without provocation. Proof was offered on behalf of the defendant in error tending to show that the deceased had gone into the field where the plaintiff in error was at work and had run him out of the field on the morning of the homicide; that he was passing along the road, and upon discovering plaintiff in error between his house and barn got off his horse and assaulted him with a knife, without provocation. Plaintiff in error also offered testimony tending to show that deceased was a man of violent and dangerous disposition. He also offered testimony that he, the plaintiff in error, was a peaceable, law-abiding citizen, bearing a good reputation as an upright citizen in the neighborhood in which he lived. Numerous witnesses were offered on both propositions. In rebuttal, the state introduced witnesses on each proposition, the testimony of which tended to establish the fact that Christie was a peaceable, law-abiding man, and that plaintiff in error was an overbearing, dangerous man, and bore a bad reputation for being a peaceable, law-abiding citizen in the community in which he lived.

[1] A careful consideration of the evidence offered by each side discloses clearly that the question of fact was solely for the jury, and that a verdict of acquittal could not have been criticized on the record before us. The verdict of guilty was equally within the province of the jury. It therefore follows that unless there is substantial error of law, no relief can be obtained upon appeal to this court.

[2] The first assignment of error urged in the brief is based upon the proposition that the court erred in refusing to give the following requested instructions:

"You are further instructed that where the defendant, without fault on his part, at his own home or place, is attacked by the deceased in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take his life or to do him some great bodily harm, and there is a reasonable ground for believing the danger imminent, and that such design will be accomplished, and the defendant so assaulted has reasonable grounds to believe and does believe such danger is imminent, he may act upon appearances, and without retreating kill the deceased. And if you should so find or have reasonable doubt therefor, you should resolve that doubt in favor of the defendant and acquit him."

In lieu of this instruction, the court gave the following:

"Gentlemen of the jury, you are further instructed that where the evidence shows beyond a reasonable doubt that the homicide was committed by the defendant, and the defendant seeks to avoid the responsibility for the killing on the grounds of self-defense, you are instructed that the defendant had a right to act in his own necessary self-defense upon a reasonable apprehension of danger, as viewed from the defendant's standpoint, although he may have been mistaken as to the actual extent of the danger,

nevertheless, he would have a right to protect his person from great bodily harm or injury even to taking the life of the assailant, if it reasonably appears by acts or by words coupled with the acts of the person killed that it was the purpose and intent of such person to do the defendant great bodily harm or injury as the said acts or surrounding circumstances would reasonably appear, whether real or apparent, to the said defendant at the time of the homicide. Therefore if you believe from the evidence that the said L. R. Horn intentionally shot and killed the said Isaac Christie, and further believe that at the time of so doing the deceased was in the act of making or about to make upon him an attack, which from the manner and character thereof, together with the weapons used or attempted to be used, if any, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury at the hands of deceased as viewed from the defendant's standpoint at the time of the killing, and acting under such reasonable expectation or fear of death or serious bodily harm he intentionally shot and killed the said Isaac Christie, then you will acquit him, or if there is a reasonable doubt in your minds thereof, you will resolve that doubt in his favor and acquit him."

And followed the same by instruction No. 15, which is as follows:

"You are further instructed that when the taking of a life is sought to be justified on the grounds of self-defense it is not incumbent upon the accused to satisfy the jury that the killing was justifiable, but if the evidence on that question is sufficient to raise a reasonable doubt in the minds of the jury as to whether the defendant was justifiable, then the defendant is entitled to an acquittal, and you should so say by your verdict."

As applied to the facts disclosed by the record, these instructions fully cover the issues submitted in the case, and there is no prejudicial error reasonably apparent.

[3] The next assignment urged [in the brief is based upon the proposition that the court permitted the jury to separate before they had been impaneled and sworn and accepted in the trial of the case. Section 5899, R. L. 1910, provides:

"The jurors sworn to try an indictment or information, may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof."

The record does not disclose that counsel for the plaintiff in error asked the court to put the jury in charge of the bailiff at all times; nor does the record indicate that counsel made any complaint to the court at any time that there was any unfairness likely to result to the plaintiff in error on account of the separation of the jury before the cause was submitted. They simply reserved an exception to the order of the court permitting the jury to separate. There is no doubt but that the court would have placed the jury in charge of a sworn bailiff and kept them together if counsel had suggested the likelihood of any prejudicial results to the rights of his client.

It is the duty of counsel to call the attention of the court to reasons why a separation should not be permitted if there is any reason why it should not be permitted. Unless this is done, it will be presumed that the trial court properly exercised the judicial discretion vested in him as provided by explicit statutory law. Of course a different state of the case would be presented should a record disclose conduct on the part of any juror, any witness, or any individual, which is calculated to influence any member of a panel selected, but in this record there is nothing to indicate that anything irregular occurred, and no complaint on this score was made. This proposition has been discussed in this jurisdiction in many cases. *Bilton v. Territory*, 1 Okl. Cr. 566, 99 Pac. 163; *Sample v. State*, 3 Okl. Cr. 432, 106 Pac. 557; *Chance v. State*, 5 Okl. Cr. 194, 113 Pac. 996; *Selstrom v. State*, 7 Okl. Cr. 345, 123 Pac. 557; *Burns v. State*, 8 Okl. Cr. 554, 129 Pac. 657; *Weatherholt v. State*, 9 Okl. Cr. 161, 131 Pac. 185, and numerous others.

It has been uniformly held by this court and its predecessor that in felony cases before a case is finally submitted it is within the discretion of the trial court to permit the jury to separate. There is no doubt but that the trial court should exercise sound judicial discretion in a capital case by granting the request of either party to place the jury in charge of a sworn officer during the progress of the trial. This must be done after the case is submitted to the jury. The presumption of law is that the courts and the juries perform their duty in accordance with the oaths which they have taken, and that presumption is only overcome by proof to the contrary. It is incumbent upon the defendant who complains of the separation of the jury before the case is finally submitted to affirmatively establish that by reason of the separation he was denied a fair and impartial trial; that his substantial rights were prejudiced thereby. In the case at bar the record is silent on this point. It is clear that the lawmaking power of this state intended that the mere separation of the jury during the numerous and necessary adjournments incidental to a criminal trial should not result in delaying or defeating the ends of justice when there is not the slightest presumption or even probability, that injustice resulted. The statutes above set forth and the opinions of this court construing the same amply safeguard the purity of jury trials. When the separation of a jury is objectionable, counsel should apply to the court for an order placing the jury in charge of a bailiff setting forth valid reasons therefor, and if the order is denied, the question arising thereon would present a different phase from that here presented.

[4] The only other error assigned which is entitled to consideration is based upon the proposition that the court erred in overruling

the defendant's challenge for cause to three jurors who stated in their voir dire examination that they had formed opinions as to the guilt or innocence of the defendant from reading newspapers and from common rumor. It appears that the jurors in question had heard the case discussed, and that they had read newspaper accounts of the homicide; that they had not discussed the case with any one known to be a witness; that from the time they heard of the purported facts up to the time they were examined on their voir dire that they had entertained an opinion as to the guilt or innocence of the defendant; that the information they got was all rumor or talk of the community. Each one said that upon hearing the testimony he could and would decide the cause upon its merits fairly and impartially without regard to any opinion that he may have previously formed. Counsel in their examinations fail to draw out any suggestions that the jurors had formed hostile opinions to the interests of their client, or that any of them maintained at the time of the examination, or any time prior thereto, any ill will or hostility towards him. There is nothing to indicate by word or suggestion of any character the leaning of any of the jurors towards the side of the state or of the defense. Section 5861, Revised Statutes, provides as follows:

"In a challenge for implied bias, one or more of the causes stated in the second preceding section must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of the third preceding section must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court."

This statute exists in New York, California, and a number of other states. It has been considered and construed in all of these states, as well as our own, in a long line of decisions. As far back as the Bradford Case in 2 Okl. 230, 37 Pac. 1062, the Supreme Court of Oklahoma Territory, discussing this provision, said:

"Under this section the court must be satisfied that the juror will act fairly and impartially, and in passing upon this question he must act judicially on the facts before him, and the conduct and appearance of the juror; his manner and apparent candor or impartiality are all to be considered by the court together with his actions in determining his fitness as a juror. * * * A very large discretion is vested in the court in determining the competency and qualifications of jurors, and its action should never be disturbed by an appellate court, unless an abuse of such discretion is clearly apparent."

In Huntley v. Territory, 7 Okl. 66, 54 Pac. 316, the same statute was considered by the territorial court, and in the opinion it is said:

"The information and expression of an opinion is not alone the test of a juror's competency, but the nature of the opinion may be inquired into, and, if found to be only a transitory inclination of mind, it is not a disqualifying opinion. To work a disqualification, there must be an abiding bias in the mind, caused by substantial facts in the case, in the existence of which the juror believes; an opinion upon the merits of the case upon the guilt or innocence of the accused of the charge laid in the indictment, upon the evidence substantially as expected to be presented on trial."

This court in the case of Johnson v. State, 1 Okl. Cr. 344, 97 Pac. 1068, 18 Ann. Cas. 300, considered the same provision, and in that opinion said:

"The trial court should resolve all doubts upon this matter in favor of the defendant. Upon the other hand, when no personal, class, or race bias or prejudice appears to exist in the mind of the juror against the defendant, but it does appear that from rumor, or reading the public press, or from notoriety, the juror has an opinion as to the guilt of the defendant, but that such opinion will not combat the testimony or resist its force, and the court is satisfied that the juror can and will lay this opinion aside, and base his verdict alone upon the testimony of the witnesses and the instructions of the court, then the juror is competent. To our minds this is the only rational construction which can be placed upon our statute."

In Jones v. State, 8 Okl. Cr. 582, 129 Pac. 449, we discussed the same proposition, and among other things said:

"Two of the jurors, when examined on their voir dire, did state that they had received impressions about the case from what they had heard, but that they had not talked to any witnesses in the case; that what they had heard was a mere matter of rumor and would not in any manner influence them in considering the evidence; that they could and would, if taken on the jury, disregard all such impressions and be governed alone by the testimony of the witnesses and the charge of the court in making up their verdict. Before a juror is disqualified on account of impressions he may have with reference to a case, it must appear that he has such an opinion as will combat the evidence and resist its force."

In Gentry v. State, 11 Okl. Cr. 355, 146 Pac. 719, the same provision was considered, and in that opinion we said:

"Under our statute, the mere expression of an opinion by a juror in common conversation, without anything to show ill will, hostility, or a fixed determination of belief, is not a legal ground of challenge for cause. In order to disqualify the juror there must be 'the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging.' Section 5853, Rev. L. The issue raised upon a challenge for cause to a juror in a criminal case, on the ground that he had formed an opinion founded upon rumor, statements in public journals, or common notoriety, and upon which he has expressed an opinion, is one of mixed law and fact; and the finding of the trial court upon the issue ought not to be set aside by a reviewing court, unless it appears that upon the evidence the trial court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial. Ex parte Spies, 123 U. S. 131 [8 Sup. Ct. 21, 22, 31 L. Ed. 80]; Holt v. U. S., 218 U. S. 245 [31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138].

* * * The increased facilities, through the press, of spreading stories of crime, as items of news, especially among the more intelligent classes, makes it difficult to lay down a fixed rule which would disqualify persons who formed their opinions from newspaper reports, or common report and rumor, unless it be of that character which impairs the impartiality of the juror by engendering a bias or prejudice which is fixed, and would require evidence to remove. Under the provisions of the statute the competency of the juror is a question of fact to be determined by the court. Before the court can so determine, it must be shown by an examination of the juror, upon his voir dire, not only that his opinion was formed solely in the manner stated, but, in addition to this, the juror must swear unequivocally that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence. * * *

An examination of the testimony of these jurors, given on voir dire, shows conclusively that the opinions which they formed, and that one juror says he may have expressed, were founded upon the reports which they had read in the newspapers. Intelligent men take newspaper accounts as current news, liable to qualification, explanation, or contradiction, and, when qualified, explained, or contradicted, they change their opinions or belief accordingly as a matter of course. The opinions of the jurors here were such opinions merely as intelligent men almost irresistibly form from reading newspaper accounts of crime, relying upon the truthfulness of the published accounts, which are always subject to be changed and altered by contradictory accounts. Such opinions rarely disqualify intelligent men from fairly considering the evidence given at a trial and rendering an impartial verdict thereon when called upon to act as jurors. Nine-tenths of the intelligent taxpayers of the county, where a homicide has taken place, and the facts and the circumstances attending it have been published in the newspapers, would be disqualified as jurors, if the objections raised in this case were well founded. All of them would read the accounts or hear the facts detailed by some one who had read them, and most of them would form just such opinions, or get just such impressions as the jurors had in this case."

[5] Counsel for plaintiff in error rely on the cases of *Turner v. State*, 4 Okl. Cr. 165, 111 Pac. 988, *Scribner v. State*, 3 Okl. Cr. 605, 108 Pac. 422, 35 L. R. A. (N. S.) 985, and *Tegeler v. State*, 9 Okl. Cr. 149, 130 Pac. 1164. The proposition presented by the case at bar is not identical with that determined in these cases. The latter three were reversed because certain jurors were retained over the objection of the defendant.

In the *Turner Case*, Juror Blackburn said that he had no reason to doubt the newspaper accounts that he had read, that he believed that account true, and that in his opinion the deceased was murdered, and that he believed the defendant was guilty. In the case at bar no such statement was made by any juror. If there had been, this cause would be reversed. In the *Scribner Case*, Juror McKinney stated that he could not give the defendant the same fair trial that he could have given if he had not heard of the case. No such statement as this was made by any of the jurors impaneled in the case at bar. They all said that they could give a fair and impartial trial, and would

do so. In the *Tegeler Case*, Juror Johns, who acted as foreman of the jury that convicted Tegeler, stated to the court that he had formed an opinion as to the guilt of Tegeler; that he was present in the courtroom at a former trial of the case and heard testimony introduced at that trial; that he probably had talked to some of the witnesses in the case; that he had talked to other parties who had detailed the evidence, and that he had read detailed accounts of the homicide and of the testimony as published in Oklahoma City newspapers; that at the time of his examination he stood on one side of the case, and that he had in his mind a fixed opinion as to the guilt of Tegeler and that it would take strong evidence to remove it. When asked as to whether he had any doubt about that, he emphatically replied, "None in the world." The record in that case further shows that the opinion of this juror was that Tegeler was guilty. In the case at bar there is no testimony that even approaches these conditions. The doctrine of these latter opinions is just as sound and is just as permanently fixed in the jurisprudence of this state as the doctrine in the *Bradford Case*, followed down to and including the *Gentry Case*.

Finding no error in the record prejudicial to the substantial rights of the plaintiff in error, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

IRETON et al. v. IDAHO IRR. CO., Limited.

(Supreme Court of Idaho. April 3, 1917.)

WATERS AND WATER COURSES §253—WATER RIGHT—LIEN—PRIORITY OF MORTGAGE.

Where a Carey Act construction company enters into a contract with a desert land entryman, whereby it furnishes water to him which is based upon, and the right to the use of which becomes appurtenant to, the land, and issues to him shares of stock in an operating company, which it is intended shall ultimately become the owner of the irrigation system, and retains possession of the shares as security for the payments to be made therefor, but does not record the contract, and the entryman afterwards mortgages the land to a third party, who, without actual notice of any lien or claim of the construction company, acquires such mortgage and records it, the lien created by the mortgage attaches to the water right and to the shares of stock and is superior to the lien or claim of the construction company.

Appeal from District Court, Gooding County; James R. Bothwell, Judge.

Action to foreclose a real estate mortgage by Samuel Iretton and another against the Idaho Irrigation Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

Oppenheim & Hodgins, of Boise, and Longley & Walters, of Twin Falls, for appellant. Richards & Haga, Marvin C. Hix, and McKeen F. Morrow, all of Boise, for respondents.

MORGAN, J. On December 21, 1911, Robert Lansdon and his wife executed and delivered their promissory note for \$2,000 to Boise Title & Trust Company, and on the same day, to secure the payment thereof, executed and delivered to that company a mortgage upon 160 acres of land in Gooding county, together with any and all water rights owned by the mortgagors or belonging to or connected with the premises. The mortgage was duly recorded on January 8, 1912, and on March 13th of that year, and prior to the maturity of the note, was sold and assigned, together with the indebtedness thereby secured, to respondents who have commenced this action to foreclose it.

Appellant, a Carey Act construction company, entered into a contract with the state of Idaho to construct an irrigation system in the counties of Blaine and Lincoln, out of a portion of which latter county the county of Gooding has been created, for the purpose of watering lands entered under the Carey Act (Act Cong. Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. St. 1916, § 4685]). The contract provided that appellant should sell to entrymen water rights and shares of stock in the Big Wood River Reservoir & Canal Company, Limited, a corporation to be formed by it in order to facilitate the transfer of the ownership and control of the system to purchasers of water rights and for their convenience, when they shall have acquired the system, in its management and control and in the distribution of water therefrom to their lands according to their respective interests. The shares were to represent a proportionate interest in the irrigation works, one share to be issued for each acre of land to be irrigated. The land in question was not Carey Act land, but was acquired by Lansdon under the desert land laws of the United States and is adjacent to the Carey Act segregation of appellant and capable of being irrigated only by its system.

On April 1, 1910, appellant and Lansdon entered into a written agreement whereby the latter purchased a certain number of shares in the canal company, each share entitling him to one-eightieth cubic foot of water per second and a proportionate interest in the system. The contract provided that in case of default in the payment of any installment of the purchase price appellant might, at its option, declare all payments due, enforce any lien it might have upon the water right and land, or proceed to enforce any remedy given it by law. Lansdon and wife, by the terms of the contract, which was recorded on June 28, 1913, were to transfer, and did transfer, the stock to appellant as

security for the payments to be made. In settlement of the first payment due the entryman gave his promissory note to appellant; he defaulted in the subsequent payments.

Neither respondents nor the Boise Title & Trust Company, at the time they respectively acquired the mortgage, or at any time prior thereto, had actual notice of any lien of appellant by reason of the entryman's contract, and, as above stated, the mortgage was made and recorded long prior to the date of recording the contract.

Water was delivered to and applied to a beneficial use upon the land during 1911, and the right to the use of water therefrom from the system of appellant has never been abandoned. Lansdon made final proof on December 12, 1911, and evidence of the water right, consisting of the contract between himself and appellant, formed part of the proof. Final certificate issued January 6, 1912, and patent July 6, 1914. The irrigation system has been practically completed, but is not yet accepted by the state, nor have the works been turned over to the operating company.

The court rendered judgment in favor of respondents, decreeing that the lands, water right, and shares of stock be sold, and the proceeds applied, first to the payment of the costs of sale; second, to the payment of the claim of respondents; and, third, to the payment of the claims of appellant for the purchase price of the water right. This appeal is from the judgment.

The only issue presented in this case is as to the relative priority of the liens of the appellant and respondents upon the water right in question; it having been conceded by appellant that whatever lien it has upon the land, by virtue of its contract, is subsequent to the mortgage. It is contended by respondents, and denied by appellant, that the water right is real property, appurtenant to the land, and was conveyed by the mortgage.

Section 3056, Rev. Codes, includes water rights within the definition of real property. Such rights are appurtenant to the land to which the water represented thereby has been beneficially applied. Section 4, art. 15, Constitution; section 3240, Rev. Codes; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19; *Taylor v. Hulett*, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A. (N. S.) 535; *Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501; *Paddock v. Clark*, 22 Idaho, 498, 126 Pac. 1033. Furthermore, by the terms of the contract between the state and appellant, and of that between appellant and Lansdon, the water right was dedicated, and made appurtenant to the land involved herein and none other.

Section 1629, Rev. Codes, being a part of the chapter of the Idaho law whereby the conditions of the Carey Act are accepted, provides that any person, company, or association, furnishing water for a tract of land shall have a prior lien upon the water right

and land for all deferred payments for the same and that the contract for the water right, upon which the lien is founded, shall be recorded in the office of the recorder of the county where the land is situated. While the land involved here was not a Carey Act entry, but was acquired under the desert land laws of the United States, the contract between appellant and Lansdon, the entryman, provided:

"That the purchaser has made application to the company to purchase upon the terms hereinafter set forth, shares in the Big Wood River Reservoir & Canal Company, Limited, upon the same terms and conditions, as near as may be, as purchasers of water rights under the Carey Act."

In that contract it was provided that Lansdon and his wife, for and in consideration of the premises and of the agreements and covenants of appellant, and as security only, by way of mortgage, for the payment, when due, of the sums agreed to be paid for the water rights, did grant, bargain, sell, convey, assign, transfer, and set over unto appellant, its successors and assigns, all their right, title, and interest in and to the lands and premises described in the contract, and Lansdon also agreed that, to further secure said payment, the shares of stock purchased in the Big Wood River Reservoir & Canal Company, Limited, should be and they were thereby assigned and transferred to appellant.

It is apparent that under the terms of this contract appellant is in no better position than it would have been, had the land been embraced within a Carey Act entry. By the terms of this contract the land, so far as it could be, and the water rights and certificates of stock, were conveyed, or agreed to be conveyed, by way of mortgage, to secure the payment of the sums due to appellant from Lansdon, which makes the provisions of section 3160, Rev. Codes, applicable to it, as follows:

"Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

Section 3161 defines the term "conveyance" to mean:

"Every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills."

At the time the mortgage was given there was nothing on record in the office of the county recorder indicating that there was any lien whatever either upon the land mortgaged or upon the water right appurtenant thereto, and the record of the case does not disclose that either the mortgagee or respondents had knowledge of any fact which would lead a prudent person to a discovery of the claims of appellant.

The fact that final proof was accepted was an indication that the entryman had obtained a water right which he could mortgage, for, under the provisions of the United States statutes relating to desert land entries, the government would not issue its patent until proof was made that a water right had been acquired by the entryman by purchase or otherwise. This fact and the fact that the mortgagor was actually using the water was sufficient, in the absence of a record or other information to the contrary, to invite the conclusion that the entryman, who had acquired title to the land, also had title to the water right appurtenant thereto.

Appellant sold this water right and permitted it to be applied to a beneficial use upon, and to become appurtenant to, the land in question. It failed and neglected to give notice of its claim to security, as by law provided, and cannot be heard to complain that the law recognizes as prior and superior the lien of an innocent mortgagee whose conveyance, though subsequent in point of date of execution, is first recorded.

It is contended by appellant that the shares of stock in the operating company are personal property, and that the water right passed by assignment of them, and did not become subject to the mortgage on the land. While shares of stock in an ordinary corporation, organized for profit, are personal property (section 2747, Rev. Codes; State v. Dunlap, 28 Idaho, 784, and cases therein cited on page 802, 156 Pac. 1141), and while this court has held shares in an irrigation company to be personal property (Watson v. Molden, 10 Idaho, 570, 79 Pac. 503) the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence. In re Thomas' Estate, 147 Cal. 236, 81 Pac. 539; Berg v. Yakima Valley Canal Co., 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292.

It follows that, since respondents' mortgage is a prior lien upon the land and upon the water right appurtenant thereto, their claim to the shares of stock, which evidence that water right, is superior to that of appellant.

The judgment appealed from is affirmed. Costs are awarded to respondents.

BUDGE, C. J., and RICE, J., concur.

STATE v. LUNDHIGH.

(Supreme Court of Idaho. April 30, 1917.)

1. HOMICIDE \S 127—MURDER—SUFFICIENCY OF INFORMATION.

An information the charging part of which is in the following language, to wit: That the defendant "did then and there willfully, unlawfully, feloniously, and with malice aforethought kill and murder one Evangelos Pappas, a human being"—is sufficient to charge the crime of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 192-194.]

2. HOMICIDE \S 200—WITNESSES \S 37(5)—EVIDENCE—DYING DECLARATIONS.

Held, that the dying declaration of the deceased in this case was properly admitted in evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Witnesses, Cent. Dig. § 85.]

3. CRIMINAL LAW \S 1129(1) — APPEAL—ASSIGNMENTS OF ERROR.

Under section 7946, Rev. Codes, written charges presented and requested by either the state or defendant are deemed excepted to, and this court may examine such charges, whether assigned as error in the brief of appellant or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954, 2962, 2964.]

4. CRIMINAL LAW \S 758 — INSTRUCTIONS—TESTIMONY OF DEFENDANT.

An instruction of the court given at the request of the state contained the following: "The jury are not to accept the evidence of the accused blindly or any further than it is corroborated by other evidence, but may consider whether it is true and given in good faith, or merely to prevent a conviction. And in considering the testimony of defendant, Lundhigh, you have a right to take into account any interest he may have in the result of your verdict, as bearing upon the question of his credibility as a witness in his own behalf." *Held*, that the giving of such an instruction is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1786-1789.]

5. CRIMINAL LAW \S 778(12)—INSTRUCTIONS—BURDEN OF PROOF—STATUTE.

An instruction to the jury based upon section 7866, Rev. Codes, to the effect that, if the state has proved beyond a reasonable doubt that the defendant shot and killed the deceased, and the plea of self-defense is interposed by defendant, it is incumbent upon him to establish and prove such defense by a preponderance of the evidence, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1900, 1967.]

6. HOMICIDE \S 151(1), 241—SELF-DEFENSE—BURDEN OF PROOF.

Upon a trial for murder, where the state has proved beyond a reasonable doubt the commission of a homicide by the defendant, or the commission of the homicide is admitted by the defendant, the burden of proving the circumstances in mitigation of, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime only amounted to manslaughter or that the defendant was justifiable or excusable; but he is not required to establish such circumstances by a preponderance of the evidence, but only to such extent that the jury, after considering the whole

evidence in the case, have a reasonable doubt as to his guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276, 504.]

Budge, C. J., and Morgan, J., dissenting in part.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

Alfred Lundhigh was convicted of murder in the second degree, and from the judgment and from an order denying motion for new trial, he appeals. Reversed and remanded, with direction to grant a new trial.

Thomas & Anderson and Hansbrough & Gagon, all of Blackfoot, for appellant. J. H. Peterson, former Atty. Gen., Herbert Wing, Asst. Atty. Gen., T. A. Walters, Atty. Gen., R. W. Adair, of Blackfoot, and C. M. Booth, of Twin Falls, for the State.

RICE, J. [1] In this case defendant was convicted of murder in the second degree. The charging part of the information reads as follows:

"The said Alfred Lundhigh, on or about the 11th day of June, 1915, at the county of Bingham and state of Idaho, and prior to the filing of this information, did then and there willfully, unlawfully, feloniously, and with malice aforethought kill and murder one Evangelos Pappas, a human being."

Demurrer was filed to this information, on the ground that it does not substantially conform to the requirements of sections 7677, 7678, and 7679, Rev. Codes of Idaho, and further for the reason that it does not state facts sufficient to constitute a public offense.

This court has stated repeatedly that an indictment or information charging an offense in the language of the statute defining it is sufficient. No distinction appears to have been made in this respect between indictments or informations for murder and those charging other crimes. *People v. Butler*, 1 Idaho, 231; *People v. Ah Choy*, 1 Idaho, 317; *State v. Ellington*, 4 Idaho, 529, 43 Pac. 60; *State v. Keller*, 8 Idaho, 699, 70 Pac. 105.

It is essential that an indictment or information should charge all the elements necessary to constitute the offense. Murder is defined to be the unlawful killing of a human being with malice aforethought. Rev. Codes, § 6560. The elements constituting the offense of murder are the killing of a human being, the unlawfulness of the killing, and that it was accomplished with malice aforethought. I think these are the ultimate facts to be pleaded, and that the means by which and the manner in which the killing was accomplished are evidentiary facts which need not be pleaded. The information filed in this case sufficiently pleads the ultimate facts and satisfies the requirements of sections 7677, 7678, 7679, and 7686, Rev. Codes. *Strickland v. State*, 19 Tex. App. 518; *People v. Cronin*, 34 Cal. 191.

The criminal practice act of the territory of Idaho was enacted in 1864 and was taken from the statutes of California. Prior to the adoption of the California criminal practice act by the Legislature of the territory of Idaho the California courts had held as follows:

"There is little or no difference between the requirements of an indictment under the common law and under our statute, except in the manner of stating the matter necessary to be contained." *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503.

In the matter of indictments charging murder the Supreme Court of California changed its position shortly after the adoption of the criminal practice act by the Legislature of this territory, as shown by the cases of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Cronin*, 34 Cal. 191; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; and *People v. Witt*, 170 Cal. 104, 148 Pac. 928. These cases and many other California cases have uniformly held an information drawn as was the information in this case to be sufficient and in proper form. The criminal practice act of Idaho thus adopted from California was re-enacted at the time of the enactment of the Revised Statutes in 1887, and again at the time of the adoption of the Revised Codes in 1909. Under the rule usually applicable, the changed position of the California Supreme Court after the adoption of the statute by the Legislature of this territory might be persuasive, but would not be binding upon this court. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

This court, however, prior to the re-enactment of 1887 had stated many times that an information charging a crime in the language of the statute defining that crime is sufficient. In the case of *State v. Sly*, 11 Idaho, 110, 80 Pac. 1125, decided in May, 1905, this court said in effect that section 7675, Rev. St., was evidently adopted for the purpose of abrogating the strictness of the common-law form of indictment. Again in the same case the court quotes with approval from the case of *People v. Murphy*, 39 Cal. 52, as follows:

"The sufficiency of the indictment is not to be tested by the rules of common law, but by the requirements of the criminal practice act of this state. That act provides that the particular circumstances need not be stated, unless they are necessary to constitute the offense charged. Murder is the unlawful killing of a human being, with malice aforethought, and certainly the means by which the killing is accomplished can never become material in ascertaining the offense charged. The requirement that it must appear that the party died within a year and a day is a rule of evidence merely. Unless the party died within that time the prosecution will not be permitted to show that he died of the injury received."

And in 11 Idaho at page 115, 80 Pac. at page 1127, in the *Sly* Case, this court said:

"It is clear to our minds from the foregoing authorities that it has never been the intention of this court since its organization under the territorial government to the present time, to

follow the doctrine laid down in the *Aro* and other early California cases in passing upon the sufficiency of an indictment or information."

Under such circumstances it is fair to presume that in the re-enactment of the Criminal Code in 1909 the Legislature intended to adopt the construction which had been placed upon the statute by our own court. *G. & S. F. Ry. v. F. W. & N. O. Ry.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; *State Commission in Lunacy v. Welch*, 154 Cal. 775, 99 Pac. 181; *Mitchell v. Simpson*, 25 L. R. Queen's Bench Div. 183. This presumption in the case of a re-enacted statute applies not only to the decisions of courts, but also to the actions of administrative officers taken under a statute. *Copper Queen Con. Min. Co. v. Arizona*, 206 U. S. 474, 27 Sup. Ct. 695, 51 L. Ed. 1143.

It would seem that, even though some of the observations in the *Sly* Case were obiter dicta, they would be entitled to as much weight as the acts of administrative officers. I think, therefore, that this court is not bound to follow the California cases decided prior to the adoption of the criminal practice act of 1864.

In the case of *State v. Smith*, 25 Idaho, 541, 138 Pac. 1107, this court held that an information charging manslaughter in the following language, viz.: "That the defendant did unlawfully and feloniously kill one Clara Foy"—is defective and insufficient to comply with the statute because of its failure to show the means by which death was accomplished. It is possible that in cases of involuntary manslaughter it might sometimes be necessary that the particular circumstances be alleged in order to constitute the complete offense. I think, however, that the case of *State v. Smith*, as applied to manslaughter generally and in so far as it might be considered as an authority with reference to indictments or informations for murder, should be overruled.

[2] The appellant assigns as error the action of the trial court in permitting witnesses Ernest Pappas and Edith Roos to testify as to dying declarations on the part of the deceased. There can be no doubt but that these dying declarations were made in the presence of approaching dissolution, and both the statements of the deceased at the time and the surrounding conditions show conclusively that the deceased was cognizant of his condition. It appears that the witness Edith Roos was testifying from her knowledge of the statements of the deceased, and not relying upon the translation of his statements made to her by an interpreter. Her testimony as to the dying declaration of the deceased is not inadmissible within the rule laid down in the case of *State v. Fong Loon*, 29 Idaho, 248, 158 Pac. 233, L. R. A. 1916F, 1198. We are of the opinion that the court did not err in permitting the testimony of these witnesses to be given.

Appellant in his brief failed to assign as error the giving of the instructions or any of them by the court. This court has held, in construing section 7946, Rev. Codes, that instructions in writing requested by the state and given, or requested by the defendant and refused, are deemed excepted to, and the questions presented thereby need not be preserved in the bill of exceptions in order to be reviewed by the appellate court; also that objections to instructions given by the court on its own motion must be preserved by bill of exceptions in order to be reviewed by this court. *State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425; *State v. Suttles*, 13 Idaho, 88, 88 Pac. 233; *State v. Peck*, 14 Idaho, 712, 95 Pac. 515. These provisions of the law, and the practices based thereon, do not appear to have been affected by the amendments to the Criminal Code which were enacted by the thirteenth session of the Legislature, found under chapters 146, 147, 148, 149, and 150 of the 1915 Session Laws.

[3-5] Under section 7946, Rev. Codes, as construed by the cases last cited, the instructions given at the request of the state are before the court for review, exceptions thereto having been preserved by law. This court will not assume the burden of searching the record for errors not assigned by the appellant, but in this case certain instructions given at the request of the state have come to our attention. Among them are instructions Nos. 62 and 65, which read as follows:

"Instruction No. 62. The jury are further instructed in the language of the statutes of this state that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable. So in this case, if the state has proved beyond a reasonable doubt that the defendant, Lundhigh, shot and killed the deceased, Pappas, the plea of self-defense interposed by the defendant must establish and prove such defense by a preponderance of the evidence. So if you find from the evidence, beyond a reasonable doubt, that the defendant has failed by a preponderance of the evidence to establish and prove such defense, it will then be your duty to convict the defendant."

"Instruction No. 65. The court instructs the jury that the law says that the defendant is a competent witness and may testify in his own behalf, and the jury should not capriciously disregard such testimony. This does not mean that you should believe, but only that you should consider it and ascertain to the best of your judgment whether it is true, and if true you should act on it, and if you should not believe it you should reject such testimony, you being the sole judges of the truth of the evidence. The jury are not to accept the evidence of the accused blindly or any further than it is corroborated by other evidence, but may consider whether it is true and given in good faith, or merely to prevent a conviction. And in considering the testimony of the defendant Lundhigh, you have a right to take into account any interest he may have in the result of your verdict, as bearing upon the question of his credibility as a witness in his own behalf."

In this case the killing was admitted by the defendant, and the only issue in the case was that arising from appellant's claim that he acted in self-defense. The only evidence of the immediate circumstances surrounding the killing is that contained in the dying declaration of the deceased and the testimony of appellant. Appellant's narrative of those events is not impossible or incredible. The two instructions quoted, therefore, bear directly upon the proof required on the part of the appellant to justify the killing of the deceased on the ground of self-defense, and go to the very foundation of his defense. They are both erroneous. *Coffin v. United States*, 156 U. S. 432, at pages 459, 460, 15 Sup. Ct. 394, 39 L. Ed. 481, at page 494.

[6] By instruction No. 62 the jurors are told that the defendant must establish and prove the plea of self-defense by a preponderance of the evidence, and that, if they find from the evidence beyond a reasonable doubt that the defendant has failed by a preponderance of the evidence to establish and prove such defense, it will be their duty to convict the defendant. This instruction does not state the law. Section 7866, Rev. Codes, is as follows:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

While the burden of proving the circumstances in mitigation or justification of the homicide rests with the defendant, he is not required to establish such circumstances by a preponderance of the evidence, but to establish the circumstances to such an extent that the jury, after considering the whole evidence in the case, have a reasonable doubt as to his guilt. *State v. Rogers*, 30 Idaho, —, 163 Pac. 912; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Elliot*, 80 Cal. 296, 22 Pac. 207; *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

By instruction No. 65 the jurors are instructed not to consider the testimony of the accused any further than it is corroborated by other evidence. We do not understand that this is the law as applied to the testimony of a defendant in a criminal case. The defendant is entitled to the same consideration as a witness as the other witnesses in the case, and his credibility is to be tested by the same rules as are applicable to other witnesses. This latter instruction is also subject to the criticism which was applied to a similar instruction in the case of *State v. Rogers*, 30 Idaho, —, 163 Pac. 912, in that it singles out the defendant and directs the jury to apply tests as to his credibility as a witness differing from those applied to other witnesses in the case.

For these errors the judgment of the dis-

strict court must be reversed. The cause is remanded, with directions to the trial court to grant the appellant a new trial.

BUDGE, O. J. (concurring in part and dissenting in part). I concur in the opinion of Justice RICE that the information is sufficient to charge the crime of murder. It will be conceded that under the common law the information would be fatally defective. *People v. Aro*, 8 Cal. 207, 65 Am. Dec. 503; *People v. Lloyd*, 9 Cal. 54; *People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32; *People v. Steventon*, 9 Cal. 273; *People v. Coleman*, 10 Cal. 334; *People v. Dolan*, 9 Cal. 576; *People v. Judd*, 10 Cal. 313; *People v. Miller*, 12 Cal. 291.

Beginning, however, with the case of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, the Supreme Court of California changed its former holding, and held that:

"In an indictment for murder it is not necessary to aver the means by which the homicide was committed, or the nature and extent of the wound, or the part of the body upon which it was inflicted."

And in the case of *People v. Cronin*, 34 Cal. 191, that court further held, that an indictment need not aver the means or mode of death. *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782.

In the case of *People v. Witt*, 170 Cal. 104, 148 Pac. 923, the Supreme Court of California, in discussing the sufficiency of an information, the charging part of which, with the exception of the name of the defendant and the date upon which the murder was committed, is the same as in the case at bar, says:

"Concededly this describes the offense of murder in the language of our statute. * * * Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case."

The *Witt* Case cites the case of *People v. De la Cour Soto*, 63 Cal. 165, with approval, wherein it is held that an information in the language of the statute defining murder is sufficient to charge murder. The Idaho cases generally have used the same expression. *Matter of McLeod*, 23 Idaho, 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 1813; *State v. O'Neill*, 24 Idaho, 582, 135 Pac. 60; *State v. Brill*, 21 Idaho, 269, 121 Pac. 79; *State v. Sly*, 11 Idaho, 110, 80 Pac. 1125; *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051; *State v. Ellington*, 4 Idaho, 529, 43 Pac. 60; *People v. Ah Choy*, 1 Idaho, 317; *People v. Butler*, 1 Idaho, 231.

The early California cases cited above were decided by the Supreme Court of that state prior to the adoption of the California criminal practice act by the Legislature of the territory of Idaho in 1864, and ordinarily would be regarded as binding upon this court in the construction of the statute. However, in the matter of sufficiency of indictments for

murder the California court changed its position shortly after the adoption of the criminal practice act by the Legislature of the territory of Idaho, as shown by the cases of *People v. King*, *supra*, *People v. Cronin*, *supra*, *People v. Hyndman*, *supra*, *People v. Witt*, *supra*, and many other cases not here mentioned.

While it is true as a general rule that where one state adopts a statute from another state it also adopts the decisions of that state construing the statute, an exception to the rule seems to obtain where the courts of the state from which the statute was borrowed have repudiated or abandoned such construction. The Colorado court states the rule as follows:

"The rule that courts are bound to adopt the prior judicial construction given a borrowed statute in the state from which it is taken is not inflexible. Where such construction is clearly erroneous, harsh, and oppressive, or where it is inconsistent with the spirit and policy of the laws of the state borrowing the statute, courts may, and frequently do, decline to follow it. It can hardly be seriously contended that the rule should control in a case like the one at bar, where the Supreme Court has repudiated and abandoned its own construction." *Dwyer v. Smelter City State Bank*, 30 Colo. 315, 70 Pac. 323.

See, also, *Oleson v. Willson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; *Coad v. Cowhick*, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953; *Lewis' Sutherland*, Stat. Const. vol. 2, § 404.

From the foregoing it would seem that this court is not bound to follow the earlier California cases prescribing the essential elements of an indictment for murder, but is at liberty to follow the later California cases and the rule hitherto announced by this court.

Informations charging murder in manner and form as alleged in this case have been held to be sufficient under statutes the same or similar to ours in the following cases: *Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102; *State v. Nielson*, 38 Mont. 451, 100 Pac. 229; *State v. Hayes*, 38 Mont. 219; 99 Pac. 434; *Strickland v. State*, 19 Tex. App. 518; note to *Schaffer v. State*, 3 Am. St. Rep. 281.

I have examined with care the case of *State v. Smith*, 25 Idaho, 541, 138 Pac. 1107, and do not hesitate to state that, in my opinion, it does not correctly state the law governing the sufficiency of an information or indictment charging murder; that it is not supported by the great weight of modern authority, or supported as authority in testing the point raised in the instant case; that it cannot be so considered in the light of the authorities considered in this opinion, nor under the plain construction and interpretation of our statute, nor with due regard to the proper, certain, and efficient administration of the law, and, in so far as the rule there announced might be regarded as a precedent in testing the sufficiency of an information or indictment charging murder, the case should be overruled.

I dissent from that portion of the opinion which discusses the alleged erroneous instructions and upon which this case is reversed. There is no assignment of error in appellant's brief predicated upon the giving of either of these instructions. There is no specification of error based thereon in the transcript or bill of exceptions. The point was not urged upon appellant's motion for a new trial, nor was it urged upon the oral argument before this court. On the contrary, it affirmatively appears on page 31 of the appellant's brief that there never was any intention on the part of appellant to predicate error upon the giving of any instructions. I quote from appellant's brief as follows:

"The court instructed the jury fully on all of these matters, and *there was no objection to the instructions of the court on either side; it being conceded and agreed that they were correct and proper.* * * *". (Italics ours.)

This court has uniformly adhered to the rule that where errors are not assigned they will not be reviewed. And it is further well settled that even where errors are assigned, if they are not discussed either in the brief or upon oral argument, and no authorities are cited in support of the assignments, they will neither be reviewed, considered or discussed by this court. *Farnsworth v. Pepper*, 27 Idaho, 159, 148 Pac. 48; *Davenport v. Burke*, 27 Idaho, 464, 149 Pac. 511; *State v. McGann*, 8 Idaho, 40, 66 Pac. 823; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341; *State v. Jones*, 28 Idaho, 428, 154 Pac. 378. See, also, *Rice v. People*, 55 Colo. 506, 136 Pac. 74; *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271; *People v. Valencia*, 27 Cal. App. 407, 150 Pac. 68; *State v. Kakarikos*, 45 Utah, 470, 146 Pac. 750; 12 Cyc. 875.

Under such circumstances I cannot bring myself to believe that it is proper for this court to assign and discuss errors for an appellant which he expressly waived, abandoned, and failed to assign as error. I find no precedents in our decisions in support of such procedure. The presumption is that, if the errors had been called to the attention of the trial court, they would have been corrected before the instructions were given. A defendant in a criminal case ought not to be permitted to sit idly by while prejudicial error is being committed and speculate upon the result of the verdict. *State v. Baker*, 28 Idaho, 727, 156 Pac. 103.

Where the evidence in a given case clearly shows the defendant to be guilty of an unprovoked murder, without any justification or excuse, and the jury could not, under their oaths, have brought in any other verdict than was rendered by them, even conceding that there is error in the instructions, and the right of the appellate court to review such errors when not assigned, the judgment of the trial court should not be reversed, for the reasons as announced in an opinion by the late Justice Stewart in the

case of *State v. Marren*, 17 Idaho, 766-790, 107 Pac. 983, 1001:

"Although the instruction referred to contains matter which should not have been given to the jury, we are, however, of the opinion that the appellant could have been in no way prejudiced by the giving of such instruction. Other instructions were given to which no exception was taken, which clearly charged the jury with reference to circumstantial evidence; and not only that, but the evidence in this case is so clear and convincing of the guilt of the appellant that the jury could in no possible manner have been influenced to return a verdict of guilty by the objectionable matter contained in this instruction; and from the evidence the jury could not, without a violation of their oaths, fail to have found the defendant guilty, and because of this the defendant could not have been prejudiced by the giving of such instruction.

"Rev. Codes, § 8070, admonishes this court: 'After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.' And again, Rev. Codes, § 8236: 'Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right.' The substance of these statutory provisions is that a new trial ought never to be granted, notwithstanding some mistake or even misdirection by the judge, provided the revising court is satisfied that justice has been done and that upon the evidence no other verdict could properly have been found"—citing cases.

In *State v. Silva*, 21 Idaho, 247-257, 120 Pac. 835, 839, it is said:

"That if the evidence of the defendant's guilt is satisfactory, that is, such as ordinarily produces a conviction in an unprejudiced mind, beyond a reasonable doubt, and the result could not have been different had the instruction been omitted, the case would not be reversed because of such erroneous instruction."

In *State v. Brill*, 21 Idaho, 269-275, 121 Pac. 79, 80, this court says:

"That even though an instruction is erroneous and ordinarily the error would be material, yet if the evidence of the defendant's guilt is satisfactory, that is, such as ordinarily produces moral certainty, or conviction in an unprejudiced mind, and the result would not have been different had the instruction been omitted, the case will not be reversed because of such erroneous instruction."

The judgment of the trial court should be affirmed.

MORGAN, J. (concurring in part and dissenting in part). I concur in all of the foregoing opinion except that portion holding the information to be sufficient; from that portion I dissent.

While this court has repeatedly stated, in effect, that an indictment or information is sufficient which charges an offense in the language of the statute defining it, I believe that in doing so it has inadvertently fallen a little short of correctly stating a sound principle of law rather than that it has deliberately attempted to announce a new rule of pleading in criminal cases. It is said in 22 Cyc. 339:

"Although the rule is frequently stated to be that it is sufficient to charge a statutory of-

fense in the language of the statute creating it, such rule is accurate only in those cases in which the statute defines and describes the offense, and is better stated with such qualification. The words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense. * * *

"The same certainty is required in indictments on statutes as at common law, and where the statute does not define the act or acts constituting the offense so as to give the offender information of the nature and cause of the accusation, other averments conveying such information must be added, even when the offense is not capital. The indictment must also be framed with such certainty that a judgment may be pleaded in bar to any subsequent prosecution for the same offense."

The territory of Idaho in 1864 (Laws 1864, p. 213) adopted the criminal practice act of California, which had been enacted by the Legislature of that state in 1851 (St. 1851, p. 212). According to a well-established rule of statutory construction, our Legislature is held to have enacted this law with full knowledge of the interpretation which the Supreme Court of that state had placed upon it and with the intent that it be so construed here. Of course, any interpretation placed upon the law by the California court subsequent to the date of its enactment by the Legislature of Idaho would not, if contradictory of its former decisions, having any binding effect upon this court.

The act of the territorial Legislature of 1864 above referred to has been re-enacted in the state of Idaho, and the part thereof by which the sufficiency of this information must be tested is to be found in sections 7677, 7678, 7679, 7686, and 7687, Rev. Codes, the language of which is practically identical with sections 237, 238, 239, 246, and 247 of the California criminal practice act of 1851.

Section 7677 provides:

"The indictment (or information) must contain: * * *

"2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

The following form is provided in section 7678:

"The State of Idaho against A. B., in the District Court of the ——— Judicial District, in the County of ———, ——— Term, A. D. Nineteen ———:

"A. B. is accused by the grand jury of the county of ——— by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like), committed as follows:

"The said A. B., on the ——— day of ———, A. D. Nineteen ———, at the county of ——— (here set forth the act or omission charged as an offense)."

Section 7679 is:

"It must be direct and certain as regards:

"1. The party charged;
"2. The offense charged;
"3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

Section 7686 is, in part, as follows:

"The indictment (or information) is sufficient if it can be understood therefrom: * * *

"6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

"7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case."

And section 7687 is as follows:

"No indictment (or information) is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits."

The Supreme Court of California construed the criminal practice act of that state, as applied to homicide cases, prior to its adoption as the law of the territory of Idaho, in the cases of *People v. Aro*, 6 Cal. 208, 65 Am. Dec. 503, decided in 1856, *People v. Wallace*, 9 Cal. 31, *People v. Cox*, 9 Cal. 33, *People v. Lloyd*, 9 Cal. 55, *People v. Stevenson*, 9 Cal. 274, *People v. Dolan*, 9 Cal. 576, *People v. Judd*, 10 Cal. 314, and *People v. Coleman*, 10 Cal. 334, all decided in 1858, and *People v. Miller*, 12 Cal. 291, decided in 1859. In these cases the court held, in effect, that the California legislation upon the subject, while intended to remove the useless technicalities in criminal pleading which had incumbered the common law and had frequently resulted in defeating the ends of justice, had wrought no material change in the requirements of an indictment except in the manner of stating the matter still recognized as necessary to be therein contained; that the necessity for a statement of the facts and circumstances constituting the offense still existed and was "recognized by the 237th section of the statute, which provides that the indictment shall contain 'a statement of the acts constituting the offense etc.,' as well as the precedent given in the statute which points out how such facts shall be charged"; that in indictments for murder a statement of the manner of the death and the means by which it was produced was necessary so that the defendant might know of what crime he was accused and be enabled to prepare his defense on the facts; also in order that the jury might be warranted in its finding, the court in its judgment, and the defendant be enabled to successfully plead a former conviction or acquittal in the event of his being again prosecuted for the same act. With this construction in view, our Legislature enacted the law above quoted, and, as above indicated, these decisions should have more than persuasive influence upon us in construing the law under consideration for they are declaratory of the intent of our Legislature in enacting it.

In the year 1865, after the Legislature of the territory of Idaho had adopted the crim-

inal practice act, the Supreme Court of California decided the case of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, referred to in the foregoing opinions, which has since been frequently cited as an authority by that and some other courts. A part of the opinion in that case, often quoted, is as follows:

"If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done; for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

Following the *King Case*, the Supreme Court of California has held accusations like the one here under consideration to be sufficient (*People v. Murphy*, 39 Cal. 52; *People v. Weaver*, 47 Cal. 106; *People v. Alviso*, 55 Cal. 230; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; *People v. Delhantle*, 163 Cal. 461, 125 Pac. 1066), as have also the courts of Montana and Arizona (*Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102; *State v. Hayes*, 38 Mont. 219, 99 Pac. 434; *State v. Nielson*, 38 Mont. 451, 100 Pac. 229; *Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258).

That one guilty of murder is possessed of knowledge of the means whereby the crime was committed and stands in no need of being further informed upon that subject is quite clear; that one accused, and innocent of murder, which may be committed by any means which the ingenuity of man can devise, could and should be aided, in the preparation of his defense, by the indictment, or information, the only means provided by law whereby he is to be apprised of the acts constituting the crime which he must be prepared to meet when placed upon his trial, is equally clear. No justification has been offered for the assertion that, if the accused is not guilty, the allegation of a properly worded indictment or information could not aid in the preparation of his defense, and it may be stated with confidence, none exists.

By the information in this case appellant had notice that the state would attempt to prove he did, on or about the 11th day of June, 1915, or some time prior thereto, somewhere in Bingham county, by some means, murder the deceased. If the crime of murder is sufficiently charged, it might have been shown at the trial that appellant either shot, stabbed, strangled, drowned, starved, or poisoned the deceased, or produced his death in any one or more of many other ways, but just what method of killing the state would rely upon and appellant must be prepared to defend against is not disclosed, nor can it be ascertained therefrom whether proof would be adduced tending to show that the murder was committed in the perpetration or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem, or whether appellant would be called upon to rebut proof that he personally committed the act which produced the death,

or that he aided and abetted in its commission. If this information is sufficient, it would, with a change of names, dates, and places, accuse Cain of having produced the death of Abel with the same impartial uncertainty with which it would, with like changes, charge every murder committed since that first homicide.

It is urged by counsel for respondent that the testimony shows the appellant killed deceased and sought to justify his act upon the ground of self-defense, that therefore he stood in no need of being informed by the pleading of the means whereby, and the manner in which, the homicide occurred, and that none of his substantial rights were invaded by the failure to more fully allege these facts. At the time the trial judge ruled upon the demurrer no testimony had been introduced, and the evidence cannot be read in aid of the information upon appeal, when its sufficiency has been called in question by demurrer. Appellant was entitled to and should have been accorded the benefit of a presumption of innocence, and of ignorance of the means by which and the manner in which the alleged crime was claimed to have been committed, and the prosecuting attorney should have been required to charge him in such language as to apprise him of what he must be prepared to meet, and with sufficient definiteness and certainty to enable him, in case another proceeding should be taken against him for the same offense, to plead a former conviction or acquittal. *State v. Lottridge*, 29 Idaho, 53, 155 Pac. 487.

Decisions to the effect that one presumably innocent may be locked in a prison cell, be informed that he is accused of the murder of a person named, in a certain county, and on or about a time stated, that he may thereafter be placed upon his trial and receive his first intimation when witnesses are produced who testify against him, as to the means by which and the manner in which he is accused of having committed the act for which his life is sought to be forfeited, are sadly out of harmony with the American idea of justice.

In *State v. Smith*, 25 Idaho, 541, 138 Pac. 1107, the defendant was accused of manslaughter in the following language:

"That the said defendant, Charles C. Smith, at the time and place aforesaid, did unlawfully and feloniously kill one Clara F. Foy, a human being; contrary to the form of the statute in such case made and provided."

This court, holding that accusation to be insufficient, said:

"To simply charge that a person committed murder or larceny merely charges the name of the offense. That alone is not sufficient. It is necessary to in some way inform the party accused as to how it is claimed he committed murder, whether by shooting, by striking a blow, by drowning, poisoning, or in some other manner perpetrating the offense, or, if he committed larceny, what property he took."

The court further stated:

"A defendant before being placed upon trial for his life or liberty is entitled to be apprised

not only of the name of the offense with which he is charged, but, in general terms, of the manner in which he is charged with having committed the offense. The statute is plain and explicit in this respect."

That opinion correctly states the law applicable to that case and this one, and I regret to see it overruled.

The weight of the opinion of this court in *State v. Sly*, 11 Idaho, 110, 80 Pac. 1125, as an authority in this case, may best be tested by comparing that information with the one here under consideration. The charging part of the information in this case is to be found in the foregoing opinion of Mr. Justice RICE. In the *Sly* Case it is as follows:

"That the said Lorenzo Payne Sly, at the county of Latah, state of Idaho, on the 27th day of January, A. D. 1904, then and there being, did then and there willfully, unlawfully, and feloniously, and of his deliberately premeditated malice aforethought, kill and murder one John H. Hays, a human being, by then and there willfully, unlawfully, and feloniously and of his deliberately premeditated malice aforethought shooting at and against the body and person of the said John H. Hays, with a certain gun then and there loaded with gunpowder and leaden bullet, and which said gun he, the said Lorenzo Payne Sly, then and there held in his hands."

While it is true this court, in that case, gave expression to the obiter dicta quoted and relied upon in the foregoing opinion of Mr. Justice RICE, in view of the manifest sufficiency of that information the case ought not to be relied upon to sustain an accusation which is manifestly insufficient.

The Supreme Court of Kentucky, in the case of *White v. Commonwealth*, 9 Bush (Ky.) 178, having under consideration an indictment, the charging part of which is almost identical with that of the information in this case, and construing the provisions of the Kentucky Code relative thereto, which are quite similar to our law upon the subject, held the accusation to be insufficient, and that an indictment ought to charge the accused with a particular offense by properly specifying the facts constituting it. See, also, *Edwards v. State*, 27 Ark. 493; *Guedel v. People*, 43 Ill. 226; *Shepherd v. State*, 54 Ind. 25; *Arrington v. Commonwealth of Virginia*, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

Section 8070, Rev. Codes, quoted in *State v. Marren*, 17 Idaho, 766-790, 107 Pac. 993, wherein it is sought to direct this court as to what it shall consider and what it shall disregard when passing upon appeals in criminal cases, is clearly violative of section 13, art. 5, of the Constitution, which provides:

"The Legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the Legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme

Court, so far as the same may be done without conflict with this Constitution."

Furthermore, the right to trial by jury mentioned in section 7, art. 1, of the Constitution means a trial free from prejudicial error by a jury which has not been misdirected by the court as to the law governing the case. Such a trial is guaranteed alike to the innocent and the guilty, and it is not within the province of this court to condemn a man who has not been properly convicted by a tribunal having jurisdiction to determine the facts.

Quotations from the cases of *State v. Marren*, supra, *State v. Silva*, 21 Idaho, 247-257, 120 Pac. 835, and *State v. Brill*, 21 Idaho, 269-275, 121 Pac. 79, have no proper place here. In each of those cases the judgment of conviction was affirmed, so probably no real harm resulted from the observations of the court relative to the guilt of the defendants. However, had the cases been reversed and new trials ordered, and had the court indulged in discussions having a tendency to prejudice the minds of prospective jurors against the defendants and thus to deprive them of fair and impartial trials, we would have searched in vain for an excuse for its conduct.

BOTTOM v. PEOPLE. (No. 8158.)

(Supreme Court of Colorado. March 5, 1917.
Rehearing Denied May 7, 1917.)

1. BAIL §61 — BAIL BOND — LIABILITY — FORMALITIES—APPROVAL BY COURT.

Where the judge ordered a defendant to be admitted to bail on sufficient surety to be approved by the clerk, and by a later order directed that a certain person be permitted to become surety on the bond, the clerk's act in approving the bond, being pursuant to the judge's order, was in fact the act of the judge, and the bond was valid.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 239, 240.]

2. BAIL §61 — BAIL BOND — LIABILITY — FORMALITIES—APPROVAL BY COURT.

In such case, the clerk's indorsement, "The recognizance signed by the above parties in my presence and filed and approved by me," merely evidenced the physical action of approving the bond, but did not make his act any less the act of the court.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 239, 240.]

3. BAIL §61 — BAIL BOND — LIABILITY — FORMALITIES—APPROVAL BY COURT.

In such case, the duty delegated by the court was purely ministerial.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 239, 240.]

White, C. J., and Garrigues and Bailey, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by the People against John T. Bottom. Judgment for plaintiff, and defendant brings error. Affirmed.

Milnor E. Gleaves, of Denver, for plaintiff in error. John A. Rush, Dist. Atty., Robert H. Kane, and Foster Cline, all of Denver, for the People.

ALLEN, J. This is an action brought upon a criminal recognizance or bail bond, in the name of the people, against the plaintiff in error, as surety on said bond. On December 19, 1912, one Thomas N. Fitchard had a preliminary examination before a justice of the peace upon a charge of larceny as bailee. He waived examination and was bound over to the district court; the bail being fixed at \$2,000. In default of bond he was on said date committed to jail. On December 23, 1912, the district attorney filed an information in the district court, charging the said Fitchard with larceny as bailee. It appears from the record that thereupon or thereafter the district court, in that case, made and entered the following order:

"At this day it is ordered by the court that this defendant, Thomas N. Fitchard, be let to bail herein on sufficient surety, to be approved by the clerk, in the penal sum of \$1,500, conditioned for his appearance in this court on the 6th day of January, A. D. 1913, and from day to day and from term to term thereafter."

Later, in the same case, an order of court was entered containing these words:

"At this day it is ordered by the court that Attorney John T. Bottom be permitted to become surety on the bond of the defendant herein, Thomas N. Fitchard."

On February 27, 1913, the plaintiff in error, the said John T. Bottom mentioned in the foregoing order, together with the defendant and another, went into the office of the clerk of said district court, which was not in the courtroom itself, and there, while not physically in the presence of the district judge, signed the bail bond or recognizance. Upon that bail bond or recognizance the said defendant Fitchard was released. The said Fitchard did not thereafter come into court to answer the said charge at the time set in said bond, or at any time, but made default. The court accordingly duly forfeited the said bond, and ordered that a scire facias issue against the defendant and said John T. Bottom, surety. On June 6, 1913, a scire facias was duly issued and served on the plaintiff in error, John T. Bottom, as surety on said bail bond, and the usual proceedings in such cases were then had, resulting in a judgment against plaintiff in error for \$1,500, the principal sum named in the bond.

The plaintiff in error denies any liability as a surety on said bail bond, contending that said bond was taken and approved by the clerk of the district court, and that it is void upon the ground that said clerk had no sufficient authority to take and approve said bond. There is no Colorado statute which limits the ordinary common-law power of a district judge to take bail under the circumstances disclosed in this case. The following from Corpus Juris is therefore pertinent:

"Granting bail and fixing its amount is a judicial or quasi judicial function. The power to take bail is incident to the power to hear and determine, or to commit, and hence it may be stated as a general rule that any court or magistrate that has jurisdiction to try a prisoner in any case has jurisdiction to discharge him, and, a fortiori, to admit him to bail, subject, however, to such regulations or limitations as may be imposed by statute, such as a statute conferring exclusive jurisdiction upon certain courts and judges, or in certain criminal cases, in the matter of hearing and determining applications for bail. Ordinarily a recognizance may be taken either by a court as such or by a judge thereof." 6 Corpus Juris, p. 971, § 194.

The case of *Ex parte Doyle*, 62 W. Va. 280, 283, 57 S. E. 824, 826, approvingly cited 5 Cyc. 76, in saying:

"Bail rests on common law, except as statute controls, and that court has power to bail which has power to try and determine the case. The power is inherent in that court by common law, because it has charge of the accused."

The district judge, in the case at bar, having the power to let the said Fitchard to bail, it remains to be determined whether the judge or court had done all that was necessary to validate the bond here in question, either through the judge personally, or by the clerk with lawfully delegated authority, or both.

[1] From the record, and the facts as hereinbefore set forth, it appears that the judicial function of allowing bail and fixing the amount thereof was not attempted to be delegated by the judge, but was fully performed by himself. The clerk did not take and approve the bond until after the judge had thus acted. The clerk's act was in obedience and pursuant to the order of the judge. It was in compliance with a direction and order of the court. This act of the clerk was in keeping with many of the duties expected of and performed by a clerk of the court under the orders and directions of the court, which are considered as regular and a lawful authorization in court procedure. In such matters the acts of the clerk in such manner are regarded under the law as the acts of the court, through the instrumentality of the clerk, effectuating the record as directed by the judge, and are considered and taken to be the official record made by the court.

Under these circumstances it seems to us that the act of the clerk ought to be construed as the act of the judge himself, and be given the same effect and consequence as if the district judge had himself personally taken and approved the said bail bond. We adopt the language, and the rule, of the court in the case of *State v. Satterwhite*, 20 S. C. 536, where it is judicially stated in the opinion:

"In this case the order for bail expressly required that the recognizance 'be entered into and approved by the clerk of said court.' * * * It was, in effect, the taking of the recognizance by the judge himself, acting through the proper officer of his court, just as many other acts are done by the clerk, through the directions of the judge, as the acts of the court."

The case of *Hunt v. United States*, 63 Fed. 568, 11 C. C. A. 340, 27 U. S. App. 287, is in point, and in harmony with the theory herein followed. The court there said:

"The District Judge discharged each important judicial function in connection with taking bail. He decided that the offense was bailable, and fixed the amount of the bond. He also ordered the clerk to approve the bond when it should be signed by two sureties. This order addressed to the clerk was tantamount to an approval in advance of a bond signed by two sureties whom the clerk might accept as sufficient."

The opinion in the *Hunt Case*, supra, was rendered upon a petition for rehearing, and deals solely with the question confronting us in the present case. There was no statute, state or federal, authorizing the clerk of the United States District Court to admit parties to bail. The sureties in that case contended that the bail bond there in question was void, because taken by a clerk, even though he acted under the direction of the court. The original opinion, reported in *Hunt v. United States*, 61 Fed. 795, 10 C. C. A. 74, invokes the principle of estoppel, and this was the subject of complaint in the petition for rehearing. In a per curiam opinion denying the petition for rehearing, the court bases its decision chiefly upon the ground that the order of the court, addressed to the clerk, that he approve the sureties, was tantamount to an approval in advance by the judge.

In the case of *State v. Sewall*, 3 La. Ann. 575, it was held that the district judge could legally delegate to his clerk, or to a justice of the peace, authority to accept a bond. The bond in that case was accepted, not by the clerk, who is the ministerial officer of the court, but by a justice of the peace, who was authorized to act in the matter, and the court held that the act of the justice was the act of the court. If a judge may delegate authority to approve a bond to an officer outside of his court, it seems there is greater reason for holding that he may delegate it to his own clerk, as was done in the case at bar. The case of *State v. Sewall*, supra, followed the case of *State v. Jones*, 3 La. Ann. 9, where after argument and consideration the court held that a bond may be executed in the presence of any person designated by the judge. These Louisiana cases are not in conflict with the general rule, so frequently mentioned in the brief of the plaintiff in error, that a recognizance or bond taken and approved by an officer without authority is void. The Supreme Court of Louisiana did not intend to abrogate such a rule in the cases cited, for the same court a little later, in the case of *State v. Clendennen*, 6 La. Ann. 744, held that a sheriff had no power to bail the accused, and the bond there was held void, but void for the reason that "there was no order of court fixing the amount of the bond, or directing the sheriff to take it." In the case at bar there is no question but that the necessary or proper order of the court preceded the action of the clerk.

We think that the trial judge was correct in his holding, as appears of record, "that this bond was taken under the direction and supervision of the court."

[2] The bail bond in the case at bar was indorsed by the clerk as follows:

"The recognizance signed by the above-named Thomas N. Fitchard, O. L. Fitchard, and John T. Bottom, in my presence, and filed and approved by me this 27th day of February, A. D. 1913.

"J. Sherman Brown, Clerk.
"By J. S. Bergen, Deputy Clerk."

This indorsement merely evidences the physical action of the clerk in taking and approving the bail bond, but it does not negative his authority to do so under the order of the court. It did not make his act any less the act of the court. In the case of *Bodine v. Comm.*, 24 Pa. 69, it was shown that the docket entry of a recognizance was subscribed by the clerk as follows:

"Taken and acknowledged before me, 26th April, 1853. A. Cochran, Clerk."

The court in that case said:

"But the record shows that it [the recognizance] was taken in term time, and we presume it to have been the act of the court—the clerk being their instrument only. 'Omnia præsumuntur rite esse acta.' Nor do the words 'Taken and acknowledged before me,' and signed by the clerk, negative this presumption, for they were unnecessary words, and may be rejected as surplusage. The court of quarter sessions had power to admit to bail; the recognizance taken was their act, and not the clerk's, and therefore it was valid, and not void."

In the *Bodine Case*, supra, counsel for the surety contended that it did not appear from the record that the court directed the accused to enter into a recognizance or fix its amount, which fact the court did not deny, but nevertheless ruled that the act of the clerk was the act of the court, regardless of the clerk's indorsement, if it was done in term time.

In the case of *United States v. Evans* (C. C.) 2 Fed. 147, an agreed statement of facts recited, among other things, that, "In pursuance to the verbal direction of the court, the bond was executed in the clerk's office adjoining the courtroom." The opinion states that the clerk wrote at the foot of the bond, "Signed, sealed, and acknowledged and approved by me," and thereto signed his name as clerk of the court. The indorsement did not deter the court from proceeding on the theory that the bond was taken by the court in the exercise of its inherent power to take a recognizance. The court said:

"Here the court had power to take a bail bond and release the defendant; and, while so lawfully in custody before a proper tribunal, he and his sureties executed and filed this bond. It was accepted by the court, or otherwise he could not have been discharged, and after such acceptance and discharge they will not be heard to say that it was not properly acknowledged and approved."

The element of estoppel seems to enter into the above quotation, but only to aid the presumption that the clerk acted under the immediate direction of the court; the case assuming, apparently, that the court could del-

egate to the clerk the ministerial work of taking and approving the bond, a doctrine quite generally followed. Concerning the delegation of authority to take and approve bonds, the following appears in *Corpus Juris*:

"The allowance of bail and fixing the amount thereof are judicial acts, and, in the absence of statute otherwise, the court or judicial officer vested with such power cannot delegate it to another. But, where such power has been exercised by the proper court or officer, the act of taking and approving the bail bond has been held to be a ministerial act which may be delegated, without statutory authority." 6 *Corpus Juris*, 982, § 200—citing *State v. Gilbert*, 10 La. Ann. 524; *State v. Wyatt*, 6 La. Ann. 701; *State v. Sewall*, 3 La. Ann. 575; *State v. Jones*, 3 La. Ann. 9; *State v. Edney*, 60 N. C. 463.

[3] We think that in the case at bar the court by its order delegated to the clerk the performance of simply a ministerial duty, and that the court had the right to do so under the authorities herein cited, and that such ministerial acts of the clerk are to be deemed as the acts of the court, performed by the clerk for the court, according to the views announced in *Hunt v. U. S.*, supra, and *State v. Sewall*, supra. The Colorado cases cited by the plaintiff in error do not hold contrary to the views herein expressed. The case of *People v. Mellor*, 2 Colo. 705, merely conceded that the sureties in a recognizance may show that the court before whom the recognizance was acknowledged, had no authority in that behalf. In the case of *Haney v. People*, 12 Colo. 345, 21 Pac. 39, the court stated that if bail be taken by a court having no jurisdiction, or by an officer destitute of legal authority, the instrument is void as to both principal and surety; but the court found that the justice of the peace who had approved the bond had power to do so, and that the bond was valid. In the case of *Rupert v. People*, 20 Colo. 424, 38 Pac. 702, no question of the authority to delegate the approval of bail bonds, or acts of clerks approving bonds as ministerial officers, arose. The bond in that case was taken and approved by the sheriff under circumstances when bail could be taken and bond approved only by a judge or two justices of the peace. The sheriff in that case acted on his own motion and without any order of court directing him to do so. In the case of *Thompson v. People*, 23 Colo. App. 205, 128 Pac. 863, the facts were parallel to those in the *Rupert* Case, and the recognizance having been taken by an officer without authority was void.

Had the clerk, in the case at bar, acted on his own motion, and without any preceding order of the court directing his action, a different situation would be presented, which it is not now necessary to discuss, but in which the doctrine announced in the *Rupert* and *Haney* Cases might have some application. We think that the rule that a district court may delegate to its clerk the authority to perform the ministerial act of taking and approving bail bonds, after the court has allowed bail and fixed the amount thereof, is

a very salutary one. It does violence to no rule of statutory construction as applied to any statute concerning bail. It eliminates one of the "loopholes of the law" through which a miscarriage of justice may occur. We think that following the rules announced herein would be an adherence to sound principles of law and legal construction and will result in doing justice in the case at bar.

The judgment is affirmed.
Affirmed.

GARRIGUES, J. (dissenting). December 19, 1912, Fitchard was bound over to the district court upon a felony charge, by a justice of the peace, acting as a committing magistrate, who fixed his bail in the sum of \$2,000. Failing to give this, he was committed to jail. December 23, 1912, the district attorney, by leave of court, filed an information against him, based upon the preliminary examination. The court fixed his bond at \$1,500 and entered an order that he be let to bail in that sum upon surety to be approved by the clerk of the court. Defendant remained in jail until February 27, 1913, when an order was entered by the court permitting his attorney, Mr. Bottom, to sign the district court bail bond, whereupon Mr. Bottom went to the office of the clerk of the district court and executed the following bond:

"State of Colorado, City and County of Denver—ss.: People of the State of Colorado against Thomas N. Fitchard. Case No. 21,021. In the District Court, Division 5. Know all men by these presents, that we, Thomas N. Fitchard, as principal, and John T. Bottom, as surety, are jointly and severally held and firmly bound unto the people of the state of Colorado in the penal sum of \$1,500 lawful money of the United States, to be levied upon our and each of our goods and chattels, lands and tenements, unto the use of the said people. If default be made in the following conditions, which conditions are these: That if the above bounden Thomas N. Fitchard shall personally be and appear at the fifth division of the district court of the second judicial district, sitting within and for the city and county of Denver, state of Colorado, on the 8th day of April, A. D. 1913, and from day to day and term to term thereafter, and remain at and abide the order of said court, and not depart the court without leave, then and there to answer unto a certain information therein pending against the said Thomas N. Fitchard, for the crime of grand larceny and larceny as bailee, then this recognizance to be void; otherwise, to be and remain in full force and effect. Given under our hands and seals this 27th day of February, A. D. 1913. [Signed] Thomas N. Fitchard. [Seal.] C. L. Fitchard. [Seal.] John T. Bottom. [Seal.]

"State of Colorado, City and County of Denver—ss.: John T. Bottom, the surety whose name is subscribed to the above undertaking, being duly sworn, upon his oath says that he is a resident and realty holder within the said city and county of Denver, and that he is worth the sum specified in the said undertaking as the penalty thereof, over and above his just debts and liabilities, in property not by law exempt from execution in this state, said property consisting of 1648 Washington street, in the city and county of Denver; value, \$10,000; incumbrance, \$2,900. [Signed] John T. Bottom. "Subscribed and sworn to before me this 27th

day of February, A. D. 1913. J. Sherman Brown, Clerk, by J. H. Bergen, Deputy Clerk.
 "This recognizance, signed by the above-named Thomas N. Fitchard, C. L. Fitchard, and John T. Bottom, in my presence, and filed and approved by me this 27th day of February, A. D. 1913. J. Sherman Brown, Clerk, by J. H. Bergen, Deputy Clerk."

Defendant was then released, but, failing to comply with the conditions of the bond, it was forfeited, and scire facias issued against Bottom. The defense was that the bond was void, because not taken by an authorized person. It was stipulated on the trial of the scire facias that the bond was taken by the clerk in the clerk's office; not in the courtroom, nor in open court, nor in the presence of the judge.

Section 245, R. S. 1908, provides that no attorney at law shall become surety in any bond or recognizance for the appearance of any person charged with a public offense, without the consent of a judge of the district first had, approving said surety.

Section 1932 makes judges of the Supreme Court and of the district courts and justices of the peace committing magistrates, with power to bind over to the district court.

Section 1938 provides for the issuing of a warrant by any judge or justice of the peace, who shall, after hearing the evidence, either commit the accused to jail, admit him to bail, or discharge him. The recognizance, if taken, shall require the accused to appear on the first day of the next term of the district court, or, if that court is in session, then on some day of the term to be designated.

Section 1942 provides that, if the accused fails to give the bail at the time of the preliminary hearing and is committed for want of good and sufficient bail, the magistrate shall indorse on the warrant of commitment in what sum bail ought to be taken, then after that any two justices of the peace or any judge may take such bail in vacancy; that is, when the district court is not sitting, as provided in section 1934.

Section 1944 then provides the manner in which the recognizance shall be taken: It shall be taken to the people, and be signed by the persons entering into the same, and certified by the magistrate or person taking it, who must then deliver it to the clerk of the district court on or before the day mentioned therein for the appearance of the accused (showing clearly that these sections relate to bind-over proceedings to the district court, conducted by judges or justices of the peace sitting as committing magistrates). The section then provides that recognizances taken in courts of record need not be so signed, meaning of course, an open court recognizance.

Section 1964, provides that the district attorney shall file an information against the accused, who has had a preliminary examination and been bound over by the examining magistrate.

Section 1969 provides that the clerk of the district court shall issue process of capias directed to the sheriff for the arrest of the person informed against, and makes it the duty of the sheriff to arrest the person therein named and let him to bail and return the recognizance to the clerk who issued the capias. When the district attorney files the information, section 1947 provides that the court shall make an order fixing the amount of the bail, which the clerk must indorse on the process, and the statute says the sheriff who arrests the person—not the clerk—shall let him to bail in the sum specified on the process, and the bail bond shall be signed by the persons entering into the same. This is a signed bail bond, as distinguished from an open court recognizance.

These sections apply to all informations alike, whether the accused has had a preliminary examination or not, or whether he is at large or in jail. In *People v. Eberlie*, 60 Colo. 209, 152 Pac. 146, it is said:

"When an information is filed in the district court, the statute makes it the duty of the court to enter an order fixing the amount of bail—to be indorsed on the process—and the clerk of the court is directed to issue process of capias for the apprehension of the defendant. The statute providing for the issuing of a capias, and the indorsement thereon of the amount of bail, and letting the accused to bail, makes no exception of cases in which defendants have had a preliminary hearing, but applies alike to all informations."

When the district attorney filed his information, and the court entered the order fixing the amount of bail, and the clerk issued the capias and placed it in the hands of the sheriff, with the amount of bail indorsed thereon, the magistrate's order indorsed on the warrant of commitment had served its purpose, and defendant was under another jurisdiction. The bail attempted to be taken in the district court was not the magistrate's bail, but that fixed by the order of the district court.

2. A bond or recognizance taken and approved by an officer of court in a criminal case, who has no statutory authority to take or approve such a bond, is void both as a statutory bond and as a common-law obligation. *People v. Mellor*, 2 Colo. 705; *Haney v. People*, 12 Colo. 345-349, 21 Pac. 39; *Rupert v. People*, 20 Colo. 424-427, 38 Pac. 702; *Thompson v. People*, 23 Colo. App. 204-206, 128 Pac. 863; *State v. Caldwell*, 124 Mo. 509, 28 S. W. 4; *San Francisco v. Hartnett*, 1 Cal. App. 652, 82 Pac. 1064; *Territory ex rel. v. Woodring*, 15 Okl. 203, 82 Pac. 572, 1 L. R. A. (N. S.) 848, 6 Ann. Cas. 950.

3. The next proposition is equally well settled. The clerk of court has no authority to take a bail bond in criminal cases, unless so authorized by statute, and, if taken by him in the absence of such authority, is void; further, it is impossible, without statutory authority, for the court to confer any such power upon the clerk, and any order

made by the court that the clerk approve the bail bond, unless the statute authorizes it, is void. 6 C. J. 981, § 207; 3 R. O. L. §§ 24, 25; 3 A. & E. Enc. of Law (2d Ed.) p. 659; *Morrow v. State*, 5 Kan. 563; *State v. Caldwell*, 124 Mo. 509, 28 S. W. 4; *State v. Winninger*, 81 Ind. 51; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184; *Territory ex rel. v. Woodring*, 15 Okl. 204, 82 Pac. 572, 1 L. R. A. (N. S.) 848, 6 Ann. Cas. 950; *San Francisco v. Hartnett*, 1 Cal. App. 652, 82 Pac. 1064. In 6 C. J. at page 981, § 207, it is said:

"As to clerks of courts, it may generally be stated that they have no inherent power to take bail, and can do so only by virtue of some statutory enactment, and this is true, even though they are deputized by the court or a judge thereof, for, in the absence of a statute permitting it, courts cannot delegate such power to their clerks. And where bail is taken by a clerk without legal authority, a subsequent approval by the court does not validate it."

In 3 R. O. L. §§ 24, 25, p. 23, it is said:

"While there is a difference of judicial opinion as to the right of the Legislature to grant the power to allow bail to a clerk of court, the authorities uniformly hold that this officer has no such power inherently, and unless it is conferred upon him expressly by statute, a bond entered into before him in a criminal case is void. The court cannot delegate its authority to take bail to the clerk."

In 3 A. & E. Enc. of Law (2d Ed.) p. 659, the rule is stated:

"There is no inherent power in the clerk of a court to take bail, and he cannot, in the absence of a statute, be delegated so to do by the court."

4. We have no statute authorizing the clerk to take and approve bail bonds in criminal cases. That power is conferred by statute exclusively upon the sheriff. The clerk's statutory duty was to indorse the amount of bail fixed by the court upon the capias and deliver it to the sheriff, whose duty it was to take the bail bond and deliver it to the clerk for filing in his office. Section 1946, p. 971, C. J., cited in the majority opinion, applies to open court recognizances, not to a bail bond like this. In criminal cases, any court of record, or court that has jurisdiction to try the defendant, has inherent power to admit him to bail. Such a technical recognizance is not written nor signed. It is entered into orally in open court, before the court, and is called an "open court recognizance." The obligors appear at the bar of the court and acknowledge themselves to owe and be indebted unto the people in a stipulated sum upon certain conditions named. Neither the clerk nor sheriff has anything to do with the execution of such a bond. The clerk enters what took place before the court in the minutes, spreads it upon the journal of the day's proceedings, and it becomes a part of the court record. Nothing of that sort was done in this case. The court entered two orders only in this matter: The first, December 23, 1912, which provides that defendant be let to bail in the sum of \$1,500, with surety to be approved by the clerk; the

next, February 27, 1913, when Mr. Bottom appeared in court and asked permission to sign the bond. There are no other orders. There was no attempt by any one to enter into an open court recognizance and the court took no such recognizance.

The only court officer authorized by statute to take the bond was the sheriff, and the court exceeded its jurisdiction when it directed the bond to be taken by the clerk. The only power to admit to bail, possessed by the court itself, was by an open court recognizance, which power was not exercised. We have neither an open court recognizance nor a bail bond taken by the sheriff, so we must of necessity eliminate from the case both these methods of taking bail. What, then, do we have? Whether the majority opinion holds that the bond was taken by the judge, as distinguished from the court, I cannot tell. If so, the answer to such a contention is that the record shows that the bond was not taken by the judge, but by the clerk. I have no way of contending against a wrongful statement of the record, except to say that there is no such record. If it be conceded that a judge, as distinguished from the court, has such power, the record shows he did not exercise it, and did not take this bond. If he had endeavored to do so, it would have been necessary for the principal and surety to execute the bond before him personally, and it then would have to be filed with the clerk the same as a bond taken by the sheriff. I have stated in full all the record in this matter, so that it cannot be contended with any truthfulness that the judge took this bond.

5. The first court order simply fixed the amount of bail, with the direction that the surety be approved by the clerk. The second court order is in the following language:

"No. 21021. *People v. Thomas N. Fitchard*. At this day it is ordered by the court that Attorney John T. Bottom be permitted to become surety on the bond of the defendant herein, Thomas N. Fitchard."

Bottom belonged to a prohibited class, and this order simply removed the disability created by the statute on account of his being an attorney. When that was removed, he became competent, and stood upon the same footing as any other prospective surety. He had to possess the property qualifications of a surety, and go before the proper court officer to sign the bond, like any other surety. The court did not pass upon his qualifications, nor order that he be accepted as a surety. It simply removed the disability, and placed him in the competent class to sign the bond. Before that he was incompetent, no matter what his qualifications. If the court ordered the clerk to take and approve Bottom as a surety on the bond, why did the clerk make him qualify?

It was admitted on the trial that this bond was signed in the clerk's office, away from the courtroom, away from the judge, and not in open court; that Bottom went to the

clerk's office, and the clerk took the bond, the same as he would take any other bond. This was a void act of the clerk, because without authority of law, and the bond was void. Being void, there could be no liability upon it.

I am authorized to state that Chief Justice WHITE and Mr. Justice BAILEY concur in the views herein expressed.

BOYD v. BOYD. (No. 8842.)

(Supreme Court of Colorado. April 2, 1917.
Rehearing Denied May 7, 1917.)

COURTS \S 185—JURISDICTION ON APPEAL—STATUTES—CONSTRUCTION.

Rev. St. 1908, \S 1536, provides for appeals to the district court from final judgments and decrees of the county court. *Sess. Laws 1915, p. 206, \S 12*, provides that no appeal shall be taken to the district court from any judgment or decree of a county court in any action for divorce. Defendant was granted a decree of divorce, and plaintiff thereafter brought independent suit to set aside such decree. The defendant appealed to the district court. *Held*, that the appeal was governed by Rev. St. 1908, \S 1536, since it was not a divorce proceeding, and the district court had jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 603.]

Error to District Court, Arapahoe County; H. P. Burke, Judge.

Suit by the Nello May Boyd against Joseph W. Boyd. To review an order dismissing an appeal to the District Court, the defendant brings error. Reversed and remanded.

George Allan Smith, of Denver, and E. L. Regennitter, of Idaho Springs, for plaintiff in error. W. G. Temple and E. M. Sabin, both of Denver, for defendant in error.

BAILEY, J. Plaintiff in error, Joseph W. Boyd, was plaintiff in a suit for divorce in the County Court of Arapahoe County, where-in Nello May Boyd, defendant in error, was defendant, in which a decree was rendered in his favor in September, 1911. In July, 1914, defendant in error filed suit for the annulment of that decree, on the ground that she did not accept service of summons, though the record purports to show that she did; and further, that she had no knowledge of the granting of the decree, or the pendency of the suit, until shortly before filing her complaint herein. Answer was filed, and upon trial judgment was entered setting aside the decree, from which judgment Joseph appealed to the District Court. Mrs. Boyd filed a motion to dismiss that appeal, on the ground that the District Court had no jurisdiction to review the judgment, as it was a judgment in divorce proceedings, to which no appeal to the District Court lies. This motion was sustained, and plaintiff in error brings the judgment of dismissal here for review.

The appeal from the judgment of the Coun-

ty Court, vacating the divorce decree, was taken to the District Court under sec. 1536, R. S. 1908, providing that appeals may be taken from the County Court to the District Court upon all final judgments of that court, except upon judgments upon confession:

"Appeals may be taken to the District Court of the same county, from all final judgments and decrees of the County Court, except judgments by confession, by any person aggrieved by any such final judgment, or decree."
* * *

The suit was an independent action in equity, to set aside an alleged void judgment. The fact that the judgment sought to be annulled happens to be a decree of divorce in no way affects the character of the action so as to bring it within the purview of the statute relating to appeals in divorce cases. It appears that plaintiff below moved the dismissal of the appeal upon the theory that sec. 12, chap. 74, Session Laws, 1915, governed the procedure. That section, so far as it might be applicable, is as follows:

"No appeal shall be taken or allowed to the District Court from any judgment or decree of a County Court in any action for divorce."
* * *

This provision relates to appeals from decrees or judgments in divorce actions, and applies to such only. This was not a suit or proceeding in divorce, and the foregoing provision has no application to the judgment and decree under consideration.

Judgment reversed, and cause remanded to the District Court for a trial on the merits, de novo.

WHITE, C. J., and ALLEN, J., concur.

KNIGHTON v. CHAMBERLIN et al.

(Supreme Court of Oregon. May 1, 1917.)

1. MORTGAGES \S 280(5) — ASSUMPTION OF MORTGAGE DEBT—EVIDENCE.

In a suit against C. and H. to foreclose a mortgage on land, conflicting evidence held to support a court finding that H. by oral agreement assumed the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 746.]

2. MORTGAGES \S 280(3) — ORAL PROMISE TO ASSUME MORTGAGE—ENFORCEABILITY.

A verbal promise by grantee to assume and pay a mortgage on land, if clearly established, is valid and enforceable in equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 742, 744.]

3. EQUITY \S 427(1) — MORTGAGE FORECLOSURE—SUFFICIENCY OF AVERMENTS TO SUPPORT DECREE.

In a suit to foreclose a mortgage on land sold by the mortgagor, averments of cross-complaint held sufficient to uphold decree that H., the purchaser, assumed and agreed to pay mortgage, and became personally liable therefor, and that, in case of deficiency upon sale, plaintiff be required first to enforce demand against H., and that cross-complainant have judgment against H. for any sum which he may be compelled to pay plaintiff.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 1001-1004.]

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Lella Knighton against Joseph Weller Chamberlin and others, in which defendants Chamberlin filed a cross-complaint against defendants Herrold. From a decree as prayed for on the cross-complaint, defendant L. O. Herrold appeals. Affirmed.

This is a suit by Lella Knighton against Joseph W. Chamberlin and Rose W. Chamberlin, his mother, L. O. Herrold, and Epsie E. Herrold, his wife, to foreclose a mortgage on lots 11 and 12, in block 74, in North Salem addition to Salem, Or., executed by Mr. Chamberlin to secure a promissory note which he and his mother gave June 21, 1913, to the plaintiff for \$500, maturing in two years, with 8 per cent. interest, payable semiannually, and providing for the payment of a reasonable sum in addition as attorney's fees if a suit was instituted to collect any part of the note. The complaint is in the usual form, alleges the payment of only three installments of \$20 each as interest, and that \$75 is a reasonable sum as attorney's fees.

The separate answer of Mr. Chamberlin and his mother admits most of the averments of the complaint, and by way of cross-complaint for affirmative relief alleges in substance that about November 26, 1913, he entered into a contract with the defendant Mr. Herrold, pursuant to which he conveyed the real property hereinbefore described to the latter, who agreed to assume and pay the mortgage on such premises, and Mr. Chamberlin also deeded a house and lot on Twentieth street, Salem, Or., to the defendant Mrs. Herrold, then Miss Smith, who assumed and agreed to pay a mortgage thereon of \$500, and in consideration thereof Mr. Herrold caused to be transferred the tools, machinery, etc., and his interest in a building used for housing motor vehicles and known as the "Salem Auto Garage," then subject to a mortgage of \$500, the payment of which Mr. Chamberlin assumed and subsequently discharged, and that Mr. Herrold has failed to keep or perform his part of the agreement, except to pay the installments of interest. The prayer of the answer is that Mr. Herrold be decreed to have assumed and agreed to pay the plaintiff's mortgage; that he thereby became personally liable therefor, while Mr. Chamberlin and his mother are his sureties only; that in case of a deficiency upon a sale of the premises under a decree of foreclosure the plaintiff herein be required first to enforce her demand for such insufficiency against the property of Mr. Herrold before Mr. Chamberlin or his mother be required to pay any part of the same; that the latter have a decree against Mr. Herrold for the recovery of any sums, including costs, etc., that they may be obliged to pay the plaintiff, and for such other and further relief as to the court may seem just and equitable in the premises.

The answer of Mr. and Mrs. Herrold denies the material averments of the cross-complaint and for a defense thereto alleges that in November, 1913, the Salem Auto Garage was a corporation, and that the capital stock therein was then owned by Mr. Herrold, Miss Smith, and Jack Melsom; that Mr. Herrold and Mr. Chamberlin entered into an oral agreement whereby such capital stock was transferred to the latter, who as part consideration therefor conveyed his equity only in and to the real property described in the plaintiff's mortgage to Mr. Herrold, and Mr. Chamberlin also conveyed to Miss Smith, now Mrs. Herrold, a like interest in and to the house and lot on Twentieth street, Salem, Or.; that at the time such transfers were made Mr. Chamberlin paid to Mr. Herrold the remainder of the consideration for such exchange of equities; and that the contract here set out is the only agreement ever entered into and the one mentioned in the cross-complaint.

These allegations of new matter were controverted by the reply of Mr. Chamberlin and his mother, and the cause, being then at issue, was tried, resulting in a decree as prayed for in the cross-complaint, except that only \$50 was allowed as attorney's fees; and Mr. Herrold appeals.

Jas. G. Heltzel, of Salem (Ernest Blue and Donald W. Miles, both of Salem, on the brief), for appellant. Pogue & Page, of Salem, on the brief, for respondent Knighton. Roy Shields, of Salem (Smith & Shields, of Salem, on the brief), for other respondents.

MOORE, J. (after stating the facts as above). The only question involved is whether Mr. Herrold, as a part of the consideration for an exchange of the property transferred, orally agreed to assume and pay the plaintiff's mortgage. The testimony given at the trial shows that Mr. Chamberlin, who had for some time been engaged as an assistant in a surveyor's office, where he had seen deeds prepared for signature and acknowledgment, had no previous experience in drawing such sealed instruments, and personally wrote the conveyances which he executed to Mr. Herrold and to Miss Smith. In each instance he stated in the deed that the premises were free from all incumbrances, except the plaintiff's mortgage for \$500, and a mortgage for a like sum on the Twentieth street house and lot; but he did not declare in either of such instruments that the grantee therein named assumed or agreed to pay the incumbrance mentioned. Mr. Chamberlin on direct examination, in referring to Mr. Herrold, testified as follows:

"I sold him these lots in controversy and a house and lot in East Salem, and told him there was a mortgage of \$500 apiece on them, and he told me there was \$400 (\$500) against the garage. There was two notes left and the chattel mortgage on record in the courthouse against the tools and apparatus in the garage; and after talking it over he agreed to take these two lots

and assume the mortgage, and house and lot and assume that mortgage, and I took over the garage and assumed the indebtedness against the garage. * * * Q. How did you arrive at the purchase price to be paid for the garage? A. We took an invoice, and it amounted to \$2,100. I had these lots in North Salem I valued at \$1,000, with \$500 mortgage; then the house was valued at \$1,500, with \$500 mortgage; then I gave Mr. Herrold \$100 credit on my books; that made \$1,600. He had \$2,100 in the garage and \$500 indebtedness against it; so we came to amounts of about \$1,600."

On cross-examination this witness was asked:

"Now, isn't it a fact, Mr. Chamberlin, that you nor Mr. Herrold never at any time talked about assuming each other's mortgages?"

He answered:

"No; that is not a fact. As I said before that was a part of the trade."

Mr. Herrold's testimony corroborates that of Mr. Chamberlin in respect to the inventory of the garage, the value of which was found to be \$1,600 after deducting the mortgage. This witness stated upon oath:

"I was to receive equities in these two pieces of property, and I was to clear the garage of all current indebtedness, and was to receive all current bills due the garage at the time of the transfer. * * * Q. When Mr. Chamberlin acquired the stock of the corporation, and others designated by him, did you require him to assume and agree to pay the mortgage against the property personally? A. I made no requirements of any kind; just transferred the stock, with the understanding that that \$500 mortgage was against the corporation. Q. At the time the deal was being talked about, and at the time it was finally closed up, did you assume the mortgages on these respective properties, or either of them? A. I did not. * * * Q. Did you ever tell Mr. Chamberlin that you would assume the mortgage that was against lots 11 and 12 in block 74 of North Salem addition to Salem, Or? A. No. Q. Did he ever ask you to assume and agree to pay his mortgage? A. No, sir. Q. Had that provision requiring you to assume and agree to pay that mortgage been put in this deed, defendant's Exhibit A, would you have accepted the deed? A. No, sir; not at all. Q. State any other matters connected with this transaction, terms of deed, and so on. A. Nothing, except we were speaking of equities all the time in the trading, and he was telling me of his equities in the properties, and we went out to see them, these two and another, and at the time I rather doubted the wisdom on my part of taking the lots. I made some investigation, and the equities seemed to be overvalued considerably; but I took the lots, thinking I would be able to make some kind of a trade in a day or two, or a month or two. It was my equity in the garage and his equity in the real estate that I was thinking of in the dealing all the time."

On cross-examination in referring to the incumbrance on the garage, Mr. Herrold was asked:

"You had an understanding with Mr. Chamberlin that Chamberlin was to take care of the mortgage? A. The trade was made on that basis. Q. That Chamberlin was to take care of that mortgage? A. It was the consideration of the transfer. Q. And you didn't expect any further liability on your part? A. I did not."

[1] It is impossible to reconcile the conflicting statements of these interested parties.

The trial court, having heard their testimony, expressly found that Mr. Herrold agreed to assume and pay the plaintiff's mortgage, and that Mr. Chamberlin also agreed to assume and pay the incumbrance on the garage. The finding so made is entitled to great weight, and a careful examination of the entire testimony, when compared and considered in connection with the inferences and presumptions deducible therefrom, is not deemed sufficient to overturn the conclusion thus reached.

[2, 3] A verbal promise by a grantee of land to assume and pay a mortgage on the premises, if clearly established, is valid, and may be enforced in equity. *Jones, Mort.* (7th Ed.) § 750. The averments of the cross-complaint are sufficient to uphold the relief which was granted. *Hough v. Porter*, 51 Or. 377, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 723.

In view of all the circumstances attending a transfer of the respective properties as disclosed by the evidence, it is believed a decree should be rendered foreclosing the mortgage as prayed for in the complaint, and also that the defendants Joseph Weller Chamberlin and Rose W. Chamberlin be awarded a recovery over against the defendant L. O. Herrold for any part of the sum they may be compelled to pay as a deficiency; and it is so ordered.

McBRIDE, C. J., and BEAN and McOAM-ANT, JJ., concur.

SWANK v. BATTAGLIA.

(Supreme Court of Oregon. May 1, 1917.)

1. SALES \S 41—IMPLIED WARRANTIES—ARTICLES OF FOOD.

The doctrine of caveat emptor applies to a sale of potatoes by a wholesaler to a retail dealer in the absence of deceit or misrepresentation, so that, where the external appearance of the potatoes indicated soundness and good quality, it was no defense to an action for the price that they were affected with dry rot and had been condemned.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 84.]

2. FOOD \S 6—SALE OF DISEASED FOOD.

L. O. L. § 2227, making the sale of diseased food a criminal offense, is not designed to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 7.]

In Banc. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge. Action by W. I. Swank against A. Battaglia. Judgment for plaintiff in part, and plaintiff appeals. Reversed, and judgment entered.

Charles M. Hodges, of Portland, for appellant. Johnson & Mathews, of Portland, for respondent.

This is an action to recover the purchase price of 100 sacks of potatoes sold to the defendant at the agreed price of \$1.13 a sack. The answer admits the sale and delivery of the goods, but alleges that both the plaintiff and defendant are dealers engaged in selling fruit and vegetables; that the potatoes were sold to defendant for the purpose of resale as food to the citizens of Portland; that the potatoes were infected with dry rot and unfit for food, a fact of which defendant was ignorant when he purchased them, and that they were inspected by the food inspector of the city of Portland and found to be unfit for human food and condemned; that the portion which defendant had sold was returned to him and he was compelled to make good the purchase price to his customers; and that the quantity remaining on hand was sold for \$18.50 for hog feed. The case being put at issue by appropriate denials, the court made the following findings of fact:

"(1) That on or about the 23d day of May, 1916, at Portland, Multnomah county, Or., the plaintiff sold and delivered to defendant, at his special instance and request, 100 sacks of potatoes, at the agreed price of \$1.13 per sack, for the purpose of use as human food; (2) that the contract sale price of 100 sacks of potatoes based on the agreed price of \$1.13 per sack amounted in the aggregate to \$113, no part of which has been paid; (3) that said potatoes so sold and delivered were affected by the disease known as 'fusarium wilt' or dry rot, and by reason thereof were unfit for human food; (4) that said defect was not apparent upon casual inspection, but became apparent only upon cutting or cooking said potatoes, and was not discovered until after said sale and delivery; (5) that about five days after said sale and delivery said potatoes were condemned by the market inspector of the city of Portland, Or., and by the inspector of the state horticultural bureau of the state of Oregon, as being affected with fusarium wilt or dry rot and unfit for human food, notice thereof being given by said officers to both plaintiff and defendant; (6) that said defendant prior to such condemnation had sold 30 sacks of said potatoes for purposes of human food; that all but a few sacks of said potatoes so sold were returned to defendant by his customers as unfit for human food, and the purchase price refunded by defendant to such customers; (7) that the condemned potatoes and the potatoes returned to defendant were, by permission of said inspectors, sold as hog feed; that the total sum realized by defendant from such sale and from those not returned to him was \$31."

As a conclusion of law the court found that there was an implied warranty that the potatoes were fit for human food and that plaintiff was entitled to judgment for only \$31, the price received for potatoes sold to customers and not returned plus the amount received for those sold for hog feed. There was a judgment for plaintiff upon these findings for the sum of \$31, from which he appeals.

McBRIDE, C. J. (after stating the facts as above). [1] There is but one question in this case, namely whether there is any implied warranty of the quality of the goods sold under the circumstances disclosed here; no

actual warranty being pleaded or proved. So far as the quality of goods purchased is concerned, the rule of caveat emptor usually applies, unless there is deceit or misrepresentation, which is not the case here. The external appearance of the potatoes indicated soundness and good quality. It was only when they were sliced for cooking that the defect became visible, and there is nothing in the evidence indicating that plaintiff knew of their unsoundness. The defendant testified: "They looked pretty good; they looked pretty nice from looking at them." So the case simmers down to this: The plaintiff sold the potatoes to defendant and defendant purchased them, each supposing them to be sound and having reason to believe they were so. There is authority for the holding that, where provisions are sold to a customer at retail for immediate use, there is an implied warranty that they are reasonably fit for food. Benjamin on Sales (7th Ed.) p. 661, and cases there cited. But in sales to dealers the rule is different. In such instances the rule of caveat emptor is applied. Howard v. Emerson, 110 Mass. 820, 14 Am. Rep. 608; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472; Ryder v. Neitge, 21 Minn. 70; Moses v. Mead, 1 Denio (N. Y.) 378, 43 Am. Dec. 676; Warren v. Buck, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754; Hanson v. Hartse, 70 Minn. 282, 73 N. W. 163, 68 Am. St. Rep. 527; Humphreys v. Comline, 8 Blackf. (Ind.) 516. The case of Howard v. Emerson, supra, is typical of all those above cited. In that case Howard, a farmer, had sold to Emerson, a butcher and dealer in provisions, a cow which Emerson purchased for the purpose of butchering and retailing to his customers. The flesh was found unfit for food, and the purchaser refused to pay for her, and suit was brought to recover the purchase price. The court said:

"The general rule of the common law is that, upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim caveat emptor applies, and no warranty is implied by law. Winsor v. Lombard, 18 Pick. [Mass.] 57; Mixer v. Coburn, 11 Metc. (Mass.) 559 [45 Am. Dec. 230]; French v. Vining, 102 Mass. 132 [3 Am. Rep. 440]. The defendants contend that when articles of food are sold for immediate domestic use there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule. Van Bracklin v. Fonda, 12 Johns. [N. Y.] 468 [7 Am. Dec. 339]. But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim caveat emptor

applies, and there is no implied warranty or representation of quality or fitness. *Emerson v. Brigham*, 10 Mass. 197 [6 Am. Dec. 100]; *Winsor v. Lombard*, 18 Pick. [Mass.] 57; *Hart v. Wright*, 17 Wend. [N. Y.] 267; *Wright v. Hart*, 18 Wend. [N. Y.] 449; *Moses v. Mead*, 1 Denio [N. Y.] 378 [43 Am. Dec. 676]; *Burnby v. Bollett*, 16 M. & W. 644. In the case at bar, the plaintiff was a farmer and the defendants were butchers and dealers in provisions * * * for immediate use as food. The fact that the plaintiff knew the purpose for which the defendants purchased the cow would not render him liable, upon an implied warranty, for unknown defects which made her unfit for that purpose. A warranty of fitness may be implied in contracts to manufacture or in executory contracts to sell, but it is not implied in executed sales of specific chattels. *Chandeler v. Lopus*, 1 Smith's Lead. Cas. (5th Am. Ed.) 238, and notes."

The cases last above cited seem to settle the law against the contention of the plaintiff in the instant case.

Counsel for plaintiff cite *Morse v. Union Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157, and *Kitchin v. Oregon Nursery Co.*, 65 Or. 20, 130 Pac. 408, 1133, 132 Pac. 956, as holding a contrary view, but, when properly analyzed, it will appear that this contention is unfounded. In the former case the buyer requested the seller to send him two carloads of "good beef cattle." The seller shipped him two carloads of cattle unfit for beef. Where articles of a particular description are ordered, there is an implied warranty that those furnished answer that description, and that is what the holding in the case cited amounts to. If A. requests B. to send him a herd of cows for milking purposes, and B. sends him a herd of Hereford steers fit only for beef, it stands to reason that he should not recover for the price of cows. Whether we treat the case as a breach of an implied warranty or a failure to perform, the result is the same. In such a case there is prima facie evidence of fraud on the part of the seller. The fitness of the cattle for beef could be known to the seller upon inspection of the cattle before he shipped them, and could not be known to the buyer, if, as in the case cited, he resided at a distance, until they were received. Under these circumstances, and where the buyer paid for the cattle before he received them, relying upon the judgment and good faith of the seller as to their quality, the court very properly held that he could recover damages. Here there was no stipulation as to quality, and no bad faith on the part of the seller, who believed and had a right to believe that the potatoes sold were sound and free from disease. In the case of *Kitchin v. Oregon Nursery Co.*, supra, the statement of the case in the opinion is not full, but an inspection of the record shows the complaint alleged that plaintiff was induced to purchase by reason of certain advertisements put out by defendant to the effect that it dealt only in "reliable nursery stock," and that all trees grown by it were strong, vigorous, healthy

trees, whereas the trees furnished were not such, and that defendant knew they were not. There was an element of fraud and misrepresentation charged in that case which is entirely lacking here. Mr. Justice Eakin, in discussing the doctrine of implied warranty by reason of an article being ordered for a particular purpose, expressly waives its application to the case there under consideration:

"The principal contention of plaintiff is as to the liability of defendant upon its implied warranty that the articles sold shall be suitable for the purposes to which they are to be applied. This rule is well recognized by this court. *Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34, 74 Pac. 325, 102 Am. St. Rep. 602; *Lenz v. Blake*, 44 Or. 573, 76 Pac. 357; *Mine Supply Co. v. Columbia Min. Co.*, 48 Or. 395, 86 Pac. 790. However, in this case it is not necessary to apply the rule because the plaintiff is not only contending that the trees were not suitable for the use to which they were to be applied, but that the trees were not sound. Defendant admits that it is bound by an implied warranty to that extent, namely, that the trees were sound and healthy, and the testimony strongly tended to establish the fact that the trees were not sound, but were unhealthy trees having an inherent defect which caused them to die."

It may also be added in that case the defendant was a large grower of nursery stock selling the same at wholesale to dealers as well as at retail, and might well be included within the reasoning of that line of cases which hold that there is an implied warranty by the manufacturer of articles that they are free from latent defects, but it is not necessary to consider that phase of the question in the case at bar.

[2] Another suggestion of counsel for plaintiff is that no recovery can be had because the contract is illegal, in that it was in violation of section 2227, L. O. L., which makes the sale of diseased food a criminal offense; but we do not think it was the intent of that section to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale. In the sale of liquor to minors and like offenses it has been held that ignorance of the age of the purchaser is no defense to a prosecution for such sale; but this rule arises from the theory that dealing in such merchandise is at best an authorized nuisance in which the dealer must engage at his peril. On the contrary, the sale of food is a business beneficial to the community, and one that should be encouraged, and a dealer will not be held to have violated a law against selling diseased food unless the pernicious character of such food was known to him or he disregarded such obvious precautions in inspecting it as would be equivalent to such intent, which is not the case here.

There is neither pleading, finding, nor testimony to sustain the judgment rendered in this case, and the judgment of the circuit court will be reversed, and one entered here in accordance with the prayer of the complaint.

SUMPTER v. ST. HELENS CREOSOTING CO.

(Supreme Court of Oregon. May 1, 1917.)

ACCOUNT, ACTION ON ~~§~~6(2) — COMPROMISE AND SETTLEMENT ~~§~~16(1)—EFFECT.

There is an account stated and settlement barring action for overtime, where an employe each month signs a time check stating amount of time and amount due, and receives payment without protest or objection.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 9; Compromise and Settlement, Cent. Dig. §§ 54-58, 62-65.]

In Banc. Appeal from Circuit Court, Columbia County; J. A. Bakin, Judge.

Action by James L. Sumpter against the St. Helens Creosoting Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

In the month of April, 1915, plaintiff began this action to recover the sum of \$163.12½ claimed to be due for labor. The substance of the complaint is that from July 1, 1913, to September 27, 1914, plaintiff performed services for defendant as an assistant engineer "at an agreed compensation therefor of \$75 per month, or \$2.50 per ten hour day, or \$0.25 per hour." It is further alleged that he worked in excess of 10 hours a day, but less than 13 hours daily, and that such overtime aggregated 435 hours, for which he claims compensation at the rate of \$0.37½ per hour. Defendant demurred to the complaint, contending that the 10-hour law upon which plaintiff's cause of action is based is unconstitutional. This contention having been overruled, an answer was filed which, after some denials, pleads affirmatively an accounting, settlement, and payment from month to month as plaintiff's wages became due. One of these pleas, being illustrative of all the others, is as follows:

Geo. M. McBride, of Portland, for appellant. Glen R. Metaker, of St. Helens, for respondent.

BENSON, J. (after stating the facts as above). In his brief defendant urges with vigor that the act of the Legislature known as the ten-hour law (Laws of 1913, p. 169) is unconstitutional, but that contention has been finally disposed of by this court in the case of *State v. Bunting*, 71 Or. 259, 139 Pac. 781, Ann. Cas. 1916C, 1003, which decision has recently been affirmed by the Supreme Court of the United States in *Bunting v. Oregon*, 243 U. S. —, 37 Sup. Ct. 435, 61 L. Ed. —, in an opinion of April 9, 1917.

We come then to a consideration of the action of the trial court in directing a verdict for the plaintiff. Section 2 of the ten-hour law reads thus:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employes when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger: Provided, however, employes may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one half the regular wage."

Section 3 of the act declares that any violation of its provisions by an employer is a misdemeanor punishable by fine, and that each day's violation of any part of the act shall be a separate offense.

The entire evidence in the case consists of the testimony of the plaintiff, the monthly time checks, of which an example is above set out, and the corresponding pay checks for the several months. It appears from the plaintiff's testimony that his contract of employment was oral; that he began his employment as an assistant engineer about Feb-

"That on August 9, 1913, defendant had an accounting with plaintiff for the month of July, paying plaintiff in full for his services for said month of July the sum of \$75, which sum was accepted by plaintiff in full payment and settlement of all wages for said month of July, as evidenced by a certain instrument of writing, of which the following is a substantial copy, to wit:

Name, J. L. Sumpter.
Has worked as engineer helper

Check No. 950.

No. 683.

Month of July, No. 17

Time Check.

31 days at
days at
days at

75.00. St. Helens Creosoting Company,

St. Helens, Ore.

August 9, 1913

191

Total

75.00. Received from St. Helens Creosoting Company, \$74.00.

Deductions

Seventy-four and no/100 dollars in full for all labor to date.

Hospital 1

Board

O. D. Golden, Timekeeper.

Store

J. L. Sumpter.

Total Deductions 1

[Sign here.]

Balance due

74.00. Not transferable."

A reply was filed consisting of a general denial, and at the close of the evidence both parties moved for a directed verdict, and, the court having directed a verdict for plaintiff, defendant appeals.

ruary 28, 1913; that he was to receive \$75 per month and was to go to work at 7 o'clock at night; that nothing was said as to the number of hours he was to work each day; that there were a night shift and a day shift;

that the rule was for him to work two weeks on the night shift, and then two weeks on the day shift; that the day shift was generally about eleven hours, and the night shift twelve hours; and that occasionally he worked for an entire month on the night shift. He says that he received his pay each month at the rate of \$75 and signed the time checks each time and made no protest or objection to the account as therein stated; that he did not work overtime after September 27, 1914, and never made any demand for additional pay until and except when his attorney made a formal demand therefor preparatory to commencing this action which was begun in April, 1915. It may also be noted that the same day when the monthly account was presented as above set out he was paid by a check containing a duplicate of the account and indorsed as follows:

"Indorsement. Received the within check in full payment and satisfaction of the items listed thereon. [Signed] Payee, J. L. Sumpter."

It appears to us that this state of the pleadings and the evidence establishes beyond any question that there was an account stated and a settlement which constitutes a bar to this action. Plaintiff argues that such a conclusion is calculated to render the statute ineffective, but we cannot agree with this contention. The law provides for a remedy in the shape of a criminal prosecution, but it nowhere prohibits the laborer from waiving his civil remedy after the labor is performed. It must be conceded that there is no power to compel plaintiff to prosecute this action and neglect to do so would be a complete waiver. An accounting and settlement is another way of reaching the same result. We conclude that the defendant was entitled to a directed verdict, and a judgment will accordingly be entered here in its favor.

Mr. Chief Justice McBRIDE did not participate in the consideration or decision of this case.

BLAKNEY et ux. v. ROWELL et al.

(Supreme Court of Oregon. April 24, 1917.)

1. EXCHANGE OF PROPERTY ⇐8(4) — EVIDENCE—SUFFICIENCY.

In a suit to rescind an exchange of property, including the assignment by defendants to plaintiffs of the lease of an apartment house, evidence held to show that the defendants in operating the apartment house received on an average of \$150 a month over all expenses during the time they occupied the premises, so that their representation to that effect was not false.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17.]

2. EXCHANGE OF PROPERTY ⇐4—WARRANTY.

A representation that defendants in operating the apartment house had received on an average of \$150 over all expenses during the time they occupied the premises, was not a guarantee that the net income which the plaintiffs would receive in operating the apartment house would be \$150 a month, or any other sum.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

3. EXCHANGE OF PROPERTY ⇐7—WARRANTY.

If defendants, who, pursuant to an agreement for the exchange of property, assigned their lease of an apartment house to the plaintiffs, warranted that plaintiffs would receive a net gain of \$150 a month if they kept the rooms well filled, defendants were not liable for the loss resulting from plaintiffs' inability to keep the rooms well filled.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 12-14.]

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by Earl A. Blakney and wife against Mary C. Rowell and others. Decree for plaintiffs, and defendants appeal. Reversed, and suit dismissed.

This is a suit to set aside a bill of sale, to cancel a promissory note and a chattel mortgage, and to recover the consideration given for personal property and the assignment of a lease. The defendant Mary C. Rowell and her husband, W. W. Rowell, now deceased, on December 27, 1913, assigned to the plaintiffs Earl A. Blakney and Lena M. Blakney, his wife, a lease of a house in Portland, Or., known as the "Nordica Apartments," having 50 rooms, and also transferred to them all the furniture, etc., therein for the expressed consideration of \$4,000, for which plaintiffs executed to Mr. Rowell a deed for five acres of land in Washington county, Or., valued at \$1,250, and gave to Mr. and Mrs. Rowell their promissory note for \$2,500, secured by a chattel mortgage of such personal property, which household goods were accepted subject to a prior mortgage of \$250, the payment of which the plaintiffs assumed. They took possession of the house December 29, 1913, and on the 9th of the next month paid on their note \$500, and later \$106.65 on the prior mortgage. This suit was commenced January 28, 1915, and four days thereafter the plaintiffs abandoned the premises, whereupon Mrs. Rowell took possession and subsequently foreclosed the larger chattel mortgage, purchasing the goods at a public sale thereof February 15, 1915, for \$1,750, and indorsing that sum on the plaintiffs' promissory note. The complaint charges that the assignment of the lease and the transfer of the personal property were brought about by the knowingly false and fraudulent representations of Mr. and Mrs. Rowell, particularly specifying them, which statements the plaintiffs believed, and relying thereon were deceived to their damage. The answer denied the charge, and for a further defense averred that prior to purchasing the property the plaintiffs carefully inspected the furniture, considered the extent of the business, and relied upon their own judgment as to the value thereof. The reply controverted the allegations of new matter in the answer, and the cause being tried resulted in a decree permitting the defendants to keep, as compensation for the

use of the property, the money which had been paid, requiring them to reconvey the five-acre tract mentioned, and also to cancel and surrender the promissory note and chattel mortgage; and they appeal.

Albert H. Tanner, of Portland (John Van Zante, of Portland, on the brief), for appellants. Barnett H. Goldstein, of Portland (Joseph & Haney, of Portland, on the brief), for respondents.

MOORE, J. (after stating the facts as above). The testimony given at the trial shows that prior to December 27, 1913, the plaintiffs were living in the vicinity of the "Nordica Apartments," and, having a general knowledge of its patronage, they, desiring to secure the house and furniture, sought an interview with Mrs. Rowell, who informed them that during the preceding year the income from the rooms had been \$150 a month in excess of all the expenses, and the plaintiffs were assured that if they purchased the property they would have no difficulty in obtaining a like monthly sum, if the rooms were kept well occupied. Mrs. Rowell also stated to the plaintiffs that she was then paying for the use of the house \$200 a month, but at her request the landlord would reduce the rent \$25 a month. Mr. and Mrs. Rowell represented to the plaintiffs that their only reason for assigning the lease and selling the furniture, etc., was a desire to remove to the state of Idaho, where they owned irrigated land, which required immediate attention, even if they were obliged to dispose of the rooming house and its furnishings at a loss. After the sale was consummated neither Mr. Rowell nor his wife went to Idaho, and the evidence discloses that when they transferred the property they were paying only \$150 a month rent, though the lease demanded a greater sum, and that no difficulty was encountered in obtaining for the plaintiffs the use of the premises at \$175 a month. The plaintiffs, in January, 1914, collected from tenants \$426.70, while the operating expenses during that time were \$435.95. They made complaint about such loss to Mr. and Mrs. Rowell, who informed them that the expenses during the spring and summer would not be so great, owing to less consumption of fuel, and the electric lights would be used for a shorter time, and that the average profit to be derived from conducting the business should be based on the yearly receipts and disbursements. The collections for the next two months were \$504.15 and \$438, respectively, while the disbursements for that time were \$480.35 and \$455.95. In April, 1914, the plaintiffs took in only \$293.80, and paid out \$292.65. The greatest sum thereafter obtained during any month they occupied the premises was \$254.50, while the monthly expenses were not diminished in proportion to the receipts. Mr. Blakney testified that they paid as rent \$175 a month

for January, February, and March, 1914; \$150 a month for the next quarter, and \$125 a month for the remainder of the time; that he was generally employed in other business for which service he received a monthly salary of \$60; that his wife collected as the monthly rent of her property \$20, which sums were employed in liquidating the expenses of the apartment house; and that during the time they occupied it they met a net profit of \$29.

Mrs. Rowell testified that she and her husband purchased the household goods in and took possession of the "Nordica Apartments" March 23, 1911, agreeing to pay therefor \$4,500; that they conducted the rooming house until December 29, 1913, when they turned it over to the plaintiff; that during the 33 months and 6 days in which they were engaged in that business they made a net profit therefrom of \$5,000, or a monthly average gain of \$150; that they kept no books, but of the sum of money so received they paid off an indebtedness of \$3,000, expended on their Idaho lands \$1,108.74, discharged taxes in that state and in Oregon and street assessments in Portland in the latter state, amounting to \$562.67, and also paid for wearing apparel, fraternal insurance, and other obligations. Mrs. Rowell further testified that when they disposed of the apartment house they expected to remove to Idaho, but later altered their plans and rented a farm in the Willamette Valley. She also stated upon oath that though they were paying only \$150 a month rent when the furniture was sold to the plaintiffs, the lease demanded a greater sum, and the remainder was to have been paid when the business of the apartment house improved. In this particular she is corroborated by the testimony of the landlord's agent who collected the rent.

The testimony of several real estate brokers, who were engaged in negotiating sales and exchanges of rooming houses and their contents, is to the effect that during the year 1913, Mr. Rowell listed with them for sale or exchange an assignment of the lease of the "Nordica Apartments" and a transfer of the furnishings therein at valuations much less than the purchase price received from the plaintiffs, such owner then saying to each agent that the business in which he and his wife were engaged did not pay.

Other witnesses impute to Mr. and Mrs. Rowell remarks which it is asserted they made about the plaintiffs, such as: "They could not succeed in operating the lodging house unless they had other income;" "they could not expect to hold possession of the property very long, and would be obliged to give it up when the chattel mortgage was foreclosed;" and in referring to the purchasers of the goods and to the price which they paid, "The suckers are not all dead yet." Mrs. Rowell denied the comments attributed to her, but, her husband having died, the expressions ascribed to him were unchallenged.

ed. She, at plaintiff's request, tried for some time to secure for them a purchaser of the personal property, but was unable to do so. It was asserted by a witness that Mrs. Rowell directed Mrs. Blakney to say to persons visiting the apartment house with a view of inquiring about or buying the furniture therein that the business was prosperous.

[1, 2] The evidence shows that when all the rooms in the "Nordica Apartments" were filled, \$461 a month could be realized from the regular occupants if they paid the sums demanded, and that from \$6 to \$12 were usually received from transient customers. It is believed the evidence clearly establishes the fact that Mr. and Mrs. Rowell, in operating the apartment house, received on an average \$150 a month over all expenses during the time they occupied the premises, so that their representation to that effect was not false. It is quite probable, however, that for a part of the year 1913 the business was not conducted at a great profit, which fact seems fairly inferable from the reduction in the rent of \$50 a month, which was granted by the landlord. We have not been able to find, from a careful examination of the testimony, any guaranty given by Mr. or Mrs. Rowell that the net income which the plaintiffs would receive should be \$150 a month or any other sum.

In the case at bar the representations made by Mrs. Rowell to the plaintiffs were to the effect that if they could keep the apartment house well filled with tenants, \$150 a month could be made in excess of the expenses. Mr. Blakney, referring to the representations made by Mr. Rowell, testified as follows: "He said they always made money. Q. He did not say they made \$150 or any definite amount? A. No."

The first three months the plaintiffs conducted the business their average receipts were about equal to the sums which they were assured could be obtained. Their expenses, however, were probably much greater than had been incurred by their predecessors. Mr. and Mrs. Blakney were inexperienced in that occupation, and made many repairs to the rooms, putting in some of them new rugs and many other furnishings. Her tenants evidently received better treatment than they had been getting for one of them, referring to Mrs. Rowell, testified: "We never had any hot water, and never had any heat; that was, to amount to anything."

[3] It is believed that by careful management of the apartment house for the first three months after the plaintiffs took possession a net profit could have been realized from the business equal to that represented. In April, 1914, and thereafter, owing to the great financial depression then prevailing on the Pacific Coast, many tenants in the "Nordica Apartments" left the premises to obtain less expensive quarters, and it was impossi-

ble to keep the rooms well filled or to conduct the business at a profit. The assurance of a monthly net gain of \$150, if the representation be regarded as a warranty, was made to depend upon the plaintiffs' ability to keep the rooms well filled. The failure in this respect is not chargeable to the defendants, who are not liable for the resulting loss. *Black v. Irvin*, 76 Or. 561, 149 Pac. 540.

As sustaining the decree rendered herein the plaintiffs' counsel cite the case of *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 653, where it was held that Hull, one of the defendants, who was the plaintiff's agent in securing for his principal a place of business, conspired with Dennison, the other defendant, and represented to the plaintiff that he could obtain from the landlord a lease of the premises, and that such confidential relation having existed between the plaintiff and Hull, and the latter's confederacy with Dennison in consummating the sale of a barber shop, rendered them liable to the plaintiff for the loss which he sustained by reason of his failure to secure a lease for more than a month. The statements made by the defendants to the plaintiff of the sums of money which he could daily make by conducting the business, though referred to in the majority opinion, were not considered as anything more than the mere expression of an opinion relating to uncertain future gains, and not amounting to a warranty. The decision in that case is not controlling herein. See, upon this subject, *Hedin v. Minneapolis, etc., Institute*, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628, and notes.

The decree is therefore reversed, and the suit dismissed.

McBRIDE, C. J., and BEAN and McCOMANT, JJ., concur.

ALEXANDER v. SCHOOL DIST. NO. 1 IN MULTNOMAH COUNTY et al.

(Supreme Court of Oregon. May 1, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS — 141(5) — CONTRACT WITH TEACHER — TRANSFER — AUTHORITY OF BOARD — STATUTE.

Laws 1913, p. 69, § 1, empowers the board of directors of every school district to hire and discharge teachers and to fix their compensation. Section 2 provides that the word "teacher" shall include supervisors and principals and instructors who are in the employ of the school district. Section 4 provides that teachers who have been regularly employed for not less than two successive annual terms shall be placed on the list of permanently employed teachers. Section 5 provides that permanently employed teachers shall not be subject to annual appointment, but shall continue to serve until dismissed in the manner therein provided, and that they shall serve in such positions and be subject to such assignments and transfer as the board may from time to time determine. Section 6 provides that before any permanently employed teacher can be dismissed notice must be given containing the charges against the teacher and a hearing had thereon if the teacher so requests. *Held*, that

the transfer of a teacher who had been acting as principal to another school where she was an instructor merely was not a dismissal of the teacher, and was within the discretion of the board without a necessity for notice and hearing on charges.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 804.]

2. OFFICERS \Leftrightarrow 1—EMPLOYMENT OF TEACHER—“OFFICE.”

A teacher permanently employed under Laws 1913, p. 70, § 4, does not hold an office, since the statute refers to it as an employment, and Const. art. 15, § 2, prohibits the Legislature from creating any office the tenure of which shall be longer than four years.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 1, 4.

For other definitions, see Words and Phrases, First and Second Series, Office.]

3. MANDAMUS \Leftrightarrow 3(10)—SUBJECTS OF RELIEF—RESTORATION TO OFFICE.

Where an officer has been removed and another appointed to perform the work, mandamus is not the proper remedy of the discharged officer, since quo warranto is the proper method for trying title to an office.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 21-23.]

4. MANDAMUS \Leftrightarrow 172—ISSUES—COMPETENCY OF TEACHER—TRANSFER.

In mandamus proceedings to compel a school board to restore a teacher to her former position as principal, where the transfer of the teacher was within the board's discretion, the court cannot consider whether her services as principal were satisfactory.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381-385.]

In Banc. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Mandamus by Alevia Alexander against School District No. 1 in Multnomah County and others. Peremptory writ issued, and defendants appeal. Reversed and remanded, with directions to dismiss the writ.

This is a mandamus proceeding where the writ required the defendants, constituting the board of directors of school district No. 1 of Multnomah county, to restore the plaintiff to the position which she formerly held as teacher in the schools there, or to one of like character, duties, and salary, or to show cause why they had not done so. Stripped of tautological verbiage and condensed to its lowest terms, the writ states substantially that for eight years prior to its issuance the petitioner had been continuously employed as a teacher in the schools of that district by the school board thereof, and for the last six of those years had occupied the position of principal; that on August 17, 1916, the defendants transferred her to the station of assistant teacher, where she was required to teach history; that this action was taken without notice to her and without her consent; that she demanded restoration, and the same was refused. A general demurrer to the writ was overruled. The defendants answered, avowing the action taken, and claiming that it was justified by the statute, besides averring matter designed to show that

her service in her former assignment was not satisfactory. The reply traversed the new matter in the answer. A trial before the court resulted in making the writ peremptory, and the defendants appealed.

C. W. Fulton, of Portland (Fulton & Bowerman, of Portland, on the brief), for appellants. A. E. Clark and Franklin F. Korell, both of Portland (Clark, Skulason & Clark, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] The issue requires a construction of the act of February 7, 1913, entitled:

“An act to provide for the employment and discharge of teachers, officers, and other employes in school districts now having or which at any time hereafter shall have a population of 20,000 or more persons.” Laws 1913, p. 69.

Section 1 of that law empowers the board of directors of every school district in this state now having or which at any time hereafter shall have a population of 20,000 or more persons to appoint and remove, hire and discharge all teachers, officers, agents and employes as it may deem necessary, and to fix their compensation. Other parts read as follows:

Section 2: “The word ‘teacher or teachers’ as used in this act shall include supervisors and principals and instructors who are in the employ of the school district or districts specified in this act.”

Section 4: “Teachers who have been employed in the schools in any such district or districts as regularly appointed teachers for not less than two successive annual terms shall by the board of directors be placed upon the list of permanently employed teachers.”

Section 5: “Teachers so placed upon such list shall not be subject to annual appointment, but shall continue to serve until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools. They shall serve in such positions and shall be subject to such assignments and transfer as the board may from time to time determine, or as may be provided for in its rules.”

Section 6: “Before being dismissed any teacher on the permanent list shall receive written notice, stating the reason for the proposed dismissal, together with a copy of any charges or complaints which may be filed against him or her, and upon written request filed with the clerk the teacher shall be entitled to and given a hearing before the board within ten days after said notice, with full benefit of witnesses and subpoenas issued in blank by and over the hand of the clerk therefor and the right to be represented by counsel. * * *

Sections 7, 8, and 9 relate to procedure in dismissal of teachers.

Section 10: “All teachers who shall have been employed in such district or districts two or more years prior to the first day of July, 1913, shall be eligible to re-election as permanent teachers, and all such teachers who shall be re-elected for employment by the board for the school year beginning in September, 1913, shall be permanent teachers under the provisions of this act.”

Section 11: “All acts and parts of acts in conflict herewith are hereby repealed: Provided, however, that all general laws of this state re-

lating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

The writ shows that the plaintiff was properly on the list of "permanently employed teachers." The act does not give any rank or preference to teachers. Principals, instructors, and supervisors are all included within the term "teachers." They are thus on a common level, without distinction or precedence under the enactment. They have the privilege of serving until dismissed or discontinued subject to the rules of the board concerning suspensions; but, on the other hand, when employed by the board or when automatically installed as permanent employes, they assume the burden imposed by the statute of serving "in such positions and shall be subject to such assignments and transfer as the board may from time to time determine, or as may be provided for in its rules." This is not a case of dismissal, discontinuance, or suspension, which must be preceded by notice and an opportunity to be heard. The writ shows that the plaintiff is still a teacher, and that she has been assigned to active service in a certain school, different, it is true, from the one in which she had been previously employed, but not in derogation of her standing as an instructor. There is no pretense that she is not competent to teach the subject assigned to her, and that therefore she has been set at an impossible task. The contention for the plaintiff is that her transfer to another school at a less salary constitutes dismissal. The only authorities cited for that doctrine come from New York, New Jersey, and California. In all of them the statute protected the incumbent in a certain particular position. It contained no such provision as in our enactment requiring teachers to serve where they are placed by the board. For instance, in *People v. Board of Education*, 174 N. Y. 169, 66 N. E. 674, the issue arose out of consolidating the cities of New York and Brooklyn. The statute accomplishing this result specially confirmed the teachers in the public schools in their several positions, and it was held that even a transfer of a teacher to another place in the public schools could not be effected without an opportunity to be heard as provided by the charter of amalgamation.

[2, 3] The New Jersey cases, of which *Michaels v. Board of Fire Commissioners*, 49 N. J. Law, 154, 6 Atl. 881, is the controlling one, depend upon a statute treating the position as an office to be held by the incumbent and from which he cannot be ousted except by regular process. The California cases, of which *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042, is the leading one, treat the matter as though the teacher in question was elected to a specified position as to an office. Those precedents have been

doubted and strongly limited by the subsequent decisions of the Supreme Court of our adjoining sister state. They are not applicable in the present juncture, because the position held by the plaintiff is not an office. In the words of the statute, she is "permanently employed." Moreover, the position being permanent, it cannot be classed as an office because the Constitution in section 2 of article 15 declares that "the Legislative Assembly shall not create any office, the tenure of which shall be longer than four years." Even then, on the hypothesis that the place is an official station, the writ having disclosed that the plaintiff's former work was confided to another, quo warranto, and not mandamus, is the proper method of trying title to an office.

The statute is part of the employment of all teachers. The language is plain making them subject to the direction of the board about the position in which they shall serve. They are not entitled to notice or previous trial on the subject. As to that the statute as enacted in 1913 requires them to hear and obey. In that respect, so far as disclosed by the writ, the directors are still supreme in their management of the affairs of their district. The legislation in question is in the nature of an exception to the general rule about the function of the directorate, and if the plaintiff would have the relief which she seeks, she must bring herself clearly within the exception. What may be said to be a legislative construction of the law of 1913 will be found in chapter 152 of the Laws of 1917, which amends the enactment of 1913 so as to require notice and a hearing for the transfer of a teacher to another position in the schools of the same district. If the position assumed by the plaintiff is correct under the statute of 1913, the legislation of 1917 on the same subject would have been superfluous. In brief, the plaintiff has no title to any particular position in the schools of the defendant district to which she may be restored as to an office. She showed herself to be nothing more than an employe who is bound by the law of her employment to serve where she is directed.

[4] It was not apropos to the present proceeding to inquire whether her services in her former place were satisfactory or not. Those questions could have been taken up if there had been charges preferred against her and the matter was properly before the court on appeal or review or otherwise. The present contest is one in which the plaintiff must show a clear right to the relief demanded without regard to the discretion of the defendants, and we cannot try out here the issue of the excellence of her conduct or any objections thereto. The demurrer to the writ should have been sustained, and the whole contention settled in that manner.

The judgment of the circuit court is therefore reversed, and the cause remanded to

that tribunal, with directions to sustain the demurrer and dismiss the writ.

BENSON, J., took no part in the consideration of this case.

COURTS v. CLARK et al.

(Supreme Court of Oregon. May 1, 1917.)

1. BAILMENT §18(2)—REPAIRS ON AUTOMOBILES—LIENS—"AUTOMOBILE REPAIRER."

Under L. O. L. § 7497, providing that every automobile repairer who has expended labor, skill, and materials at the request of the owner, reputed owner, or authorized agent shall have a lien on the automobile for the contract price of the expenditure, although he has surrendered possession of the car, a tire seller who employed men to set tires which he sold and who set new tires sold to the reputed owner of an automobile was an "automobile repairer," and was entitled to a lien; the tire being essential to the complete machine.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 78, 79.

For other definitions, see Words and Phrases, First and Second Series, Automobile Repairer.]

2. BAILMENT §18(3)—REPAIRS TO AUTOMOBILE—LIENS—SUFFICIENCY OF POSSESSION.

Where the reputed owner of an automobile left it with a seller of tires to have a new tire attached and went about his business for a short time, the repairer's possession was of sufficient duration to entitle him to a lien under L. O. L. § 7497.

Department 2. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Action by Albert Courts, doing business as the Peerless Tire & Rubber Company, against T. E. Clark and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This is a suit to foreclose an alleged automobile repairer's lien. The cause, being at issue, was tried, and findings of fact were made to the effect that at all the times stated therein the plaintiff, Albert Courts, was engaged in business at Portland, Or., under the legally assumed name of the Peerless Tire & Rubber Company, selling and repairing automobile tires, and for that purpose kept qualified employes who removed from motor vehicles old tires and put on new ones; that when such alterations were required by the proprietor or reputed owner of an automobile to be made by the plaintiff the car would be taken to and for a short time left upon the street in front of his place of business, where his employes raised the end of an axle, removed the bolts, and pried the old tire from the retaining rim, scraped the rust therefrom, attached the new tire, and inflated the inner tube, which service was the only repair work performed by the plaintiff; that on March 16, 1915, and on the 12th of the succeeding month, respectively, the defendant T. E. Clark was in possession and the reputed owner of a Mitchell touring car, particularly describing it, which automobile he drove to the plaintiff's place of business,

and on each occasion requested that an old tire be removed from a hind wheel and a new rubber casing and inner tube be attached; that such orders were complied with in Clark's absence, and the work was performed in the manner indicated at a total expense of \$115.45, which sum was not paid, but entered upon the plaintiff's books without any charge being made for the services of his employes; that the automobile referred to had been sold upon the installment plan to Clark by the defendant the Mitchell, Lewis & Staver Company, a corporation, which retained the title to the car until the purchase price thereof was paid; that, no part of the alleged repairing charge having been liquidated, a lien notice was filed and this suit instituted within the time limited therefor; and that in perfecting the lien the plaintiff had incurred an expense of \$2.45, giving the items thereof, and was entitled to \$25 as a reasonable attorney's fee for foreclosing the lien. As conclusions of law the court also found that the prayer of the complaint should be granted, and, having rendered a decree in accordance therewith, the defendants appeal.

Stapleton & Conley, of Portland, on the brief, for appellants. M. O. Wilkins, of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] The statute giving the security designed to be afforded in such a case reads:

"Every * * * automobile repairer * * * who has expended labor, skill, and materials on any chattel at the request of its owner, reputed owner, or authorized agent of the owner, shall have a lien upon said chattel for the contract price for such expenditure * * * notwithstanding the fact that the possession of such chattel has been surrendered to the owner thereof." L. O. L. § 7497.

It is contended: (1) That the plaintiff, within the language of the enactment, is not an automobile repairer; (2) that he did not expend any labor, services, or skill upon the car; (3) that the automobile was never in his possession so as to be the basis of a lien; and (4) that the right to such security is given only when materials used in repairing a motorcar have been furnished in connection with the performance of labor, and then only as an incident to such service. The section of the statute under consideration was amended February 9, 1917, so as to give a lien to any person who furnished an automobile tire at the request of the owner or reputed owner of a motor vehicle. Laws Or. 1917, c. 72. The latter enactment is evidently a legislative interpretation that the prior statute did not grant a lien to any person who merely furnished an automobile tire when no labor, skill, or service was employed in attaching it to the wheel of a car. If that construction were adopted, it is believed the services rendered by plaintiff's employes, as found by the court and hereinbefore stated, constituted the performance of such labor

and skill as was contemplated by the statute as a prerequisite to the lien, though no separate charge was made for the work which was accomplished. Whether an automobile tire when thus attached is a part of the car for the purpose of securing the benefits of a statutory lien for the labor so furnished and the material thus supplied is to be determined by an affirmative answer to the inquiry: Is the tire essential to the completeness of the vehicle for the purpose for which it was designed? *Griggs v. Stone*, 51 N. J. Law, 549, 18 Atl. 1094, 7 L. R. A. 48. Common experience teaches that no automobile planned to be used with flexible tires can be driven uninjured any great distance over a rough surface without such cushioned protection to its wheels. When, therefore, an automobile tire has been injured, the car of which it forms a part needs to be restored, and any person who, being engaged in that business, patches the rent or furnishes a new tire and performs the labor necessary to put on and fasten the casing to the wheel of the car, is an "automobile repairer" within the meaning of the term as used in the statute and is entitled to the benefits of the lien thus given. Though no separate charge was made by the plaintiff therefor, he caused his employes to expend labor, services, and skill upon the car in repairing it by prying off the old tire and putting on the new.

[2] It will be remembered that on the occasions referred to the defendant Clark left the car in the street in front of the plaintiff's place of business, and was absent when the repairs were made to the wheel. While he was away, at least, the plaintiff had such possession of the vehicle as to entitle him to a lien, though the custody of the automobile was surrendered, when the repairs were made, to the reputed owner. The tires were supplied by the plaintiff in connection with the labor which he caused to be performed in making the repairs, and, such being the case, no error was committed in declaring the validity of the lien or in foreclosing the security thus given.

It follows that the decree should be affirmed; and it is so ordered.

McBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

FRY et al. v. CITY OF SALEM.

(Supreme Court of Oregon. May 1, 1917.)

1. MUNICIPAL CORPORATIONS §=294(4) — STREET IMPROVEMENT—NOTICE BY RECORDER—CITY CHARTER.

Under Salem City Charter, § 26, providing that the city council shall, by resolution, determine the portion of a street to be improved, and that notice to property owners must be given by the recorder by order of the council, and must specify with convenient certainty the street

or part thereof proposed to be improved, the recorder is not empowered to determine what part of a street shall be improved, and any notice of street improvement given by the recorder, without the sanction of the city council, is not effective, so that a notice given by the recorder, leaving out part of the street determined to be improved by the council, was not good as to the owners adjacent to the portion of the street included in the recorder's notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 783, 791.]

2. MUNICIPAL CORPORATIONS §=294(4) — STREET IMPROVEMENT—ERROR IN RECORDER'S NOTICE—CURE.

Where a reference in the recorder's notice to the plans and specifications for the improvement of the street, correctly describing the extent to be improved, was made as a means to ascertain the details and kind of improvement, not to contradict or delineate the description of the portion of the street determined to be improved, the erroneous description of the extent of the street to be improved in the recorder's notice was not cured.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 783, 791.]

3. MUNICIPAL CORPORATIONS §=294(4) — STREET IMPROVEMENT—VALIDITY OF ASSESSMENT—NOTICE—CITY CHARTER.

Under Salem City Charter, § 26, requiring ten days' notice of intention to improve a street be given to property owners, where the notice of a street improvement published by the recorder, under direction of the city council, failed to describe correctly the portion of the street affected, omitting a certain extent thereof, the notice did not confer power or jurisdiction upon the common council to take subsequent proceedings for the improvement of the street as originally determined by it, nor to assess the costs against any of the abutting property, and its assessment was invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 783, 791.]

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Daniel J. Fry and another against the City of Salem. From a decree for plaintiffs, defendant appeals. Affirmed.

This is a suit to quiet title, involving the validity of an assessment upon the plaintiffs' property for a street improvement. From a decree in favor of plaintiffs, defendant city appeals.

The following proceedings appear from the record: On April 1, 1912, the common council of the city of Salem, Or., a municipal corporation, adopted resolution No. 781, directing the city engineer to prepare plans, specifications, and estimates for the improvement of South High street from the south line of mill street to the south line of Bush street, for more than two kinds of appropriate improvements, at least one of which was to be of a nonpatentable kind, and to estimate the probable cost of each class of improvement. On the same date the city engineer as directed filed with the city recorder plans, specifications, and estimates for the improvement mentioned, which were approved by the city council by resolution No. 806, adopted by it on April 8, 1912, in

which it declared its purpose and intention of making the said improvement, determined the portion of the street to be improved, and authorized and directed the recorder to give notice by publication for not less than five successive days in a daily newspaper published in the city, inviting bids for making the improvement. About April 12, 1912, the city recorder caused a notice as directed by the council to be published for six successive days in the Daily Oregon Statesman, a daily newspaper of general circulation, published in the city of Salem. The notice is set forth in the record. On April 22d, bids were received by the city and filed with the recorder, among which was one by Montague-O'Reilly Company, proposing to make the improvement according to the plans and specifications adopted and on file, for the total estimated sum of \$18,746.95. On April 29th, the council adopted resolution No. 828, which in so far as deemed material to the issues is here set down:

"Be it resolved by the mayor and common council of the city of Salem, Oregon. * * * Sec. 2. That the council deems it expedient and proposes to improve South High street from the south line of Mill street to the south line of Bush street with El Oso pavement, at the expense of the abutting and adjacent property within the said limits, said improvement to be made in accordance with the plans and specifications adopted for such improvement and on file in the office of the city recorder.

"Sec. 3. That the recorder be and he is hereby authorized and directed to publish for ten (10) days in some daily newspaper published in the city of Salem, Oregon, the following notice: 'Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and proposes to improve South High street from the south line of Mill street to the south line of Bush street with El Oso pavement at the expense of the adjacent and abutting property within said limits, in accordance with the plans, specifications and estimates for the improvement of said South High street from the south line of Mill street to the south line of Bush street as heretofore adopted by the common council and on file in the office of the city recorder which are hereby referred to for a more particular and detailed description of said improvement, and are hereby made a part of this notice. Written remonstrances against the improvement proposed herein may be made at any time within ten (10) days from the final publication of this notice in the manner provided by the city charter. This notice is published for ten (10) days pursuant to a resolution of the common council and the date of the first publication thereof is the ____ day of ____, 1912, and the date of the final publication will be the ____ day of ____, 1912. * * *'"

About the 1st of May the recorder caused a certain notice of intention to improve a portion of South High street to be published in the Daily Oregon Statesman, reading thus:

"Defendant's Exhibit C. Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and proposes to improve South High street from the south line of Mill creek to the south line of Bush street with El Oso pavement at the expense of the adjacent and abutting property within said limits, in accordance with the plans, * * * [the remainder of the notice being in conformance with the resolution of the council].

"Chas. F. Elgin, City Recorder."

Thereafter a contract was entered into between the city and the Montague-O'Reilly Company for making the improvement, and the work was commenced and prosecuted to completion. After the required notice the council adopted Ordinance No. 1306, assessing the share of the cost of the improvement against adjacent property, which assessment was docketed as a lien upon the respective abutting lots.

B. W. Macy, City Atty., and William H. Trindle, both of Salem (George G. Bingham, of Salem, on the brief), for appellant. William P. Lord, of Portland, and Grant Corby, of Salem (John A. Carson, of Salem, on the brief), for respondents.

BEAN, J. (after stating the facts as above). The defendant city sets forth all the proceedings leading up to the making of the assessment which it asserts is a valid lien upon the real property. Plaintiffs contest the sufficiency of the procedure to support the assessment, and claim that the city authorities had no jurisdiction or authority to make the same. It will be observed that the notice to the property owners of the proposal to make the improvement of South High street described the part to be paved as being "from the South line of Mill creek to the south line of Bush street," while the resolution of the common council authorizing the notice mentions that part to be improved as "South High street from the south line of Mill street to the south line of Bush street." It is contended by counsel for plaintiffs that the notice as published was materially different from the one directed by the council and was not in conformity with the city charter, and that the recorder had no authority to publish such a notice. Bush street is located south of Mill street. South High street crosses Mill creek at right angles some 300 or 400 feet south of Mill street; hence that much of the street designated in the resolution was left out of the notice. Mill creek is a good-sized stream, with a well-defined south line or bank. In ascertaining whether the required remonstrance to defeat the improvement could be obtained, an owner of adjacent property between the "south line of Mill creek and the south line of Bush street" who would be governed by the notice would not take into consideration the realty adjacent to that part of the street not contained in the notice. The owners of the latter property would have no notice whatever. It is manifest, therefore, that the omission affects the substantial rights of the property owners interested. All realty holders on the entire portion of the street to be paved have a common interest in the right to remonstrate.

The matter, however, is controlled by the city charter, section 45 of which confers upon the city council the power and authority, whenever it deems it expedient, to improve

or build any street or part thereof within the city at the expense of the owners of adjacent property. Section 28 provides in part as follows:

"The council in improving any street or streets, or any part or parts thereof within the city of Salem, Oregon, shall require from the city engineer plans, specifications, and estimates for two (2) or more kinds of appropriate improvements at least one of which must be of a nonpatentable kind, and the city engineer shall file said plans, specifications and estimates in the office of the city recorder of the city of Salem, Oregon. If the council shall find such plans, specifications and estimates to be satisfactory it shall approve the same, and shall determine the limits of the street proposed to be improved, and the council shall, by resolution declare its purpose and intention of making said improvement and determine the portion of the street to be improved. * * * Provided, that no grade or improvement mentioned in this section or in section 25, except the original establishing of the grade, can be made without ten (10) days' notice thereof being first given by publication in some daily newspaper published in the city of Salem, Oregon; provided, however, in case of the improvement of any street or any part thereof, such notice shall not be required to be published until the council has determined the kind and character of the improvement to be made as herein specified. * * *"

The next section reads thus:

"Sec. 27. (*What Notice Must Specify.*) Such notice must be given by the recorder, by order of the council, and must specify with convenient certainty the sewer or street, or part thereof, proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made. S. L. 1901, p. 284."

[1] It is argued by counsel for the city that the notice as published is good as to the owners of property adjacent to the portion of the street described, which would include the plaintiffs. By the plain mandate of the charter the city council shall, by resolution, "determine the portion of the street to be improved"; and, further, "such notice must be given by the recorder by order of the council," and must specify with convenient certainty the street or part thereof proposed to be improved. The recorder is not empowered to determine what part of a street shall be improved, and any notice of street improvement given by that official without the sanction of the city council is not effective.

[2] It is further claimed on behalf of the city that as the notice refers to the plans, specifications, and estimates for the improvement of "said South High street from the south line of Mill street to the south line of Bush street" on file in the office of the city recorder, the erroneous description is cured. Reference to the plans and specifications appears to be made in the notice as a means of ascertaining the details and kind of improvement, and not in order to contradict or delineate the description of the portion of the street determined to be improved. It will also be seen by reading the charter that in the regular order indicated the part of the street proposed to be paved would be

determined after the plans and specifications were filed, and would not necessarily be of the same extent as indicated therein. The plans and specifications were not referred to in the notice as a part of the description of the street nor for the purpose of aiding the property owners in determining the property to be affected, by the improvement. The notice in question is not similar to the one in *Rogers v. City of Salem*, 61 Or. 321, 325, 122 Pac. 308.

[3] The notice as published was not authorized by the common council, and did not confer power or jurisdiction upon that body to take the subsequent proceedings for the improvement of South High street from the south line of Mill street to the south line of Bush street, nor to assess the cost thereof against any of the abutting property. The assessment was invalid. The adjacent property owners are entitled to know what portion of the street is proposed to be improved in order to give them an opportunity to remonstrate. The requirement of the city charter that ten days' notice of intention to improve a street be given to the property owners must be complied with by the city authorities before the council has jurisdiction to make the improvement at the expense of the abutting property owners. Sections 43 and 44, Rev. Charter City of Salem, as amended December 4, 1911; *Paulson v. Portland*, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673; *Id.*, 149 U. S. 80, 13 Sup. Ct. 750, 37 L. Ed. 637; *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474; *Smith v. Minto*, 30 Or. 351, 354, 48 Pac. 166; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Jones v. City of Salem*, 63 Or. 126, 123 Pac. 1096; *Johns v. City of Pendleton*, 66 Or. 182, 133 Pac. 817, 134 Pac. 312, 46 L. R. A. (N. S.) 990, Ann. Cas. 1915B, 454; *Dyer v. Bandon*, 68 Or. 406, 136 Pac. 652; *Watson v. City of Salem*, 164 Pac. 567, decided April 10, 1917. This conclusion renders it unnecessary to consider several irregularities complained of. The decree of the lower court will therefore be affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

LORD et al. v. CITY OF SALEM et al.

(Supreme Court of Oregon. May 1, 1917.)

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge. Suit by Juliet M. Lord and another against the City of Salem and others. From a decree for plaintiffs, defendants appeal. Affirmed.

B. W. Macy, City Atty., and William H. Trindle, both of Salem (George G. Bingham, of Salem, on the brief), for appellants. William P. Lord, of Portland, and Grant Corby, of Salem (John A. Carson, of Salem, on the brief), for respondents.

BEAN, J. This suit is brought for the removal of a cloud from the plaintiffs' title created by reason of the levying of an assessment against their property for the construction of the same

improvement, as that under consideration in *Fry et al. v. City of Salem*, 164 Pac. 715, and *Carson v. City of Salem*, 164 Pac. 718. The questions herein involved are the same as those raised in the above-named cases; therefore, for the reasons given in the opinion this day rendered in the case of *Fry et al. v. Salem*, supra, the decree of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

CARSON v. CITY OF SALEM.

(Supreme Court of Oregon. May 1, 1917.)

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Helen F. Carson, administratrix of the estate of John A. Carson, deceased, against the City of Salem. From a decree for plaintiff, defendant appeals. Affirmed.

B. W. Macy, City Atty., and William H. Trindle, both of Salem (George G. Bingham, of Salem, on the brief), for appellant. William P. Lord, of Portland, and Grant Corby, of Salem (John A. Carson, of Salem, on the brief), for respondent.

BEAN, J. This is a suit to quiet title involving the validity of an assessment upon the plaintiff's property for the improvement of South High street from the south line of Mill street to the south line of Bush street. From a decree in favor of plaintiff, defendant appeals.

The issues in this suit are identical with those in the case of *Fry et al. v. City of Salem*, 164 Pac. 715, in which an opinion has this day been rendered. It is unnecessary to repeat what was said in that case. For the reasons stated therein the decree of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

MISHLER v. EDMUNSON.

(Supreme Court of Oregon. May 1, 1917.)

EXCEPTIONS, BILL OF \S 7—CONTENTS.

A literal transcript of all the evidence given on trial, interspersed with remarks and objections of counsel and the statements of the court's rulings, having appended what purports to be the entire charge to the jury, is not a bill of exceptions, and the objections made cannot be considered.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. \S 9.]

Department 1. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Replevin by A. J. Mishler against J. M. Edmundson. From a judgment for plaintiff, defendant appeals. Affirmed.

Claiming to have purchased from the defendant 184 bales of hops at the price of \$3,446.90, upon which he had paid the sum of \$1,000, the plaintiff tenders in court the balance, and brings replevin to recover the property on the refusal of the defendant to deliver the same to him, laying his damages for the detention at \$200. The answer denies the entire complaint, and avers, in substance,

that the \$1,000 mentioned constituted the consideration for an option to buy the hops at the price named in the complaint, given on October 19, 1914, and ending on the twenty-fourth of the same month, by the terms of which the plaintiff was to forfeit all payments made unless he had paid in full for the property by the expiration of the option period, and that inasmuch as he failed in this, the defendant was compelled to and did dispose of the property to other parties on the assumption that the plaintiff had determined not to exercise the option. The reply challenged the entire answer. The jury returned a verdict in favor of the plaintiff, and, in substance, assessed the value of the plaintiff's interest in the property at \$1,346.69. From the ensuing judgment the defendant appealed.

Woodcock, Smith & Bryson and L. R. Edmundson, all of Eugene, for appellant. R. S. Hamilton, of Eugene (Foster & Hamilton, of Eugene, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). What is relied upon by the defendant as a bill of exceptions is nothing else than a literal transcript of all the evidence given at the trial, interspersed with remarks and objections of counsel and the statements of the court's rulings. Appended is what purports to be the entire charge of the court to the jury. The errors assigned in the abstract relate only to an instruction of the court on the subject of what constitutes a sale, mingled with counsel's discussion of the same. We must decline to consider the objections thus framed, because we have no bill of exceptions. In *Keady v. United Railways Co.*, 57 Or. 325, 100 Pac. 658, 108 Pac. 197, Mr. Justice Slater compiled to that date the precedents established by this court on that subject, laying down the rule very lucidly that a document framed as the one before us does not constitute a bill of exceptions, and declining to consider the questions suggested. Again, in *National Council v. McGinn*, 70 Or. 457, 138 Pac. 493, the subject was discussed and the authorities brought down to that time. The principle has been reiterated several times since, but not often enough to require a supplemental compilation. At present it is unnecessary to add to the necrology of such crude attempts to bring before us objections to the decisions of the circuit court. It not being apparent that the substantial rights of the defendant were seriously abused, the judgment will be affirmed for want of a proper record upon which to review the same.

McBRIDE, C. J., and BENSON and BEAN, JJ., concur.

HART et al. v. CITY OF INDEPENDENCE.

(Supreme Court of Oregon. May 1, 1917.)

1. MUNICIPAL CORPORATIONS — 654—LOCATION OF STREETS — SUFFICIENCY OF EVIDENCE.

Where a street location had been recognized for 40 years, a survey measured from a corner located by discovering a bottle buried in the ground as described in a deed held insufficient to change the boundaries of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1428.]

2. ESTOPPEL — 62(4)—MUNICIPAL CORPORATIONS—LOCATION OF STREET.

Where a street was located according to the theory of men who laid out the town, had been maintained for over 40 years, and sidewalks and valuable improvements made, the city is estopped from changing its boundaries merely to attain mathematical exactness.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 153.]

Department 1. Appeal from Circuit Court, Polk County; H. H. Belt, Judge.

Injunction suit by James S. Hart and others against the City of Independence. Decree for plaintiffs, and defendant appeals. Affirmed.

This is a suit to enjoin the defendant from improving Main street in the city of Independence, which street is also sometimes called the Salem-Independence county road, in accordance with a recent resurvey of said street by which defendant claims that it runs over and includes portions of certain lots owned and occupied by plaintiffs.

The complaint alleges that the highway has been used and traveled by the public in its present location for more than 40 years; that it is a legal county road, under the exclusive jurisdiction of the county court of Polk county, and never has been a street, within the jurisdiction of the municipality of the city of Independence; that plaintiffs are the owners of certain lots abutting on said highway, and that they and their grantors have been in the peaceable, undisturbed, continuous, and adverse possession of these said premises for more than 40 years; that they have been using said premises for residence purposes only for more than 20 years last past, and that there are now standing thereon dwelling houses and many fruit and ornamental trees, which greatly enhance the value of their property; that upon the line between their lots and said highway as it has been used for more than 20 years last past there have been fences erected and maintained thereon for that length of time; and that said fences and residences have been constructed with reference to the county road and highway as it is now traveled and used. They follow allegations that the city threatens to improve said highway as a street by assuming that the street line extends over and upon the premises of plaintiff, to their

great and irreparable damage, the nature of which is fully set forth.

The defendants, after formal denials of the existence of the highway as claimed by plaintiffs, answered alleging the dedication of the town plat by one E. A. Thorp in November, 1850, and the recording of said plat in 1879, and the incorporation of the city of Independence. It was then alleged that Main street in the city of Independence was one of the streets shown on said plat, and included the lands claimed by plaintiffs; that by virtue of certain ordinances passed by the city it was proceeding to improve said Main street; that the defendants were wrongfully maintaining fences therein; and that the lands claimed by plaintiffs were a part of said street.

The plaintiffs in their reply pleaded as matter in estoppel that Charles Dick was the owner of certain described lots, and that he and his predecessors have been in exclusive possession of the land in dispute for more than 40 years, and have built fences and buildings and planted useful and ornamental trees with reference to the present location of the fence and county road, which the proposed change in the street line would destroy, if the same were carried out. There were similar pleas as to the other plaintiffs. Thorp's dedication of his plat reads as follows:

"This indenture witnesseth, that for the purpose of laying out and establishing a town within the county of Polk, and state of Oregon, to be known and designated as the town of Independence, and in consideration of the location and establishment of said town and of the benefits to thereby accrue to me, I, E. A. Thorp, hereby signify my approval of the location of said town, or so much thereof as may be upon my land, and do hereby grant, dedicate, and quitclaim unto the inhabitants of said town all and singular of the lands hereinafter described, laid out, and designated as streets and alleys, the plat and description of said town of Independence being as follows, to wit: The same being in the northeast end of my donation land claim."

Thomas Brown, of Salem, and B. F. Swope, of Independence (Carson & Brown, of Salem, on the brief), for appellant. J. H. McNary and E. M. Page, both of Salem (McNary & McNary, of Salem, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] There is not sufficient evidence here to justify us in changing the lines of the streets of Independence as they have been acquiesced in and recognized for 40 years before the last survey. It is evident that no survey was made when the land was originally platted, but by referring to the plat it is plain that Thorp intended to plat the northeast corner of his claim. The original field notes are not here, and there is not a scrap of original evidence anywhere in the record to identify the location of the north-

east corner. In this dilemma the surveyor attempted to locate it by reference to a description in a deed from E. A. Thorp to A. Nelson, dated March 21, 1883, conveying all his donation land claim not included in the town plat, in which deed the beginning point is described as follows:

"Beginning at the northeast corner of said land claim, where a bottle with charcoal in it is sunk in the ground," etc.

Upon what data this description is based does not appear. Evidently it was not a "government corner," because the government surveys are not marked by beer bottles buried in the ground; and it is a matter of common knowledge that in the early 50's, when these donation claims were being surveyed. Oregon was in a state of pristine purity and sobriety, and beer bottles were unknown. So this beer bottle, which the surveyor found and dug up and identifies as such, must belong to a more recent geological period than that extending from 1850 to 1854. There is no proof of the accuracy of the survey, if there was a survey, when it was buried, and no sufficient proof that it was the same bottle referred to in Thorp's deed, though it probably was. It is not nearly so reliable as indicating the location of the streets as the acts of old settlers, including Thorp himself, who owned some of the lots now owned by one of the plaintiffs, and who maintained his fences upon the street line as it is now claimed by them. If anybody on earth knew the boundary lines of Main street, Thorp was that man. He was the owner of the town site and interested in the progress of the town, and it is not probable that he would infringe upon the streets which he

had laid out, or allow his neighbors to do so without remonstrance.

[2] Upon the whole testimony we are inclined to the opinion that the boundaries of Main street are as a matter of fact where the plaintiffs contend; but, even if the northeast corner of the Thorp donation land claim is situated where defendant's engineer places it, the city is estopped from claiming a right to shift the boundaries of the street, which have been accepted and acquiesced in by everybody for nearly half a century, merely to attain mathematical exactness. This is not a case like *Oliver v. Synhorst*, 58 Or. 582, 109 Pac. 762, 115 Pac. 594, or *Cruson v. Lebanon*, 64 Or. 593, 131 Pac. 316, where there would have been no difficulty in ascertaining the exact boundaries of the street, if the parties had been reasonably diligent. Here the plaintiffs have adopted the theory of the man who laid out the town and dedicated the plat, and, assuming that he knew the lines of the streets he had dedicated, have purchased from him, and in some instances only replaced the fences placed by him upon what he evidently believed was the street line. These lots are not in an outlying and unoccupied part of the city, but upon one of its earliest occupied streets. With the acquiescence of the city, and under the direction of its officials, permanent sidewalks have been erected and valuable improvements made. For 40 years the street has been actually used by the public upon the ground and within the boundaries claimed by plaintiffs. There it will remain.

The decree is affirmed.

BENSON, BURNETT, and HARRIS, JJ., concur.

TUCKERMAN et al. v. BERRY. (No. 8547.)

Supreme Court of Colorado. May 7, 1917.)

1. WILLS ~~606~~—LETTER AS WILL—WITNESSES—TESTAMENTARY INTENT.

Testatrix having made previous will signed by witnesses, a letter by her containing no words of bequest, but statements of intention to destroy old will and make new one and that she would have some one witness and sign letter only she could not bear to have any one know about it till her death, is not a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 228-231.]

2. TRUSTS ~~372(3)~~—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit to recover real estate alleged to have been held in trust for plaintiff, letter written by record owner, in form of a solemn declaration, designating in unmistakable terms the property purchased, that plaintiff's money purchased it, and that entire interest belonged to plaintiff, held sufficient to support a finding for plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603.]

Hill, Garrigues, and Bailey, JJ., dissenting.

En Banc. Error to District Court, Weld County; Robert G. Strong, Judge.

Suit by Mattie M. Berry against James Tuckerman, executor of the will of Hannah J. Dawley, deceased, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

L. M. Goddard, of Denver, Guy D. Duncan, of Boulder, James C. Scott and H. E. Churchill, both of Greeley, and Charles Roach, of Denver, for plaintiffs in error. Joseph C. Ewing and William R. Kelly, both of Greeley, for defendant in error.

TELLER, J. The defendant in error, hereinafter called the "plaintiff," brought suit against the plaintiffs in error to recover certain real estate alleged to have been held in trust by Hannah J. Dawley, of whose will defendant Tuckerman was the executor; the other defendants being beneficiaries under said will.

It appears from the record that the plaintiff was a niece of Mrs. Dawley's husband, and worked for the family before the death of the husband. After Mrs. Dawley's decease, a letter written by her under date of November 28, 1905, and addressed to Edward Dawley, an adopted son, whose death preceded that of Mrs. Dawley, was found, and delivered unopened to plaintiff's attorneys. The plaintiff being barred by the statute from testifying in the cause, this letter was, as the court states in its finding, the sole proof of a trust in favor of plaintiff. The trial court found for the plaintiff as to the real estate, and against her on the claim for rents and profits from it prior to suit, and certain personal property mentioned in the letter. Judgment was entered accordingly.

The defendants introduced evidence which showed that D. L. Dawley acquired the two

lots in question, with other lands, on the 27th day of May, 1879; that on the 5th day of December, 1879, Dawley by quitclaim deed conveyed the two lots to Sarah Molnar, which deed was recorded May 20, 1882; and that Molnar by quitclaim deed conveyed them to Mrs. Hannah J. Dawley on November 24, 1882. It appeared further that in 1883 Mrs. Dawley erected upon the lots a substantial house at a cost of some \$5,500, which she occupied as a residence to the time of her death. D. J. Dawley died on May 27, 1881, and Hannah J. Dawley died December 25, 1909.

Plaintiffs in error charge the defendant in error with laches; but as it appears that she had no knowledge of the principal facts upon which the finding that the lots were impressed with a trust was based, and was barred by the statute from testifying as to matters of which she had knowledge, there was no error in the court's ruling on that point.

It is strongly urged that the judgment is wrong for two reasons: (1) That the so-called letter is in fact a will, and that, failing as a will for lack of witnesses, it cannot serve as a declaration of trust; and (2) that, in the absence of evidence that Sarah Molnar took title to the lots with notice of the trust, she must be held to have been a purchaser in good faith, whose deed to Mrs. Dawley conveyed title free from the trust, though Mrs. Dawley had knowledge of the facts from which the trust springs.

[1] The first proposition does not seem to have been brought to the attention of the trial court, and we might for that reason decline to consider it; inasmuch, however, as we agree with the conclusion of the trial court that Exhibit A was not intended as a will, we hold the first objection bad on that ground. The writer of the letter had, as the record shows, made a will, and she knew that it was necessary to an effective will that it be signed by witnesses. She says:

"I have made a will here in Greeley, but I have sent my sisters and the rest so much money one time and another that I intend to destroy it and make a new one and do as D. L. wished and as I promised him I would. * * * Now this is my last (will and confession) and I am sorry for what I have done. I would have some one to witness and sign this, but I can't bear to have any one know about it until I am in my grave."

This is equivalent to a statement that, but for the writer's shrinking from a revelation of the matters to which she had in the letter confessed, she would have had it witnessed and so made it a will. This, with the statement that she intended to destroy the old will and make a new one, is conclusive that she did not regard nor intend the writing as a will. It contains no words of bequest, but a recital of her wishes addressed to her sole heir apparent, with the view, possibly, of explaining to him the reasons of her disposition of her property in the new will yet to be

made, wherein she would "do as D. L. wished and as I promised him I would."

[2] The second objection is based upon the proposition that the transfer of the lots to Mrs. Dawley by Sarah Molnar gave her a title free from the trust, assuming in the absence of evidence that the conveyance to Molnar was without notice on her part that the land was subject to a trust. But Mrs. Dawley's own statement is in conflict with this position. Had she purchased the lots for value and in good faith, either with or without knowledge of the trust, being presumed to know that she had a good title, if we accept the law as counsel for plaintiffs in error contend that it is, she would hardly declare that the lots were plaintiff's "by right." Rather should we conclude that the transfers were made under circumstances which justified Mrs. Dawley's acknowledgment of the existence of a trust.

The transfers by which the property in the hands of Mrs. Dawley is claimed to have been freed from the trust were pleaded in the answer and proved on the trial. The court below must have passed upon the question thus presented and found that the conveyances were not made in good faith so as to produce the effect for which counsel now contend, but were merely colorable.

It cannot be said that the evidence does not justify that conclusion. The letter throughout clearly reveals that the writer was, and for a long time had been, greatly distressed because of the withholding from the plaintiff of knowledge of the matters from which the trust arose. It is a pathetic story of the sufferings of one whose conscience, long denied recognition, is at last allowed full hearing. It is a strong appeal to the writer's sole help apparent to right the wrongs which she had not the moral courage to right in her lifetime. She wrote:

"Now D. L. had some money of Matties that he had kept for her ever since she worked for us, he invested it in these two lots where I live and intended for her to have the place some time when we were through with it, this is the reason I would not give you and Ella a deed to it that time you wanted me to and the reason I did not sell it to Mrs. Clark that time. Oh Edward, how I have longed to sell out and go back east to live, but I promised D. L. to do what was right, and I am getting too old to go now; he had her papers all ready when he died, and I promised him faithfully that I would make everything all right and have everything done as he wanted it, but as no one knew about it but myself I destroyed the will and papers, and lied to Mattie that time she came down and asked me if I had seen any papers for her. I told her I had not seen any but if I found any I would let her know. Oh, Edward, I am afraid to go to bed nights for what I have done for I can't sleep. And have to walk the floor half the nights. * * * I want Mattie to have the house and two lots where I live for they are hers by right. I want everything left in the house just as it is to pay her in part for what I have kept back of hers all these years."

The letter contains numerous expressions of regret because of the course pursued by

the writer, and repeated declarations that she could not endure to have the facts known until after her death; but they are important only as indicating a condition of mind which compelled this belated admission of plaintiff's right to the property in question. Under these circumstances, we are not at liberty, and in any event are not disposed, to question the conclusion of the court on this point.

Whether the statement that the husband of Mrs. Dawley invested plaintiff's money in the two lots, and that they should go to her because they were hers by right, be regarded as a declaration of trust or as an admission against interest admissible to prove the allegations of the complaint that plaintiff's money had been invested in the lots under circumstances from which a trust resulted, is immaterial, and the court did not err in declining to classify the trust. This cause was before the Court of Appeals under the title of *Berry v. French* (24 Colo. App. 519, 135 Pac. 985) on the question of the sufficiency of the complaint, and in reversing the judgment, on the ground of error in sustaining a demurrer to the complaint, the court said:

"Resulting trusts and constructive trusts have been discussed learnedly in the briefs, but a difference of terminology does not settle principles, and courts need concern themselves but little with the nice distinctions between the various classifications of trusts. This view is stated very aptly in *Kaphan v. Toney* (Tenn. Ch. App.) 58 S. W. 900-913, and in 39 Cyc. 26."

Exhibit A designated in unmistakable terms the property purchased, the person whose money purchased it, and declared the extent of the interest in it belonging to the cestui que trust; i. e., the whole title. It is a solemn declaration, evidently made in agony of spirit after a long struggle with conscience, and to deny to it the effect to which it is entitled, and which it was intended to produce, would be to repudiate the primary rules of equity, and result in a miscarriage of justice.

The findings of the trial court are supported by the evidence. The judgment is without error, and is, accordingly, affirmed.

Judgment affirmed.

HILL, GARRIGUES, and BAILEY, JJ., dissent.

NATIONAL SURETY CO. v. QUEEN CITY LAND & MORTGAGE CO. (No. 8552.)

(Supreme Court of Colorado. May 7, 1917.)

1. CONTRACTS ~~8343~~ — ACTIONS — ANSWER — PERFORMANCE OF CONDITIONS PRECEDENT IN CONTRACT.

Where plaintiff has pleaded generally, as allowed by Rev. Code 1908, § 72, performance of the conditions precedent in a contract, a general denial is not sufficient, but defendant must allege the condition or conditions relied on, and negative performance thereof.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1696, 1697.]

2. PLEADING \Rightarrow 400(4) — ISSUES — MATTERS NOT PLEADED TREATED AS IN ISSUE.

Time that plaintiff obligee in contractor's bond gave defendant obligor notice of the contractor's default, not put in issue by the answer, was not treated as an issue at the trial, so as to allow review, the only evidence bearing thereon being given by plaintiff, when on its request defendant produced a dated notice from plaintiff to defendant giving notice of the default and requesting that defendant exercise its option of election to complete the contract or designate its unwillingness to do so; the notice evidently being offered only to show defendant had opportunity of exercising its election.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1386.]

3. APPEAL AND ERROR \Rightarrow 1064(4)—HARMLESS ERROR—INSTRUCTIONS.

Including the reasons for the rule in an instruction correctly stating that a surety for hire is not released by deviations from the exact terms of a contract not shown to have damaged it is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224; Trial, Cent. Dig. § 475.]

White, C. J., dissenting.

En Banc. Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the Queen City Land & Mortgage Company against the National Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George P. Steele, of Denver, for plaintiff in error. Ponsford & Carnine, of Denver, for defendant in error.

HILL, J. The defendant in error, hereafter called the plaintiff, secured judgment against the plaintiff in error, hereafter called the defendant, upon a contractor's bond. Two trials were had, each to a jury, in both of which the verdict was for the plaintiff. In his opening brief, counsel for defendant says:

"Practically all of the testimony at both trials was directed to an issue whether in the construction of the project the plans and specifications had been so materially departed from that the surety on the bond was relieved. This particular issue was given to each jury under correct instructions, and will not therefore be discussed here."

Counsel follow this with the statement:

"But another and an equally important issue was offered by the pleadings, which involved the question whether the Queen City Company itself had complied with certain conditions precedent required of it by the terms of the bond. The surety company contended that the Queen City Company had not given it the required notice of the failure on the part of the Golden Company to complete the project within the time specified for such completion. It is in relation to this question that the errors now complained of were committed."

That portion of the bond the conditions of which it is now claimed were not complied with reads:

"(3) If said principal shall in any manner default in the performance of any matter or thing in said contract specified to be by said principal performed, or in the event of said principal

abandoning the work provided by said contract to be done by said principal, the obligee shall immediately so notify the company, and thereafter the company shall have the right at its option to assume and sublet said contract and to proceed thereunder as if no default or abandonment had occurred; * * *

"(9) All notices and other evidence required by this instrument to be furnished by the obligee to the company shall be in writing, and shall be forwarded by registered letter addressed to the company at its principal offices in the city of New York."

[1] We agree with counsel that practically all of the testimony was directed to an issue whether in the construction of the project the plans and specifications had been so materially departed from that the surety on the bond was relieved. But we cannot agree that an issue was offered by the pleadings which involved or raised the question that the plaintiff had not complied with the conditions precedent required of it by the terms of the bond pertaining to notice in order to entitle it to recovery. Paragraph 7 of plaintiff's second amended complaint alleges:

"That the plaintiff has performed each and every term, provision, covenant, and condition on its part to be performed in said contract and in said bond contained."

This method of pleading is permitted by section 72, Revised Code 1908, which reads:

"In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading shall establish on the trial the facts showing such performance."

The defendant's answer to this paragraph reads:

"Denies the allegations in paragraph 7 of said second amended complaint contained."

This denial was insufficient to put plaintiff on proof concerning the question of notice. A similar question was under consideration in Penn M. L. I. Co. v. Ornauer, 39 Colo. 498, at page 505, 90 Pac. 846, at page 848, wherein this court said:

"It is unquestionably true that under a general denial a defendant may introduce any evidence which controverts the facts which plaintiff is bound to establish in order to sustain his action. Under this doctrine the defendant contends that, under its general denial, it may show that what it calls conditions precedent had not been fulfilled. In this complaint there was an averment generally permitted by section 56 of our Code that plaintiff had fully performed all conditions of the contract to be by him performed. Where such an averment of performance of conditions precedent is allowed in the complaint, the rule is that, if a defendant relies upon nonperformance, he must specially allege the condition or conditions on the nonperformance of which he relies, and negative their performance. Bliss on Code Pleading (3d Ed.) § 356a; Nash on Pleading, 300."

To the same effect are Insurance Company v. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Branham v. Johnson, 62 Ind. 259; Parks v. Holmes, 22 Ill. 522; Preston v. Roberts, 12 Bush (75 Ky.) 570; Kahnweiler v. Phenix

Ins. Co., 67 Fed. 483, 14 C. C. A. 485; Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708; Breard v. Mechanics' & Traders' Ins. Co., 29 La. Ann. 764; Continental Ins. Co. v. Chase, 89 Tex. 212, 34 S. W. 93; Evarts v. U. S. Mut. Acc. Ass'n, 16 N. Y. Supp. 27.¹

[2] The record discloses that the present counsel of defendant did not represent it in the trial court and in his reply brief he practically concedes the correctness of the position above outlined, but claims that the question of the time of the service of the notice was treated as an issue; that testimony was offered concerning it and an instruction given in relation thereto; that for these reasons, it must, for the purposes of this hearing, be thus considered.

Anderson et al. v. Sloan, 1 Colo. 485, Althoff Mfg. Co. v. Althoff, 52 Colo. 501, 123 Pac. 326, Perkins v. Russell, 56 Colo. 120, 137 Pac. 907, and other cases are relied upon as sustaining this conclusion. We adhere to the ruling in these cases, but cannot agree that the record shows any testimony was offered upon the question as an issue in the case. The defendant offered no testimony concerning it. The only testimony upon behalf of plaintiff which tended to establish when notice of the default of the contractor was given was when, upon request of the plaintiff, the defendant produced a notice signed by the plaintiff to the defendant notifying it of the default and requesting that it exercise its option of election thereunder. It bore date November 8, 1911. The time limit for completion of the contract was October 5, 1911, but no witness testified as to when the notice was sent. From these dates it would appear to be about 29 days after the default by the contractor. We cannot agree, however, that the date of the giving of the notice was treated as an issue. It appears to have been raised for the first time upon defendant's motion for a nonsuit, but after this motion was overruled it neither asked to amend its pleadings pertaining to that question, nor offered any testimony concerning it. In this notice the defendant was requested, as allowed by the bond, to exercise its option to assume the contract and complete the work, or designate its unwillingness to do so. When this clause in the bond is considered, it is more consistent with the record to assume that the notice was offered in evidence to show that the defendant had had the privilege of exercising its election to proceed with the work than that the notice was given at any particular time. It is quite apparent that the defendant at that time thus considered it, for the reason that upon December 26th following, through its Denver office, it acknowledged in writing the receipt of two notices to the local office; also stated therein that this let-

ter was an answer to the papers sent to the New York office. In this letter it advised that it did not elect to proceed with the contract, having acted upon the notice by electing not to complete the contract as the bond allowed. This election might consistently be construed as a waiver concerning the time within which the notice was to be given. Montelius v. Atherton, 6 Colo. 224; Insurance Co. v. Allis, 11 Colo. App. 284, 53 Pac. 242; American Ins. Co. v. Donlon, 16 Colo. App. 416, 66 Pac. 249; Modern American Law, Vol. 14, p. 49; Adams v. Colo. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412.

It can be said, of course, that the question of waiver was not made an issue by the pleadings, for which reason it cannot be taken advantage of. Atchison Co. v. Baldwin, 53 Colo. 416, 128 Pac. 449. This is true unless treated as an issue as defendant claims the question of the time of notice was. These two communications, however, are more consistent as tending to show that the question of waiver was treated as an issue than the one is as tending to show that the question of the time of notice was thus treated. The fact that the question of the time of giving the notice was not pleaded as a defense or thus treated is borne out by the fact that no waiver was pleaded. This is another reason going to show that neither was considered as an issue. For these reasons the instruction to the jury upon the question of the time of the notice was harmless, even though erroneous, which need not be determined.

[3] By instruction No. 3, the jury were told, that the defendant being a surety for hire, and having, for a compensation, become surety upon the bond executed by the defendant as surety for the performance of the contract, it could not escape liability by reasons of alterations or deviations from the exact terms of said contract or of said bond, where no damages are shown to have resulted to said surety by reason of such alterations or deviations; that such a bond was in the nature of an insurance policy, and is not to be construed as strictly as a bond executed by a noncompensated surety who signed merely for accommodation of the principal, etc. While the reasons for the rules pertaining to such bonds and the contracts which they are given to secure the fulfillment of were immaterial so far as the jury was concerned, and should have been omitted, and while there may be cases where such reasons, when stated in an instruction, might constitute reversible error, in the circumstances of this case we cannot agree that the defendant was prejudiced thereby. The instruction, without the reasons, correctly states the law pertaining to the questions concerning which it was given. Empire Co. v. Lindenmeyer, 54 Colo. 497, 131 Pac. 437, Ann. Cas. 1914C, 1189; Messenger v. German American Co., 47 Colo. 448, 107 Pac. 643; Boppert v. Surety Co., 140 Mo. App. 675, 126 S. W. 768; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 61 Hun, 624.

L. Ed. 977; Rule v. Anderson, 160 Mo. App. 347, 142 S. W. 358; Bank v. Fidelity Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; Brown v. Title G. & S. Co., 232 Pa. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698; Hewitt v. Watertown Fire Ins. Co., 55 Iowa, 323, 7 N. W. 596, 39 Am. Rep. 174.

The former opinion will be withdrawn, and the judgment affirmed.

Affirmed.

WHITE, C. J., dissents. TELLER and ALLEN, JJ., not participating.

BENFORD v. YOCKEY. (No. 8632.)

(Supreme Court of Colorado. Nov. 6, 1916. Rehearing Denied En Banc May 7, 1917.)

1. EXCHANGE OF PROPERTY ⇐4—CONTRACT—ACCOUNTING FOR PRICE ON SALE.

Under provision of contract for exchange of properties requiring defendant to place on the market and sell the property received from plaintiff, and account to plaintiff for the part of the price in excess of a certain amount, defendant having elected in making the sale to take other property in exchange for part of the price, must account therefor at the value at which he took it; that is, the valuation agreed on by him and his vendee.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

2. CONTRACTS ⇐75(2)—CONSIDERATION.

An agreement to give plaintiff possession of property on a certain day, to which he is entitled under existing contract, is no consideration for release of any of his rights thereunder.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 280-285.]

3. EXCHANGE OF PROPERTY ⇐4—CONTRACT—ACCOUNTING FOR PRICE ON SALE.

Under contract of exchange providing for plaintiff giving defendant notes secured by mortgage on the house received by plaintiff from defendant, and defendant selling the farms received from plaintiff, and crediting on said notes any sum in excess of a certain amount received on said sale, plaintiff may recover such excess, and is not limited to the remedy of having it credited on the notes, plaintiff having sold the house to one who assumed payment of the notes, without transfer of any right to the contingent credit, and having secured from defendant a release of liability on the notes.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

4. PLEADING ⇐36(3) — FAILURE TO MAKE FINDING—ADMISSION IN ANSWER.

Though there was no finding of a release by defendant of plaintiff from liability on her notes to him, defendant cannot question such fact, having admitted it by the allegation of his answer, that on her sale of the property on which said notes were secured her interest in the payment thereof ceased.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 82.]

White, C. J., and Bailey and Garrigues, JJ., dissenting.

Error to District Court, City and County of Denver; John T. Shumate, Judge.

Action by Ada M. Yockey against William

H. H. Benford. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph D. Pender and Andrew H. Wood, both of Denver, for plaintiff in error. H. L. Lubers, of Denver, for defendant in error.

TELLER, J. Defendant in error brought suit against the plaintiff in error to recover an amount alleged to be due on a contract for exchange of properties.

[1] Designating the parties as they appeared below, the plaintiff relies upon a contract in writing under which she was to receive a certain apartment building owned by the defendant, and she was to convey to the defendant several pieces of property, including an 85-acre farm. She was to put in her property at \$16,000, and to execute a mortgage upon the apartment building for the balance of the purchase price, viz. \$40,000. The agreement provided that:

"The property conveyed by the party of the second part [the plaintiff] to the party of the first part [the defendant] is to be placed on the market for sale by him, and if the same shall have been sold before the maturity of the notes hereby agreed to be executed by the party of the second part and secured by mortgage upon said apartment property for a price, after paying all commissions and charges for selling the same over and above the sum of \$16,000, then the party of the second part shall be credited upon said notes, or such part thereof as may be unpaid, of the amount so received upon said sale above said \$16,000."

The transfers were duly made, and all the properties transferred by the plaintiff to the defendant were sold by the latter. The plaintiff claims that the net sum of the sales above costs and expenses was \$18,564, and demand was made for the excess of \$2,564. Its payment being refused, suit was brought to recover it.

There is no dispute as to the net amount received for any of the properties except the 85-acre farm. The plaintiff claims that the farm was sold by the defendant to one Rogers, for a consideration of \$13,000, paid by the transfer to defendant of a piece of city property, and \$5,000 in cash. It is admitted that the consideration named in the deed to Rogers was \$13,000. Defendant denied that the consideration was in fact \$13,000, and offered, on the trial, to prove that the value of the city property received from Rogers was not more than \$5,500. The offer was refused.

It is now contended that the court should have considered the actual value of the property, and not the value stipulated in the deed, or by the parties. We cannot agree with this contention. The defendant was required by the contract to place the property on the market and sell it. If he chose to take property in exchange, he ought to account for that property at the value at which he took it; in other words, at the agreed valuation as between him and Rogers.

The principal error discussed is that the evidence was insufficient to support the find-

ing in favor of plaintiff on this question of consideration. There was a good deal of evidence on both sides of the question, and on this conflicting evidence the trial court found in favor of the plaintiff. We cannot say that it was not justified in so doing, and the finding will not be disturbed.

[2] One of the defenses was that an oral contract was entered into by the parties, subsequent to the making of the written contract, and before any part of said contract had been performed, whereby the defendant was relieved of any obligation to place said farm on the market or to sell it; and that the farm was to be considered, in carrying out the contract, as if sold for \$8,000. When testimony in support of this defense was offered, objection was made to it on the ground that the contract sought to be proved was within the statute of frauds; and that it was without consideration. The evidence was in part by deposition, and so much of the depositions as related to the oral contract was excluded. The testimony of Snell, a witness for the defendant, on the oral contract, was excluded under the same objection. These rulings are assigned as error. Whether or not the excluded evidence tended to show a contract of sale, and so was void because not in writing, need not be determined, because the objection that there was no consideration shown was good. Boyer's testimony as to this new contract is as follows:

"At this time and in consideration of said Ada M. Yockey getting the possession of the 1. X. L. Apartment, on the 15th of October, 1908, said Ada M. Yockey agreed to accept the net sum of \$8,000 as consideration of the 85 acres mentioned in the contract. This was accepted by Benford, and the deal was closed according to this verbal agreement."

The defendant's report of the conversation, as set out in his deposition, is:

"Well, if I remember, Mrs. Yockey came into the office and said: 'I have a chance to sell the 85 acres for \$8,000, but I will have to pay a commission. I don't want to do that.' 'Well now,' I says, 'Mrs. Yockey, if you want to let me have the 85 acres for \$8,000, there will be no commission.' She said, 'All right, you can have it.' So that ended that."

Mr. Snell testified that Benford said to Mrs. Yockey, who had said she could sell the farm for \$8,000, but didn't want to pay a commission:

"Well, if you will take \$8,000 for that place, why don't you let me have it?" Mrs. Yockey said she would."

There was no other testimony on this subject offered.

It is urged, however, that a consideration is shown by Boyer's testimony, according to which it consisted of the agreement to give Yockey possession of the apartment on October 15th. But that cannot serve as a consideration, because she was, by the terms of the written contract, entitled to such possession on that date. There was, therefore, no

error in excluding this testimony, since it could not, without evidence of a consideration, establish a new contract to take the place of the contract in writing, and there is no such evidence.

[3] It is further urged that in any event the money judgment is wrong, since the contract provided only for a credit on plaintiff's notes, and she, having been released from obligation thereon, had no right of credit, and hence no right of action. The correctness of this contention must be determined by a consideration of the contract and the circumstances under which it was made. Mrs. Yockey conveyed the lands to Benford as a payment of \$16,000 on the property he conveyed to her, reserving an interest in her property to the extent that it might sell above said sum. This interest was Mrs. Yockey's, and the contract provided that anything received by Benford on sale of the lands above \$16,000 should be credited on the notes which she owed him. She was thereby to receive pay for the interest reserved. When, however, she was released from liability on the notes, she still owned this interest. In the lands, she not having transferred to Mudd, who assumed the liability on the notes, any right to this credit. To give her credit on the notes was a natural way of paying her for the reserved interest in the land when sold; and it is not reasonable to suppose that it was intended to be the exclusive mode of payment. If she could, as she did, sell the apartment house and induce the buyer to assume the payment of the notes, without transferring the right to this contingent credit, there is nothing to show an intention that she should release such interest to Benford. The fact that she reserved it shows that she thought it of value, and without evidence that she cared for it only as a possible source of credit on her notes, we cannot assume that she so regarded it. There is nothing in this inconsistent with her securing a release from Benford on the notes, nor has anything been done in the premises which makes it impossible to carry out the contract according to its clear intent. Any other view would give to Benford the excess above \$16,000 without any consideration therefor.

[4] It is urged that, because the court refused to find as to Mrs. Yockey's release on the notes, she is entitled only to credit thereon; but plaintiff in error cannot now question the fact of the release, he having admitted in the answer that on the sale to Mudd "her interest in the payment of said notes, and in all credits that might be made thereon thereafter ceased."

Finding no error in the record, the judgment is affirmed.

WHITE, C. J., and BAILEY and GARRIGUES, JJ., dissent.

CONTINENTAL OIL CO. v. JAMESON.
(No. 3910.)

(Supreme Court of Montana. April 23, 1917.)

1. ATTACHMENT \Leftrightarrow 77 — AFFIDAVIT — NECESSITY.

Presenting to the clerk of court an affidavit containing the averments enumerated in Rev. Codes, § 6657, is essential to the issuance of a valid writ of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 204-206.]

2. ATTACHMENT \Leftrightarrow 91 — "AFFIDAVIT" — SUFFICIENCY.

Under Rev. Codes, § 7988, defining "affidavit" as a written declaration under oath, etc., a paper intended as an affidavit for attachment, but not signed or sealed by a notary, is on its face insufficient.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 231-237.]

For other definitions, see Words and Phrases, First and Second Series, Affidavit.]

3. ATTACHMENT \Leftrightarrow 247 — PROCEEDING TO DISCHARGE — OPPOSING AFFIDAVITS.

Under Rev. Codes, § 6682, providing that, if motion to discharge an attachment be made upon affidavits, the plaintiff may then, but not otherwise, offer affidavits in opposition, affidavits cannot be offered to show that a notary's seal was omitted by mistake, where the motion is made upon the record, although such affidavits might have been used on a motion to amend the attachment affidavit, under the express provisions of section 6683.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 846, 852-857.]

4. ATTACHMENT \Leftrightarrow 109 — AFFIDAVIT — SUFFICIENCY.

Rev. Codes, § 6657, requiring affidavits for attachment to state the indebtedness has not been secured by any mortgage, etc., or, if originally so secured, such security has become valueless, is not complied with by an allegation that the debt is not secured, since it does not negative the implication that it was previously secured.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 240.]

Appeal from District Court, Phillips County; Frank N. Utter, Judge.

Action by the Continental Oil Company against J. W. Jameson. From a judgment discharging a writ of attachment, plaintiff appeals. Affirmed.

W. B. Sands, of Chinook, and Nolan & Donovan, of Butte, for appellant. R. E. O'Keefe, of Chinook, for respondent.

HOLLOWAY, J. The Continental Oil Company commenced an action against J. W. Jameson to enforce payment for certain goods, wares, and merchandise sold and delivered to the defendant. A writ of attachment was issued, and property belonging to the defendant seized. A motion to discharge the attachment, on the ground that an affidavit had not been presented at the time the writ was issued, was granted, and plaintiff appealed from the order.

At the time the writ was issued the plaintiff filed with the clerk of the court the following writing:

"Affidavit of Attachment.

"State of Montana, County of Blaine—ss.:

"W. B. Sands, being duly sworn, says: That he is the attorney for plaintiff in the above-entitled action. That the defendant in the said action is indebted to it in the sum of eight hundred sixty-one dollars, lawful money of the United States, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit: A balance due for merchandise sold by plaintiff to defendant of eight hundred sixty-one dollars. That the same is now due, and that the payment of the same is not secured by any mortgage, lien, or pledge upon real or personal property. That the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant. W. B. Sands.

"Subscribed and sworn to before me this 5th day of Nov., A. D. 1915.

"Notary Public for Montana Residing at Chinook, Montana.

"My commission expires."

[1-3] An indispensable prerequisite to the issuance of a valid writ of attachment is the presentation to the clerk of the court, by the plaintiff, of an affidavit containing the averments enumerated in section 6657, Revised Codes. Section 7988, Revised Codes, defines an affidavit as follows:

"An affidavit is a written declaration under oath, made without notice to the adverse party."

On the face of the paper copied above it is not an affidavit, for the declarations contained therein do not purport to be made under oath, or before an officer authorized to administer an oath. It is a mere ex parte statement by Mr. Sands. If, as a matter of fact, an oath was administered, and the statements in the writing received the sanction of the oath, but the officer neglected to sign his name to the jurat, the writing was subject to amendment under the express provisions of section 6683; but plaintiff did not ask to amend the writing, but contented itself with presenting affidavits in opposition to the motion to discharge, to the effect that the declarations contained in the writing were made under oath, and by inadvertence the officer omitted his signature. In support of an application to amend, these affidavits would have been proper, but in opposition to the motion they are entirely out of place.

The motion to discharge was made upon the record and not upon affidavits. Section 6682, Revised Codes, provides:

"If the motion be made upon affidavits on the part of the defendant, *but not otherwise*, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made."

In the absence of an application to amend, the trial court had before it nothing to disclose the true character of the writing, and its order was commanded by section 6683.

[4] The writing is also defective in substance as well as in form. Section 6657 above requires that the affidavit shall contain the statement that payment of the indebtedness *has not been secured*—

"by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless."

The purpose of this requirement is obvious. There is but one action for the recovery of debt secured by mortgage upon real or personal property, viz. foreclosure. Rev. Codes, § 6861. If, however, the debt was originally secured, but without fault of the plaintiff, or the person to whom the security was given, the security has become valueless, an attachment may issue, provided the facts be disclosed in the affidavits.

The statement in this instrument that payment of the debt *is not secured* falls short of the requirements of the statute. It is clearly referable to the date upon which the writing was prepared or tendered to the clerk; and, though the debt may not have been secured at that time, it does not negative the fair implication that it was secured at some time prior thereto. Indeed, the statement is pregnant with the admission that the debt had been secured, and omits altogether any explanation which would warrant an attachment. Substantial compliance with the requirements of the statute is necessary to authorize the issuance of a valid writ. For this additional reason, the court was justified in making the order.

The order is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

GREGORY v. OREGON FRUIT JUICE CO.

(Supreme Court of Oregon. May 1, 1917.)

1. TROVER AND CONVERSION §9(1) — CONVERSION.

Refusal to surrender an article to the owner entitled to its possession is a conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 58.]

2. CONTRACTS §9(1) — AGREEMENT TO CONTRACT—MEETING OF MINDS.

There is not the necessary meeting of minds where the terms of the chattel mortgage which parties agree shall be executed and substituted for a lien giving right to possession are not agreed on with certainty.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-15, 17, 19, 20.]

3. TROVER AND CONVERSION §35—RIGHT TO POSSESSION—BURDEN OF PROOF.

Plaintiff claiming conversion because of defendant, having a lien on the chattel entitling him to possession, having agreed to accept a chattel mortgage and permit removal of the article, and then having refused to accept a tendered note and mortgage, has the burden of showing that the terms of the mortgage were definitely agreed on, and tender of a note and mortgage in conformity.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 215, 216.]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by J. S. Gregory against the Oregon Fruit Juice Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

This is an action to recover damages for the conversion of an hydraulic pressing machine and equipment. It appears that plaintiff installed his machine in the defendant's place of business at Salem for use during the berry season of 1915. The machine was incomplete when installed, and plaintiff was unable to purchase the parts needed to equip it for the work contemplated. The defendant agreed to advance the necessary funds for this purpose, taking a lien on the machine for its security. The advances of the defendant aggregated about \$400. On June 11, 1915, the parties entered into a written contract whereby defendant agreed to pay plaintiff 30 cents an hour for his services and the use of the machine. Plaintiff agreed "to give his interest bearing note for the sums of money advanced, same to be payable on or before June 1, 1916," and to give a bill of sale or chattel mortgage to secure the note. The agreement provides: "It is further understood and agreed that said moneys so advanced acts as a lien upon said hydraulic pressing machine." The machine was used in defendant's plant during the berry season of 1915, and plaintiff ceased working there in about the end of July. He had made arrangements to press apples at Lebanon, and desired to take the machine there for that purpose. He admits that defendant was not repaid its advances, and makes no claim that it waived its lien. Plaintiff does contend that subsequent to June 11, 1915, an agreement was entered into whereby defendant consented to accept a chattel mortgage for the amount of its debt, and to permit plaintiff to remove the press out of the county to Lebanon. Defendant refused to surrender the machine, and plaintiff brought this action, claiming damages in the sum of \$2,054.93. Of this sum \$504.93 is alleged as the value of the machine; the remainder of the damage is predicated on the interference with plaintiff's plans to use the machine at Lebanon. The jury rendered a verdict for plaintiff in the sum of \$225, on which judgment was entered. Defendant appeals.

William H. Trindle, of Salem, for appellant. Frederick S. Lamport, of Salem, for respondent.

McCAMANT, J. (after stating the facts as above). [1] At the conclusion of plaintiff's testimony the defendant moved for a nonsuit, and error is assigned on the denial of this motion. Plaintiff bases his claim of conversion on the refusal of the defendant to permit him to take the machine to Lebanon. If plaintiff was entitled to the possession of the machine the refusal of the defendant to surrender it was a conversion. Budd v. Multnomah Street Ry. Co., 12 Or. 271, 274,

7 Pac. 99, 101 (58 Am. Rep. 355). In this case the court said:

"The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own is guilty of a conversion."

[2] Was plaintiff entitled to the possession of the machine? It is conceded that the agreement of June 11th gave defendant the right of possession as an incident to its lien. Plaintiff relies wholly on an alleged subsequent agreement made with defendant whereby defendant covenanted to accept a chattel mortgage and permit the removal of the machine. It is conceded that when a note and chattel mortgage were tendered defendant refused to accept them. We are therefore called upon to determine whether there was any evidence of such a subsequent agreement, and whether the note and mortgage tendered were in conformity thereto.

We think there was some evidence that defendant agreed to accept a chattel mortgage, although plaintiff's testimony on this subject is contradictory. There is also evidence from which the jury could find that the parties agreed on \$365.93 as the debt to be secured by the mortgage, and June 1, 1916, as the date of maturity of the note. The evidence also justifies the conclusion that the chattel mortgage to be given was to be in such form as to permit plaintiff to take the machine to Lebanon. The evidence is silent as to all other provisions in the contract. In the case of *Holtz v. Olds*, 164 Pac. 583, decided April 10, 1917, we considered the effect of an agreement to make an agreement. The law as announced in that opinion is as follows:

"It is indeed competent for parties to enter into a preliminary agreement looking to the execution of a consequent one in the future. We have daily examples of that kind in bonds for deeds or in contracts for insurance, the policies of which are yet to be issued. But in all cases the minds of the parties must meet on the terms not only of the present convention, but also as to those of the covenants yet to be executed. If this rule be not observed in the stipulation and a substantial part is left open for further settlement without a canon by which the subsequent negotiations may be controlled there is no aggregatio mentium so essential to every contract."

[3] The burden devolved on plaintiff to prove an executory agreement to execute a chattel mortgage certain within the rule announced in the above case and the tender of a note and mortgage conforming thereto. In our opinion he has failed to do so. The only note and mortgage tendered, so far as the record shows, were dated September 11, 1915; the note bears interest only from that date. It appears that a portion of the defendant's advances were made in April and the bulk of them in June. There is no evidence that defendant waived interest earned prior to September 11th. The mortgage tendered provided that on default defendant's remedy should be to sell the property at a sale had

under his own direction. Under section 7411, L. O. L., such remedy is exclusive. The defendant may well have preferred the remedy provided by statute, eliminating as it does some obligations which the law imposes on a mortgagee under the covenants of the mortgage tendered. The instrument tendered is out of harmony with plaintiff's testimony in that it forbids the removal of the security from Marion county without the written consent of the mortgagee. The note tendered was unstamped as required by the internal revenue law then in force, and if defendant had accepted it, appreciating this fact, it would have been guilty of a misdemeanor. *Bender's War Revenue Law*, p. 55; Act of Congress, approved October 22, 1914, § 9 (38 Stat. 755, c. 331). Defendant was justified in refusing to accept the note and mortgage tendered.

Our attention is called to a line of authority holding that when a check is tendered as payment and the creditor refuses the tender on some other ground, he cannot subsequently object to the tender because it was in the form of a check. Plaintiff's allegations and proofs do not bring him within this principle of law. He does not allege a waiver of proper tender, and the proof shows that defendant assigned no reason for refusing the tender. There being no evidence that the minds of the parties ever met in an agreement subsequent to June 11, 1915, defendant was entitled to possession of the machine under the agreement of that date.

The circuit court erred in denying the motion for a nonsuit. The judgment is reversed, and the lower court instructed to enter judgment of nonsuit.

BURNETT, BENSON, and HARRIS, JJ., concur.

HAYDEN et al. v. CITY OF ASTORIA.

(Supreme Court of Oregon. May 1, 1917.)

1. APPEAL AND ERROR — 733—ASSIGNMENT OF ERROR—SUFFICIENCY.

Under the rule of the Supreme Court requiring that appellant set out briefly and concisely the errors relied on, where the bill of exceptions shows that plaintiff appellants pointed out to the lower court with precision and great detail what their contentions were, and such contentions are presented in the Supreme Court in plaintiff's briefs with the same clearness, the assignment of error that the trial court erred in not rendering judgment for plaintiffs in a larger amount is sufficient, since the rule should be construed reasonably and liberally to promote justice, and not so as to embarrass suitors by unnecessary restrictions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027.]

2. MUNICIPAL CORPORATIONS — 860(1)—IMPROVEMENT CONTRACTS — DELAYING CONTRACTORS—RECOVERY ON QUANTUM MERUIT.

Where a city, by enlarging the excavation and by imposing burdensome methods of doing the work, delayed its contractors for a dam so that they could not begin the laying of concrete

until the fall, and the most burdensome portion of the work had to be done in the winter season under most disadvantageous conditions, the contractors were entitled to recover on a quantum meruit for the excess cost incurred by them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

3. MUNICIPAL CORPORATIONS §374(4) — IMPROVEMENTS — RIGHTS OF CONTRACTORS — QUANTUM MERUIT — EVIDENCE.

In an action against a city by its contractors to erect a dam to recover on a quantum meruit for work without the contract, the contract was admissible as establishing the standard of value.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 906, 910.]

4. MUNICIPAL CORPORATIONS §360(6) — IMPROVEMENTS — EXTRA WORK — RECOVERY.

So far as work done without their contract by contractors with a city to erect a dam conforms to the contract in character and in the conditions under which it is done, the contract price will govern the contractors' extra recovery on a quantum meruit against the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

5. MUNICIPAL CORPORATIONS §360(6) — EXTRA WORK — RECOVERY ON QUANTUM MERUIT.

When contractors with a city to erect a dam did extra work under burdensome conditions not within the contemplation of the parties when the contract was made, the deviations from the contract being so material as to entitle the contractors to recover on a quantum meruit, the recovery allowed should take the form of damages adequate to compensate for the additional burdens, which damages should be added to the contract price.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

6. APPEAL AND ERROR §1010(1) — REVIEW — FINDINGS OF COURT WITHOUT JURY.

In trying a case without a jury, the circuit court exercised the functions of a jury, and its findings, having the force and effect of a special verdict, and entitling plaintiffs, in whose favor they were, to the benefit of any conclusions of law arising from them, are binding on the Supreme Court, unless wholly without support in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981.]

7. APPEAL AND ERROR §1011(1) — REVIEW — FINDING ON CONFLICTING TESTIMONY.

A finding on conflicting testimony made by the circuit court trying a case without a jury is binding on the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

8. PLEADING §385 — BILL OF PARTICULARS — LIMITATION OF PROOF.

When a bill of particulars is furnished as required by statute or by the order of a court of competent jurisdiction, the party furnishing it is confined in his proof to the items alleged therein, though he may offer proof of the value of the items along other lines than those alleged in the bill.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1299.]

9. PLEADING §314 — BILL OF PARTICULARS — STATUTE.

Under Oregon law, a bill of particulars is demandable only under the provisions of L. O. L. § 81, and, unless the complaint alleges an ac-

count, a bill of particulars is not demandable under the section.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 952, 953.]

10. ACCOUNT, ACTION ON §2 — CONTRACTORS' ACTION.

An action against a city by its contractors to erect a dam to recover on a quantum meruit for the excess cost of doing the work incurred on account of the city's increasing the amount of excavation and delaying the work, was not an action on an account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 1, 2.]

11. PLEADING §385 — BILL OF PARTICULARS — LIMITATION OF TESTIMONY — STATUTE.

In an action against a city by its contractors to erect a dam to recover the reasonable cost of extra work, where the contractors furnished an account on demand of the city, the action not being on an account, so that a bill of particulars was not demandable under L. O. L. § 84, the account furnished could not be used to shut out testimony otherwise competent in the absence of showing that the city had been misled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1209.]

12. ACCOUNT STATED §20(1) — ACCOUNTING MONTH BY MONTH.

Where contractors with a city to erect a dam frequently complained to the city's representatives that much more excavation was demanded of them than they were required by the contract to render, and notified the city's representatives several times that they would expect additional compensation, there was not an accounting month by month as matter of law because the contractors in a number of cases marked monthly estimates of their work O. K. over their signature and accepted 90 per cent. of the contract price therefor in accordance with the contract, the elements of estoppel being lacking.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 8, 98.]

13. EVIDENCE §540 — EXPERT EVIDENCE — QUALIFICATION OF WITNESS.

In an action against a city by its contractors to erect a dam to recover on a quantum meruit for extra work, a plaintiff, who had been in the contracting business for 12 years, the excavation of material having been part of the work in which he had been engaged, was qualified to testify as to what is the usual and ordinary way of making an excavation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2353.]

14. EVIDENCE §540 — EXPERT EVIDENCE — QUALIFICATION OF WITNESS.

Another witness, who had been in charge of construction work for 10 years or more up to the time of the trial, and who had built 40 miles of railroad, excavation being one of the lines in which he had had large experience, was also qualified.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2353.]

15. MUNICIPAL CORPORATIONS §374(4) — IMPROVEMENT CONTRACT — EXTRA WORK — EVIDENCE.

In an action against a city by its contractors to build a dam to recover on a quantum meruit for extra work and delay caused by the city, where a ground alleged by the contractors for their right to recover was the increased burden of the work during the winter season, their testimony tending to show that the road into the works was a good road in summer, but that it

would have been impassable in winter but for the work they did on it, was competent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 905, 910.]

16. MUNICIPAL CORPORATIONS *§*374(4)—**EXTRA WORK—EVIDENCE.**

It was also competent for the contractors to prove that their labor was less efficient in the winter season, and that the burden of operating the rock quarry was greater in the winter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 905, 910.]

17. MUNICIPAL CORPORATIONS *§*374(4)—**IMPROVEMENTS—EXTRA WORK—EVIDENCE.**

The contractors were properly permitted to show that but for the deviations from the contract complained of they could have completed the work during the summer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 905, 910.]

18. INTEREST *§*39(3)—**ALLOWANCE TO CONTRACTORS.**

In such action, the trial court improperly allowed interest on the contractors' recovery from the date of the completion of the dam, they being entitled to interest only from the date of the judgment on the amounts recovered.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 84.]

19. APPEAL AND ERROR *§*1154—**REMAND FOR CORRECTION—NECESSITY.**

Under Const. art. 7, § 3, as amended in 1910, the Supreme Court need not remand the cause for new trial to correct numerical errors in the judgment, one caused by a mistake in addition, the other by mistranscribing an item in a finding of fact, the Supreme Court being entitled to direct the trial court to correct the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4497.]

In Banc. Appeal from Circuit Court, Clatsop County; J. U. Campbell, Judge.

Action by Wilbur Hayden and others, partners doing business under the copartnership name of Bidwell, Hayden & Co., against the City of Astoria, a municipal corporation. From a judgment for plaintiffs, both parties appeal. Cause remanded, with instructions.

On August 22, 1911, plaintiffs contracted with the defendant for the construction of a dam on Bear creek in Clatsop county in accordance with plans and specifications furnished by the defendant. During the winter of 1911-1912 they cleared the reservoir site and entered on the work of excavation about April 1, 1912. Plaintiffs claim, and the lower court found, that the amount of excavation called for by the contract could have been completed in a month, or by May 1, 1912. The city engineer of the defendant demanded large additional excavation with a view to securing a satisfactory foundation for the dam; for this reason and because of the manner in which defendant's engineer required the work to be done, the excavation was not completed until August 29, 1912. This delay compelled plaintiffs to perform a large share of the work during the winter of 1912-1913 under expensive and disadvantageous conditions. The work was completed June 27,

1913, and accepted by the defendant as satisfactory.

On November 28, 1913, plaintiffs brought this action in the circuit court for Clatsop county, claiming that such deviations from the contract had been required of them as entitled them to recover on a quantum meruit the reasonable value of their work and materials. This value, they claimed, was \$61,666.47 over and above the sum of \$91,779.11, which had been paid them by the city. The circuit court struck the amended complaint from the files for failure to comply with an order to make more definite, and plaintiffs appealed to this court. The judgment of the lower court was reversed. See 74 Or. 525, 145 Pac. 1072. This court upheld the sufficiency of the amended complaint and the right of plaintiffs to recover on a quantum meruit under the allegations of this pleading. The defendant answered, denying most of the allegations of the amended complaint and setting up certain affirmative defenses. The first affirmative answer set up that the extra work of plaintiffs had been performed as "force account," and that plaintiffs had been paid therefor in accordance with their contract except for the sum of \$482.50 which defendant had tendered. The second and third affirmative answers plead an estoppel against plaintiffs by the acceptance and approval of the monthly estimates in their favor, by their request for extensions of time within which to perform the work, and by their failure to complain of the matters now relied on. The fourth affirmative answer alleges that extensions of time were granted plaintiffs, conditioned on their payment of the defendant's engineering expense during the period of extension, and a counterclaim of \$4,428.07 is set up on this account. The fifth affirmative answer tenders plaintiffs a judgment in the sum of \$10,371.11. The reply denies the material allegations of the answer.

The case was tried by the lower court without the intervention of a jury. The court passed 52 findings of fact. These findings are too lengthy to be incorporated even in substance in this statement of facts. In the main they were in accord with plaintiffs' contentions, and bore out the allegations of the amended complaint. The findings were to the effect that the departures from the contract of August 22, 1911, were so numerous and so substantial as to entitle plaintiffs to recover on a quantum meruit. The forty-eighth finding fixed the compensation of plaintiffs at \$114,604.72, this amount being made up of 15 specifications into which the work done by them was divided. In 13 of these cases plaintiffs were allowed only the prices provided by the contract. For the laying of 5,470 yards of concrete they were allowed \$11.10 a yard as against \$8.88 provided by the contract. The total excavation amounted to 6,256 yards; the lower court

allowed only the contract price for excavating 6,152 yards, but a 20 per cent. increase over the contract price was allowed for excavating 104 yards of rock. This increase amounted to \$41.60. Plaintiffs had received from the defendant \$91,848.41 on account of their compensation, and the lower court gave them judgment for the additional sum of \$22,756.31, with interest thereon from June 27, 1913, the date when the dam was completed. Both parties have appealed.

Coy Burnett, of Portland, for plaintiffs. G. C. Fulton, of Astoria (A. W. Norblad, City Atty., and G. C. & A. C. Fulton, all of Astoria, on the brief), for defendant.

McCAMANT, J. (after stating the facts as above). [1] The sole assignment of errors on behalf of plaintiffs is as follows: "That the court erred in not rendering judgment for the plaintiffs in a larger amount." The defendant contends that this assignment is insufficient. It would have been better practice for plaintiffs to specify the items in the findings of the lower court which are objected to, and also the additional amounts claimed by them for each class of work. The requirement of assignments of error is no longer statutory in this state, but is found in the rules of this court. The requirement is that appellant "set out briefly and concisely the errors relied on." The rule "should be construed reasonably and liberally to promote justice, and not so as to embarrass suitors in the appellate courts by unnecessary restrictions." 3 C. J. 1349. In other words, a party entitled to relief in this court should not be turned away remediless if any fair construction of the rule will uphold his assignments of error. "In the later cases courts have shown that they are no longer disposed to scrutinize assignments of error with the minuteness which was applied in the earlier decisions." 2 R. C. L. 163. The bill of exceptions shows that plaintiffs pointed out to the lower court with precision and in great detail what their contentions were, and these contentions are presented in this court with the same clearness in plaintiffs' briefs. In view of these other portions of the record we think the assignment of error above quoted sufficiently serves the purpose designed by the rule of this court.

[2] The lower court found that the defendant had imposed burdens on plaintiffs not contemplated by the contract, and that there had been such departures from the contract as entitled plaintiffs to recover on a quantum meruit. Plaintiffs claim that the measure of their recovery should be the cost to them of the work performed, plus 15 per cent. for overhead and profit. The evidence abundantly sustains the findings of the lower court on the subject of a departure from the contract. It sufficiently appears that the excavation contemplated by the parties when the contract was let could have been com-

pleted by May 1, 1912, and the entire dam could have been constructed by October 1, 1912; that by reason of an enlargement of the excavation and burdensome methods of doing the work, imposed on plaintiffs by defendant's engineers, the progress of the work was so delayed that plaintiffs could not begin the laying of concrete until September, 1912, and that the most burdensome portion of the work had to be done in the winter season under most disadvantageous conditions. These circumstances clearly entitle plaintiffs to recover on a quantum meruit for the reasons set forth in the former opinion of this court.

[3, 4] Evidence was offered and received on behalf of plaintiffs to the effect that contractors are usually compensated for work without their contract by the "force account" method; that is, by paying them the cost of doing the work plus a percentage to cover overhead expense and profit. Notwithstanding this testimony we think the lower court adopted the proper method of relieving plaintiffs. In this character of litigation the contract is admissible in evidence as establishing the standard of value. *Reynolds v. Jourdan*, 6 Cal. 108, 111; *Boyd v. Bargarliotti*, 12 Cal. App. 228, 107 Pac. 150, 154; *Wheeden v. Flake*, 50 N. H. 125, 128. In so far as the work conforms to the contract in character and in the conditions under which it is done, the contract price will govern. *Dermott v. Jones*, 2 Wall. 1, 9, 17 L. Ed. 762; *Hollinsead v. Mactier*, 13 Wend. 276; *Merrill v. Ithaca*, 16 Wend. (N. Y.) 586, 5-9, 30 Am. Dec. 130; *Board of Commissioners v. O'Connor*, 187 Ind. 622, 35 N. E. 1006, 1009, 37 N. E. 16; *H. E. & W. T. Railway Co. v. Snelling*, 59 Tex. 116, 119; *De Room v. Priestly*, 1 Cal. 206, 207.

[5] When, as in this case, the work is done under burdensome conditions not within the contemplation of the parties when the contract was made and when the deviations from the contract are so material as to entitle the contractor to recover on a quantum meruit, the recovery allowed should take the form of damages adequate to compensate for the additional burdens, which damages should be added to the contract price. *Dubois v. Hudson Canal Co.*, 4 Wend. (N. Y.) 285, 291; *Koon v. Greenman*, 7 Wend. (N. Y.) 121, 123; *H. E. & W. T. Railway Co. v. Snelling*, 59 Tex. 116, 120; *Wood v. Ft. Wayne*, 119 U. S. 312, 321, 7 Sup. Ct. 219, 30 L. Ed. 416. In *Jones v. Woodbury*, 11 B. Mon. (50 Ky.) 167-169, the Kentucky court says:

"The general principle applicable to the case of a special contract for erecting a house, when in the progress of the work there have been alterations or additions not originally contemplated nor expressly provided for, seems to be that as far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be paid for as if there were no contract. But the

safety of employers, and the good faith proper to be observed in all cases, requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate further that extra work either in quantity, or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such work than the contract price bears to the measure and value price of the work contracted to be done. So that if the contract price was a fourth or a fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths or four-fifths of its price according to measure and value."

The rules announced in these authorities forbid us to sustain plaintiffs' contention that they are entitled to recover the cost to them of the work and materials, plus a percentage for profit and superintendence. Their recovery was properly based on the unit prices provided by the contract with added damages to compensate for the burdens imposed upon them. This brings us to the question of the adequacy of the damages awarded.

[6] The circuit court in trying this case exercised the functions of a jury. Its findings are binding on this court, unless wholly without support in the evidence. The lower court found that Lars Bergsvik was engineer of the defendant in charge on its behalf of the work in question, and that Arne Froyseth was his assistant who was present on the work at all times. There was some conflict in the testimony as to the circumstances under which the work of excavation proceeded. The court resolved this conflicting testimony in favor of plaintiffs, finding as follows:

"That both the said Bergsvik and said Froyseth were unacquainted with the nature of the ground and soil or depth necessary for a proper foundation, and that Froyseth, being the subordinate, was required frequently during the progress of the work to stop operations until he could consult with Bergsvik, who was not present upon the work, and that these delays and the extra depth to which plaintiffs were required to excavate prevented the plaintiffs from doing the work or completing it within the time originally contemplated and fixed by the contract. That the specifications provide that the defendant shall furnish plaintiffs with stakes at all times to indicate the depth of the grade and excavation, and that this the defendant at all times refused to do, and that the furnishing of the same would have been a material help and assistance to the contractor in the performance of his work, and the refusal of the defendant to so furnish them prevented the plaintiffs to the extent that it was impossible for them to complete the work in the time originally contemplated by and fixed in the contract. That the refusal to furnish stakes mentioned in the last finding, and the refusal of the defendant, through its agents, to at any time advise the plaintiffs the depth necessary for the excavation, required the plaintiffs to excavate the material in layers; thereby the plaintiffs were required to make many small operations of what would ordinarily be one complete operation, and thus prevented the plaintiffs from doing the work within the time originally contemplated and fixed by the contract."

The testimony showed without contradiction that the method of excavating exacted by defendant's engineers added greatly to the expense and burden of the work. The findings above quoted have the force and effect of a special verdict. Plaintiffs are entitled to the benefit of any conclusions of law arising from them. We think the conclusion is inevitable that plaintiffs sustained material damage by these burdens imposed upon them, and that they are entitled to such damages over and above the contract price as will make them whole. The circuit court allowed plaintiffs only the contract price for 6,152 yards of excavation, and allowed an increase of 20 per cent. thereover for excavating 104 yards. The damages so awarded amount to \$41.60, a sum scarcely more than nominal. The finding of the lower court was to the effect that the disadvantageous conditions of which plaintiffs complain applied to the whole excavation. There is abundant evidence to support this finding. It follows that the damages of plaintiffs should be predicated on the entire excavation, and not confined to an insignificant fraction thereof. We can find no better rule for admeasuring the damages than that applied by the lower court. Plaintiffs will therefore be awarded damages in the matter of excavation equal to 20 per cent. of the contract price thereof. This will increase the judgment of plaintiffs by \$1,880.90.

[7] Plaintiffs complain that the damages awarded them for laying concrete are also inadequate. There is a great deal of evidence from which the circuit court might have found plaintiffs entitled to larger damages, but the record contains considerable evidence on behalf of the defendant on this issue. The contract price for laying concrete was \$8.88 a yard. This was all that was allowed for 2,926.2 yards. For the remainder, 5,470 yards, the lower court allowed plaintiffs \$11.10 a yard. A considerable portion of the concrete was laid under conditions contemplated when the contract was signed and the evidence justified the lower court in withholding damages to plaintiffs based on this portion of their work. As to the concrete laid in the winter season, two of defendant's witnesses testified that an advance of 10 per cent. on the contract price would be adequate to cover the difference in conditions. Another witness for defendant placed the difference as low as 2 to 3 per cent. In view of the conflict in the testimony the finding of the circuit court is binding upon us on this issue. We think plaintiffs are entitled to no further modification of the judgment of the lower court.

The defendant assigns error on the refusal of the lower court to sustain a motion for a nonsuit. As already indicated, we think the evidence sustained the right of plaintiffs to recover on a quantum meruit for the reasons alleged in their amended complaint.

The contention of the defendant on this branch of the case is based chiefly on another ground. The defendant demanded of plaintiffs a bill of particulars prior to the previous appeal. Plaintiffs furnished in response to this demand a "statement showing expenditures building dam." This statement set out the various items of expenditure incurred by plaintiffs in carrying on their work. They claimed 15 per cent. of these expenditures, presumably as a charge for overhead expense. The statement credited the defendant with certain payments and with another item. The net claim was for \$61,666.47, the amount for which judgment was asked in the amended complaint. On the former appeal this court held that if this statement was regarded as insufficient it should have been attacked by a motion to make more definite. Thereafter, without awaiting any action on the part of defendant, plaintiffs filed an amended verified statement of account or bill of particulars. This statement showed in great detail every expenditure made by plaintiffs in the performance of their work. It claimed the same damages as those alleged in the amended complaint. The defendant excepted to this amended statement, but the exceptions were never passed upon by the lower court. At the trial defendant contended that no evidence of the value of the work could be received other than its cost as set forth in this statement. Defendant also objected to the evidence of plaintiffs offered to prove the cost of the work as not tending to support the allegations of the amended complaint. The motion for a nonsuit is based chiefly on the alleged failure of plaintiffs to prove the value of their work in accordance with their statement.

[8, 9] It is true, as contended by the defendant, that when a bill of particulars is furnished as required by statute or by the order of a court of competent jurisdiction, the party furnishing such bill is confined in his proof to the items therein alleged, although he may offer proof of the value of the items along other lines than those alleged in the bill. *Robinson v. Well*, 45 N. Y. 810. A bill of particulars under our law is demandable only under the provisions of section 84, L. O. L. This section is as follows:

"A party may set forth in a pleading the items of an account therein alleged, or file a copy thereof, with the pleading verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true. If he do neither, he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, verified as in this section provided, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one filed or delivered is defective."

[10] Unless the complaint alleges an account a bill of particulars is not demandable under this section. *Davis v. Hofer*, 38 Or. 150, 157, 158, 63 Pac. 56; *Ives v. Shaw*, 81

How. Prac. (N. Y.) 54; 1 O. J. 653. We do not think this is an action on an account. We have held that plaintiffs are in error in their contention that they are entitled to recover their disbursements, plus a percentage. The case therefore is one in which parties acting under a misapprehension of their remedy have furnished an account not demandable of them, and which does not correctly state the amount to which they are entitled or the method of arriving at that amount. The account furnished is in harmony with the contentions of plaintiffs and with the amended complaint which alleges a usage to compensate by the force account method for work done without the contract. The adverse party has not been misled. The city understood perfectly that plaintiffs were claiming the reasonable value of the work done and material furnished. Both parties were chargeable with knowledge of the law. They therefore knew that plaintiffs were entitled to recover, if at all, the contract price of the work, plus such sum as should make them whole for their burdens not covered by the agreement. To ignore the evidence of the reasonable value of plaintiffs' work admitted in the court below, and to set aside the findings based thereon, because of this statement, would be to exalt technicality and to lose sight of justice. In *Seaman v. Low*, 17 N. Y. Super. Ct. 337, 352, the court said:

"I apprehend that it is not the office of a bill of particulars to state the grounds of a plaintiff's claim, but simply to point out the items and particulars which he claims in such a manner as will enable the party to prepare for trial, and if the specification be ambiguous or susceptible of a double interpretation, the defendant should apply to have it made more definite and certain, or the plaintiff would be permitted to give any evidence not clearly excluded by the terms used, subject only to the duty of the court to see that the defendant is not misled to his prejudice."

[11] It is not intended by this opinion to question the power of a court of general jurisdiction in a proper case and on a proper showing to require a party to furnish his adversary with such a specification of the cause of action or defense as shall prevent surprise and insure a fair trial. When an account is so furnished the party providing it is properly confined in his proof to the items alleged therein. What we do hold is that where an account is furnished on demand of the adverse party in a cause wherein the account is not demandable, the account so furnished cannot be used to shut out testimony otherwise competent, in the absence of a showing that the adverse party had been misled.

The former appeal did not raise the question of the measure of plaintiffs' damages, and the court did not consider the question of whether this is an action on an account within the purview of section 84 L. O. L. We adhere to the ruling on the former appeal that the lower court erred in requiring plaintiffs to make their amended complaint more

definite, and in entering judgment of dismissal for failure to comply with that order.

Under the contract plaintiffs were entitled to a monthly estimate of their work and to payment month by month of 90 per cent. of the amount found due under the estimates. In a number of cases they marked estimates "O. K." over their signature. It is claimed that this circumstance and the acceptance of money under the estimates preclude a recovery in this case. The finding of the lower court on this subject was as follows:

"With reference to the estimates hereinbefore mentioned, the engineers in charge for the city, without any participation therein by the plaintiffs, made out statements of the amount of work done during the previous month, and these statements were from month to month received by the plaintiffs; but the plaintiffs at no time represented to the defendant that such estimates were received in final payment, and at no time represented to the defendant that the plaintiffs were waiving their claim for the reasonable compensation of the work performed and labor furnished, and the defendant, by paying said amounts to plaintiffs, has in no wise prejudiced itself or changed its position because of the acceptance by plaintiffs of said estimates, and the plaintiffs at times marked an O. K. upon the estimates, but that no importance was attached to this O. K. on the part of the city, and the same was not attached by the plaintiffs nor understood by the defendant as being any agreement as to the correctness or finality of said estimates, and the same are not in any wise final, but on the contrary by the specifications herein and by the conduct of the parties, the whole matter was at all times left to final adjustment at the conclusion of the work, and that at such time of final adjustment the plaintiffs and the defendant were unable to agree either as to the basis of the adjustment or the amount owing to plaintiffs."

The defendant contends that this finding is without support in the evidence. There is testimony of the plaintiff Meager that he complained to Mr. Bergsvik of the manner in which plaintiffs were required to excavate, and that Bergsvik said: "Go on and do your excavating and a good job of concrete, and we will take care of this in some way." Plaintiffs claim to have relied on this assurance from defendant's engineer, and to have regarded the monthly estimates as tentative. They frequently complained to defendant's representatives that much more was demanded of them than they were required by the contract to render. They notified the city's representatives several times that they would expect additional compensation.

[12] It cannot be said as a matter of law that there was an accounting month by month. 1 R. C. L. 211. The elements of estoppel are lacking. The city paid plaintiffs less than they are entitled to, on the city's own showing. In any event the finding above quoted is sufficiently supported by the evidence, and is fatal to defendant's contentions on this branch of the case.

[13, 14] The defendant reserved numerous objections and exceptions to the testimony offered and admitted on behalf of plaintiffs.

The plaintiff Wilbur Hayden was asked the following question: "What is the usual, ordinary way of making an excavation, if you know?" This question was objected to on the ground that the witness was not qualified. The testimony shows that he had been in the contracting business for 12 years, and that the excavation of material was a part of the work in which he had been engaged. We think his qualification sufficiently appeared, and that other testimony of the same witness objected to on the same ground was properly admitted. The defendant reserved an objection and exception to similar testimony from the witness J. F. Meager. The testimony shows that this witness had been in charge of construction work from 1902 up to the time of the trial, that he had built 40 miles of railroad, and that excavation was one of the lines of work in which he had large experience.

[15-17] The court received over the objection and exception of the defendant testimony tending to show the burden and expense of plaintiffs in maintaining during the winter of 1912-13 a wagon road from Svenson to the place where the work was in progress. Svenson is a station on the Astoria & Columbia River Railroad. One of the grounds alleged by plaintiffs for their right to recover on a quantum meruit was the increased burden of the work during the winter season. It being their contention that if the work had been only that provided by the contract it could have been completed in the summer of 1912. Their testimony tended to show that the road into the works was a good road in summer, but that it would have been impassable in the winter season but for the work which they did on it. We think the evidence was competent and material. It was also competent for plaintiffs to prove that their labor was less efficient in the winter season, and that the burden of operating the rock quarry was greater in the winter. The court properly permitted plaintiffs to show that but for the deviations from the contract complained of they could have completed the work during the summer of 1912. Objection was reserved by the defendant to the evidence of plaintiffs as to the manner in which the excavation was done, the defendant contending that it was the duty of plaintiffs to have made written objection to the city, and that in the absence of such written objection plaintiffs acquiesced in the orders of the engineers. The lower court found against the defendant on this issue, and we cannot say as a matter of law that plaintiffs acquiesced in the deviations from the contract of which they complain in this suit.

Numerous other objections and exceptions were reserved to the testimony on the part of the defendant, but it is not deemed necessary to set them out in the opinion. We are clear that no reversible error was committed.

ted by the lower court in the respects complained of.

[18] It is finally contended by the defendant that the lower court erred in allowing interest on plaintiffs' recovery from the date of the completion of the dam. This contention is well taken. *Sargent v. American Bank & Trust Co.*, 80 Or. 16, 39, 154 Pac. 759, 156 Pac. 431; *Baker County v. Huntington*, 48 Or. 593, 603, 87 Pac. 1036, 89 Pac. 144. Plaintiffs are entitled to interest only from the date of the judgment in the lower court on the amounts which they recovered therein.

Our attention is directed by the defendant to an error of \$31 in the judgment of the lower court. One of the items making up the amount allowed plaintiffs is an item for force account aggregating \$3,359.85. It appears from the forty-second finding of fact that this item should be \$3,328.85. The defendant is entitled to have the judgment corrected to the extent of the error, and there is a further error of 21 cents in the addition of the items in finding 48.

[19] Under section 3 of article 7 of the Constitution, as amended in 1910, it is not necessary for this court to remand the cause for a new trial. We are entitled to direct the lower court to correct the judgment in the respects above indicated. *Knight v. Beyers*, 70 Or. 413, 418, 419, 134 Pac. 787.

The cause will therefore be remanded to the lower court, with instructions to modify the judgment by eliminating therefrom all interest prior to the date of the judgment, and also the further sum of \$31.21. The sum of \$1,880.90 should be added to the remainder so obtained.

WHITE v. EAST SIDE MILL & LUMBER CO.

(Supreme Court of Oregon. May 1, 1917.)

1. APPEAL AND ERROR ¶780(1)—RIGHT OF APPEAL—PAYMENT OF COST.

The mere fact that costs on former appeal have not been paid does not entitle the defendant to dismissal of the appeal in the absence of showing that the costs cannot be collected.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3121.]

2. EVIDENCE ¶471(19) — CROSSING ACCIDENTS—ADMISSIBILITY.

In action for death of traffic officer when struck by auto truck, it was not error to admit statement of witness as to what seemed to him to have been the circumstances where he used the expression as the equivalent of "as I saw it."

3. APPEAL AND ERROR ¶237(2)—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

A party who fails to move to strike out an answer to a question has no cause for complaint that the testimony was admitted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 233.]

4. EVIDENCE ¶471(19) — CROSSING ACCIDENTS—ADMISSIBILITY.

While as a general rule a witness must testify to facts and not conclusions or opinions,

yet, in action for death of traffic officer when struck by auto truck whose tires were of peculiar make and the tracks of which could not be reproduced, a witness could say that the tracks found fitted the tires of defendant's automobile.

5. EVIDENCE ¶594—PROVINCE OF JURY—DISREGARDING TESTIMONY.

The jury need not accept as conclusive uncontradicted statements of any witness, and it may disregard undisputed testimony if unsatisfactory.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2431.]

6. MUNICIPAL CORPORATIONS ¶706(6) — CROSSING ACCIDENTS—QUESTIONS FOR JURY—EVIDENCE.

Evidence held to present a jury question whether driver of defendant's automobile truck was negligent in turning to the left before crossing an intersection, and in so doing killing the traffic officer stationed at such intersection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

7. MUNICIPAL CORPORATIONS ¶706(8)—INJURIES TO PERSONS—INSTRUCTIONS—CARE REQUIRED.

In action for death of traffic policeman when struck by auto truck, instruction precluding recovery if the policeman was negligent, and that the jury could consider that he had duties to perform, and could not look after himself as an ordinary pedestrian, is not objectionable as imposing less than the ordinary degree of care upon the officer, where it further instructed the jury to consider all the circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

8. TRIAL ¶217—INSTRUCTIONS.

Instruction that the jury is supreme in the realm of fact, and that the court is supreme in the realm of law, whether it correctly states it or not, is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 483, 485.]

9. TRIAL ¶260(1) — INSTRUCTIONS—REPETITION.

Refusal of requested instructions which, in so far as they conform to the law, were covered by charges given, was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651.]

10. COSTS ¶280(1) — DILATORY APPEAL — DAMAGES.

Where an appeal was taken in good faith and with probable cause, the respondent is not entitled to 10 per cent. of the judgment as damages for delay.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 963, 986, 996.]

In banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Lulu R. White, as administratrix of the estate of James R. White, deceased, against the East Side Mill & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 81 Or. 107, 155 Pac. 364, 158 Pac. 173, 527, 161 Pac. 969.

This is an action by plaintiff, Lulu R. White, as administratrix of the estate of James R. White, her deceased husband, to recover damages for a personal injury to him whereby he lost his life. The cause was tried before the court, and a jury resulting

in a verdict and judgment for \$6,000 in favor of the plaintiff. Defendant appeals.

The gist of the complaint is that on November 17, 1914, the decedent was a traffic officer in the city of Portland stationed in the middle of the intersection of East Burnside street and Union avenue; that an auto truck of defendant driven by one Mergens was carelessly and negligently driven against him causing his death; that it was the duty of the driver of said truck to proceed at a reasonable speed, and that he drove at a rate greater than was safe and proper; that in driving the truck from Union avenue east on Burnside street, it was his duty, while the auto was being so turned to the left, to run to and beyond the center of the intersection of such streets, at which point James R. White, the deceased, was then standing and directing traffic as a police officer; that defendant's servant did not drive the truck to and beyond the center of the intersection of said streets, but operated it directly over and across the center of the intersection thereof over the point where James R. White was then standing and ran into and struck him, knocking him with great force to the pavement, and causing the injuries which resulted in his death. It is further alleged that the seat of the auto truck was negligently inclosed at the rear and on both sides with a hood, which prevented the driver from looking to the rear and sides and ascertaining the condition of the traffic. The defendant answered, admitting that the decedent was killed by a collision with the truck driven by its servant, but denied all the allegations of negligence on its part, and alleged contributory negligence upon the part of the traffic officer in turning his back to the auto and stepping backwards in front of the automobile as it passed him, thereby causing the accident. The reply put in issue the new matter of the answer in so far as it was in conflict with the allegations of the complaint.

Section 10 of the traffic ordinance of the city of Portland, which is pleaded, requires that all vehicles approaching a street intersection with the intention of turning shall, in turning to the left, run to and beyond the center of the intersection of such streets. Section 18 enacts that:

"The rate of speed of all vehicles within the congested district shall not exceed 15 miles per hour, and shall at no time be greater than is reasonable and proper, having regard to the safety of the public, the traffic or use of the streets or highways then being traveled."

The intersection of Union avenue and East Burnside street is within the congested district of the city of Portland. There is a double track street railway on East Burnside street and on Union avenue leading from the north, diverging east and west on the former street. The auto truck mentioned was a 4-ton truck, with a 50 per cent. overload. The wheel base was 16 feet; the total length being about 25 feet.

Hamilton Johnstone, of Portland (Asher & Johnstone, of Portland, on the brief), for appellant. R. A. Sullivan, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] Counsel for defendant moved the court to strike the case from the trial docket for the reason that the costs upon the former appeal (see 81 Or. 107, 155 Pac. 364, 158 Pac. 173, 527) and those upon the trial in the circuit court had not been paid. This was refused, and the ruling constitutes the first assignment of error. This court denied a similar motion in 1894 in the case of Osmun v. Winters, 25 Or. 260, 274, 35 Pac. 250. There the ruling was in consonance with article 1, section 10, of the Constitution, which provides that:

"Justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

This is not a second or a vexatious action. Defendant contends that if plaintiff had shown that she was too poor to pay the costs, the trial of the cause might properly have proceeded. On the other hand, there is no showing that the costs cannot be collected from the estate or that defendant will be injured. There was no error in denying the motion.

[2] The third, fourth, and fifth assignments of error involve the reception of certain evidence over defendant's objection and exception. Harry Root, a witness for plaintiff, in describing the approach of the truck, testified as follows in part:

"Q. What did the truck do then? A. It came down—well, it came down about here (indicating), in here, some place, and gave a very sharp turn, bringing the fore wheels just almost inside this track here (indicating), and—and then the rear wheels, it being such a long truck, came over and struck the officer. There was a pipe in front of the front wheels that seemed to control the feed, an oil pipe that seemed to feed the chain— Q. (Interrupting) The front truck? A. I mean, the rear wheel. There seemed to be an oil pipe sticking out there that caught the officer and threw him. * * * Q. Tell, Mr. Root, just what you saw there. A. Well, the truck turned down there, and naturally the rear wheels came between him and I, but the part that seemed to strike him, was that pipe."

Objection was made that the witness "should state just what he saw, not his conclusion of what 'seemed' to be there." After some argument and the third objection, the trial court explained that "I take it that the witness uses the term 'seems' when his judgment of the thing is that he saw it." We think the language of the witness was to the same effect as though he had said "It appeared to me" or "as I saw it," and that the evidence was not an expression of an opinion or conclusion, and that the ruling was correct. We fail to see that it was very material whether the part of the machine in front of the rear wheel was a guard rail, oil pipe, or a part of the chain attachments.

The evidence indicated that the decedent was struck by the part of the truck in front of the rear wheel.

[3] Sam Goldeen, who was sitting in a machine about 50 feet away on Burnside street and saw the accident happen, testified for plaintiff to the effect that there was a traffic officer standing right in the center of the street; and that on Union avenue north of East Burnside street there was a truck standing up even with the property line, and quite a ways out from the west curb far enough to have one wheel on the street car track. To the question, "What did you see happen there, Mr. Goldeen?" he answered: "Well, the traffic officer motioned for him to come ahead and he came right straight down here. I thought he was going to our right straight ahead, the way I was looking at him, on account of the way he turned this corner. He went down there cramping his wheels, and he shot right straight up this track. You could see that he didn't go right straight up that track (indicating), there—" The witness further testified in substance that before the machine started the officer was facing north, and then turned around facing south; that the truck came down with its front wheels a little beyond the center of the intersection; that the driver then turned east with his wheels on the track, the back ones over the track and the front ones just about straddling each rail; that in making the turn the truck did not run to and beyond the center of the intersection of those streets; that he judged the left rear wheel of the truck went about two or three feet north of the intersection; and that as the truck attempted to make the turn the officer was struck and run over. While, as we understand, the witness' first statement in regard to the officer being struck was his way of expressing what he saw, yet the ruling of the court was favorable to the defendant, and the witness changed his answer to the emphatic statement that "the officer was struck and run over." Further, there was no objection to the question, and while a request was made for counsel for plaintiff to consent to the striking out of the answer objected to no direct motion was made to that effect for the court to rule, upon, which was the proper remedy. For these three reasons defendant has no cause for complaint. The authorities cited do not apply.

Henry W. Norene, a police officer and a witness for plaintiff, testified that after the accident happened he followed the truck about three blocks and brought it back to the street crossing, and about 30 or 40 minutes after the injury he examined the tracks at the intersection of the streets mentioned. To the question, "What kind of marks did you see on the pavement of this street intersection, Mr. Norene?" he replied, "Why, there were blotches in the dust that would be made by tires of that kind of wheels."

To the further interrogatory, "What did you discover in regard to any marks upon that street intersection?" he answered, "I traced the tracks that the rear wheels had taken, especially the left rear wheel." Upon motion of defendant's counsel plaintiff's attorney consented that the part of the answer as to what wheels made the tracks be stricken out as a conclusion. In answer to the question, "What kind of marks did you see on the pavement of this street intersection, Mr. Norene?" he said, "Why there were blotches in the dust that would be made by tires of that kind of wheel." Upon a motion of counsel for defendant to strike out the latter part of the answer the court held that the evidence came within the ruling in *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401, that as the marks were effaced and could not be reproduced or described to the jury precisely as they appeared to the witness who examined them at the time, he might give his conclusion for the consideration of the jury. Counsel for defendant saved an exception to this ruling.

[4] As a general rule a witness must testify to facts and not to conclusions or opinions in order that the jury may draw inferences from the evidence and conclusions from the facts presented. There are exceptions to this rule founded upon necessity, for the reason that the facts cannot be reproduced or depicted to the jury precisely as they appeared to the witness, and from the nature of the subject it is impractical for him to relate what he may have seen without supplementing his description with his conclusion. Under such circumstances a common observer, although not an expert, may testify to his opinion or conclusion regarding what he has seen. *Bank v. Fire Association*, 33 Or. 172, 50 Pac. 568, 53 Pac. 8; *State v. Barrett*, 33 Or. 194, 54 Pac. 807; *Everart v. Fischer*, 75 Or. 316, 328, 145 Pac. 33, 147 Pac. 189. An exception to the general expert evidence rule is the admissibility of testimony in regard to the identity and appearance of persons and things, respecting which facts, when personally observed by any one of maturity and ordinary intelligence, he may express an opinion. *Weiss v. Kohlhagen*, 58 Or. 144, 113 Pac. 46; *Kitchin v. Oregon Nursery Co.*, 65 Or. 20, 25, 130 Pac. 408, 1133, 132 Pac. 956; *Kelly v. Weaver*, 77 Or. 267, 271, 150 Pac. 166, 151 Pac. 463. The evidence objected to comes within the exception to the general rule. It would have been practically impossible for the witness, whether lawyer or layman, to describe the auto truck tire which appears from the photo to be a kind of double nonskid type, and the marks in the dust, both of which he had seen, so that the jury could determine whether the tracks were made by the truck. The evidence was not vital. Other eyewitnesses to the casualty delineated the course taken by the auto truck at the time. There was

no error in denying the motion to strike out the evidence.

[5, 6] At the close of plaintiff's evidence in chief, counsel for defendant moved the court for a nonsuit, and at the proper time requested the court to direct a verdict in favor of defendant. These requests may be considered together. The question involved is the crux of this case. In addition to the evidence above referred to the testimony tended to show that at the time of the accident complained of, in making the turn to the left at the intersection of Union avenue and East Burnside street the defendant's driver did not run to and beyond the intersection of the streets named before turning, according to the direction of the city ordinance, but negligently ran the truck at a high rate of speed so that the front part of the same was slightly past the street center, and then turned and ran to the left causing the truck to run over the center of the street intersection where plaintiff's intestate was stationed in the performance of his duty as a traffic officer; and that the part of the truck in front of the left rear wheel struck White, knocked him down, and the wheel ran over and killed him. Counsel for defendant do not question that the evidence on the part of the plaintiff tends to show such facts, but submits that "uncontradicted and unimpeached testimony shows it was a physical impossibility for the left rear wheel of the auto truck to take the courses marked on the maps by Root and Goldeen." The material point is that the defendant's servant drove the truck against the decedent in the center of the intersection of the streets where he was in the performance of his duty in violation of the ordinance of the city, which suggestion is a sufficient answer to this argument. What route the truck took, where it started from to get to the center of the street, whether the witnesses for plaintiff marked the course of the left rear wheel on the map correctly, or whether Clark, defendant's expert, was correct, are matters of secondary consideration. It was for the jury to settle the minor discrepancies in the evidence and determine what was the actual truth as to the main facts. A jury is not bound to accept as conclusive the uncontradicted statements of any witness; they may disregard undisputed testimony if it is unsatisfactory to them. *Taffe v. O. R. & N. Co.*, 60 Or. 177, 117 Pac. 989; *Graham v. Coos Bay R. & N. Co.*, 71 Or. 393, 139 Pac. 337. We have no duty pertaining to the weight of the testimony. Suffice it to say that the evidence tends directly to show that the auto truck was not run to and beyond the center of the intersection of the streets before turning, and to sustain the allegations of the complaint. Whether the witnesses were exactly correct in all the details would not prevent the jury from segregating the evidence and finding where the preponder-

ance was. *Sullivan v. Wakefield*, 59 Or. 401, 117 Pac. 311; *Jones v. National Laundry Co.*, 66 Or. 218, 133 Pac. 1178; *Dickerson v. E. & W. Lumber Co.*, 79 Or. 281, 155 Pac. 175; *Johnson v. P. R. L. & P. Co.*, 79 Or. 403, 408, 155 Pac. 375; *Childers v. Brown*, 81 Or. 1, 158 Pac. 166. The evidence on this and other points was amply sufficient to be submitted to the jury. There was no error in denying the defendant's motion for a nonsuit, nor in refusing the request for a directed verdict for the defendant.

[7] Defendant complains of the charge given to the jury. The court in effect told the jury that for the plaintiff to recover, the death of White must have been caused by the sole negligence of the defendant, which sole negligence must have been the proximate cause of his death; that to constitute negligence there must be a want of reasonable care which a person of ordinary prudence would have used under the existing circumstances; that if they found that White himself was negligent, and that his negligence contributed in any way to bring about his death, that is, if the combined negligence of both him and the defendant brought about his death, there could be no recovery. The court also instructed the jury in substance that a man must exercise his senses of hearing and seeing and everything of that kind for his personal safety and protection; but that it should take into account that "that man, as a traffic officer, had duties to perform there, other than looking after his own personal safety," and that he "had the right to expect that those traveling those streets would take into consideration the fact that he had duties to perform there, and that he could not look after himself as would one who had nothing to do but walk around those streets." Defendant objects and excepts to the portion of the charge quoted, particularly as to the degree of care required of plaintiff's husband. Upon this phase of the case defendant requested the court to instruct the jury as follows:

"Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances, and it should be proportioned to the danger and peril reasonably to be apprehended from a lack of the proper prudence. A person must use his faculties in proportion to the danger of his employment, and must use every reasonable precaution to provide for his safety and such as an ordinarily prudent man under the same circumstances would do."

We compare the charge given with the request of the defendant, and are unable to distinguish any material difference in regard to the part complained of. The language used by the court was more closely applied to the case. In plain terms the court instructed the jury to take into consideration the surrounding circumstances of the place. Ordinary care would suggest more vigilance by the same person upon a crowded thoroughfare than in a secluded spot. We should not confound the alertness which ordinary

care and prudence would demand of a reasonably careful person in a place of danger, with the care itself. Great danger requires great vigilance. *Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721, 48 L. R. A. (N. S.) 971. We do not agree with the suggestion of the learned counsel, if such was intended, that the instruction given required less than ordinary care on the part of the traffic officer. The charge indicated that it was the duty of the officer to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided. *Carroll v. Grande Ronde El. Co.*, 47 Or. 424, 84 Pa. 389, 6 L. R. A. (N. S.) 290; 11 *Thompson on Neg.* § 1463; 1 *Shearman & Red.* on Neg. (8th Ed.) § 87; *Graves v. P. R. L. & P. Co.*, 68 Or. 232-234, 134 Pac. 1, Ann. Cas. 1915B, 500.

The charge enjoined no less a degree of care on the part of the officer than it did upon the defendant's driver of the auto truck. The chauffeur should have been watchful, and should have known that in making a turn the rear wheels of a vehicle do not follow exactly in the course of the front ones. As the jury must have found there was plenty of room to turn the machine at the street intersection without running over the center and striking the officer while he was at his place of duty. Indeed, it is difficult to see how the jury could have found otherwise from the evidence. The facts in the case at bar differ widely from those in the cases of *Clark v. Boston & Albany R. R. Co.*, 128 Mass. 1, and *Loettker v. Chicago City Ry. Co.*, 150 Ill. App. 69, cited by the defendant. From the two decisions cited the only variance in law which we can discern, as given the jury by the trial court, is a mere matter of phraseology. The instruction to the jury was in plain language and fairly submitted the question to them. The duty of the traffic officer required him to be at the center of the intersection where the evidence tended to show, and the jury found, that he was. In the ordinary course of affairs he would not expect that a vehicle would be run over the center of the intersection contrary to the law, and he could not be expected to be looking in both directions at the same time.

[8] It is asserted by defendant that the court erred in charging the jury as follows:

"You are supreme in the realm of fact. Just as supreme as you are in the realm of fact, just so supreme is the court in the realm of law. He may not correctly have stated the law which is to govern you, and he may be far afield. Be that as it may, there is a tribunal appointed by law to correct him if he is in error. You are not that tribunal."

[9] This was in effect the usual and proper direction and caution to the jury. The requested instructions in so far as they conform to the law were covered by the court's charge, and there was no error in refusing those not given. *State v. Branson*, 161 Pac. 689; *Pilson v. Auto Co.*, 67 Or. 537, 136 Pac.

642; *Powder Valley State Bank v. Hudelson*, 74 Or. 191, 144 Pac. 494.

[10] We have examined other assignments of error which we do not deem require further discussion. Application is made by plaintiff for damages to the amount of 10 per cent. of the judgment for the delay caused by this appeal. We cannot say the appeal was not taken in good faith. There was probable cause therefor, and the application is denied.

Finding no error in the record, the judgment of the lower court is affirmed.

HAYES v. HAYES. (No. 13672.)

(Supreme Court of Washington. May 5, 1917.)

DIVORCE—§ 184(10)—FINDINGS—REVIEW.

Where divorce was granted upon evidence in considerable conflict of the nature which renders proper disposition of the cause much more easily determined by the trial than by the appellate court and the appellate court cannot say that the evidence does not preponderate in support of the trial court's conclusion and there is no question of law involved, the decree will be affirmed. [Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 572.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Suit by Russell S. Hayes against Elva M. Hayes. Decree for plaintiff, and defendant appeals. Affirmed.

R. L. Blewett and Jesse A. Frye, both of Seattle, for appellant. E. H. Guile, of Seattle, for respondent.

PARKER, J. The plaintiff, Russell S. Hayes, commenced this action in the superior court, seeking a decree of divorce dissolving the marriage relation existing between him and the defendant, Elva M. Hayes. She answered, resisting the granting of a divorce decree, and by cross-complaint sought a decree of separate maintenance. The trial resulted in findings and decree of divorce in favor of the plaintiff and denial of a decree of separate maintenance to the defendant. She was by the decree awarded attorney's fees and also alimony in the total sum of \$500, to be paid by the plaintiff at the rate of \$50 per month for the period of ten months. The defendant has appealed from this disposition of the cause to this court.

At the time of the marriage both parties were 32 years old. They both possess considerable earning power, as evidenced by the salaries earned by each in their respective employments. They have no children. The divorce was granted by the superior court upon the ground of appellant's personal indignities towards respondent. The evidence is in considerable conflict. It is of that nature which renders the proper disposition of the cause much more easily determined by the trial court than by this court. We cannot say from our review of the evidence in

cold typewriting that it does not preponderate in support of the trial court's conclusion. There is no question of law involved here. We deem it unprofitable to notice here in detail the distressing happenings of this unfortunate marriage.

The decree is affirmed.

ELLIS, C. J., and FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

STATE ex rel. O'NEIL v. WALLACE, County Auditor. (No. 18696.)

(Supreme Court of Washington. May 2, 1917.)

1. CONTEMPT \Leftrightarrow 81—AGAINST COUNTY AUDITOR—EXPIRATION OF TERM OF OFFICE—EFFECT.

Contempt of county auditor in not obeying writ of mandamus directed to him in his official capacity, and for which an order for his commitment was issued, was purged and the controversy ended when his term of office expired; it being then impossible for him to obey the writ.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 272.]

2. MANDAMUS \Leftrightarrow 187(10)—AGAINST COUNTY AUDITOR—EXPIRATION OF TERM OF OFFICE—EFFECT OF APPEAL.

Remanding appeal and directing vacation of order committing county auditor for failure to comply with mandate, because of expiration of term of office, does not affect judgment in the mandamus case, and applicant is left to her rights thereunder as against the present auditor.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 437.]

Department 1. Appeal from Superior Court, Whatcom County; William H. Pemberton, Judge.

Application on relation of Georgia O'Neil for writ of mandamus against Will D. Wallace, Auditor of Whatcom County, Washington. Writ issued, and, upon defendant's refusal to comply therewith, order entered committing defendant to county jail, and defendant appeals. Cause remanded, with direction to set aside order of commitment.

W. P. Brown and Loomis Baldry, both of Bellingham, for appellant. Brown, Peringer & Thomas, of Bellingham, for respondent.

WEBSTER, J. [1] On May 2, 1914, respondent applied to the superior court of Whatcom county for a writ of mandate commanding appellant as auditor of Whatcom county to countersign and register in the manner prescribed by law two certain warrants, which were alleged to have been drawn in due and regular form by the school board of school district No. 32 in that county. It was alleged that the warrants had been presented to the auditor with the request that he countersign and register them, but that he had refused to do so. An alternative writ of mandate was issued, ordering the auditor to countersign and register the warrants or to appear and show cause at a

time designated why he refused to do so. Such proceedings were had in the cause that on June 20, 1914, the alternative writ of mandate was made peremptory and the auditor was commanded to countersign and register the warrants. On July 31, 1914, Lyman Seelye and wife, as residents and taxpayers of school district No. 32, commenced an action in the superior court, making the school district and certain individuals, including appellant as auditor for Whatcom county, parties defendant, and prayed, among other things, that the auditor be restrained and enjoined from countersigning or registering the warrants which he had theretofore been ordered to countersign and register in the mandamus proceeding. A temporary order was granted, restraining the auditor from countersigning or registering the warrants, and on August 4, 1914, by order of court, the temporary restraining order was continued in force pending the final determination of the action. On February 7, 1916, respondent filed a motion supported by affidavit for a citation against appellant, ordering him to appear and show cause why he should not be punished for contempt for failing and refusing to obey the peremptory writ of mandate issued on June 20, 1914. The citation issued, and such steps were taken that on May 17, 1916, the court entered an order committing appellant to the county jail until he should obey the command of the writ by countersigning and registering the warrants. From this order the present appeal is prosecuted.

On February 21, 1917, appellant filed in this court his affidavit setting forth that his term of office as auditor for Whatcom county expired on January 8, 1917, and since that date he has not been connected with that office in any capacity; that he now is the duly elected, qualified, and acting sheriff of Whatcom county. At the oral argument it was conceded that the statements contained in the affidavit were true.

It will be observed that the peremptory writ of mandate was directed to appellant in his official capacity as the auditor of Whatcom county, and the judgment in the contempt proceeding ordered appellant committed to the county jail until he should obey the writ. It being now conceded that appellant's term of office as auditor has expired and he no longer has authority to countersign or register the warrants, and it is therefore impossible for him to obey the writ, we are constrained to hold that the contempt has been purged and the controversy has ended.

[2] The judgment in the mandamus proceeding is in no way affected by this appeal, and respondent must be relegated to her rights thereunder as against the present auditor of Whatcom county.

The cause will be remanded, with direction

to cancel and set aside the order committing appellant to the county jail until the warrants shall be countersigned and registered.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

OSBORNE et ux. v. CHICAGO BONDING & SURETY CO. (No. 13711.)

(Supreme Court of Washington. May 5, 1917.)

PRINCIPAL AND SURETY — 39—LIABILITY OF SURETY COMPANY—MISREPRESENTATION.

The fact that a surety company, executing a bond to purchaser of uncompleted building to secure completion by the seller, was uninformed that stated consideration was to be partly in money and partly in other property, did not release it from liability, where company retained no interest in purchase price, and no prejudice resulted, and the contract being made upon the credit of the seller, and not upon the credit of the contract between seller and buyer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82–85.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by J. E. Osborne and wife against the Chicago Bonding & Surety Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

William E. Froude and Higgins & Hughes, both of Seattle, for appellant. Robert F. Booth and Peters & Powell, both of Seattle (Hyman Zettler, of Seattle, of counsel), for respondents.

MOUNT, J. This action was brought to recover upon a surety bond. The plaintiffs had judgment below, and the defendant bonding company has appealed.

The facts are substantially as follows: In September of 1914, Robert Knipe agreed to sell two lots in Seattle to the respondent Mr. Osborne for the sum of \$40,000. An apartment house was being constructed upon one of these lots. The house was not completed, and Mr. Knipe agreed that he would finish the building, and furnish a surety bond for the completion of the house according to the plans and specifications. The contract between Mr. Knipe and Mr. Osborne provided that the \$40,000 should be paid, \$5,000 in cash, \$5,000 by second mortgage upon the property, the assumption by Mr. Osborne of a first mortgage for \$15,000, and the balance by a deed to certain described real estate. When Mr. Knipe applied to the appellant bonding company for a bond, he stated that the consideration was \$40,000. No statement appears to have been made as to how the money was to be paid. The surety bond was prepared by Mr. Osborne's attorney. It was for \$15,000. The condition of the bond, as stated therein, was as follows:

"The condition of this obligation is such that whereas the said J. E. Osborne and Edith May Osborne, his wife, have purchased from the said

Robert T. Knipe for the sum of forty thousand dollars (\$40,000.00), that certain property in the city of Seattle more particularly described as lot eight (8), block thirteen (13), Law's addition to the city of Seattle, together with the building now being erected thereon, and, whereas, the said Robert T. Knipe is constructing said building upon said property and whereas said building is not as yet fully completed and whereas, said Robert T. Knipe has agreed to fully complete said building according to the original specifications and has agreed to pay and discharge all bills for labor and material which have been incurred, or which shall be incurred against said property on said building and to complete the same free and clear of all liens of every kind and nature and whereas, said Robert T. Knipe has further agreed to complete said building by the first day of November, 1914: Now, therefore, if the said Robert T. Knipe shall well and truly save and hold harmless the said J. E. Osborne and Edith May Osborne, his wife, from any and all claims and liens against said premises above described by the reason of the construction of said building upon the property, * * * then this obligation to be void. * * *

Thereafter, the building was completed, but Mr. Knipe failed to pay certain laborers and materialmen. Liens were filed against the building, and Mr. Osborne was required to pay the same, to the amount of \$8,000. This action was brought upon the bond for that sum.

No question is made by the appellant about the amount of the liens which the respondents were compelled to pay. The sole contention of the appellant is that the surety is not liable because the bond recites that the consideration for the purchase of the property was \$40,000, when, in fact, the purchase price of the property was not \$40,000 in cash, but that this sum was to be paid, partly in cash, partly by mortgage, and partly by other property. It is strenuously argued by the appellant that the consideration passing from Mr. Osborne to Mr. Knipe was not a cash consideration, as represented to the surety, but was a property consideration, and, because the method of payment was not stated to the surety, the surety was, in effect, defrauded and led to enter into a contract which, if the facts had been stated, it might have refused.

The appellant relies upon the case of Atlantic Trust & Deposit Co. v. Union Trust & Title Corporation, 110 Va. 286, 67 S. E. 182, 135 Am. St. Rep. 937. In that case, a bond, much the same as in this case, was given to complete the performance of a building contract. In that case, it was represented that a loan of \$70,000, bearing interest at 6 per cent., was made for the purpose of completing the building, when, in fact, the loan was for \$60,600, and was at 8 per cent. It was held in that case that the surety company was not liable because the contract was not properly represented to the surety company, and that the representation that the loan was for \$70,000 was, in substance, a fraud upon the surety company. In that case, the borrowed money was for the

purpose of completing the building, and, of course, the surety company had a right to look to the whole of that fund to complete the building for its benefit. In the case we are now considering, the transaction was fully completed. The surety company did not reserve any right to any of the purchase money which was being paid by Mr. Osborne to Mr. Knipe, and whether the payment was in cash or property was of no interest to the surety company. The bond recites that the consideration was \$40,000. Mr. Knipe and the respondent Mr. Osborne had agreed upon that consideration. The payment was not to be in cash, but it was to be partly cash, partly by a mortgage upon the property, and the balance by a transfer of real estate. We are at a loss to understand in what way the surety company had any interest in the method of payment, because no lien was reserved by the surety company against the purchase price. The purchase price was to be paid by Mr. Osborne to Mr. Knipe, and was paid, and the transaction closed at the time the bond was delivered to Mr. Osborne. There is no showing that Mr. Osborne was required to account, in any way, to the surety company for any of the payments which he was required to make. It is, no doubt, true that the surety company may have inferred, from the statements that the consideration was \$40,000, that this money was to be paid in cash. The agent of the surety company apparently did not inquire whether it was to be paid in cash at once, or by installments, or by other means, and the reason is obvious. It was a matter of total indifference to the surety company in what way the \$40,000 was paid, because it retained no lien thereon, but trusted entirely to the credit of Mr. Knipe for the fulfillment of the conditions of the bond. The surety company in this case was a paid surety. The record does not show that any damage has accrued to the indemnity company by reason of the method in which the \$40,000 was paid. In the case of *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, at page 477, 112 Pac. 517, at page 519, we said:

"The general rule is, if the building owner advances to the builder more than he is entitled to under the contract, the surety will be released. The rule rests upon two reasons. The one is that such advance deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind to induce him to finish the work in accordance with the terms of his obligation."

Again, on page 479 of 61 Wash., on page 519 of 112 Pac., we said:

"In all the cases decided by this court, and by all other courts holding that payment by the owner would not discharge the principal, the facts have been such that no prejudice resulted by reason of such payments to the surety."

There is no claim that Mr. Osborne advanced to Mr. Knipe more or less than he was required, under his contract. He was obligated to pay the full amount to Mr. Knipe. The surety company, as above stated, retained no interest therein. It follows, of course, that no prejudice resulted to the appellant by reason of the fact that the purchase price of the lot and the apartment house was paid to Mr. Knipe in money, or other property.

Upon the facts in the case, we are satisfied that the surety company issued this bond for the completion of the building upon the credit of Mr. Knipe alone, and not upon the faith or credit of the contract which he had with the respondents Osborne; and, for that reason, appellant should respond upon the bond.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

HICKS v. BAUMGARTNER et ux. (No. 13892.)

(Supreme Court of Washington. April 30, 1917.)

1. APPEAL AND ERROR ⇨1058(1)—SCOPE OF REVIEW—HARMLESS ERROR.

Error, if any, in excluding testimony of a witness who experimented with an automobile that it made a great noise when operated, was harmless, where the same witness and another testified that the car could be heard for at least a block and a half.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200.]

2. HUSBAND AND WIFE ⇨235(4)—VERDICT—SUFFICIENCY.

Where the verdict found for the plaintiff against "M. B. et ux.," it was sufficient to sustain a judgment against the defendant husband and the community of the husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 852, 882.]

3. JUDGMENT ⇨256(1) — CONFORMITY WITH VERDICT.

Where the verdict warranted judgment against the husband and the community, a judgment "against the defendants and each of them" was too broad, since it could be construed as being against the wife individually.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446, 454.]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Mary A. Hicks against Matt Baumgartner and wife. Judgment for plaintiff, and defendants appeal. Remanded, with directions to modify.

John M. Gleeson and A. G. Gray, both of Spokane, for appellants. McCarthy & Edge and W. G. Boland, both of Spokane, for respondent.

CHADWICK, J. Plaintiff was struck by an automobile driven by defendant Matt

Baumgartner. She brought this action to recover damages. The wife of Matt Baumgartner was made a party to the suit. To the allegations of negligence, defendants raised the general issue and pleaded further the defense of contributory negligence. From a verdict and judgment, defendants have appealed. Plaintiff testified that she did not hear the automobile at or before the time she was struck. The court refused to permit the defendants to show, by a witness who had experimented with the machine, that it made a great noise when operated; the purpose being to show that it was unlikely that plaintiff did not hear the machine, or that, in the exercise of ordinary care, she should have heard it, and was therefore guilty of contributory negligence.

[1] It is true that the court sustained objection to a question general in its terms and not sufficient in form to indicate a similarity of physical conditions; but, waiving the suggestion that the allowance or disallowance of such testimony is a matter so entirely within the discretion of a trial judge that appellate courts will rarely question his rulings, we think defendants were not prejudiced, for immediately after the court had sustained the objection upon a proper question, objections were overruled, and the witness answered:

"Well, you could hear the car, and you could hear that particular car for at least a block and a half."

Another witness testified to the same effect.

The next objection is to the form of the verdict and judgment. The jury returned a verdict in form as follows:

"We, the jury in the case of Mary A. Hicks, Plaintiff, v. Matt Baumgartner et ux., Defendants, find for the plaintiff and assess her damages at the sum of \$500.00 five hundred dollars. Spokane, Washington, March 31, 1916. Alex M. Hogg, Foreman."

The judgment on the verdict is:

"The above-entitled cause came on for trial before the court and a jury regularly impaneled and sworn to try said cause, and the parties having produced their proof, and said cause having been regularly submitted to the jury, and the verdict having been returned in favor of the plaintiff, and motion for new trial having been denied: Now, therefore, it is ordered and adjudged, that the plaintiff have judgment against the defendants and each of them for the sum of five hundred (\$500.00) dollars, together with plaintiff's costs and disbursements of this suit taxed at \$——. Done in open court this 8th day of April, 1916."

[2] It is contended that this verdict will not support a judgment; that the judgment is not sufficient in form to sustain an execution against the separate property of the defendant wife.

As to the sufficiency of the verdict to sustain a judgment against Mamie F. Baumgartner as a member of the community, we think there can be no doubt. Unless an intent to discharge one of several defendants is manifest, we will presume that the jury

intended to find against all of the record defendants. No such intent is apparent. The abbreviation "et ux," as well as the name of Matt Baumgartner, may be rejected as surplusage, and we still have a verdict which will sustain a judgment against defendant Matt Baumgartner and the community. We do not understand that it is necessary to employ the names of parties litigant in a verdict unless from the nature of the case a several verdict may be returned; and this, the record shows, the jury was invited to do either by the instructions of the court or by request of counsel.

[3] "The judgment is broad enough in its terms to be construed as a personal judgment" against Mamie Baumgartner. "Is this it is erroneous." Continuing to use the words of Godefroy v. Hupp, 160 Pac. 1674: "This, however, does not necessitate a reversal of the judgment." We will direct that it be so modified as to run against the property of defendant Matt Baumgartner, and the community consisting of Matt Baumgartner and Mamie F. Baumgartner.

Remanded, with directions to modify the judgment accordingly.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

J. M. COLMAN CO. v. CUMMINGS et al (No. 13686.)

(Supreme Court of Washington. May 7, 1917.)
MORTGAGES — 176 — FAILURE TO RECORD—NOTICE.

Where a mortgage was not recorded for several days, and in the meantime defendants purchased the mortgaged land and recorded their deed, their deed was subject to the mortgage if they knew or should have known thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 425.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the J. M. Colman Company against Thomas H. Cummings and Margaret A. Cummings, his wife, and others. From a decree for plaintiff, the defendants Cummings appeal. Affirmed.

Oliver Hulback, of Seattle, for appellants. W. H. Beatty and R. E. Thompson, Jr., both of Seattle, for respondent.

MOUNT, J. Action to foreclose a real estate mortgage. On a trial of the case, the decree prayed for in the complaint was entered. The defendants Cummings and wife have appealed.

The only question presented in the case is one of fact, and that is, whether Cummings and wife, at the time they purchased the mortgaged property, knew of the mortgage or had sufficient notice to put them upon inquiry. After hearing all the evidence, the trial court found that the appellants did have no

tice of sufficient facts to put them upon inquiry concerning the mortgage.

It appears that, in 1909, B. Rosenthal gave to the respondent a mortgage on lots 20 and 21, block 5, Sea View Park, West Seattle, to secure a promissory note for \$500. Thereafter, in the year 1912, Mr. and Mrs. Cummings desired to purchase one of these lots, and requested the respondent to execute a release of the mortgage upon that lot. The respondent agreed to do so, and did execute a release of one of the lots. It appears that the lot released was not the one Mr. and Mrs. Cummings desired to purchase. Thereupon, at the request of Mrs. Cummings and Mr. Rosenthal, the respondent executed a release of both lots, and took a mortgage back on lot 20, for the total amount due from Mr. Rosenthal, namely, \$620. This latter mortgage was not recorded for several days. In the meantime Mr. and Mrs. Cummings purchased both lots from Mr. Rosenthal and recorded their deed. Afterwards the mortgage was recorded. The evidence is in dispute as to whether Mr. and Mrs. Cummings knew of the subsequent mortgage at the time they purchased both lots. After reading all the evidence in the case, we are satisfied that the preponderance is in favor of the respondent to the effect that Mr. and Mrs. Cummings either knew of the second mortgage or should have known of it. Their deed, therefore, was subject to the mortgage.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER and HOLCOMB, JJ., concur.

LYONS et ux. v. INGLE et al. (No. 13115.) (Supreme Court of Washington. May 1, 1917.)
WATERS AND WATER COURSES §—138—PRIVATE DITCH.

One who for 20 years uses water from a private ditch on his neighbor's land, and annually cleans and repairs the ditch, is, where the acts and declarations of the neighbor recognize his right to some proportion of water, entitled as of right to a proportion thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151.]

En Banc. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

On petition for rehearing. Former order modified, and cause remanded, with instructions.

For former opinion, see 91 Wash. 179, 157 Pac. 480.

H. N. Martin and Merritt, Jesseph & Merritt, all of Davenport, for appellants. W. E. Southard, of Wilson Creek, for respondents.

FULLERTON, J. This cause is before us on the grant of a rehearing upon the departmental decision reported in 91 Wash. 179, 157 Pac. 480, wherein the decree of the superior court quieting title in respondents to

a certain ditch and water right on appellants' land was reversed. The evidence as given by the parties to the action was flatly contradictory and far from satisfactory and convincing on any theory; but, as the effect of our former decision was to deprive the respondents of the use of water which they had enjoyed for over 20 years, the cause was assigned for a second argument before the court sitting en banc.

A brief summary of the facts in the case is here given in order to make clear the situation of the parties. In the year 1889, Lester Popple, the father of the appellants Mrs. Ingle and Mrs. Jenks, settled upon certain land in Lincoln county through which ran a stream known as Crab creek. Within the confines of Popple's land, this creek branched into three channels, afterwards reuniting again in one main channel. From the south channel Popple led a ditch to a large pond or pool, which was thus kept supplied with water for his stock and from which he occasionally took water for irrigating small tracts. In 1891, respondents acquired land west of Popple's, a portion of which they irrigated for a couple of years from what appears to have been overflow waters escaping from Crab creek during periods of high stage and reaching their land by means of natural depressions in the soil. In the latter part of 1892, respondent B. J. Lyons entered into an agreement with Popple, whereby the former was allowed to tap the pond on Popple's farm and lead water therefrom by a ditch to a 7-acre orchard tract belonging to Popple, and from there on down to respondents' land, where the water could be used for irrigating some 30 acres. It does not appear whether this was originally a mere permissive use of a ditch and water right or the grant of an easement. This ditch was constructed by Lyons and used by him and Popple jointly for about 11 years. In the year 1904, it was necessary to shift a part of the ditch farther north by reason of the location of a public road through Popple's land, which location partially covered the existing ditch. The necessary work of reconstructing the ditch was done by Popple. The joint user of the ditch by Lyons and Popple continued thereafter without any friction until the latter's death in July, 1913. For a period of 20 years Lyons had looked after the cleaning and repair of this ditch, employing thereon annually the labor of two men usually from two to five days. He had also on occasions cleaned the ditch constructed by Popple, which tapped the waters of Crab creek. The waters of this creek at the place of intake were 2½ feet in depth. The ditch built by Lyons and afterwards partially relocated by Popple was some 30 inches in width, with a usual depth of 1 foot of water running at the rate of 2 feet per second of time. This amount of water was subject,

however, to fluctuations due to the stage of water in the Crab creek source of supply. The ordinary volume of water carried in the ditch was practically all necessary for the irrigation of respondents' 30 acres and appellants' 7 acres. In the year 1915, the appellants, as the successors of Popple, denied Lyons any greater water right than the use of such surplus as might remain after they had distributed what water they needed upon their land. At the same time, the appellants were proposing to take water from the ditch for the purpose of irrigating 25 acres that had not theretofore been irrigated. As this would practically deprive the respondents of water, they brought suit to quiet title to the ditch and water right and to restrain interference therewith. The action included not only the ditch as constructed by Lyons and reconstructed by Popple, but also the Popple ditch between the creek and the pond.

The evidence introduced at the trial to establish the rights of the parties, we may repeat, is most unsatisfactory, although it is possible that nothing more definite can be produced. A more careful perusal of it has convinced us, however, that we were in error in our former opinion in holding that the respondents' right to the use of water from the ditch was merely permissive. We think the evidence justifies the conclusion that Popple, not only by his acts but by his declarations, recognized a right in the respondents to some proportion of the water, and that this, together with the long-continued use of the water by the respondents, justified the trial court in finding that they were entitled as of right to a proportion thereof.

But we think the court was in error in dividing the water on the basis of $\frac{1}{37}$ to the appellants and $\frac{30}{37}$ to the respondents. There is evidence that Popple at times irrigated a larger tract of land than the 7-acre tract, not only from what may be called the joint ditch, but from the ditch leading from the source of supply to the pond mentioned; and this without dispute as to his right by the respondents. Indeed, it seems to us that this area equals, if it does not exceed, the area irrigated by the respondents. While Popple's use of the water for the larger area was intermittent and may not have seriously interfered with the quantity of water required by the respondents, it tends to refute the finding of the trial court that the respondents had acquired the right to so large a proportion of the water. It must be remembered that Popple was the original appropriator of the water, that his land supports the ditches in which the water is carried, and that there is on his land a much larger area capable of irrigation than the seven acres he planted to an orchard. In view of these facts, we think it not reasonable to suppose that he intended to surrender all of his acquired rights save such as might be sufficient to irrigate the 7-acre orchard tract.

For want of a more definite basis for a division, therefore, we believe it would be more in consonance with the rights of parties and with the equities of the case to divide the water equally between them, than to award the whole to one of the parties, or to divide it on the basis of division employed by the trial court.

Our former order will be modified, and the cause remanded to the trial court, with instruction to award to each of the parties an equal division of the water, with such right to maintain the ditches as may be necessary to insure the permanence of the water supply.

ELLIS, C. J., and PARKER, MOUNT, MAIN, WEBSTER, CHADWICK, MORRIS, and HOLCOMB, JJ., concur.

GEISSLER et al. v. GEISSLER et ux.
(No. 13597.)

(Supreme Court of Washington. May 5, 1917.)

1. HUSBAND AND WIFE \S 270(2) — ACTIONS FOR TORTS—PARTIES.

In an action for injuries from an assault committed by a husband in taking possession of an automobile, the community property of the husband and wife, the wife was properly joined as a party, as the act was for the benefit of the community and created a community liability.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 969, 970, 974.]

2. ASSAULT AND BATTERY \S 43(2)—INSTRUCTIONS—INDEFINITENESS.

Defendant attempted to prevent plaintiff from taking possession of an automobile which he had sold conditionally to plaintiff's husband and was mounting to the front seat when defendant put her aside with more or less force, taking the front seat himself. She immediately climbed to the rear seat, remained in the automobile while defendant was driving to his garage, storming at him and working herself into a state of high excitement, and refused to leave the car after reaching the garage, but sat there in the cold, wrapping herself in a damp lap robe. Held, that in an action for injuries an instruction that it was the duty of plaintiff, knowing that she was pregnant, to avoid where possible any altercation or excitement, or to voluntarily engage in any altercation or excitement, that might tend to injure her health while in such critical condition, though correct as a general statement, was too indefinite to be of value when applied to the facts, as it did not sufficiently define the acts for which defendants were or were not liable.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57, 58, 62.]

3. DAMAGES \S 62(2)—PERSONAL INJURIES — PROXIMATE CAUSE.

While defendant was liable for any injuries necessarily flowing from the undue force employed by him, he was not liable for any aggravation thereof resulting from plaintiff's voluntary acts.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 120-123.]

4. DAMAGES \S 185(1) — EVIDENCE — SUFFICIENCY.

Evidence held to show that defendant's violence towards plaintiff did not cause injuries justifying a verdict of \$3,000, reduced by the

trial court to \$2,000, or for any amount in excess of \$750.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503, 505, 508.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Mabel Geissler and husband against George Geissler and wife. From a judgment for plaintiffs, defendants appeal. Remanded, with instructions.

Defendants' requested instruction mentioned in the opinion was as follows:

I instruct you that it was the duty of the plaintiff Mabel Geissler, knowing that she was six months pregnant with child, to avoid where possible any altercation or excitement, or to voluntarily engage in any altercation or excitement, that might tend to injure her health, while in such critical condition of health.

O. J. Albers, Herman Allen, and W. W. Langhorne, all of Chehalis, for appellants. C. A. Studebaker, of Chehalis, for respondents.

FULLERTON, J. This is an action for damages for personal injuries claimed to have been inflicted upon the plaintiff Mabel Geissler by the defendant George Geissler, in which recovery is sought against the community composed of George and Isabelle Geissler. Howard Geissler, who, as the husband of Mabel Geissler, joins as plaintiff, is the son of the defendants.

Howard Geissler was in possession of an automobile, which he had bought from George Geissler under a conditional sales contract which by its terms provided that, in case of default in payment of any installment note given for the purchase price, "the vendor shall be empowered to take possession * * * with or without process of law, as vendor may elect." The purchaser being in default for the payments falling due on the tenth days of October and November, 1915, George Geissler on November 11th called at the public garage operated by Howard and demanded payment. Howard Geissler was unable to make payment, but claimed he would be able to do so during the course of the day. George Geissler, being dissatisfied with such assurance and assuming that his contract gave him the right to repossess himself of the machine without resort to legal proceedings, started to take possession, cranking the machine for that purpose. Mabel Geissler, who was present in the garage where she acted as bookkeeper for her husband, undertook to prevent the withdrawal of the car, and was in the act of mounting to the front seat when George Geissler put her aside with more or less force in order to take the front seat himself. She immediately climbed to the rear seat, when her four year old daughter was handed to her, and she was carried to the home of George Geissler, where the car was placed in his private garage. She refused to vacate the car, and sat there for an hour in the cold, wrapping herself in a damp lap robe. When her husband

arrived with a car to take her away she was in a fainting condition, and he had to carry her from the one car to the other. She revived on the way to Howard's garage, but was in a hysterical condition. A physician was summoned, who gave her some medicine to quiet her, and advised that she be taken to her home. At the time of this incident Mrs. Geissler was six months advanced in pregnancy. In taking her home the car stuck in the mud at about a block and a half from her mother's home, and she was taken into a neighbor's house from which, within a short time, she was assisted to walk to her mother's. She had pains in her back, and was fearful of a miscarriage. A doctor was summoned, who discovered some rythmical contraction of the womb. He took measures to check any threatened danger of miscarriage, and ordered her to her bed for some weeks' time. No complications arose, and, at the proper period, she was delivered of a healthy child. One month after the birth of the child she began this action for damages, alleging that the force used by George Geissler in dragging her backward from the car had bruised her arms and shoulders, sprained her spine, and injured her in the region of the abdomen and womb, rendering probable the premature birth of her child; that she had been confined to her room for two months by reason of defendant's fault, and would be further confined to her room for some time; that she had suffered great physical pain and mental anguish, and would continue to suffer in like manner in the future; and asked \$200 for medical attendance, \$200 for household assistance, and \$4,000 for her physical and mental suffering. The jury awarded \$3,000, which was reduced by the trial judge to \$2,000, and judgment given for the latter sum. The defendants have appealed.

[1] The first error assigned is the overruling of defendants' demurrer to the complaint on the ground of misjoinder of parties in making the wife of George Geissler a defendant. There is no merit in this assignment. The alleged tort may have been committed by the husband alone, but it was done in taking possession of community property and with the purpose that his act should inure to the benefit of the community. This created a community liability. *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, 36 L. R. A. (N. S.) 88, Ann. Cas. 1913A, 318.

[2] Complaint is also made of the instructions given by the court and of the refusal to give a certain requested instruction. These we shall not notice in detail. While the instructions given were somewhat long and complicated, our study of them has convinced us that they contain nothing requiring a reversal. The requested instruction, while correct as a general statement, was too indefinite to be of value when applied to the facts; it did not sufficiently define the acts giving rise to the injuries complained

of for which the appellants were or were not liable to respond in damages.

[3, 4] There was sufficient evidence to warrant the submission of the case to the jury, but we are clearly of the opinion it did not justify the amount of damages awarded by them. We think the size of the verdict indicates that the jury were influenced by passion and prejudice, and that the action of the trial court in reducing it did not go far enough. Conceding that undue force may have been employed by George Geissler in preventing Mrs. Geissler's entrance into the car, he would be liable only for the injuries necessarily flowing from such violence, and not for any aggravation thereof resulting from the voluntary acts of Mrs. Geissler. The evidence on the part of appellants, as appears from the testimony of Mrs. Geissler and her mother and sister, was that she had one foot on the running board and one foot on the floor of the car, when George Geissler seized her by her two arms between elbow and shoulder and jerked her backward so violently that she would have fallen if her mother had not caught her. George Geissler's testimony was that she had one foot on the floor with one hand on the door and one on the bow of the seat; that he removed her hand from the bow and brushed by her into the front seat; that Mrs. Geissler did not lose her balance. In this connection it may be observed that the alleged assault did not so far overcome her as to hinder her entering into the rear seat as quickly as he entered the front one, and that her mother immediately passed to her a four year old child. In confirmation of the appellants' testimony as to the manner of handling her, she further testified that a couple of days later she discovered black and blue marks on her arms where she had been seized. But no complaint of pain in the arms was made to the doctor by whom she was examined on the day of the trouble for any possible injuries; her complaint at that time being as to her back and abdomen. The medical testimony was to the effect that it was usual for a woman in her state of pregnancy to have pains in the back, and that they were probably due to her condition rather than to the act of pulling her out of the car. The examination by her own physician discovered one of the premonitory symptoms of miscarriage in the rythmical contraction of her womb, but nothing further. The medical experts, however, testified that this could be induced by anger and excitement. The evidence discloses that Mabel Geissler is a nervous, hysterical woman, and that she was in a state of extreme anger and hysteria due to her part in trying to prevent her father-in-law from taking the car. She knew her condition of pregnancy and the care she should take of herself; but she nevertheless attempted forcibly to prevent the removal of

the car, and, falling in that, indulged in violent movement to enter the car before it could get under way. During the ride she worked herself into a state of high excitement, storming at her father-in-law. On arrival at his garage she stubbornly sat in the car for an hour, attempting to ward off the cold by wrapping herself in a damp lap robe. In the light of the evidence, the injuries she suffered were largely due to her own condition and conduct, for which the appellants were not responsible. Her fears of miscarriage, in so far as they were occasioned by her own misconduct, are not an element of damage, and her actual sufferings were so largely the result of her own negligent conduct that they cannot be charged as a natural sequence of the acts of appellant. The doctor summoned to attend her on her removal to her husband's garage testified that, from his observations, she could not have been seriously injured. The doctors appointed by the court to examine her prior to the trial, six months and a half after the alleged assault, found no indication of the pains she claimed to be suffering at that date.

The cause is remanded to the trial court, with instructions to vacate the judgment upon the return of the remittitur herein, and if within 30 days thereafter the respondents shall, in writing, remit \$1,250 from the judgment as rendered by the trial court, the court shall then enter judgment against the appellants for \$750. Otherwise it shall grant a new trial.

ELLIS, C. J., and PARKER and HOLCOMB, JJ., concur.

SCHOENHEIDER v. TUENGEL. (No. 13683.)

(Supreme Court of Washington. May 2, 1917.)

1. HOMESTEAD §57(3)—ACQUISITION—GOOD FAITH—STATUTE.

Evidence that plaintiff, after entry of judgment against him, made a homestead entry and built a small house on land previously owned and lived there with his daughter a small portion of the time, no efforts being made to improve the property, held insufficient to show homestead occupation in good faith under Rem. Code 1915, § 552, providing that premises must be actually intended and used as a home for the claimant.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 85.]

2. HOMESTEAD §31—ACQUISITION—INTENT.

Since the idea of a home is the basis of the homestead act, the declarant's honest intention to actually occupy premises as a home is necessary.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 39.]

Department 1. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Franz Schoenheider against

Martha Dehne Tuengel. Judgment for defendant, and plaintiff appeals. Affirmed.

Cooley, Horan & Mulvihill, of Everett, for appellant. E. W. Klein, of Snohomish, and Q. A. Kaune, of Everett, for respondent.

WEBSTER, J. Appellant filed a declaration of homestead on a tract of land situated in Snohomish county, and subsequently brought this action to quiet his title thereto and to enjoin respondent from levying upon and selling the land under execution. Appellant, who was a widower, claimed to be the head of a family under subdivisions 2 and 5 of section 553, Rem. Code, alleging that he had residing with him on the premises a minor son, and an adult daughter who was unable to care for or support herself. Respondent denied that appellant was the head of a family, that he and his family were residing on the premises at the time the declaration of homestead was filed, and that appellant intended to actually occupy the land as a home. The cause was tried upon its merits, resulting in a judgment denying the relief prayed and dismissing the action.

[1] The salient facts are these: Respondent, with his daughter and son, resided in the city of Snohomish for about 10 years prior to the summer of 1912, at which time he dismissed his housekeeper, stored his household goods, and sent the children to the home of their married sisters who resided near the city of Chicago. Immediately thereafter, appellant spent most of his time in California, visiting in Germany, and living with his daughters in the East. On July 9, 1914, respondent recovered a judgment against appellant in the superior court for Snohomish county. In August, 1914, appellant went upon the premises in question, consisting of about 40 acres of raw, unimproved land and built a small house or shack thereon. The building was 14 feet wide, 28 feet long, and was constructed out of plain boards, was not plastered, and had but one outside door. Upon the completion of the house, appellant took a few articles of furniture and some household goods to the place, and, in the latter part of August, he and his daughter went to live upon the land claiming it as their home. On September 2, 1914, he filed a declaration of homestead in the office of the auditor for Snohomish county. At the time of the trial, which occurred on February 21, 1916, no clearing or improving of any kind had been done on the land. There were no outbuildings on the place, and no poultry, horses, or stock of any kind had ever been kept on the premises by appellant. About the first of December, 1914, appellant and his daughter went East, ostensibly on a visit, and remained there until March, 1915. In May, 1915, they again went East and did not return until August, 1915. On October 22, 1915, this action was commenced. In November, 1915, they again left for the East

and did not return to Snohomish county until January 30, 1916, about three weeks prior to the trial.

It is undisputed that, during the time appellant and his daughter were in Snohomish county after the declaration of homestead was filed, they kept trunks and wearing apparel at the home of an intimate friend who lived in the city of Snohomish. During the whole of this time they would go into the city on Friday or Saturday each week and stay at the home of their friend over Sunday, usually returning to the country on Monday or Tuesday, though sometimes not until later in the week. While visiting at the home of his friend, appellant contributed to some extent to the payment of the household expenses. The minor son at the time of the trial was over 20 years of age and has since attained his majority. He did not attend the trial and had not been in the state of Washington since the summer of 1912. After finishing the grade school in Snohomish, he continued his studies in Portland for 2 years. He then went to Milwaukee and attended college, and later went to Chicago, and was taking a course in a business college in that city at the time of the trial. He is possessed in his own right of an estate valued at about \$6,000. He has never lived on the lands claimed as a homestead, and there is no evidence in the record indicating that he ever intended to do so. The clear inference is entirely to the contrary. Indeed, the record is silent as to whether it was his intention to return to the state of Washington after finishing his education. The trial court found that the adult daughter was able to care for and support herself and was not dependent upon her father. This finding is supported by the clear preponderance of the evidence. The judgment below was based upon the thought that the son had never actually resided on the premises with his father, and that mere constructive residence growing out of the principle that the domicile of the father is the domicile of his minor child is not sufficient to satisfy the provisions of the homestead statute.

As we view the record, it will not be necessary to enter upon a consideration of this very interesting question. Rem. Code, § 552, provided that the premises included in the homestead must be actually intended and used as a home for the claimant. The facts to which we have referred in the light of the details gathered from careful examination of the record convince us that appellant never intended in good faith to occupy the land as a home for himself and his son. His pretended residence was merely colorable, and the filing of the declaration of homestead was not for the purpose of establishing and maintaining a home, but was solely for the purpose of defeating his creditors.

"If the intention of the debtor when he occupies land as a homestead is not only to make

it his present home, but also to prevent creditors from collecting their debts by subjecting the property thereto, the exemption may nevertheless be secured; but, in the absence of good faith upon the debtor's part in respect to occupancy of the property, no homestead can be obtained by him." 21 Cyc. 471.

"It was an enlightened public policy, looking to the general welfare as well as to that of the individual citizen, which dictated the passage of the homestead act; and the obvious intent of the act is to secure to every householder, or head of a family, a home, a place of residence, which he may improve and make comfortable, and where the family may be sheltered, and live beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid." *Wassell v. Tunnah*, 25 Ark. 103.

[2] The idea of home is the very foundation rock upon which all homestead laws are based, and, unless it is the honest intention of the declarant to actually occupy the premises as a home, he is not within the protection of the statute. We are not unmindful of the rule that statutes of this character are not in derogation of the common law, but are to be liberally construed to the end that the wise and benevolent policy which prompted their enactment may be carried into effect. At the same time, it is equally the duty of the courts not to permit these humane laws to be prostituted and perverted to the purpose of enabling an unscrupulous debtor to avoid the payment of his honest obligations by resorting to their provisions as a mere subterfuge with no honest intention or purpose of occupying the land as a home. Especially is this true in this state, where a homestead once acquired is not lost by failure to occupy it, but can only be abandoned by a formal declaration to that effect.

Affirmed.

ELLIS, MORRIS, MAIN, and CHADWICK, JJ., concur.

NORTHERN CODFISH CO. v. STIBERG et al. (No. 13678.)

(Supreme Court of Washington. May 5, 1917.)

CORPORATIONS §306—DIRECTORS—INDIVIDUAL LIABILITY.

Under Rem. Code, §§ 3677, 3697, 3698, imposing certain individual liabilities on directors and stockholders, and providing that corporations and the members thereof shall be subject to the conditions and liabilities therein imposed and none others, the directors of a corporation were not personally liable for the fraud of the president and manager of the corporation, in which they did not participate, and of which they had no knowledge, merely because they knew of other fraudulent acts on his part and failed to discharge him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the Northern Codfish Company against C. O. Stiberg and others. From a

judgment dismissing the action on demurrer, plaintiff appeals. Affirmed.

Willett & Oleson, of Seattle, for appellant. Winfield R. Smith, of Seattle, for respondents.

MOUNT, J. In this action, the plaintiff sought to hold the directors and trustees of a corporation responsible for an alleged fraud perpetrated upon the plaintiff by the president and general manager of the corporation. A general demurrer to the complaint was sustained by the trial court. The plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. This appeal followed.

The only question in the case is the sufficiency of the complaint, which alleges, in substance, the following facts:

That the defendants are the directors and trustees of the Kildall Fishing & Packing Company, a corporation engaged in the fish brokerage business; that these directors and trustees had full charge of the business of the corporation, and elected Joseph Kildall as president and general manager thereof; that the trustees had a written agreement with the manager, to the effect that he was to take orders from and be subservient to the trustees, and that they could, at any time, without notice, remove Mr. Kildall from the management of the business; that, on October 9, 1914, Joseph Kildall represented to one D. Daun Egan, who was a broker for the plaintiff, that he, Mr. Kildall, individually, had an order for four carloads of codfish, to be shipped to Davis Bros., at Gloucester, Mass., and requested said broker of the plaintiff to furnish the codfish to fill the order; that plaintiff accepted said order on condition that such business would not be transacted or shipped through the Kildall Fishing & Packing Company, and that company should have no connection with the transaction; that these representations of Mr. Kildall were false, and the fact was that the Kildall Fishing & Packing Company had received the order, and that Davis Bros. were customers of the Kildall Fishing & Packing Company, and not of Joseph Kildall; that, immediately upon making the agreement above stated, and in violation of it, and without the knowledge of the plaintiff, Mr. Kildall placed the shipments in the hands of the Kildall Fishing & Packing Company; that the order was for shipments of fish in four separate carload lots, with approximately 30 days between each shipment; that the plaintiff shipped, at intervals of approximately 30 days, three carloads of codfish to Seattle, Wash., consigned to itself; that without the knowledge of the plaintiff, the Kildall Fishing & Packing Company took possession of each of the cars, upon arrival at Seattle and shipped the same to Davis Bros., at Gloucester, Mass., and took out a separate bill of lading for each carload, in the name of the

Kildall Fishing & Packing Company; that said company took the bill of lading for each shipment and attached thereto sight draft for the total amount of each shipment, being a sight draft for each carload as shipped, and totaling \$5,156.75; that the Kildall Fishing & Packing Company sold the bills of lading, with sight drafts attached, for the total amount represented by the drafts, namely, \$5,156.75, without the knowledge or consent of the plaintiff; that thereupon Joseph Kildall, as president and manager of the Kildall Fishing & Packing Company, represented to the plaintiff that the Kildall Fishing & Packing Company could obtain in cash, in Seattle, for said codfish, but 80 per cent. of the invoice price thereof, and that the balance would be paid by Davis Bros. on arrival of the fish at Gloucester; that thereupon, at the different dates of shipment, the Kildall Fishing & Packing Company, by its president and general manager, issued its checks to the plaintiff in the aggregate sum of \$3,971.71, and that said checks were received and cashed by the plaintiff; that the Kildall Fishing & Packing Company had received the total invoice price of said shipments, and had paid over to the plaintiff only 80 per cent. of that amount, and unlawfully retained the balance of 20 per cent.; that the plaintiff believed that 80 per cent., and no more, of the invoice price had been advanced by Davis Bros., and that the checks so given were for the total amount collected by the Kildall Fishing & Packing Company; that thereafter, the Kildall Fishing & Packing Company fraudulently converted the balance, or 20 per cent. of the invoice price, belonging to the plaintiff, all of which was done by the said Joseph Kildall as president and general manager of the Kildall Fishing & Packing Company; that said company thereafter became insolvent, and was placed in the hands of a receiver, and the 20 per cent. so obtained by the company was deposited to the credit of the Kildall Fishing & Packing Company, and was lost to the plaintiff. The complaint then alleges as follows:

"That prior to October 9, 1914, and at the time the said Kildall Fishing & Packing Company acted as agent for the plaintiff herein, the said defendants, C. O. Stiberg, C. F. Hendricksen, and Anthon Eckern, had personal knowledge of the fact that the said Joseph Kildall was unreliable and dishonest, and had knowledge of other fraudulent transactions and embezzlements of the said Joseph Kildall while he acted as president and manager of the said Kildall Fishing & Packing Company, and that in spite of such knowledge they, the said defendants, carelessly and negligently allowed the said Joseph Kildall, as manager of the Kildall Fishing & Packing Company, to remain such manager and president of said company, and allowed him to make contracts and carry on the business of the said Kildall Fishing & Packing Company, and to receive and negotiate bills of lading and commercial paper, and to receive and pay out cash without any limitation or supervision whatsoever; that through the said misrepresentations of the said Joseph Kildall, as manager of the said Kildall Fishing & Packing Company, and through the negligence of these defendants, the

plaintiff has been damaged in the sum of \$1,194.99; that the said defendants, C. O. Stiberg, C. F. Hendricksen, and Anthon Eckern, as trustees and directors of the said Kildall Fishing & Packing Company, were negligent in this, that they allowed the said Joseph Kildall, after they had knowledge of former fraudulent transactions, to remain as president and manager of said corporation, and allowed him to convert the property and money belonging to the plaintiff."

The plaintiff then demands judgment against the defendants for \$1,194.99.

It is not alleged in the complaint that the respondents, who were the trustees of the Kildall Fishing & Packing Company, had any notice or knowledge of this particular transaction. It is alleged that they had knowledge of other fraudulent transactions of Mr. Kildall, and that they were therefore negligent in not discharging him from the management of the affairs of that corporation. It is not alleged in the complaint, nor is it claimed, that these respondents took any part in the transaction whatever. It is not alleged in the complaint that the respondents could have known anything about the transaction. The complaint simply alleges that Mr. Kildall, who was acting as general manager of the corporation, of which these respondents were directors, represented that he had an order, personally, from Davis Bros., for four carloads of codfish. He desired the appellant to furnish the fish to him, individually. The appellant agreed to do so upon condition that Mr. Kildall would not ship the fish through the corporation of which he was manager. In other words, the complaint charges that the transaction was a personal transaction between Mr. Kildall and the appellant. After the fish were shipped by the appellant, the corporation of which Mr. Kildall was manager took charge of the cars of fish and shipped them to Gloucester, Mass. The bills of lading, with sight drafts attached, were cashed for the full amount. Eighty per cent. of what was received was paid by checks of the Kildall Fishing & Packing Company to the appellant, and the checks were cashed by the appellant. At that time, of course, the appellant knew that the business was being done by the Kildall Fishing & Packing Company, and not by Mr. Kildall personally. Mr. Kildall represented that the amount of the checks was the total amount collected. This was not the full amount collected, but the remaining 20 per cent. was kept on hand by the Kildall Fishing & Packing Company. Afterwards, when that company went into the hands of a receiver, this money was used by the Kildall Fishing & Packing Company to pay its debts.

So far as the allegations of the complaint are concerned, the directors and trustees of the corporation were not informed that anything wrong had been done by Mr. Kildall, and there is nothing in the complaint to charge them with notice thereof, except the mere fact that the fish were received and sold, and the money collected by the Kildall

Fishing & Packing Company. The statute (Rem. Code, § 3677) provides that corporations for mercantile purposes "may be formed according to the provisions of this chapter; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others." Section 3697 provides that where trustees make any dividends from the business of a corporation, or divide, or withdraw any part of the capital stock of the company, unless in the manner prescribed in this chapter, then the trustees under whose administration such act occurred, except those who dissent therefrom, shall, in their individual capacities, be liable to the corporation and the creditors thereof in the event of its dissolution. Section 3698 provides for the liability of stockholders. There is no provision of the statute making the trustees liable for the acts of the president or manager of the corporation. The corporation itself is, no doubt, liable for his corporate acts, but trustees are not made so by statute, and, under the provision above quoted, cannot be held liable except for acts done by the trustees, or in which they participated. See *American Radiator Co. v. Kinnear*, 56 Wash. 210, 105 Pac. 630, 25 L. R. A. (N. S.) 453. In the case of *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389, we held that a stockholder in a corporation was liable for his own misrepresentations. In referring to the sections above named, we said:

"These sections deal only with their contractual relations. The Legislature did not intend to, and has not, exempted as stockholder in a corporation from liability, when by his actual misrepresentations as to the capital stock of the corporation he has induced a third party to extend it a credit which it would not otherwise have given it, and has suffered a loss in so doing. In short, there was no intention to protect a stockholder against his own fraudulent acts."

It is not alleged in the complaint in this case that these trustees participated in the fraud of Mr. Kildall in any way. It is not even alleged that they knew of the fraud, and it is not shown that they could have discovered the fraud by diligence. As stated above, this appellant did not desire to do business with the corporation of which Mr. Kildall was manager. It intended to do business with him personally. If the allegations of the complaint are true, Mr. Kildall is liable, personally, to the appellant. The corporation of which he was manager, having received the money, is also liable to the appellant, but we see no reason why the trustees, who took no part in the transaction, and who knew nothing of it, may be held personally liable. The only allegation in the complaint with reference to negligence of the trustees is to the effect that the trustees knew of other transactions of Mr. Kildall, which transactions were fraudulent, and for that reason they should have discharged him. But a general allegation of this character is

not sufficient to hold the trustees individually responsible, where they did not participate in, and had no knowledge of, the transaction.

We are of the opinion for these reasons that the trial court properly sustained a demurrer to the complaint.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, FULLERTON, and HOLCOMB, JJ., concur.

WYLDE et ux. v. SCHOENING et ux.
(No. 13620.)

(Supreme Court of Washington. May 1, 1917.)

1. TROVER AND CONVERSION ⇨10—CONVERSION OF NOTE—ASSIGNMENT.

Where defendants, holding a nonnegotiable promissory note, the last of a series of six, given for the purchase price of land, the sale of which was effected by plaintiff, under an agreement to hold for plaintiff, executed an assignment of all six notes to a bank for a loan, their agent, who effected the loan, intending to pledge all of the notes, defendants, by executing the assignment, assented to the agent's act in pledging all the notes, even if they did not expressly consent in advance, and converted plaintiffs' note, the conversion not being technical, merely, but actual.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 84-94.]

2. JUDGMENT ⇨707—BINDING FORCE.

One not a party to a suit is not bound by the court's findings and judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230.]

3. ACTION ⇨28—WAIVER OF TORT.

Where one person wrongfully converts the property of another, the injured party may sue him as a wrongdoer, or, waiving the tort, recover the value of the property as on an implied contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215.]

4. TROVER AND CONVERSION ⇨50—CONVERSION OF NOTE—DAMAGES.

In an action for conversion of a note, the measure of recovery is the face of the note and interest from the date of conversion only where the note was a personal obligation of a solvent maker or other person individually liable.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 266.]

5. TROVER AND CONVERSION ⇨50—CONVERSION OF NOTE—MEASURE OF DAMAGES.

In an action for conversion of a note, the last of a series of six given for the purchase price of land, the note being a charge only against the mortgaged premises, no deficiency judgment being recoverable on it, and, as a charge, being subject to the other five notes and interest, the measure of recovery was the value of the security as of the date of the conversion, less the amount of the other notes, and any then accrued interest thereon, with interest from such date on the amount found.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 266.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Samuel Wyld and wife against Charles Schoening and wife. From a judgment for plaintiffs, they appeal. Reversed.

and cause remanded for further proceedings in accordance with the opinion.

Andrew J. Ballet, of Seattle, for appellants. E. H. Guile, of Seattle, for respondents.

ELLIS, C. J. This is an action for conversion of a nonnegotiable promissory note. On May 14, 1910, defendants were the owners of a certain 80 acres of land in King county, and on or about that date sold the same to plaintiffs and a number of other persons. The purchase price was \$26,000, of which the sum of \$2,000 was paid in cash. The balance, evidenced by six nonnegotiable promissory notes for \$4,000 each, was secured by a purchase-money mortgage on the property. The mortgage contained provisions as follows:

"The mortgagors (mortgagees) herein are limited solely to the above-described property for the payment and satisfaction of the above-named notes, hereby secured, and in case of foreclosure, no deficiency judgment shall be entered against the mortgagors herein, jointly or severally. The mortgagors intend platting the land herein described in quarter acre tracts approximately, which will consist of about three hundred and twenty-two (322) quarter acre tracts. The mortgagees agree to release any of such quarter acre tracts upon being paid one hundred dollars (\$100) per tract. Such release or releases, however, shall not impair the validity of this mortgage as to the balance of the land described in said mortgage."

Plaintiff Samuel Wyld, having been instrumental in negotiating the sale of the property, defendants, as a commission for his services, indorsed to plaintiffs the sixth or last of the promissory notes, defendants retaining possession of that note under the following written agreement:

"Know all men by these presents, that whereas, Charles Schoening and Minnie Schoening, his wife, have indorsed over to Samuel Wyld and Ellen J. Wyld, his wife, promissory note No. 6, for the principal sum of four thousand dollars (\$4,000), dated at Seattle, Washington, May —, 1910, due on or before three years from date, payable to the order of said Charles Schoening and Minnie Schoening, his wife, with interest at seven per cent. (7%) per annum, payable semiannually; said note is indorsed without recourse. Said note is also secured by mortgage on the following described real estate, to wit: The north half of the northwest quarter of section thirty (30), township twenty-three north, range four (4) east, W. M., containing eighty (80) acres, situated in the county of King and state of Washington. It is agreed between said Charles Schoening and Minnie Schoening, his wife, and said Samuel Wyld and Ellen J. Wyld, his wife, that said note shall be held by said Charles Schoening in trust for the benefit of said Samuel Wyld and Ellen J. Wyld, his wife, with the express understanding and agreement that the payments of said note and interest thereon are subject to the prior payment of the principal and interest of five (5) other notes of like tenor and effect, for four thousand dollars (\$4,000). And the said note so indorsed over to the said Samuel Wyld and wife is not to be collected or suit brought for the foreclosure of the same until the said five notes of four thousand dollars (\$4,000) each, with interest, as aforesaid, shall first be paid to said Charles Schoening and Minnie Schoening, his wife, or their order. The said Charles Schoen-

ing and Minnie Schoening, his wife, agree that if the interest is paid on all of said notes, including the said \$4,000 note, so held in trust by said Charles Schoening, that he will immediately remit to the said Samuel Wyld and Ellen J. Wyld, his wife, or their order, any interest that may be collected by him, without cost or charge. That when said five notes of Charles Schoening shall have been fully paid and satisfied, he, the said Charles Schoening, will turn over to the said Samuel Wyld the said notes or the proceeds of the same if they shall have been paid to the said Schoening. In the event said mortgage is foreclosed and said note of \$4,000 shall be included in such foreclosure suit, the said Samuel Wyld and Ellen Wyld, his wife, shall bear their proportionate share of the cost of such foreclosure suit, but it is optional with the said Charles Schoening as to whether or not he will include the said note in any foreclosure proceedings should such suit be brought to foreclose.

"Executed in duplicate this — day of May, 1910.

Samuel Wyld.
Ellen Wyld.
C. Schoening.
Minnie Schoening."

Soon after May 14, 1910, the land was platted into 320 quarter acre tracts in accordance with the terms of the mortgage for the purpose of resale. Whenever one of the tracts was sold it was released from the mortgage lien upon the payment to defendants of \$100, which amount was credited upon the notes. In December, 1912, defendants, for their personal use and benefit, borrowed, through one Fred E. Sander, as agent, \$7,000 from the People's Savings Bank, of Seattle. As collateral security for this loan, on December 28, 1912, they executed and delivered to the bank in writing an absolute assignment of the \$24,000 mortgage and the six notes. The assignment included the note for \$4,000, which defendants held in trust for plaintiffs. It is this act which is relied upon as a conversion. In January, 1915, 160 of the quarter acre tracts were sold to certain persons, as the court found, "for the purpose of facilitating the sale of the land." It appears that prior to that time plaintiffs had parted with their interest in the land. No money was paid on this sale, but a note for \$16,000, secured by a mortgage covering these tracts, was given by the purchasers to defendants. This mortgage was pledged to the bank as collateral security for defendants' loan in the same manner as the \$24,000 mortgage, and on May 5, 1915, the bank released from the lien of the original \$24,000 mortgage the 160 quarter acre tracts covered by the \$16,000 mortgage. On learning these facts plaintiffs demanded that the \$16,000 be credited on the \$24,000 mortgage. This was refused. Thereafter the indebtedness of defendants to the bank which had been reduced to about \$4,000 was taken over by the Seattle Land & Improvement Company, a corporation, of which Sander is president, and the \$24,000 mortgage and notes, including that of plaintiffs, and also the \$16,000 mortgage were assigned to it by the bank. After this latter assignment, Sander indorsed on the \$16,000 note a memorandum to the effect

that the amount named in that note would not be credited on the original \$24,000 notes and mortgage until actually paid in money. The trial court found most of the facts substantially as above stated, and specifically:

"That some time after the said agreement had been entered into said Charles Schoening, by and through an agent, obtained a loan of \$7,000 from the People's Savings Bank, of Seattle, and said agent against the instructions of said Charles Schoening, included the note of plaintiffs so held in trust by defendant Charles Schoening with the other of said five notes as collateral security for the said \$7,000 loan. That prior to the commencement of this action the said note of plaintiffs was released from the assignment to said bank as collateral security, as aforesaid, and returned to the control of the defendant as such trustee under the terms of said trust agreement, and the said note of plaintiffs is now held by the said Charles Schoening as trustee for plaintiffs and under the terms and conditions of said trust agreement. That after the said 14th day of May, 1910, the said land hereinbefore described was platted into 320 quarter acre tracts, streets, and alleys for the purpose of selling the land so platted. That in order to facilitate the sale of said land the said People's Savings Bank did release 160 of the said quarter acre tracts, and the said 160 quarter acre tracts were immediately remortgaged for \$16,000, payable to the order of said Charles Schoening. That the said mortgage for \$16,000 still retains its lien as a first mortgage, subject to all the rights of the plaintiffs in and to the said \$4,000 note according to the terms and conditions of said trust agreement, and that the plaintiffs' title in and to said note has not been impaired in any extent whatsoever, but the said trust agreement remains in full force, virtue, and effect between the plaintiffs and defendants, and that any money that may be paid or received on said \$16,000 note and mortgage shall at the same time be credited on the \$24,000 note and mortgage, and in any foreclosure of said \$16,000 mortgage and sale of the property in foreclosure, the amount received or paid on such foreclosure sale of the said \$16,000 mortgage shall be credited on the said \$24,000 mortgage and the said promissory note, in accordance with the terms of said trust agreement."

The court further found that there was a "technical conversion" of the note to plaintiffs' damage in the sum of \$1.

On appropriate conclusions of law the court "ordered, adjudged and decreed" in substance that defendant Charles Schoening now has in his possession and under his control the note in question; that he holds it in trust for plaintiffs under the terms of the trust agreement; that plaintiffs' interest in the \$24,000 mortgage is continued and exists in the \$16,000 note and mortgage, subject to the terms of the trust agreement; that any money that may be paid for releases of any tracts of land from the lien of the \$16,000 mortgage, or any money received by foreclosure of that mortgage, should be credited and applied on the \$24,000 mortgage, and the indebtedness secured thereby in accordance with the terms of the trust agreement. Plaintiffs were awarded judgment for \$1, and for their costs. They appeal.

Appellants contend that the court erred in finding that there was only a technical conversion of their note. The assignment to the bank which is in evidence is an absolute as-

signment of all six of the original purchase-money notes, and of the mortgage securing the same. It is an admitted fact that this assignment was made and the notes and mortgage were delivered to the bank to secure a loan of \$7,000 for the sole personal use and benefit of respondents. Though this loan was secured through Sander as respondents' agent, and Sander claims that Schoening told him that one of the notes was held in trust for appellants, there was no evidence whatever that any officer or representative of the bank ever at any time had any knowledge of appellants' interest. The trust agreement was not recorded until May 11, 1915, and it is not claimed that the bank had any knowledge of its existence. Though Charles Schoening testified that he did not know that his agent Sander had hypothecated the sixth note with the bank, the evidence as a whole forces the conviction that he must have known it and at least tacitly consented to it. At first he testified that he took the matter up with A. K. Wyld, a son of the appellants, and that A. K. Wyld consented that the note be pledged with the others. A. K. Wyld flatly denied this, and disavowed any knowledge of the transaction. The evidence is conclusive that the appellants were not consulted, and knew nothing of the transaction till about a year before this action was commenced. Schoening, notwithstanding his first intimation that the note had been pledged with A. K. Wyld's consent expressed to him personally, afterwards asserted that it was done without his own knowledge or consent. Moreover, he and his wife executed the assignment to the bank which expressly described the six notes. It is not claimed that he could not read, nor that he did not read it. Sander was admittedly respondents' agent in securing their loan from the bank. Though he testified that Schoening advised him that appellants had an interest in the notes, he did not testify that Schoening did not know of and consent to its inclusion in the pledge. He testified as follows:

"Q. Did he [Schoening] show you the agreement [trust agreement]? A. No, sir. I didn't see the agreement until the time you put it on record. Q. And still you assigned that [the note] to the bank? A. Why shouldn't I; it wasn't of record two years ago. Q. Is there any other reason than it wasn't of record? A. When you loan money you get what collateral you can. Q. If it had been of record your theory is that it could not have been done? A. Oh, yes it could, because I dealt for Mr. Schoening. Q. I mean if the agreement between Mr. Wyld and Mr. Schoening had been of record the sixth note could not have been assigned? A. Not very well."

[1] It is clear that Sander intended to pledge all of the notes, and the inference is that he found it necessary to do so in order to secure the loan from the bank. Respondents, by executing the assignment, assented to that act even if they did not expressly consent to it in advance. It seems to us that

the court's finding to the effect that the sixth note was pledged without respondents' knowledge or consent is not only unsupported by but is contrary to the clear preponderance of the evidence. We are clear that the facts as disclosed by the evidence show a conversion of the note—not technical merely, but actual. *Howard v. Seattle National Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100. Even more unfounded in evidence is the finding that the note in question, prior to the commencement of this action, was returned to the control of respondents, and is now held by them as trustees for appellants under the terms and conditions of the trust agreement. It was admitted that the note is held by the Seattle Land & Improvement Company under an absolute assignment from the People's Savings Bank. Sander testified as follows:

"Q. You do not hold an assignment of that mortgage? A. Oh, yes; I do. Q. A full assignment? A. Yes, sir. Q. You hold the sixth note? A. No, sir. Q. You hold an assignment of it? A. Sure. I know when the money comes in \$4,000 goes to Mr. Wyde. Q. Where is the note? A. Down in my safe. Q. Where is the sixth note? A. In my safe. Q. Didn't you say you didn't have the sixth note? A. No, I never said that. Q. I understood you to say so. A. You didn't so understand me; I never said it. It's in my safe. Q. All of the six notes? A. Yes, sir."

[2, 3] Though Sander thus declares that he recognizes appellants' right to this note there is no evidence that the investment company as such recognizes that right. So far as the record shows it holds this note through an assignment from the bank and just as the bank held it—as collateral to respondents' debt just as it holds the other notes. Whatever its attitude may be it is not a party to this suit, and is not bound by the court's findings and judgment. The judgment furnishes no protection to appellants. Furthermore, this is not an action to recover the note, but to recover damages for its conversion. We know of no rule of law which, in such a case, would require the owner to look to the pledgee of a converted note for redress. It is settled law in this state that where one person wrongfully converts the property of another the injured party may sue him as a wrongdoer, or waiving the tort, recover the value of the property as on an implied contract. *Livingstone v. Lovgren*, 27 Wash. 102, 100, 67 Pac. 599; *Cremidas v. Dallas*, 91 Wash. 441, 157 Pac. 1084.

[4, 5] But it does not follow that the measure of recovery is the face of the note and interest from the date of conversion, as appellants claim. That measure only applies where the note is a personal obligation of a solvent maker, or other person individually liable. *Cremidas v. Dallas*, supra. Here the note was a charge only against the mortgaged premises. No deficiency judgment was recoverable upon it. Even as a charge against the land it was subject to the other

five notes and interest. Obviously the true measure of recovery must be the value of the security as of the date of the conversion, December 28, 1912, less the amount of the other notes and any then accrued interest thereon, with interest from that date on the amount so found. Had the trial court found, as we hold he should have found, that the transfer of the notes to the bank was a conversion, he doubtless would have required proof of the value of the converted note so measured. Simple justice to both parties requires that the cause be remanded, with direction to the trial court to take evidence of the value of the note as measured by the value of the land as of the date of the conversion, considering also its relation to the other notes, and thereon make a finding of the value and enter judgment in appellants' favor against respondents for that amount, with interest and costs.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views here expressed.

MORRIS, MAIN, and HOLCOMB, JJ., concur.

McALPINE et al. v. KOHLER & CHASE. (No. 13869.)

(Supreme Court of Washington. May 5, 1917.)

1. HUSBAND AND WIFE \Leftrightarrow 267(2)—COMMUNITY PROPERTY—SALE BY WIFE.

Under Rem. Code 1915, § 5917, giving the management and control of community property, with power of disposition as though it were his separate property, a sale thereof by the wife contrary to order of the husband, known to the buyer, where husband and wife are living together, and there is no unusual situation, is void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 931.]

2. HUSBAND AND WIFE \Leftrightarrow 267(9) — WIFE'S AGENCY—RATIFICATION.

An unauthorized sale by a wife of community property is not ratified by the husband, so as to estop him to attack it, his inaction having been only when told that the property was stored, and he having required a rescission as soon as informed that there was a sale.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 933.]

Department 2. Appeal from Superior Court, King County; Walter M. French, Judge.

Action by A. N. McAlpine and another against Kohler & Chase. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fred W. Llewellyn, of Seattle, for appellant. Paul Carrigan, of Seattle, for respondents.

MOUNT, J. This action was brought by the respondents to recover a Decker Bros. piano, or its value. A judgment resulted in favor of the respondents, for the value of the piano. The defendant has appealed.

The facts are, briefly, as follows: The

respondents are husband and wife. Mrs. McAlpine had stated to her husband that she desired to exchange a Decker piano which they owned for a player piano. Her husband informed her that he did not desire to dispose of the Decker piano, and that he was not able to purchase a player piano; that as soon as he was able they might, probably, purchase a player piano. Mrs. McAlpine, when her husband was away from the city, went into a store, of which A. A. Campbell was manager for the appellant, and told Mr. Campbell that she wanted to look at a player piano. Upon the next day, March 20, 1915, Mr. Campbell brought a player piano to her house. She testified that she told Mr. Campbell that she was not authorized to sell her Decker piano, or trade it for another, because her husband had so told her. She also testified, in substance, that Mr. Campbell told her that he would leave the player piano there for six months, or a year, and that she might use it, and if she was not satisfied with it she could return it, and that he would take her Decker piano and store it for her until she was satisfied to make the exchange. The player piano was valued at \$800, and he agreed to allow her a credit of \$415 for the Decker piano. At that time Mrs. McAlpine signed a conditional bill of sale for the player piano, and a bill of sale for her Decker Bros. piano, which was taken away by Mr. Campbell. She also testified that at the time she signed the bills of sale she did not read them, and that she was informed by Mr. Campbell that they were simply receipts for the pianos. Upon Mr. McAlpine's return to his home, some three days after, he was informed by Mrs. McAlpine that the player piano had been left in their home for one year, for approval, with no obligation to purchase, and that the Decker piano had been taken away to be stored pending their decision. She did not inform her husband of the execution of the bills of sale. Thereafter, on or about June 20, 1915, the appellant made a demand upon Mrs. McAlpine for payments due and in arrears under the terms of the conditional sale contract. She then informed her husband that the appellant was asserting that the player piano had been purchased by her and the Decker piano sold to the appellant. Upon being informed of these facts, Mr. McAlpine told her that she must rescind the contract and return the player piano. Thereafter, on November 28th, Mrs. McAlpine served a formal written demand upon the appellant to take possession of the player piano, and to return the Decker piano. On November 28, 1915, the appellant removed the player piano from respondents' home, but refused to return the Decker piano. Thereafter, in February, 1916, this action was brought, and resulted in a judgment in favor of the respondents for \$125, which the court found to be the value of the Decker piano. Upon the trial the court was of the opinion that

Mrs. McAlpine was not authorized to sell or exchange the Decker piano, and for that reason entered judgment as stated.

[1] We are of the opinion that the trial court was right in this respect. The statute (Rem. Code, § 5917) provides:

"The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

It is conceded that the Decker Bros. piano was the community property of the respondents. It is not disputed that Mrs. McAlpine was told by her husband not to dispose of the piano. She told the agent, Mr. Campbell, that fact. Nevertheless he took the Decker piano from her, and afterwards sold it for \$125, without her consent.

It is plain from the statute, above quoted, that Mrs. McAlpine was not authorized to dispose of the piano, and that her contract was void. In the case of *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111, we held that the wife in that case was authorized to sell an automobile which was owned by the community, but that was a case where the husband had purchased an automobile, and had left his wife and had gone to Alaska, and where the automobile was classed as perishable property, and we held, under the facts of that case, that she was authorized to sell it and convey good title. That was an exceptional case, and this court said, in closing the opinion:

"We do not, by this opinion, enlarge the rights of a wife so as to give to such as buy from her any presumption of good title. On the contrary, these must buy at their peril from one who can deliver title only in an unusual situation. They can prevail only after justifying the exception beyond reasonable debate."

The case at bar does not present the "unusual situation" presented in that case. Here the husband and wife were living together. There was no necessity for selling the Decker Bros. piano. She was not authorized to sell it, but, on the other hand, had been refused the right to do so. The agent of the appellant was informed of that fact when he took the piano away from the house, and, as said in *Marston v. Rue*, supra, he must buy at his peril.

[2] The appellant seeks to justify this appeal upon the ground of ratification and estoppel, but we think there was neither ratification nor estoppel, because Mr. McAlpine was not informed of the facts. He was told, upon discovering that a new piano had been placed in the house, that it was placed there on approval, without any obligation to purchase, and that the Decker piano had been taken away to be stored pending their decision. If he had been told that there was a bargain of sale, and that bills of sale had been executed, and no action on his part had been taken after such information, then it might be reasonably argued that he was estopped after making no objections thereto. Quoting from *O'Shea v. Rice*, 49 Neb. 593, 69

N. W. 308, it is said, in *Murphy v. Clarkson*, 25 Wash. 585, 66 Pac. 51:

"It is elementary law that knowledge by the principal of the material facts is an essential element of an effective ratification of the unauthorized acts of his agent."

Mr. McAlpine was not told the material facts until months afterwards. When he was told that the appellant claimed a sale and exchange of the pianos, he immediately notified his wife that she must rescind the sale, and thereafter she sent notice to the appellant. The appellant came and took away the player piano, and refused to redeliver the respondents' piano which had been taken and sold.

We are satisfied, under the statute and the facts stated, that Mrs. McAlpine was without authority to enter into the contract of sale, and that there was no ratification by her husband after the facts were made known to him. For this reason the judgment of the trial court is affirmed.

It is unnecessary to discuss other questions presented in the briefs.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

JONES v. JONES. (No. 13699.)

(Supreme Court of Washington. May 8, 1917.)

1. HUSBAND AND WIFE \S 333(9)—ALIENATION OF HUSBAND'S AFFECTIONS—EVIDENCE—SUFFICIENCY.

In a suit by a wife against her father-in-law for alienation of her husband's affections, evidence warranting the inference of malice on the part of the defendant held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 1124.]

2. HUSBAND AND WIFE \S 333(9)—EVIDENCE—MALICE.

Malice, like other mental processes, is as well shown by conduct as it is by the testimony of the person whose condition of mind is the subject of inquiry.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 1124.]

3. HUSBAND AND WIFE \S 333(3)—ALIENATION OF AFFECTIONS—ADMISSIBILITY.

Declarations of the husband, to the effect that his father had forbidden him to talk to the plaintiff, that the matter had been put in the hands of attorneys, and that she would have to talk to them was admissible to show the effect that his father's wrongful interference and misrepresentations had upon his mind, although the husband was not a party to the action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 1124.]

4. WITNESSES \S 58(4)—HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.

Under Rem. Code 1915, \S 1214, providing that one spouse shall not be examined for or against the other without the other's consent, testimony of the husband, purporting to show want of affection for plaintiff, and testimony of other witnesses as to declarations by the husband prior to any knowledge on the defendant's part of the relation between the son and the

plaintiff offered to show that the husband's feelings and conduct toward the plaintiff were not influenced by his father was not competent evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 164.]

5. WITNESSES \S 58(4)—HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.

Under Rem. Code 1915, \S 1214, the competency of the husband as a witness would depend upon his relationship at the time of the trial, and he would be precluded from testifying against his wife as to occurrences transpiring before their marriage.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 164.]

6. HUSBAND AND WIFE \S 334(3)—ALIENATION OF AFFECTIONS—EXCESSIVE VERDICT—PREJUDICE.

As the evidence showed that the defendant consented to marriage to avoid criminal prosecution against his son with the ultimate idea of securing a divorce of the parties and that he was the active agency in keeping his son away from his wife, such action being in opposition to public policy, a verdict of \$12,500 will not be disturbed as result of prejudice on the ground of its size alone.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 1125.]

7. CONTINUANCE \S 7—DISCRETION OF COURT.

It is within the discretion of the trial court to grant or refuse a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 17, 18.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Carola B. Jones against T. E. Jones. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles F. Munday and Griffin & Griffin, both of Seattle, for appellant. Halverstadt & Clarke, of Seattle, for respondent.

FULLERTON, J. The plaintiff, Carola B. Jones, brought this action against T. E. Jones, her father-in-law, to recover damages on the ground of alienation of her husband's affections. A verdict of \$25,000 was returned by the jury, upon which the court ruled that he would grant a new trial unless plaintiff would submit to a reduction to the sum of \$12,500. The plaintiff submitted to the reduction, and judgment was given accordingly. The defendant appeals.

The principal error assigned by the appellant is the denial of his challenge to the sufficiency of the evidence, which was raised by motions for nonsuit, for a directed verdict, and for judgment non obstante veredicto. The appellant contends that there was an entire absence of any testimony showing, or tending to show, malice on his part, and that, in the absence of any proof of malice, the case should have been taken from the jury and judgment given for appellant. The evidence on the part of the respondent tended to show that Tom Jones, the son of appellant, had been attentive to the respondent for a period of over a year prior to the marriage, during which time he displayed towards her

the utmost affection, and exhibited the extreme jealousy of the attentions of other young men to her. He was a constant visitor in her home, taking her frequently for auto rides and to the theater. The respondent at this period was 16 years of age and Tom Jones was 21. After they had been thus intimate for about a year respondent discovered in August, 1914, that she was pregnant. Tom Jones was apparently ignorant of this state of affairs until the father of respondent, in October, 1914, called him to the house and informed him of her condition. The respondent was hysterical at the time, and Tom Jones put his arm around her and told her not to worry, and everything would come out all right, saying:

"The only right thing to do was to get married, but he had to speak to his father first, because he was in no position to support a wife"

—then kissed her good-bye and left. He went home and informed his father, who testified that he told his son that, if she was a decent girl and he loved her, he must marry her and take care of her. There is no further evidence of what passed between father and son at the time, but the fact is that the son never returned to the respondent to make good his promise. The respondent later began to threaten a criminal prosecution, and the appellant undertook complete charge of all negotiations, the son remaining passive. The attorney for respondent was insisting that marriage was the only alternative to prosecution. A meeting was arranged between this attorney and those representing the appellant, in which the appellant agreed to a marriage between his son and respondent. The marriage occurred about a week later in Everett; the appellant with his son and the respondent with her sister and father composing the party present at the ceremony in the courthouse there. On their return from the marriage ceremony, respondent and her family left the interurban car at Fremont, appellant and his son going on down town. It was in evidence that the appellant promised to call at the home of respondent the next day. He did not go there, however, until about a week later, and then in response to an insistent summons. On this visit appellant asked respondent about her condition, and suggested that she go to some other city until the baby was born. She declined, and then he told her to go to the hospital in Seattle and have the best of care and he would pay all of her bills. She testified that he asked her when she would release his son, and she told him that, with a small baby on her hands, she would not release him. "Well, he says, 'You can give the baby to Tom, and you can always get married again.' Then he got kind of mad, and he told me he absolutely refused Tom to live with me. He said he had another girl picked out for Tom and had other plans." This testimony, though denied by appellant,

is substantiated by that of the sister of respondent, who was present at the meeting between the parties. The appellant left this meeting in an angry frame of mind, and subsequently declined to pay the hospital bills of respondent. Appellant's son made no effort to visit or cohabit with his wife. She met him but once after the marriage. She testified:

"My sister called Tom up and asked him to meet her, and she went and met him first, and then about five minutes afterwards I met him, because he refused to meet me at all; and he was awfully mad because I met him that way, and he said he couldn't talk to me; that his father had forbidden him to say anything; that he had put it in the hands of his attorneys, and I would have to talk to them. He said his father had forbidden him to say anything to me."

A child was born to respondent in January, 1915. The husband continued to live with his father until July, 1915, when he left his home to take a position in Alaska, without calling upon or communicating with the respondent. The only money he ever contributed to the support of his wife and child was the sum of \$20.

[1, 2] We think the motions challenging the sufficiency of the evidence were properly denied by the court, as there was sufficient evidence to warrant the submission of the case to the jury. These objections were based chiefly on the assumption that there was no proof of malice on the part of appellant. It is true the appellant testified there was none, but we think there were matters in evidence from which malice might be inferred. Malice, like other mental processes, is as well shown by conduct as it is by the testimony of the person whose condition of mind is the subject of inquiry.

[3] An objection is made to the declaration of the son to the effect that his father had forbidden him to talk to respondent; that their matter had been put in the hands of attorneys, and she would have to talk to them. We do not find that timely objection was made to this, but, conceding the fact otherwise, such evidence was admissible under the authorities. In *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492, it is said:

"The declarations of the young husband, although not a party to the suit, were admissible to show the effect that his father's wrongful interference and misrepresentations had upon his mind. It was competent, not only to show the active and persistent efforts of the defendant to alienate his son from Ella, but it was also both proper and necessary to show the effect of such efforts upon the son. For this purpose the testimony was competent."

In *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, it is said:

"Under the issue to be determined, and in connection with the testimony introduced, it was, in our opinion, proper to admit in evidence the declarations of Edward, for the purpose of showing what influenced his conduct in separating from his wife. It is true his mere declarations were not admissible to show what his mother's conduct was, nor was it, of itself alone, material

how bad his mother's conduct was towards plaintiff; for, no matter how bad her conduct was, she could not properly be held liable in this action unless the effect of her conduct was such as to cause Edward to become estranged from and desert his wife. From the record it clearly appears that the trial court was careful to place the declarations of the husband upon this ground. Thus limited, it was not error to admit proof of his declarations."

[4, 5] Contention is made by appellant that it was error to exclude the testimony of the husband purporting to show want of affection for his wife, and also the testimony of other witnesses as to declarations made by the husband prior to any knowledge on appellant's part of the relations between his son and respondent for the purpose of establishing that the husband's feelings and conduct toward respondent were not influenced by his father. Under Rem. Code, § 1214, providing that one spouse shall not be examined for or against the other without such other's consent, we have held in *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187, a suit by the wife against her husband's parents for alienating the affections of the husband, that the husband was not competent to testify over the objection of the wife. If the husband was incompetent to testify as to any matter, clearly the statute could not be evaded by admitting in evidence declarations made by him to third parties. While the state of mind of the husband in this case was a material fact to be considered in determining whether there had been an alienation of the husband brought about by his father, it was a matter for proof by competent evidence, by evidence which would not fall within the inhibition of our statute. It was sought further to prove by the husband's testimony what his disposition toward respondent was at a period preceding the existence of the marriage relation. But his competency as a witness would depend upon his relationship at the time of the trial, and he would be precluded from testifying against his wife as to occurrences transpiring before marriage. *Sands v. David Bradley & Co.*, 36 Okl. 649, 129 Pac. 732, 45 L. R. A. (N. S.) 396.

[6] Appellant further contends that the verdict of the jury was so grossly excessive as to show passion and prejudice on their part, and that a new trial should be awarded in consequence. The verdict, as we have seen, was for \$25,000, and was reduced by the trial judge to \$12,500. The latter figure still seems large, but there is evidence justifying an award, and there is no showing other than the size of the verdict that the jury was influenced by prejudice. The jury was warranted in finding from the evidence that the appellant consented to the marriage for the purpose of avoiding a criminal prosecution against his son and with the ultimate idea of securing a divorce of the parties, and that he was the active agency in keeping his son away from his wife. Public policy has

regard for the maintenance of the marriage relation, and appellant's acts and conduct were in opposition to that policy. Under the circumstances we are loath to disturb the verdict of the jury as modified by the trial court.

Errors are assigned relating to the admission and exclusion of evidence other than those above indicated, but we find none of them material. Objections raised as to several of the instructions given are not well taken, even if the paragraphs complained of be withdrawn from their setting as a part of the charge given. The instructions as a whole were proper statements of the law, and presented the appellant's defense to the jury in the clearest and fairest way possible.

[7] Error is assigned upon the refusal of the court to grant a continuance at the close of the trial for the purpose of enabling the appellant to show that respondent had tried to place the paternity of her child upon another man prior to her claim on that score against the son of appellant. The court refused to grant the continuance at that stage of the proceedings, suggesting to appellant that the matter might be presented upon a motion for a new trial. The matter was presented upon the motion for new trial on the ground of newly discovered evidence, and affidavits pro and con were submitted, upon which the court ruled the showing made was insufficient. It was within the discretion of the trial court to grant or refuse a continuance, and we do not think there is any showing of abuse on his part. An examination of the affidavits clearly indicates their inadequacy to affect the issue of the trial.

The judgment is affirmed.

ELLIS, C. J., and PARKER and HOLCOMB, JJ., concur.

In re SLOCUM'S ESTATE.

DU BOIS v. DAUGHERTY.

(No. 13868.)

(Supreme Court of Washington. May 2, 1917.)

1. WILLS \S 439—CONSTRUCTION—TESTATOR'S INTENT.

The primary object in construing wills is to determine the testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957.]

2. WILLS \S 820(4)—CONSTRUCTION—MAINTENANCE OF WIFE.

Where a testator gave his wife a life estate in both his separate and the community property, with power to use for her maintenance, and provided that, upon her death, her property and his then remaining should descend, etc., maintenance expenditures by the wife should be deducted from the total of the husband's and wife's property, and not merely from that passing under his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2116-2119.]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

In the matter of the estate of C. W. Slocum, deceased. Proceeding by W. B. Du Bois, administrator of C. W. Slocum, deceased, against Alice Daugherty, administratrix of Laura Slocum, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

McMaster, Hall & Drowley, of Vancouver, for appellant. Miller & Wilkinson, of Vancouver, for respondent.

CHADWICK, J. C. W. Slocum, now deceased, left a will in which he provided, among other things, as follows:

"One-third of my property is my own separate property owned by me before marriage, and the natural increase thereof; two-thirds of all my property is community property acquired by myself and wife.

"I give, bequeath and devise all of my property, both real and personal, of every kind, nature and description whatsoever, of which I may die seised and possessed, unto my wife, Laura Slocum, during her natural life, to be used by her for her own comfort and maintenance as she may see fit. That upon her death it is my desire and wish that her one-third of the property still remaining descend as she may desire and my two-thirds then remaining descend to my legal heirs then living, share and share alike."

The will was, in form, a nonintervention will. Upon the death of the testator, Laura Slocum, the surviving wife, took possession of the whole of the estate as executrix. Pending final settlement, Laura Slocum died. Respondent was appointed administrator cum testamento annexo of the estate of C. W. Slocum, and appellant was appointed administratrix cum testamento annexo, of the estate of Laura Slocum, deceased. Between the death of C. W. Slocum and the death of Laura Slocum, she had used for her own maintenance and comfort a large sum of money. It is the contention of the respondent that this sum—the parties do not agree upon the exact amount—should be deducted from the whole estate, including the share of Mrs. Slocum, while appellant maintains that it should be deducted from the property passing under Mr. Slocum's will to the exclusion of Mrs. Slocum's share. After a hearing, the court held that the expenditures made by Mrs. Slocum for her maintenance and comfort should be charged to the whole estate, and this appeal followed.

[1, 2] We incline to the holding of the trial judge. We must admit that an attractive theory may be advanced by either side, but the first landmark in the construction of wills is to ascertain the intention of the testator. Under the laws of this state, the testator might have disposed of his entire property to the exclusion of his spouse. Instead of doing so, he treated his whole property, separate and community, as one entity, subject to a charge for the support, maintenance, and comfort of his wife during her lifetime. After her death the remainder, if any, of his

separate and community property, should go to his legal heirs then living. If the testament ended with the words:

"I give, bequeath, and devise all of my property, both real and personal, of every kind, nature and description whatsoever, of which I may die seised and possessed, unto my wife Laura Slocum, during her natural life, to be used by her for her own comfort and maintenance as she may see fit"

—appellant's position could hardly be doubted. In gathering the intention of a testator, we are put to the added burden of considering each phrase, and in its setting with other phrases. Immediately following the clause quoted, we find the intention of the testator clearly manifested:

"That upon her death it is my desire and wish that her one-third of the property still remaining descend as she may desire and my two-thirds then remaining descend to my legal heirs then living, share and share alike."

The subsequent expression is not vague or general, nor is it repugnant to the first phrase. The gift is complete. All property passes. The doubt, if any, as to whether the charge for the comfort and maintenance of the survivor is to be made against the husband's share alone or the entire estate is not answered by reference to the first testamentary clause. Resort to the clause following discloses the thought that the remainder of the estate, after the death of the wife, would be that part of the whole estate remaining after deducting all sums used by her for her own comfort and maintenance.

Affirmed.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

COATES v. CARSE et al. (No. 13726.)
(Supreme Court of Washington. May 8, 1917.)

LANDLORD AND TENANT ~~47~~—LEASE—PAYMENT IN CASE OF SALE.

Provision in lease to lessor right to sell the land, and providing that in case of sale the lessor will pay lessee \$200, and compensate him for expenditures on the land, and on such payment the lessee will surrender possession, entitles the lessee to payment only in case he is required to surrender possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 112, 113.]

Department 2. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Action by F. R. Coates against William Carse and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions.

Clark & Lockhart, of North Yakima, for appellants. William M. Thompson, of North Yakima, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover from the defendants \$276.82, under a lease. The case was tried

to the court and a jury. At the close of the plaintiff's evidence, and at the close of all the evidence, the defendants moved the court for a directed verdict. These motions were denied, the case was submitted to the jury, and a verdict was returned for the full amount claimed in the complaint. The defendants have appealed.

The facts in the case are not in dispute. It appears that on the 29th day of March, 1916, the appellants were the owners of 20 acres of land in Yakima county, which contained a bearing orchard. On that day they leased the premises to the respondent. He immediately took possession under the lease. This lease provided, among other things, as follows:

"The said parties of the first part reserve the right to sell said land on or before August 1, 1916, and in case of a sale being made, the said parties of the first part hereby agree to pay to the said party of the second part the sum of two hundred dollars (\$200.00), together with a just and equitable price or sum of money for labor and money expended on said land and orchard by said party of the second part, and upon said payment the said party of the second part agrees to surrender to said parties of the first part peaceable possession of said land."

After the respondent had entered into possession of the land, and prior to August 1, 1916, the appellants sold and conveyed the land to one Rankin. At the time of the sale Mr. Rankin knew of the tenancy of the respondent. The respondent was not required to terminate the lease or surrender possession of the land. The respondent also knew of the sale to Mr. Rankin by the appellants. After the sale had been completed, and while the respondent was still in possession of the land, he made a demand upon Mr. Carse, one of the appellants, for the sum of \$200, and for labor and expenses which he had at that time put upon the land to the amount of \$76.82. The appellant refused to pay, and this action was brought.

It is not claimed, either in the complaint or in the evidence, that the respondent surrendered possession of the land to the appellants, or that he was requested to do so. Under these facts it is clear that respondent was not entitled to recover, and it was the duty of the court to direct a verdict in favor of the appellants. The lease provides, as quoted above, that the appellants reserve the right to sell the land before August 1, 1916, and in case of such sale then the appellants agree to pay the respondent the sum of \$200, together with a just and equitable price for labor and money expended upon said land, and upon said payment the respondent "agrees to surrender to said parties of the first part peaceable possession of said land." It is plain from this provision of the contract that the appellants agreed to pay the \$200, and the expenses, only in case the land was sold, and the respondent required to surrender the possession of the land. The object of this provision clearly was to protect

the respondent in case he had expended money and labor upon the land, and, after such expenditure, was dispossessed by reason of a sale. The lease was executed in March. The appellants reserved the right to sell the land up to August of that year. The work of spraying the orchard, pruning it, irrigating it, and attentions of that kind, would all be done between March and August. The crop grown upon the orchard would not be gathered until after August. This provision of the lease required that the appellants, if possession was taken from the respondent before August, should pay him for his time and expense, and \$200 in addition thereto, to remunerate him for his loss of the harvest in case of the surrender of possession. It was clearly not the intention of the parties to the contract that the respondent, in case of sale, would be entitled to retain possession of the land, harvest his crop, and, in addition thereto, receive pay for his work and expenses, and \$200 additional. It is unreasonable to suppose that such a contract was contemplated. The terms of the contract are plain that the \$200 and expenses incurred between March and August was for the surrender of the premises by the respondent to the appellants, and for no other purpose. Inasmuch as the respondent was not dispossessed of the premises, but was permitted to remain thereon, he was clearly not entitled to recover. The purchaser of the land knew of the tenancy, and therefore could not dispossess the tenant. The appellants could dispossess him only by complying with the terms of the lease, that is, by paying him for his labor and expense, and \$200 additional. No effort was made, either by the appellants, or by the purchaser, to dispossess the respondent, and he was therefore not entitled to recover either his expenses, or for his labor, or the \$200. He will be remunerated by his share of the crop under the lease.

The judgment is therefore reversed, and the cause remanded, with instructions to dismiss the action.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

DWIGHT v. WALDRON et al. (No. 13982.) (Supreme Court of Washington. May 5, 1917.)

1. TENANCY IN COMMON \S 19(1)—RIGHT OF COTENANT—PURCHASE OF ADVERSE INTEREST.

A tenant in common cannot by purchasing an outstanding adverse title to or incumbrance on the land deprive his cotenants of their common interest when the purchase is made for the benefit and protection of the common estate.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. \S 55.]

2. TENANCY IN COMMON \S 19(2)—RIGHT OF COTENANT—PURCHASE OF OUTSTANDING TITLE OR CLAIM.

A purchase by one cotenant of an outstanding title or claim against land owned in com-

mon is as to the other cotenants voidable only; they having right to elect to share in benefit of purchase.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 56.]

3. TENANCY IN COMMON §19(2)—RIGHT OF COTENANT—PURCHASE OF ADVERSE TITLE OR CLAIM—SHARE IN BENEFITS.

If a cotenant wishes to share in adverse title acquired by a cotenant, he must within a reasonable time tender payment of his share of the price necessarily expended in acquiring title; what constitutes a reasonable time depending upon the particular facts in each case, but must not be longer than is consistent with fair dealing.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 56.]

4. TENANCY IN COMMON §38(5)—ACTION BY COTENANT TO QUIET TITLE—LACHES.

In action by a cotenant to set aside a tax deed and quiet title to undivided interests in the land, 20 years having elapsed since plaintiff's predecessors made default in payment of taxes, and more than 12 years having elapsed since a cotenant, defendant's predecessor, acquired the land at the tax foreclosure sale, was barred by laches.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 111.]

5. TENANCY IN COMMON §19(2)—DUTY TO PROTECT COMMON TITLE.

Equity does not oblige a cotenant to pay out his money to protect the common title, but permits him to do so and converts him into a trustee when he has done so.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 56.]

6. TENANCY IN COMMON §19(5)—PURCHASE OF ADVERSE CLAIM—FAILURE OF COTENANTS TO REIMBURSE—PRESUMPTION.

Where a cotenant has purchased an adverse claim to the land, failure of the other cotenants to reimburse him within a reasonable time will be taken as an election on their part to allow him to take the title he has acquired for his individual use.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 56.]

7. TAXATION §667—FORECLOSURE PROCEEDINGS—VALIDITY—SALE IN EXCESS OF AMOUNT OF TAXES DUE.

Under the procedure prescribed by our statute, that the property was sold for approximately 50 cents in excess of the amount of taxes due does not render void the tax foreclosure proceeding or the title acquired thereby.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1350.]

Department 2. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by W. G. Dwight against Ella Waldron and others. From a judgment of dismissal after sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Stewart & Tucker, of Aberdeen, for appellant. Bridges & Bruener, of Aberdeen, for respondents.

FULLERTON, J. This is an action brought by the appellant, Dwight, against the respondents Waldron, to set aside a tax deed to certain real property situate in the city of Hoquiam, and to quiet the title of the re-

spondents to certain undivided interests in the property. A demurrer to the complaint was interposed and sustained, after which the appellant elected to stand thereon. From a judgment of dismissal thereafter entered this appeal is prosecuted. The ultimate question therefore is: Does the complaint state facts sufficient to constitute a cause of action?

The facts stated in the complaint are substantially these: On October 16, 1890, the respondent R. P. Waldron, together with Arch Murray, Alex Miller, and Frank Miller, became the owners of the property in question by virtue of a warranty deed executed to them by the then owner of the property, the deed conveying to Frank Miller an undivided one-seventh interest in the land, and to the remaining grantees an undivided six-sevenths interest therein. These parties held the land until June 20, 1895, when R. P. Waldron conveyed his interest to one I. W. Walker. During the years the property was held by the original purchasers taxes were assessed against the property by the assessor of Chehalis county, the county in which the lands lie, in the name of the original purchasers up to the time of the transfer by Waldron to Walker, and from that date up to May 31, 1902, in the name of original purchasers, with the exception that the name of Walker was substituted for that of Waldron as one of the owners of the property. The owners of the property suffered the taxes to become delinquent, and on the date last named one M. E. Ross, then a stranger to the title, procured from the county of Chehalis a certificate of delinquency for the taxes for the years 1896 to 1900, inclusive. After procuring this certificate, and on September 2, 1902, M. E. Ross acquired by quitclaim deed from I. W. Walker his interests in the property. On September 13, 1902, Mrs. Ross began an action in the superior court of Chehalis county to foreclose her certificate. At this time both Alex Miller and Frank Miller were dead, and the plaintiff made parties defendant to the foreclosure proceedings the surviving owner Murray and the heirs at law of the deceased owners. Service was had upon Murray personally, and upon the other defendants by publication after a return of not found had been made by the sheriff in whose hands the summons was placed for service. Default was made in the proceedings by the defendants, and on December 18, 1902, a decree of foreclosure was entered on the certificate of delinquency, for the principal and interest due thereon, together with the costs of the proceedings, the total aggregating the sum of \$81.73. Thereafter a sale of the property was had under the decree of foreclosure by the treasurer of Chehalis county, at which sale Mrs. Ross became the purchaser of the

property, and on February 14, 1903, a treasurer's deed therefor was issued to her. The tax sale was in all respects regular, other than that the land was sold for a sum in excess of the amount due on the decree, "of approximately 50 cents." After the execution of the treasurer's deed Mrs. Ross assumed ownership of the entire tract, and on April 7, 1909, conveyed the same by warranty deed to R. P. Waldron. The respondent H. B. Waldron is the wife of R. P. Waldron, and these respondents on March 19, 1909, mortgaged the property to the respondent Ella Waldron, which mortgage had not been paid in full at the time of the commencement of the present action on December 8, 1915. Since the execution of the tax deed Mrs. Ross and R. P. Waldron and wife, as owners, have paid all of the taxes levied upon and assessed against the property, and "plaintiff has not, and his predecessors in interest have not, paid or undertaken to pay any taxes on the said property since the execution of the said tax deed." The appellant acquired such interests in the property as he possesses from Arch Murray and the heirs at law of Frank and Alex Miller. He made no tender of the taxes paid by the respondents and their predecessor in interest, but in his complaint avers that he is ready and willing to pay the amount of the taxes, interest, costs, and accrued costs becoming due and payable on the property on account of levies of taxes made against the property since the year 1896.

The complaint contains allegations also concerning the relations existing between Mrs. Ross and the respondents Waldron, and concerning their purposes in acquiring the title to the property through the tax foreclosure proceedings, but, as no stress is laid on these allegations in this court, they need not be further noticed.

The complaint contains no allegation concerning the possession of the property since the time of the tax foreclosure sale. It is inferable from the allegations, however, that neither the appellant nor any of his predecessors in interest has ever had possession of it, and the most favorable deduction than can be drawn in his favor is that the land has been at all times vacant and uncultured.

The demurrer was based on two statutory grounds of demurrer, want of facts sufficient to constitute a cause of action, and the statute of limitations. The record does not disclose upon which of these the trial court rested its conclusion, but the appellant contends that the conclusion is not sustainable upon either of the suggested grounds. More specifically, he contends that Mrs. Ross became a tenant in common with the predecessors in interest of the appellant when she acquired the interests of R. P. Waldron on June 20, 1895, that her subsequent acquisition of the legal title to the whole prop-

erty at the tax foreclosure sale inured to the benefit of her cotenants, and that such title has not since lapsed either under the doctrine of laches or by the statute of limitations.

[1] It is a generally recognized rule that there is such a mutual relation between tenants in common of real property that one of such tenants cannot deprive his cotenants of their interests in the common property by purchasing an outstanding adverse title thereto, or by the purchase of an incumbrance thereon which is afterwards converted into title, when the purchase is made for the benefit and protection of the common estate. The principle has been frequently recognized by this court. *Cedar Canyon Con. Min. Co. v. Yarwood*, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841; *Dahlstrom v. Beard Fruit Co.*, 78 Wash. 13, 131 Pac. 450; *Stoll v. Griffiths*, 41 Wash. 37, 82 Pac. 1025; *Burnett v. Ewing*, 89 Wash. 45, 80 Pac. 855; *Anderson v. Snowden*, 44 Wash. 274, 87 Pac. 358, 120 Am. St. Rep. 998; *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858; *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

[2] But it is not meant by the rule that the purchase is void, or that the title acquired by the purchase vests by operation of law in the cotenants. The cotenants may believe that the property is not sufficient in value to justify the expenditure, or they may believe that the common title is the paramount title; hence the title acquired by the purchaser is not forced upon them. The rule but gives the cotenants the right to share in the benefits of the purchase, a privilege which they may accept or reject. At most, the title acquired by the purchase is voidable not void, and they who would complain must elect whether they will avoid it or not. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167.

[3] It is a settled rule also that, if the cotenant would share in the adverse title acquired by the purchasing tenant, he must pay or tender payment of his proportionate share of the price necessarily expended in acquiring the title, and must exercise the privilege within a reasonable time. *Starkweather v. Jenner*, supra; *Freeman on Cotenancy*, § 156. What will constitute a reasonable time depends much upon the facts of the particular case, but the authorities all agree that whatever delay is occasioned must be entirely consistent with fair dealing, and not attributable to an effort to retain the advantages of the purchase while the responsibilities attending upon it are shirked.

[4] In the light of these principles, it seems to us that the judgment of the trial court can be rested on the ground of laches if not strictly upon the statute of limitations. From the dates given it will be observed that nearly 20 years had elapsed be-

tween the time the appellant's predecessors in interest made default in the payment of taxes and the time the appellant sought by this action to redeem therefrom. This is almost twice the period of the statute of limitations for the recovery of real property held adversely. More than 12 years have elapsed since the respondents' predecessor in interest acquired the property at the tax foreclosure sale. At that time they paid the accumulated taxes, and have since regularly paid all of the taxes subsequently levied upon the property. They have at all times since the sale claimed exclusive ownership of the property, and have otherwise exercised acts of ownership over it consistent only with a claim of exclusive ownership. The property consists of city lots in a growing city, and its value must necessarily have fluctuated, although having a general tendency to increase. It must be remembered also that the tax foreclosure sale at which the predecessor in interest of the respondents purchased the property was not the ordinary tax sale made upon a general notice of more or less publicity, but was a judicial sale founded on a decree of foreclosure, in an action in which the cotenants were made defendants, and in which all of them found within the jurisdiction of the court were personally served with summons. They cannot therefore plead, and do not plead, want of notice of the sale. They were charged with notice also that on each succeeding year there were taxes levied against the property which they must pay if the title to the property was to be preserved in them, and they are chargeable with knowledge that the land was vacant land, producing no rental, and if the taxes were being paid by their cotenants, they were being paid from the private funds of such tenants which they were equitably bound to proportionately reimburse.

[5, 6] Equity does not oblige a cotenant to pay out his money to protect the common title. It rather permits him to do so and converts him into a trustee when he has done so. But it equally lays an obligation upon the other cotenants to reimburse him for his outlay, and a failure to reimburse him within a reasonable time will be taken as an election on their part to allow him to take the title he has acquired for his individual use. *Wilson v. Linder*, 21 Idaho, 576, 123 Pac. 487, 42 L. R. A. (N. S.) 242, Ann. Cas. 1913E, 148.

In *Kershaw v. Simpson*, 46 Wash. 313, 89 Pac. 889, a case similar in principle to the one at bar, we used this language:

"Appellant, after learning of the purchase of the property by respondents, did not tender any portion of the purchase price, although something over three years elapsed from the time

she learned of said purchase to the date of the commencement of this action. As this is an action wherein she invokes equity, it was incumbent upon her to show that she had done equity by paying, or promptly offering to pay, her portion of the purchase price."

The case of *Dahlstrom v. Beard Fruit Co.*, 73 Wash. 13, 131 Pac. 450, does not support the appellant's contention, nor does it hold that the tenant in common acquiring the adverse title cannot in any case assert such title short of the period of the statute of limitations. In that case the tenant was in possession of the land, collecting the rents and profits. The rentals had been more than sufficient to pay the taxes, and the tenant had led the cotenant to believe he would pay them. It was held that under such circumstances he could not suffer the taxes to become delinquent, purchase at the tax sale, and assert the title so acquired as against the interests of the cotenant short of the period of the statute of limitations. This is not the case here. There was here no possession of the property nor rents nor profits, nor did the tenant agree to pay the taxes, and the period elapsing since the tax sale and the open assertion of title exceeds the period of the statute of limitations.

[7] Nor does the fact that the property was sold for approximately 50 cents in excess of the amount of taxes due render void the tax foreclosure proceedings or the title acquired thereby. Cases can be found where, in proceedings wholly ex parte, the courts have set aside tax sales for excessive exactions where the excess was perhaps no greater than the excess shown here; but the cases are not in accord with the weight of authority or the better reasoning, even in the instances to which they are strictly applicable. We cannot think, however, they have application to a procedure such as our statute prescribes. Here the foreclosure is a judicial proceeding, had after the service of a summons, in which the adverse party may appear and contest the foreclosure. The sale is made after judgment in the cause, and the opportunity is given to appear and question the regularity of the sale before it becomes final by the execution of a deed. Manifestly, it seems to us, it would be a perversion of the statute to hold that an irregularity such as this renders the entire proceeding void.

It is our conclusion that the complaint shows no ground for a recovery of the property, and that the judgment should be affirmed.

It is so ordered.

ELLIS, C. J., and PARKER, MOUNT, and HOLCOMB, JJ., concur.

FIREMEN'S FUND INS. CO. v. OREGON-WASHINGTON R. & NAV. CO.
(No. 13872.)

(Supreme Court of Washington. May 2, 1917.)

1. RAILROADS — 484(1) — FIRES — NEGLIGENCE — QUESTION FOR JURY.

Evidence as to a fire starting 140 feet from a railroad being negligently set from a locomotive held sufficient to go to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740, 1748.]

2. RAILROADS — 484(4) — INJURIES FROM FIRES — INSTRUCTIONS.

The question of a locomotive, claimed to have set a fire, being equipped with a proper spark-arresting device, should not be submitted to the jury, all the evidence agreeing that it had the best known appliance on the market, and the questions open being proper adjustment of the appliance and operation of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1743.]

3. RAILROADS — 458 — FIRES — NEGLIGENCE — DEGREE OF CARE REQUIRED.

Relative to liability for fire set by locomotive, a railroad is not required to exercise the highest degree of care in its operation, but only reasonable or ordinary care, that degree which an ordinarily careful and prudent person engaged in the same business would exercise under similar circumstances and conditions, though this is unquestionably a high degree of care, because the risk when care is not observed is very great, and the degree of care in all cases must be commensurate with and correspond to the danger incident to the failure to exercise care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657-1660, 1667.]

4. TRIAL — 296(3) — INSTRUCTIONS — CURE — CONFLICTING INSTRUCTIONS.

An instruction erroneously declaring it is defendant's duty to exercise the highest degree of care consistent with the practical conduct of its business is not cured by another properly defining the degree of care resting on it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

Department 1. Appeal from Superior Court, Walla Walla County; Edward Q. Mills, Judge.

Action by the Firemen's Fund Insurance Company against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

A. C. Spencer and W. A. Robbins, both of Portland, Or., and Evans & Watson, of Walla Walla, for appellant. O. C. Moore, of Spokane, for respondent.

WEBSTER, J. This is an action brought by the Firemen's Fund Insurance Company against the Oregon-Washington Railroad & Navigation Company to recover damages for the alleged negligent burning of a field of grain located near Boles Station, in this state. Plaintiff alleged in substance that it is a fire insurance company, and prior to the fire in question had insured the grain which was destroyed; that thereafter it paid

the owner of the grain the amount of the loss, and, by reason thereof, was subrogated to whatever rights the owner may have had against the defendant company; and that the company was guilty of negligence in that it caused sparks and cinders to be emitted from its locomotive, thereby setting fire to the wheat field. The defendant denied any negligence on its part and affirmatively pleaded that on July 26, 1915, the day on which the fire occurred, one of defendant's east-bound passenger trains, drawn by engine No. 262, passed through Boles Station at about the hour of 10:40 a. m.; that this was the only locomotive of the defendant passing in that vicinity for a considerable time prior to the discovery of the fire; that locomotive No. 262 was of first-class construction, was equipped with suitable and proper spark-arresting apparatus, which was in place and in good repair; and that the engine was carefully and skillfully operated. The affirmative matter in the answer was denied by the reply. Upon the issues thus joined the cause was tried to a jury, which returned a verdict in favor of plaintiff. From the judgment entered upon the verdict, the defendant appeals.

[1] At the conclusion of the testimony the defendant moved the court for a directed verdict in its favor upon the ground of the insufficiency of the evidence. The motion was denied, and this ruling is assigned as error. Counsel for defendant contend that it was necessary for the plaintiff to prove that the fire originated near defendant's right of way soon after the locomotive had passed the field, and that under all the circumstances it was more probable that the fire originated from its locomotive than from any other cause; that this showing would give rise to a prima facie presumption of negligence and render it incumbent upon the defendant to go forward with the testimony and show if it could that its locomotive was properly equipped, maintained, and operated at the time the fire is alleged to have been set out, and that in this case the defendant made such showing; that after the defendant had produced such testimony, it then devolved upon plaintiff to again go forward with the testimony and produce evidence tending to show that the defendant was guilty of actual as distinguished from presumptive negligence in the equipment or operation of the locomotive; and that the plaintiff failed to introduce such evidence. The record discloses that plaintiff introduced testimony to the effect that the fire originated in the wheat field about 140 feet from the center of the railway track and about 800 feet from Boles Station, at which the locomotive had stopped; that the track from the station to a point immediately in line with the place in the field where the fire was discovered, and beyond, was up a steep grade; that the locomotive

was working heavily and was emitting large volumes of smoke, soot, and cinders; that hot embers or sparks struck the harvesters at work in the field; that the effect of their heat as they lit on the men and on the backs of the teams was noted at the time. For example, one witness testified:

"As the train passed it threw out quite a few cinders, and most of them were pretty hot. I had my shirt open and they went down my back, and I had a mule that was clipped and on his back and shoulders when they fell on him I noticed a burn or two where it kind of scorched the hair."

It was also shown that the fire was discovered only a few minutes after the locomotive had passed; that none of the men in the field were smoking or carrying matches; and that there was not other known cause for the fire. An experienced locomotive engineer testified in behalf of plaintiff that an engine properly equipped and operated would not throw live cinders a distance of 140 feet, and the engineer in charge of engine No. 262 at the time the fire is alleged to have been started testified on cross-examination that, if the fire was set out by his engine in the manner claimed by plaintiff, it would indicate either that something was wrong with the locomotive, or that it was not operated in a proper manner.

These facts bring the case squarely within the rule announced by this court in *Northwestern Mutual Fire Association v. Northern Pacific Ry. Co.*, 68 Wash. 292, 123 Pac. 468, Ann. Cas. 1913E, 968. In that case the railway company introduced evidence to the effect that the engine there charged with having caused the fire was equipped with a suitable spark-arresting device which was in excellent state of repair; that the engine was in first-class condition in all respects; and that it was carefully and skillfully operated. A verdict was rendered in favor of the plaintiff. A motion for judgment notwithstanding the verdict was granted. In reversing the judgment the court said:

"Appellant insists that its evidence made a prima facie case of negligence sufficient to shift to respondent the burden of showing that its engine and spark arrester were in good repair, that the engine was properly operated, and that respondent exercised due care. It also contends that, upon all the evidence, it was for the jury to determine whether respondent had been negligent, and whether it had successfully overcome the prima facie case made by appellant. Respondent, in substance, contends: (1) That the cause of the fire was a matter of mere conjecture; (2) that negligence on its part was not proven; and (3) that, conceding appellant by its evidence made a prima facie case as to the origin of the fire, yet the burden of proof would not then shift to respondent, but respondent would only be required to show that it had used reasonable care in the equipment and operation of its engine; that when it had done so, and had thus disposed of appellant's prima facie case, the burden still rested upon appellant to sustain its charge of negligence, which it failed to do; and that it was the duty of the trial judge to so hold, as a question of law.

"The first question presented for our determination is whether appellant made a prima facie case of negligence against respondent. We con-

clude that it did. In *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78, we said: 'There was no direct evidence that the fire was started by the appellants' engine, nor was it discovered burning upon the right of way previous to the discovery of the smoke arising from the roof of the barn. It was in evidence, however, that there was no fire upon the premises prior to the passage of the engine, and no other known source from which the fire could probably have originated. From this record we have no hesitancy in saying that, to our minds, the evidence justifies the finding of the jury, not only that the fire which caused the injury escaped from the passing passenger engine, but that it caught first in the inflammable debris, and spread from thence to the respondent's barn. The respondent was not obligated to prove these facts by the direct evidence of an eyewitness, nor by proofs which would leave them beyond the possibility of a doubt. It was sufficient if he established them by the proof of circumstances which lead reasonably to their inference, and which ordinarily satisfies an unprejudiced mind of their truth.'

"The evidence now before us leads reasonably to the inference that the fire was caused by sparks from respondent's engine. Respondent attempts to distinguish the *Abrams* Case, and other cases decided by this court, by calling attention to the fact that, in the cases mentioned, inflammable debris was on the right of way, a fact not shown in this record. The evidence here does show that the engine was working heavily; that it was emitting large cinders and sparks which were carried towards the house by a strong wind; that within a few minutes the fire was discovered; and that no other cause for the fire has been suggested or shown. These facts are sufficient to sustain the finding of the jury. * * *

"As above stated, the respondent further contends that, even though the evidence offered by appellant be held sufficient to make a prima facie case of negligence on respondent's part, so as to require respondent to offer proof in rebuttal, the undisputed evidence which it offered so completely overcame and disposed of appellant's case that it was the duty of the trial judge to direct a judgment of dismissal. This would be an unauthorized invasion of the province of the jury. Respondent's showing which it made was nothing more than evidence opposed to evidence. It was made through the medium of respondent's records and the testimony of witnesses who were respondent's employees. It was for the jury to pass upon the credibility of the witnesses, and determine whether this evidence was sufficient to rebut the prima facie case made by appellant."

The evidence in the case before us is more strongly in favor of the plaintiff than it was in the case from which we have just quoted. The question presented was one of fact for the determination of the jury, and the ruling of the trial court denying the motion for a directed verdict was clearly right.

Defendant assigns numerous errors based upon the instructions of the court defining the duty resting upon defendant to equip its locomotive with approved appliances to prevent the escape of sparks and cinders. As we read the record and in view of the fact that the judgment must be reversed upon another point, it will not be necessary to consider these assignments.

[2] At the trial defendant introduced evidence to the effect that engine No. 262 at the time in question was equipped with a master mechanic's front end, which was one of

the best-known devices for arresting sparks, and that it was supplied with a 7x7 netting, which is the finest netting that it is practicable to use on a locomotive. Plaintiff's only expert on this point testified that he was familiar with the master mechanic's front end spark arrester, and that he knew of no better device on the market, and that a netting 3x3 would be proper equipment, a 3x3 netting being of much larger mesh than one 7x7. Consequently there was no dispute or conflict in the testimony as to the character of the appliance with which the engine was equipped. The sole issues for the consideration of the jury were whether the fire had been set out by defendant's locomotive, and, if so, whether the spark-arresting appliances at the time were properly adjusted, in place, and in good repair, and whether the locomotive was carefully and skillfully operated.

There is evidence in the record that the adjustment of the deflector plate in the spark-arresting apparatus and the position of the diaphragm or draft plates were matters to be taken into consideration in determining whether a locomotive is properly equipped to prevent the escape of sparks. As we have already said the engineer in charge of the locomotive testified that, if the fire was set out in the manner claimed by plaintiff, it would indicate either that something was wrong with the engine or with the manner in which it was operated, and plaintiff's expert testified that a locomotive properly equipped, adjusted, and operated would not throw sparks or live cinders a distance of 140 feet. *Overacker v. Northern Pac. R. Co.*, 64 Wash. 491, 117 Pac. 403; *Chicago & E. R. Co. v. Ohio City Lumber Co.*, 214 Fed. 751, 131 C. C. A. 57.

There being no conflict in the evidence as to the character of the spark-arresting device with which the engine was equipped, that is, there being no contention that it was not a suitable and proper device, but all of the evidence agreeing that it was the best-known appliance on the market for the purpose for which it was designed, that question should not have been submitted to the jury. But the case should have been permitted to go to the jury upon the questions of whether the locomotive in fact caused the fire, and, if so, whether the defendant was guilty of negligence in failing to exercise ordinary and reasonable care and caution in properly adjusting the appliance and keeping it in repair, and whether the locomotive at the time was operated with ordinary and reasonable care and skill.

[3] In its charge to the jury the trial court instructed in part as follows:

"It is the duty of a railroad company to equip its locomotives with approved mechanical inventions and appliances to prevent the escape of sparks, fire, and cinders therefrom, and to exercise reasonable diligence and precaution in keeping such equipment in place and proper repair.

And it is the further duty of a railroad company to exercise the highest degree of care in the operation of its locomotives consistent with the practicable conduct of its business, and likewise to employ and provide competent, skillful, and careful men to operate same."

Defendant complains of this instruction upon the ground that it imposed upon the company a higher degree of care in the premises than the law sanctions. It will be seen that the jury was instructed that it was the duty of defendant to exercise the highest degree of care in the operation of its locomotives consistent with the practicable conduct of its business, and to exercise the same degree of care in employing and providing competent and skillful men to operate the same. This is not the law. The instruction imposed upon defendant the duty to exercise the same degree of care exacted by law of carriers of passengers. The law, in its tender regard for human life and limb, holds railway companies as carriers of passengers to the exercise of the highest degree of care and caution consistent with the practical operation of the business in which they are engaged, but in a case such as is now before us the defendant is required only to exercise ordinary care and caution. Ordinary or reasonable care in a case of this kind is unquestionably a high degree of care, because the risk of injury when care is not observed is very great. In this, as in all cases of negligence, the degree of care must be commensurate with and corresponding to the danger incident to the failure to exercise care. It is, however, only that degree of care which an ordinarily careful and prudent person engaged in the same business would exercise under similar circumstances and conditions. The standard of care is ordinary and reasonable caution. But whether this standard is observed depends upon the attendant facts of the particular case. *Abrams v. Seattle & Montana Ry. Co.*, 27 Wash. 507, 68 Pac. 78. *Thompson*, in his *Commentaries on the Law of Negligence* (volume 2, §§ 2232 and 2233), announces the rule supported by the great weight of authority in this language:

"The modern law has so far departed from ancient conceptions that, instead of the railroad company being liable as an insurer against damages arising from its use, it is liable only for what the books describe as reasonable or ordinary care, which may be said to mean, in this connection, the care which will under given circumstances be exercised by a competent specialist having a due regard for the rights of others. But for the lack of this measure of care it is liable. In the absence of a statute making it such, it is not an insurer against loss by fire of all the combustible property situated along the line of its road, but is required to exercise only such care and caution in providing machinery, in the employment of agents in operating its road, and in caring for its right of way, as an ordinarily prudent person would exercise under all the circumstances if all the property to be affected belonged to himself. This obligation to use reasonable or ordinary care includes the obligation to use reasonable care and skill in the construction of its locomotives, by the adoption of approved appliances

to prevent the escape of fire or sparks therefrom; to use reasonable care in keeping them in repair; to use reasonable care and skill in operating and managing such locomotives while running; to use reasonable care in preventing the accumulation of combustible materials along its right of way; to use reasonable care in arresting the spread of fires which have been communicated from its locomotives or which have been otherwise set by its servants on its right of way, or by strangers; and to use reasonable efforts to extinguish fires set by its locomotives, by its employees, or spreading from its right of way, no matter by whom set, after such fires have reached the premises of others.

"The degree of care which it is required to exercise in all these cases is, as in other cases, proportioned to the danger accruing to third persons from the failure to exercise care. In other words, here, as in other cases, what the law regards as reasonable care is a care proportioned to the risk; and it may in some cases require a high degree of skill and the most exact and unremitting attention and diligence, while in other cases, where the danger is remote, it will be satisfied with less skill and with a less exact and sustained degree of attention."

[4] The trial court, in other portions of the charge to the jury properly defined the degree of care resting upon the defendant, but the vice in the instructions is that they are absolutely contradictory and inconsistent. In one place the jury is told that the defendant must exercise the highest degree of care consistent with the practical conduct of its business, and in other places in the charge it is told that the defendant need only exercise ordinary and reasonable care in the light of the attending circumstances and surroundings. The instructions are irreconcilable, and set up for the guidance of the jury contradictory rules pertinent to a material and vital issue in the case. Under such circumstances it is impossible for the court to say which instruction the jury followed. One of the instructions was erroneous, and it may be the jury followed that one. The instructions being thus inconsistent and contradictory upon a material and pivotal point in the case, the error must be regarded as prejudicial, requiring a reversal. *Dunn v. Puget Sound T., L. & P. Co.*, 89 Wash. 36, 153 Pac. 1059; *Johnson v. Heltman*, 88 Wash. 595, 153 Pac. 331; *Paysse v. Paysse*, 84 Wash. 351, 146 Pac. 840; *Mosso v. Stanton*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943; *Gage v. Springston Lumber Co.*, 47 Wash. 141, 91 Pac. 558; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Miller v. Vermurie*, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600.

The assignments of error not referred to or discussed in this opinion have been noticed and are considered to be without merit.

The judgment is reversed, and the cause remanded for a new trial not inconsistent with this opinion.

ELLIS, C. J., and MORRIS, MAIN, and OHADWICK, JJ., concur.

MOSER v. PANTAGES et ux. (No. 13725.)
(Supreme Court of Washington. April 30, 1917.)

CONTRACTS—§107—REBATE FROM INSURANCE PREMIUM—STATUTE—AGENT'S RECOVERY ON CONTRACT.

An insurance agent, by agreeing to obtain without commission a loan from his company to defendant if latter would take out life policies for which agent would obtain commissions, violated Rem. Code 1915, § 6059—180, prohibiting rebates, and upon defendant's refusal to accept policies and loan the agent could not recover on the contract, and it was immaterial that the statute did not declare such contract void in view of section 6059—191, providing that agent shall be fined and have his license revoked for violating any of the provisions of that article.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 479.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by F. C. Moser against Alexander Pantages and wife. Demurrer to amended complaint sustained and action dismissed, and plaintiff appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant. Ryan & Desmond, of Seattle, for respondents.

MOUNT, J. The plaintiff brought this action to recover damages because the defendants failed to pay the premiums upon two life insurance policies. The trial court sustained a general demurrer to the amended complaint. The plaintiff refused to plead further, and an order was entered dismissing the action. The plaintiff has appealed.

The amended complaint, after alleging that the defendants are the owners of two lots in the city of Seattle, is as follows:

"(2) That on or about April 1, 1914, the said defendants orally employed the plaintiff to negotiate for them a first mortgage loan upon the within described property. That thereupon this plaintiff entered into negotiations with the New York Life Insurance Company of New York, to procure the maximum loan for said defendants upon the within described property which the said New York Life Insurance Company might authorize.

"(3) That thereupon on May 27, 1914, the said defendant Alexander Pantages made a written application through this plaintiff for a loan of \$150,000 to be secured by a first mortgage upon said premises for a period of five years with interest at the rate of 6 per cent. per annum with repayments of \$10,000 at the end of the second, third, and fourth years, \$100,000 to be advanced upon satisfactory title being shown, the balance after the completion of a building to be erected on said lots to cost not less than \$200,000. That the New York Life Insurance Company accepted the application of said defendants for said loan and agreed to make same in accordance with the terms of said application.

"(4) That at the time the plaintiff was employed by the defendants to procure said loan, and as compensation for his services in procuring the said loan of \$150,000 for the defendants, the defendants agreed to take out life insurance policies in the New York Life Insurance Company through the plaintiff, as agent for said New York Life Insurance Company; the said plaintiff being during all of said negotiations a solicitor of life insurance for the New York Life

Insurance Company. That said plaintiff stated to said defendants that, if the defendants took out policies in the said New York Life Insurance Company at the solicitation of the plaintiff, he as a solicitor of the New York Life Insurance Company would be entitled to a commission for procuring such insurance, and that the commission he would receive from the New York Life Insurance Company for procuring said policies would be his compensation for the procuring of said loan for the defendants upon the above-described premises.

"(5) As there now existed a completed contract between the New York Life Insurance Company and the defendants, for a loan, said plaintiff therefore demanded of the said defendants for his services for procuring for them the said loan of \$150,000 that they accept policies of life insurance in the said New York Life Insurance Company. That on the 28th day of May, 1914, said plaintiff delivered to the defendant Alexander Pantages policy of life insurance No. 4,577,322 issued by the New York Life Insurance Company for \$100,000 upon the life of the said Alexander Pantages, and at the same time delivered to Alexander Pantages policy of life insurance No. 4,577,325 issued by the New York Life Insurance Company for \$100,000 upon the life of the defendant Lois A. Pantages. That said policies of insurance were received and accepted by the said defendants, and that the said defendants promised and agreed to pay the premiums thereon and to maintain said life insurance policies in force. That the premiums upon said policies for the first year aggregated the sum of \$10,359, which sum the defendants promised and agreed to pay. That, under plaintiff's contract of employment with the New York Life Insurance Company, he was entitled to receive out of said premium, for the year 1914, when paid, 35 per cent. thereof, or the sum of \$3,625.65, upon said policies of insurance so delivered by plaintiff to the defendants and accepted by them.

"(6) That after the plaintiff had negotiated said loan of \$150,000 with the New York Life Insurance Company, and after said insurance company had agreed to make said loan, and was able, ready, and willing to complete the same, and after said policies had been issued and delivered to the defendants and accepted by them, the said defendants returned said policies to the New York Life Insurance Company and refused to pay the premiums thereon and refused to accept said loan. That the plaintiff completely performed the service of procuring said loan for the defendants and in procuring said policies of insurance, and did and performed all the things required of him under the terms of his employment with the defendants. That the defendants, by refusing to complete said loan with the New York Life Insurance Company and refusing to retain said policies of insurance after their acceptance by them, and by refusing to pay said premiums upon said policies in accordance with their agreements with plaintiff, damaged the plaintiff in the sum of \$3,625.65. That the plaintiff has demanded of the defendants the payment of said sum of \$3,625.65, but that the defendants have not paid the sum nor any part thereof, and that the whole sum of \$3,625.65 is now due and unpaid."

Then follows a prayer for judgment for that amount.

The statute (Rem. Code, § 6059—180) provides:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals, between insureds of the same class and equal expectation of life, in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the

terms and conditions of the contracts it makes; nor shall any company or agent * * * make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent * * * pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any other valuable consideration or inducement whatsoever not specified in the policy contract of insurance."

The complaint above quoted shows that the loan contract and the insurance contract were parts of the same transaction. It shows that the appellant was an agent of the New York Life Insurance Company; that as such agent he was employed by the respondents to obtain a loan of \$150,000 from the New York Life Insurance Company; and then, in paragraph 4, states:

"That said plaintiff stated to said defendants that, if the defendants took out policies in the said New York Life Insurance Company at the solicitation of the plaintiff, he as a solicitor of the New York Life Insurance Company would be entitled to a commission for procuring such insurance, and that the commission he would receive from the New York Life Insurance Company for procuring said policies would be his compensation for the procuring of said loan for the defendants upon the above-described premises."

This is a direct allegation that the commission he would receive from the company for procuring the policies would be his compensation for procuring the loan. In other words, he would reduce the premium by the amount of his commission, as an inducement for the respondents to enter into the contract of insurance. In short, the appellant induced the insurance by a rebate of the premium to the extent of his commission which he made up by a charge for procuring the loan. This clearly is in face of the statute which provides that no insurance agent shall pay as an inducement to insurance any rebate of premium payable on the policy, or any special favor, or other valuable consideration, or inducement whatsoever, not specified in the policy contract of insurance.

The appellant relies upon the case of *Calvin Phillips & Co. v. Fishback*, 84 Wash. 124, 146 Pac. 181. That case is distinguishable from this by the fact that in that case there was no rebate of commissions, either on the loan or upon the policy of insurance. Here, there is a rebate upon the premium for the policy of insurance, or a rebate of commissions for procuring the loan, either of which was unlawful, because an unlawful inducement for the insurance. We are satisfied, for that reason, that the opinion in the *Calvin Phillips Case* does not control in this case.

The appellant further argues that, if the complaint discloses an agreement in violation of the section of the Code above noted, even then he is not precluded from recovering, because the law does not declare such contract void. The statute does not, in terms, declare such contracts void, but section 6059—180

(Rem. Code), hereinbefore quoted, clearly prohibits such contracts, and section 6059—191 (Rem. Code) provides that any insurance agent knowingly and willfully violating any of the provisions of this article shall be fined in any sum not exceeding \$500 and shall have his license revoked.

The appellant relies upon the cases of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595, 49 L. R. A. (N. S.) 147, and *Ferguson-Hendrix Co. v. Fidelity & Dep. Co.*, 79 Wash. 528, 140 Pac. 700. The *Way* Case was a case where the appellant sought to recover the difference between the regular rate upon a policy of insurance and the reduced rate. We held in that case he could not recover, because, in substance, he could not profit by his own wrong. We said in that case, however, that a contract which violates a statutory regulation of business is not void unless made so by the terms of the statute. We were there considering a contract which the agent was seeking to avoid for his own benefit. In the *Ferguson-Hendrix* Case we held to the same effect. In the latter case, quoting from *Miller v. Ammon*, 145 U. S. 421, we said:

"The general rule of law is that a contract made in violation of the statute is void; and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." We announced the same principle in the recent case of *Stirtan v. Blethen*, 79 Wash. 10 [139 Pac. 618, 51 L. R. A. (N. S.) 623]."

The contract made here was in violation of the terms of the statute, and this action is an attempt on the part of the appellant to enforce, in his favor, an illegal contract, which he made with the respondents. This he may not do.

We are satisfied that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

CARSTENS et al. v. NUT HOUSE. (No. 13677.)

(Supreme Court of Washington. April 30, 1917.)

1. PRINCIPAL AND AGENT §23(1) — EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.

In an action by dealers in peanuts against a company dealing in peanuts, on an assigned claim for the price of peanuts sold, wherein defendant company claimed commissions due it in excess of the amount it owed, evidence held sufficient to support the conclusion that defendant company was in fact at all times acting for plaintiffs' predecessor in selling peanuts, and not for itself.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41.]

2. PRINCIPAL AND AGENT §81(1)—RIGHT TO COMMISSIONS.

A company which sold peanuts through another company acting as broker, and the assignees of the selling company, its successors in interest, against the broker company's claim for commissions could not avail themselves of the fact that the broker company made sales in its own name.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 194.]

3. PRINCIPAL AND AGENT §81(2)—RIGHT TO COMMISSIONS — PROOF OF FINANCIAL RESPONSIBILITY OF PURCHASERS.

In an action for the price of peanuts by the assignees of a company dealing in nuts against another company so dealing, which sought to offset commissions due it for effecting sales for the first company, where the evidence warranted the conclusion that the first company failed to consummate sales made for it by defendant company for reasons apart from want of financial ability on the part of the purchasers, defendant company was not called upon to prove the financial responsibility of purchasers.

4. EVIDENCE §450(8) — EXPLANATION OF TRADE TERM.

In such action, the sale contracts referring to the quantity sold as so many cars, it was competent to prove that the meaning of the word "car," in the trade, was a carload of 30,000 pounds, thereby rendering the sale contracts sufficiently certain as to quantity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2073, 2074.]

5. PLEADING §330—COPY OF ACCOUNT—EVIDENCE—STATUTE.

Under Rem. Code 1915, § 284, providing that the court may order a further account when the one delivered is defective, and may order a bill of particulars of the claim of either party to be furnished, where the account furnished by defendant was not as particular as demanded by counsel for plaintiffs, but was an account which, read in connection with the information appearing in the pleadings on file, fully informed counsel for plaintiff of every fact demanded by them to be furnished, the trial court properly overruled the objections to the introduction of defendant's evidence that the account was defective.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 996—1002.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Thomas Carstens and another, copartners under the firm name and style of the Pacific Oil Mills, against the Nut House. From a judgment for defendant, plaintiffs appeal. Affirmed.

Halverstadt & Clarke, of Seattle, for appellants. Hastings & Stedman and Ewing D. Colvin, all of Seattle, for respondent.

PARKER, J. The plaintiffs, Thomas Carstens and Herman Meyer, copartners doing business under the firm name of Pacific Oil Mills, and successors in interest by assignment of Pacific Oil Mills, a corporation, commenced this action in the superior court for King county seeking recovery of \$4,015 claimed as the purchase price of peanuts sold by that corporation to the defendant, the Nut House, a corporation, during the months of November and December, 1913, and the

month of January, 1914. It is conceded by defendant that peanuts of that total value were so sold to it, and that the claim therefor was assigned to the plaintiffs by the Pacific Oil Mills, a corporation, before the commencement of this action. The defendant alleges that before such assignment was made it earned the sum of \$7,940 as commissions in selling peanuts for Pacific Oil Mills in Chicago and New York in pursuance of a commission contract entered into between it and that corporation, which earned commissions the defendant alleges are unpaid and seeks to offset the same against the claim of the plaintiffs here sued upon. So the real controversy was, and here is, over the commission claim of the defendant. The trial in the superior court sitting with a jury resulted in a verdict in favor of the defendant to the effect that it is entitled to have its commission claim offset against the claim of the plaintiffs, and that such commission claim exceeds the claim of the plaintiffs. Judgment was accordingly entered that plaintiffs recover nothing and that the defendant recover from the plaintiffs its costs and disbursements incurred in this action. From this judgment the plaintiffs have appealed to this court.

Pacific Oil Mills was a corporation engaged in the importation and wholesale of nuts in the city of Seattle at all times here in question prior to the assignment of its claim against respondent to appellants, who thereafter did business as copartners under the same name. Respondent was at all times here involved engaged in the nut business in Seattle, but on a much smaller scale than that of appellants and their predecessor, Pacific Oil Mills. While respondent was much the smaller concern of the two, it apparently had superior selling facilities and advantages of which Pacific Oil Mills desired to avail itself.

The principal contentions here made by appellants have to do with the sufficiency of the evidence to sustain the verdict and judgment, which questions were presented to the trial court by motions timely made therein. It is insisted in that behalf that there was not sufficient proof of the making of the commission contract between respondent and Pacific Oil Mills. The fact of the making and also the terms of that contract seem to us to be rendered quite certain by the testimony of the respondent's president, if he is to be believed, the furnishing of samples by Pacific Oil Mills to respondent, and certain correspondence introduced in evidence. The contract so appearing contemplated the sale of peanuts by respondent for the Pacific Oil Mills in Eastern cities and that respondent should have as its compensation for making such sales an amount equal to the excess over six cents per pound. It seems quite clear to us that the evidence fully warrants the conclusion as evidently reached by the jury that this contract was actually entered

into and that its terms were as we have indicated. We are of the opinion that there was no failure of proof so far as this branch of the case is concerned.

[1, 2] It is contended that there was a failure of proof of the making of sales under the commission contract by respondent. This contention seems to be rested largely upon the fact that the sales were made by respondent's representatives in its own name instead of the name of Pacific Oil Mills. The making of sales in this manner without disclosing the name of Pacific Oil Mills as principal was assented to by it upon being fully advised of the sales being so made. It actually made shipments in accordance with some of these sales and received the whole of the proceeds therefrom, the shipments being made by Pacific Oil Mills in the name of respondent, and remittances in payment thereof being immediately turned over to Pacific Oil Mills when received. There was evidence pointing to a special reason for the making of sales by respondent in this manner without disclosing to the purchasers the principal for whom it was acting and that this manner of making the sales would have worked to the benefit of Pacific Oil Mills in increasing the quantity of sales had it furnished the goods as agreed upon by it in the commission contract. Not only did that corporation know of the reason for the sales being so made, but evinced a ready willingness to profit thereby in so far as it saw fit, or was able, to furnish the goods in consummation of the sales. The conclusion that respondent was in fact at all times acting for Pacific Oil Mills and not for itself is amply supported by the evidence. This, we think, renders it plain that the Pacific Oil Mills, and also appellants, as its successors in interest, can neither avail themselves of the fact that the sales were made in respondent's name. We have had occasion to notice the law relating to contracts made by agents of undisclosed principals as being in harmony with this conclusion in our recent decision in *Pacific Power & Light Co. v. White et al.*, 164 Pac. 602. This is not a case involving ratification of a contract made by one who at the time of its making was not in fact acting for the one sought to be held upon the theory of ratification, as counsel for appellant seem to argue, citing 2 C. J. 474. In other words, we have here a case where there was an existing principal for whom the agent acted at the time of making the sales contracts, though such principal was not disclosed to the purchasers. We are of the opinion that there was no failure of proof of the fact that these sales contracts were the contracts of the Pacific Oil Mills, made by respondent as its agent.

[3] It is contended that the proof fails to show that the purchasers to whom respondent claims to have made the sales were willing and able to consummate the sales. That they were willing to consummate the sales

seems to find ample support in the evidence. Indeed, we do not understand that it is seriously contended to the contrary. The principal contention in this behalf is that the financial ability of the alleged purchasers is not sufficiently proven. We may concede that, if it had been necessary in this case to make such proof, the evidence might be considered as in some measure deficient, but it is plain from the evidence as a whole that the Pacific Oil Mills approved the sales in so far as the financial ability of the purchasers to pay for the goods sold is concerned. The evidence is little short of conclusive that the failure of appellants to consummate the sales made in its behalf by respondent was not because of its belief in the financial inability of the purchasers. We have already noticed that it actually did consummate sales to one of these purchasers, and we note that, had it consummated the other sales made to that purchaser, they alone would have earned commissions for respondent of much greater amount than is necessary to offset appellants' claim against it. The evidence warrants the conclusion that the Pacific Oil Mills failed to consummate the sales made for it by respondent for reasons wholly apart from want of financial ability on the part of the purchasers and for reasons for which respondent was in no way responsible. The jury, we think, were fully warranted in concluding, as it evidently did, that respondents made the sales in good faith and in compliance with its commission contract with the Pacific Oil Mills, and thereby fully earned commissions at least equal to the amount of appellants' claim against it. We are of the opinion that the condition of the proof upon this branch of the case was such that respondent was not called upon to prove the financial responsibility of the purchasers. 4 R. C. L. 309.

[4] It is further contended in appellants' behalf that the sale contracts procured for it by respondent are too indefinite as to quantity to support recovery of commissions by respondent, in any event except in so far as two of such sales were consummated. The sale contracts in evidence refer to the quantity sold as so many "cars," manifestly meaning so many carloads. This is the manner of describing the quantity sold in each particular sale contract. Testimony was received showing that "car" or "carloads," with reference to merchandise of this character which is measurable by weight, means to the trade approximately 30,000 pounds. It was competent to so prove the meaning of the word "car" as used in the sale contracts and thereby render the sale contracts sufficiently certain as to quantity. 12 Cyc. 1085; Bullock v. Finley (C. C.) 28 Fed. 514; Indianapolis Cabinet Co. v. Herrman, 7 Ind. App. 462, 34 N. E. 579.

Manifestly in the making of these sales the quantity to be furnished under each particular contract did not call for very exact measurement until it became necessary to compute the exact total purchase price. For the latter purpose, of course, the quantity was contemplated to be determined with exactness, which could be done by determining the total exact weight when shipment would be made in pursuance of the sale contract, the price per pound being agreed upon. We are of the opinion that all questions of fact, the proof of which counsel for appellant challenged the sufficiency of, were properly left for determination by the jury, and that none of such questions could be properly determined by the court as questions of law.

[5] It is contended by counsel for appellant that the trial court erred in admitting in evidence testimony to show the making of the sales in question because prior to the trial of the case they had demanded of counsel for respondent a bill of particulars in response to which respondent furnished a bill of particulars, but somewhat defective we may admit for argument's sake. Counsel invoke the provisions of section 284, Rem. Code. While that section seems to contemplate the exclusion of evidence of items of account when not stated in the complaint or in a bill of particulars when demanded, it also provides that, in case the account is defective, the court "may order a further account." Counsel for appellant did not ask for any such order at any time prior to trial, though the statement of items was furnished five weeks before the trial, simply making their objections to the introduction of evidence upon the trial. While the account furnished was not as particular as demanded by counsel for appellants, it was an account which, read in connection with the information appearing in the pleadings on file, fully informed counsel for appellants of every fact demanded by them to be furnished. Under these circumstances we are clearly of the opinion that the trial court did not err in overruling the objections to the introduction of the evidence upon this ground.

Finally it is contended in appellants' behalf that the trial court erred in giving certain instructions and in refusing to give certain others requested by them. What we have already said disposes of some of the questions so raised. Otherwise we think the rulings of the court upon the instructions were wholly without prejudice to the rights of appellants and do not call for further discussion here.

We are quite clear that appellant has had a fair trial free from prejudicial error.

The judgment is affirmed.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

BOERINGA v. PERRY. (No. 18715.)

(Supreme Court of Washington. April 30, 1917.)

1. FIXTURES ⇨27(1)—PRESERVING PERSONAL CHARACTER—FORM OF AGREEMENT.

An agreement that chattels affixed to realty shall retain a personal character may generally be either in writing or parol.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 5.]

2. FIXTURES ⇨27(1)—PRESERVING PERSONAL CHARACTER BY AGREEMENT.

The right to preserve personal character of fixtures by agreement is limited to chattels attached to realty in such a manner that they may be detached without destroying or materially injuring either chattel or realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 5.]

3. FIXTURES ⇨35(2)—BETWEEN MORTGAGOR AND MORTGAGEE OF CHATTELS.

The giving of a chattel mortgage on fixtures is sufficient evidence of intention that they shall retain their personal character.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 73, 74.]

4. CHATTEL MORTGAGES ⇨150(1)—FILING—NOTICE TO THIRD PERSONS.

Filing of chattel mortgage under Rem. Code 1915, § 3662, making such filing "full and sufficient notice to all the world of the existence and conditions thereof," imports as much as actual notice of all its conditions, including the agreement that the property, though affixed to the realty, shall be personal, and a subsequent purchaser of the land cannot claim as an innocent purchaser.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-248, 252.]

5. PUBLIC LANDS ⇨136—DESERT LAND ENTRY—FIXTURES—CHATTEL MORTGAGE—SUBSEQUENT ENTRYMAN.

Where an entryman on desert land installed an irrigation pipe line, and give a chattel mortgage thereon, the mortgage being duly filed, the mortgagee could foreclose against defendant, who had obtained possession of the land and improvements in a contest of the mortgagor's entry, defendant not being an innocent purchaser, and the mortgage showing the parties' intent to treat such fixtures as personalty.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 364-366.]

Department 2. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Action by George Boeringa against John M. Perry. Judgment for defendant, and plaintiff appeals. Reversed in part, with directions.

W. A. Funk, of Sunnyside, for appellant. Lynch & Chesterley, of North Yakima, for respondent.

HOLCOMB, J. Appellant brought action to foreclose a chattel mortgage given by defendant, Thomas S. Sewell, to plaintiff, upon a certain pumphouse and motor and all pipe and all improvements of every kind and nature, excepting one pump, located on the southeast quarter of the northwest quarter of section 30, township 10 north, range 22

east, W. M., in Yakima county, Wash., to secure the payment to appellant of a promissory note for the sum of \$1,500, with interest at the rate of 10 per cent. per annum according to the terms and conditions of a promissory note dated July 1, 1912, signed by the mortgagor, due one year after date. At the time of the execution of the note and mortgage on July 1, 1912, Sewell was in possession under a desert land entry of the land described, and the money was borrowed for the purpose of buying the pipe, pumphouse and motor, and installing the same to irrigate the land. The pumphouse and motor were not situated on the desert land claim.

Sewell paid none of the principal or interest of the debt, and on July 3, 1912, immediately after the maturity of the note and mortgage, respondent Perry began a contest of the entry against Sewell, which was prosecuted in the federal Land Office. Sewell made default in the contest. Perry was given the preference right of entry, and thereupon entered the same as a desert land entry. This action was begun on April 12, 1915. Perry was made a party to the action as claiming some right, title, or interest in and to the mortgaged property, alleged to be subordinate and subject to the claim or interest of appellant and his lien under the mortgage.

It appears from the evidence that Sewell abandoned the premises and did not remove the pipe during his term. He had the right of possession of the land in question under his desert land entry at the time the alleged chattel mortgage was executed, but forfeited his right of entry and never claimed the pipe. It appears also that the pipe was joined together in one continuous line and placed in the soil on the land in question, the most of it being completely buried, but a small part of it being left uncovered.

The trial court found, among other things, that Sewell procured the pipe and installed it upon the land in construction of an irrigation system which was of a permanent nature, and further found that all the pipe line situated upon the premises is appurtenant to the fee of the premises and fixtures thereon. Upon these findings he concluded that the pipe line on the land mortgaged to appellant was part and parcel of the realty and free from the lien of the plaintiff as set up in his complaint, and that the foreclosure proceedings should not include any pipe or pipe lines upon the described premises. The question to be determined is whether the pipe mortgaged to appellant became real estate or remained a personal chattel under the chattel mortgage and subject to the lien thereof.

It is contended by respondent that, inasmuch as the pipe was embedded in the soil and became a part of the permanent system of irrigation attached to the soil, it is therefore a fixture and real estate, and cannot be

subject to a chattel mortgage. This condition is important only to determine whether or not property which may be considered real or personal property is one or the other according to the acts of the parties, in the absence of an agreement relating thereto.

[1] Generally speaking, an agreement that chattels affixed to realty shall retain a personal character may be either in writing or parol. *Broaddus v. Smith*, 121 Ala. 335, 28 South. 34, 77 Am. St. Rep. 61; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; *Western, etc., Railroad v. Deal*, 90 N. C. 110.

[2] In general it may be said that almost anything affixed to realty may by agreement be treated as personalty. Thus it has been held that houses and other buildings, machinery, railroad tracks, nursery stock, and indeed practically everything which before annexation was personal property may still retain their chattel character by an agreement to that effect. But the right to preserve the personal character of fixtures by agreement is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured or without destroying or materially injuring the realty to which they are attached. *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148; *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Western Union Tel. Co. v. Burlington, etc., Ky. Co. (C. C.)* 11 Fed. 1; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *German Savings & Loan Society v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

In the last-cited case this court held, in conformity with the great weight of authority, that:

"Whether fixtures attached to real estate should be regarded as personalty or realty is largely governed by the intention of the contracting parties, even so far as the rights of a former mortgagee are concerned, subject to the limitation that the fixtures, which, but for the stipulation, would be regarded as realty, can be removed only when such removal can be effected without injury to the real estate." Syllabus.

And in the course of the opinion language from the case of *Ford v. Cobb*, 20 N. Y. 344, was quoted with approval, as follows:

"But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of or material injury to the things real with which they are connected, though their connection with the land or other real estate in such that, in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate."

Of course, as was observed in *Binkley v. Forkner*, 117 Ind. 176, 181, 19 N. E. 753, 755 (3 L. R. A. 33):

"* * * If, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brick-maker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to re-

tain their character as personalty notwithstanding their annexation. * * * But when chattels are of such a character as to retain their identity and distinctive characteristics after annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement."

It has been held in many cases that, if competent parties make an express agreement that fixtures shall retain their character as chattels, there can be no doubt that the agreement is binding as between the parties thereto. *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *Kaestner v. Day*, 65 Ill. App. 623.

[3] And where one purchases an article to be annexed to the freehold which, from its character, may, after annexation, be either realty or personalty according to the intention of the parties, the giving of a chattel mortgage thereon to the seller is sufficient evidence of an intention that the fixture shall retain its character as personalty. *Edwards, etc., Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765, 73 Am. St. Rep. 514; *Arlington, etc., Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

An agreement that the fixture shall retain its personal character is said to be implied from the mere giving of a chattel mortgage. *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; *Ford v. Cobb*, 20 N. Y. 344; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Warner v. Kenning*, 25 Minn. 173; *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571, 32 N. W. 824; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148; *Andrews v. Chandler*, 27 Ill. App. 103; *Miller v. Griffin*, 102 Ala. 610, 15 South. 238.

It is therefore well settled as between *Sewell* and appellant that the status of the pipe mortgaged to appellant was fixed as a chattel.

The difficulty is in determining the effect of this agreement as to third parties; for it is also well settled that, while parties themselves may make almost any agreement they wish as to the personal character of fixtures, yet such an agreement does not in most cases affect the rights of third persons who are not parties to the agreement. To what extent third parties are bound is a question depending upon the nature of the agreement and the relation of the parties. The statement made in some cases that an agreement cannot change the character of the property so far as third parties are concerned is true only to a limited extent. *Kaestner v. Day*, 65

Ill. App. 623. If the rights of innocent third parties will not be prejudiced, fixtures may retain their chattel character. *Edwards, etc., Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765, 73 Am. St. Rep. 514.

[4] In cases where the rights of claimants of fixtures depend upon notice to adverse claimants, there is a considerable variety of opinion as to the effect of recording alone, as importing notice, much depending, of course, upon the language of statutes involved. 19 Cyc. 1054. As to such notice our statute relating to the filing or recording of chattel mortgages provided, in section 3662, Rem. Code, that every such mortgage filed and indexed in pursuance of this act "shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof." The effect of this provision is that the due filing of a chattel mortgage, as was the case here, imports as much as actual and positive notice of the mortgage and of all its conditions to all persons dealing with the chattel thereafter.

[5] Respondent cites authorities to the effect that a subsequent purchaser for value is an innocent purchaser, and that fixtures attached to the soil are real estate and not subject to a chattel mortgage seeking to hold a lien thereon as a chattel. That is true where a subsequent purchaser for value has no notice either actual or constructive or notice such as our statute provides which is equivalent to actual notice that the property in question has been agreed and determined to be chattel property. The respondent here is not an innocent purchaser for value. He is merely a subsequent occupant of the same real estate. He has, it is true, the right of possession, which cannot be questioned, of the real estate and of all the real estate comprises. His right of possession of the real estate has been granted by the national government and is superior to the rights of all others as to the land itself and its enjoyment. But the respondent had notice by the filing of the chattel mortgage that the pipe embedded and installed in the land was chattel property upon which the appellant had a lien by his chattel mortgage. The respondent has bought nothing. He is not an innocent purchaser of anything. While the former entryman and possessor of the land under the desert land entry was in possession he could contract with reference to chattels, fixtures, and improvements thereon in all respects under the local law, and his contracts would be enforced. He could have removed the pipe mortgaged or any other fixture which he placed upon the land prior to his abandonment or his removal from the land.

Under the facts and circumstances shown we are impelled to the conclusion that the pipe mortgaged was by virtue thereof agreed

by the former entryman and possessor of the desert land entry to be chattel property, and not a part of the real estate.

Notwithstanding the fact that he made what is called three years' proof under which he proved the methods by which he had attempted to reclaim the land and included in his improvements the pipe purchased, that must be taken and understood to have been subject to the lien which he had theretofore voluntarily given for the money which he had borrowed with which to purchase the same. It was therefore not fraudulent for him to make such proof in attempting to obtain title to the land.

Equity and good conscience demand that appellant's mortgage be enforced according to its terms. It may be said in opposition thereto that any attempt to remove the pipe from the land will constitute a trespass against the possession of the respondent, and also that it is impossible to remove the same without injury to the freehold. As to the first proposition, the possession by the respondent and present entryman is not as yet a complete and permanent possession, but is only a possession dependent upon his reclamation of the land, and compliance with the laws relating to desert entries. In any event his possession can only be protected under and by virtue of the state laws. These guarantee him the peaceable possession of the land in question as against trespass or unlawful intrusion. It is no unlawful intrusion for the state to enforce the rights of a person having a superior and prior right to chattel property remaining upon the land.

It is shown by the evidence that the pipe in question can be removed without permanent injury to the real estate. Such injury as would occur would be temporary only, and that could be avoided by removing it at a time when the land is not being irrigated or during the fall and winter months. Notwithstanding the extreme character of this case, we think appellant entitled to such a decree.

The judgment of the lower court will be reversed in so far as it decreed that appellant was not entitled to a judgment of foreclosure against the pipe described in the chattel mortgage, and further providing for the protection of the rights of the respondent in the matter by decreeing that the pipe shall only be removed at a time when there is no irrigation being done upon the premises or during the months between November and March, inclusive, and that no growing tree shall be removed, despoiled, or injured upon the premises, or any permanent structure thereon, and that the soil removed shall be restored, in as good condition as before.

ELLIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

BALCH v. STATE ex rel. GRIGSBY, Co.
Atty. (No. 7917.)

(Supreme Court of Oklahoma. Jan. 30, 1917.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. JURY §14(12) — TRIAL BY — ACTION TO ABATE NUISANCE.

In an action by the state to abate a public nuisance, the defendant is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 78.]

2. EVIDENCE §322(2) — GENERAL REPUTATION.

Evidence as to general reputation for lewdness or chastity of persons who frequent a place charged to be a house of prostitution, and also evidence of the general reputation of such house as being a place of prostitution, held to be admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1204.]

3. NUISANCE §61—PUBLIC NUISANCE—PARTICULAR CASE.

A place where intoxicating liquors are sold in violation of the law, where cigarettes are sold to minors, and where lewd and lascivious persons congregate for the purpose of indulging in immorality, held to be a public nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 142-151.]

4. NUISANCE §82—ABATEMENT BY STATE—CIVIL ACTION.

A public nuisance may be abated by a civil action brought by the state on the relation of the county attorney of the county in which such public nuisance exists.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 195.]

Commissioners' Opinion, Division No. 1. Error from District Court, Cleveland County; F. B. Swank, Judge.

Action by the State of Oklahoma, on the relation of J. D. Grigsby, County Attorney of Cleveland County, Okla., against A. R. Balch and others. Judgment for plaintiff, and defendant A. R. Balch brings error. Modification ordered to be entered of record in the proceedings below, and in other respects judgment affirmed.

W. J. Davidson, of Oklahoma City, for plaintiff in error. J. D. Grigsby, Co. Atty., Ben F. Williams, and John E. Luttrell, all of Norman, for defendant in error.

STEWART, C. The parties hereafter will be designated as in the court below. The county attorney of Cleveland county brought an action in the name of the state of Oklahoma against A. R. Balch and others for the purpose of abating a public nuisance alleged to be maintained by the defendants in the town of Moore, Cleveland county, Okla., the petition averring that a building in which the said A. R. Balch conducted a grocery store was used by A. R. Balch for the purpose of selling intoxicating liquors; that intoxicating liquors were sold on said property; and, further, that a platform was

erected near said building and a series of dances conducted thereon by the defendants for the purpose of drawing crowds into the place of business in order that intoxicating liquors and imitations thereof and substitutes therefor might be sold to the patrons of the dance; that among the regular attendants at said dances were two women of unchaste and lewd character, known as Kate and Babe, who frequented the store belonging to defendant Balch, being seen often in the company of and in bed with men of questionable character; that the said Kate and Babe conducted themselves in a lewd and licentious manner in and about said building and premises, and that men who frequented such resort, visiting with Kate and Babe, would curse and swear in loud and boisterous manner in the hearing of women and children; that people would congregate at said store and become drunk and imbibe intoxicating liquors sold in said store; that cigarettes were sold to minors in violation of law; that the general reputation of such place of business was that of a place where lewd men and women would resort for the purpose of unlawful cohabitation and sexual intercourse; that said place was an unfit place for women and children to purchase groceries, or for other purposes; that the same was an immoral resort and a public nuisance, and the conduct of the said Kate and Babe and others who frequented the store was outrageous to public morals and public decency. The plaintiff prayed for a temporary injunction restraining the defendants and all of them from opening or conducting said store or building, or permitting any one else to conduct same, and that same should be placed in the hands of the sheriff of Cleveland county and closed until final hearing in the matter; that upon final hearing, the injunction be made perpetual, and for general and special relief. A hearing was had in chambers before the county judge of Cleveland county, in the absence of the district judge from said county, and upon the affidavits of numerous citizens residing at said town of Moore and in the vicinity thereof; the county judge granted a temporary injunction and order abating said nuisance and closing the store. Afterwards the defendants made application before the judge of the district court in chambers asking for a vacation of the temporary injunction. After hearing on said application, the district judge modified the temporary order before made to read as follows:

"On consideration of said motion and being fully advised in the premises, it is now ordered by the court that the said temporary injunction be modified to the extent that the said defendant A. R. Balch is hereby permitted to open and conduct his said storeroom in what is known as the Courtney Building in said town of Moore, in Cleveland county, Okla., and to make regular and lawful sale of merchandise therein contained until the 1st day of November, 1915, and it is

the further order of this court upon the execution of bond of said A. R. Balch in the sum of \$1,000, with sufficient surety to be approved by the court clerk of Cleveland county, Okl., on the condition that during said time said defendant A. R. Balch either by himself or by his agents or servants shall not violate the prohibitory liquor law or any other laws of the state of Oklahoma on or about said premises."

The defendants afterwards filed answer, denying the allegations contained in plaintiff's petition, except the allegation that the said defendant A. R. Balch was using said premises for the purpose of conducting a retail grocery and general store.

The cause came on for hearing at the regular term of the court, and after the introduction of testimony on the part of both the plaintiff and defendants the court found for the plaintiff and against the defendant A. R. Balch; the court making the following order and decree:

"Thereupon it was considered, ordered, adjudged, and decreed by the court that the temporary injunction heretofore made herein be, and the same hereby is, made permanent as against said defendant A. R. Balch, and that the storeroom of said defendant A. R. Balch described in said petition be ordered closed by the sheriff of Cleveland county, Okl., and plaintiff have judgment against defendant to pay all costs of this action, taxed at \$——."

Motion for new trial having been duly filed, overruled, and exceptions saved, the defendant A. R. Balch appeals to this court.

The defendant urges in his brief the following assignments of error: (1) Error of the trial court in denying the plaintiff in error a trial by jury. (2) Error of the trial court in overruling the demurrer of plaintiff in error to the evidence introduced on behalf of the state of Oklahoma, plaintiff below. (3) Error of the trial court in the admission of evidence offered by defendant in error and objected to by plaintiff in error. (4) Error of the trial court in the rejection of testimony offered by plaintiff in error. (5) Error of the trial court in rendering judgment for defendant in error and against plaintiff in error. (6) Error of the trial court in rendition of final judgment made by it by exceeding the jurisdiction of the district court in declaring the storeroom of the plaintiff in error a nuisance and ordering the same to be closed by the sheriff of Cleveland county.

[1] The objection of defendant to the refusal of the court to grant a trial by jury is not tenable. It is settled law in this state that the constitutional provision declaring that the right of trial by jury shall be and remain inviolate refers to the right of trial by jury as the same existed under the law of the territory of Oklahoma prior to the time of the adoption of the Constitution. In *re Byrd*, 31 Okl. 549, 122 Pac. 516; In *re Simmons*, 4 Okl. Cr. 662, 112 Pac. 951; *State v. Cobb*, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; *Parker v. Hamilton*, 154 Pac. 65.

The proceeding in the case at bar, being equitable in its nature, the defendants were

not entitled to a jury trial either as a matter of constitutional or statutory right. Such right was not recognized by the courts of Oklahoma Territory, nor has the same been sanctioned by the courts of the state. The Supreme Court of the territory in *Reaves v. Territory*, 13 Okl. 396, 74 Pac. 951, passed squarely on the question of the right of jury trial in an action brought by the state to abate a public nuisance. In the syllabus to the opinion the court says:

"A trial by jury is not required in suits brought for an injunction to suppress and abate a public nuisance."

[2, 3] It is clear that the acts complained of in the petition, if true, in the instant case would constitute the place a public nuisance. It is provided in section 4250, Revised Laws of 1910:

"A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

"First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or

"Second. Offends decency. * * *"

And section 4251, Revised Laws of 1910, reads as follows:

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."

In addition to the general law of the state on the subject, by specific enactment, our statutes provide that a place where intoxicating liquors are sold or kept for sale or barter, or where persons congregate for the purpose of drinking such liquors, is a public nuisance. The county attorney of the county in which a public nuisance exists has the authority to bring a civil action to abate same by civil action in the name of the state.

The defendant contends that the court erred in the admission of testimony as to the general reputation of the women known as "Kate" and "Babe" as to lewdness and chastity, and also in admitting testimony as to the general reputation of the house in which the defendant's business was conducted as being a house of ill fame or one to which persons resorted for the purpose of prostitution. There is no longer any question in this state as to the admissibility of such testimony in cases of the character of the one at bar. In *Jones v. State*, 10 Okl. Cr. 79, 133 Pac. 1134, in the syllabus, it is said:

"In a prosecution for keeping a bawdyhouse, it is competent for the state to show the general reputation of the house as being a house of ill fame, and that the house is resorted to by people of both sexes who are reputed to be of lewd and lascivious character, and from evidence of the general reputation of the house and of the inmates and persons who resort thereto as being of lewd and lascivious character, the law will infer that such characters resort thereto for lewd and immoral purposes, and that the house is a bawdyhouse. The state is not required to show specific acts of lewdness or prostitution in the house. It is sufficient if it be shown that the house is commonly resorted to for the commission of acts of immorality, and that the proprietor knows the fact, and either procures

it to be done, connives at it, or does not prevent it."

The admission of such testimony was not error. We have examined the record and find that there is no error in the admission of testimony prejudicial to the defendant, nor do we find any prejudicial error in the exclusion of testimony. Most of the testimony offered by the defendant and excluded by the court consisted of hearsay or of self-serving statements, and was not competent.

The evidence in this case sustains the allegations contained in the petition, and shows that the defendant was engaged in a business which annoyed, injured, and endangered the comfort, repose, and safety of others, and also offended public decency. It shows that the defendant was engaged in the violation of the prohibitory liquor laws of the state of Oklahoma, was guilty of selling cigarettes to minors, and of permitting lewd, profane, and lascivious characters, both men and women, to congregate about his business, and indulge in lewd, boisterous, and indecent acts, greatly to the annoyance of the good citizenship of the small town of Moore. We unhesitatingly say that the judgment of the lower court was righteous and in the interest of good morals and public decency.

[4] We would be inclined to let the order of the lower court stand without modification, but the county attorney in his brief has cited the case of *Hill et al. v. State*, 45 Okl. 387, 145 Pac. 492, a case in which Justice Kane modified the order of the court below in a case similar to the one at bar by allowing, under conditions imposed by the court, the building to be used for legitimate purposes. The brief for the state, in this case, suggests a modification of the order of the lower court which we think would meet the ends of justice, which suggestion we have decided to adopt. The order of the lower court, with reference to the building and property, is therefore modified to read as follows:

"That the sheriff of Cleveland county, Okl., take an invoice of all stock and fixtures now in said building, and return the invoice of all goods of an intoxicating or contraband nature to the board of county commissioners of Cleveland county, Okl.; that said board may make such disposition of said stock and fixtures and furniture in any manner as provided by law; that all personal property seized and found not to be of an intoxicating or contraband nature nor used in keeping or maintaining such nuisance shall be returned to the owner thereof; that the building in controversy should be restored to plaintiff in error by the sheriff of Cleveland county upon the condition that said A. R. Balch should observe in all respects the order of the court, and shall not at any time either in person or by agents, tenant, or subtenant enter in or upon or conduct any unlawful business of any nature whatsoever in or upon the premises, or permit any person to conduct any such unlawful

business on said premises. In consideration of said property being restored to the owner aforesaid he is required to execute a bond with sufficient sureties in the sum of \$1,000, to be paid to the state as liquidated damages in case of violation of the judgment and decree by said A. R. Balch, his servants, agents, or employes; said bond to be filed and approved by the court clerk, whereupon this decree shall immediately become effective. This order shall be continued in force."

The lower court should be instructed to cause such modification to be entered of record in the proceedings below, and in all other respects the judgment of the lower court should be affirmed, at the cost of the defendant.

PER CURIAM. Adopted in whole.

SADDLER v. SCOTT. (No. 4665.)
(Supreme Court of Oklahoma. April 24, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773(2) — WANT OF PROSECUTION—BRIEF—RULE OF COURT—DISMISSAL.

Where plaintiff in error fails to file brief as required by rule 7 of this court (38 Okl. vi, 95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3104, 3108.]

Action between J. Le Roy Saddler and E. F. Scott. Judgment for the latter, and the former brings error. Appeal dismissed.

OWEN, J. The petition in error and case-made were filed in this court December 19, 1912. The plaintiff in error has failed to file brief as required by rule 7 of this court (38 Okl. vi, 95 Pac. vi). For failure to comply with this rule this appeal is dismissed for want of prosecution. All the Justices concur.

SADDLER v. LEAHY. (No. 4666.)
(Supreme Court of Oklahoma. April 24, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773(2) — WANT OF PROSECUTION—RULE OF COURT—DISMISSAL.

Where plaintiff in error fails to file brief as required by rule 7 of this court (38 Okl. vi, 95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3104, 3108.]

Action between J. Le Roy Saddler and W. T. Leahy. Judgment for the latter, and the former brings error. Appeal dismissed.

OWEN, J. The plaintiff in error having failed to comply with rule 7 of this court (38 Okl. vi, 95 Pac. vi), this appeal is dismissed for want of prosecution. All the Justices concur.

WESTERN UNION TELEGRAPH CO. v. CATES. (No. 7011.)

(Supreme Court of Oklahoma. Jan. 2, 1917.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. DAMAGES §91(1)—**PUNITIVE DAMAGES—**
GROUND.

In an action for the breach of an obligation not arising from contract, exemplary or punitive damages can be recovered, in addition to the actual damages, only where the defendant has been guilty of oppression, fraud, or malice, actual or presumed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-198.]

2. DAMAGES §91(1) — **PUNITIVE DAMAGES—**
TORT—EVIDENCE.

To authorize a recovery for exemplary or punitive damages, in an action sounding in tort, the evidence must show some element of oppression, fraud or malice; i. e., the act which constitutes the cause of action must have been actuated by or accompanied with some evil intent, or must have been the result of such gross negligence as is deemed equivalent to such intent.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-198.]

3. TELEGRAPHS AND TELEPHONES §66(4)—
FAILURE TO DELIVER MESSAGE—GROSS NEGLIGENCE—PUNITIVE DAMAGES.

The evidence in this case fails to show that the conduct of the defendant, which is alleged as the cause of action, was actuated by or accompanied with any evil intent, or was such gross negligence as is deemed equivalent to such intent.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63.]

Commissioners' Opinion, Division No. 5.
Error from District Court, Osage County;
R. H. Hudson, Judge.

Action by J. W. Cates against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Preston A. Shinn, of Pawhuska, and George H. Fearons, of New York City, for plaintiff in error. H. P. White, of Pawhuska, for defendant in error.

CAMPBELL, C. In the court below, J. W. Cates, who was the plaintiff, recovered exemplary damages against the Western Union Telegraph Company, the defendant, for the failure to deliver a death message. From that recovery, the defendant has appealed and presents to this court the question of the sufficiency of the evidence to sustain such a recovery. In addition to such exemplary damage, actual damage in the sum of 32 cents was presumably allowed by the jury. The defendant at the trial offered to pay the amount of actual damages claimed by the plaintiff and the costs accrued to the time of such offer, but such offer was refused, and the trial resulted in a judgment for the plaintiff for \$500, which amount, less 32 cents, was exemplary damages.

The contention in this court is that the evi-

dence was insufficient to warrant any recovery as exemplary damages, and that the trial court erred in refusing to require the plaintiff to accept the offer made by the defendant at the trial, and in permitting any recovery as exemplary damages.

[1] Under section 2851, Rev. Laws 1910, exemplary or punitive damages can be recovered in an action for the breach of an obligation not arising from contract only where the defendant has been guilty of oppression, fraud, malice, actual or presumed. This action cannot be treated by the plaintiff as one for breach of a contract and the recovery of exemplary damages upheld on any theory, for to do so would do violence to the general rule that exemplary damages can never be recovered for the mere breach of contract irrespective of the motive on the part of the defendant which prompted the breach, except in certain cases which are exceptions to the general rule and in cases where the statute specifically authorizes such recovery. This case comes within none of such excepted cases. Therefore the action, so far as the exemplary damage feature of it is concerned, must be treated as one sounding in tort.

[2] Treating the action as being one in tort, can a recovery of exemplary or punitive damages be sustained under the evidence in the case? Under the section of the statute, supra, as construed by the decisions of this court, which are in harmony with the leading decisions upon this question, to authorize a recovery of exemplary or punitive damages, the evidence must show some element of oppression, fraud, or malice; that is, the act which constitutes the cause of action must have been actuated by or accompanied with some evil intent, or must have been the result of such gross negligence as is deemed equivalent to such intent. *Chicago, R. I. & P. Ry. Co. v. Wells*, 156 Pac. 314 (not yet officially reported); *Western Union Telegraph Co. v. Garrett*, 158 Pac. 619 (not yet officially reported); *Western Union Telegraph Co. v. Reeves*, 34 Okl. 468, 126 Pac. 216, and cases cited therein. It is true that in the case of *Western Union Telegraph Co. v. Garrett*, supra, the court held the evidence sufficient to warrant the submission of the question of exemplary damages to the jury for determination, but there is nothing in that case which militates against the general and uniform rule as above stated. In that case the court, in passing upon the sufficiency of the evidence, said:

"Taking into consideration the intimate acquaintance of defendant's agent with plaintiff, that he was in the office two or three times a day, and no mention ever made of this telegram or explanation offered for a failure to deliver, we think the weight of authority authorized the court and jury to conclude that defendant was guilty of gross negligence amounting to a wanton disregard of the rights of plaintiff."

As we read the decisions, it is not every case of grossly negligent conduct which will warrant the infliction of exemplary or punitive damages, but the authorities seem to uniformly require that the conduct which constitutes the gross negligence must have been actuated by or accompanied with some evil intent, or such conduct must have been of a character so grossly negligent as to be deemed equivalent to such intent. We have read the evidence in this case with a view of determining whether the conduct of the defendant's agent, in the matter of delivering the death message, constituted gross negligence. There can be no question but that the defendant's agent was guilty of negligence under the evidence in this case. But such determination does not materially assist in the solution of the question presented in this appeal. It must be determined from the evidence that the defendant's agent was guilty of gross negligence before the question becomes complex to any degree. Our statute (section 2919, R. L. 1910) defines gross negligence as follows: "Gross negligence is the want of slight care and diligence." Section 2917, R. L. 1910, defines slight care and diligence as follows: "Slight care or diligence is such as persons of ordinary prudence * * * exercise about their own affairs of slight importance."

[3] Taking these definitions as a guide, and measuring the conduct of the defendant's agent by them, what conclusion must we reach? The evidence upon the question as to what was done by the defendant's agent in attempting to make delivery of the message in question is not disputed. The telegram was addressed to W. T. Williams. The messenger boy testified that he was given the message by the agent for delivery to the addressee, and that after he received it he took it to a person living on Ninth street in the city of Pawhuska by the name of Williams, and tried to deliver it, but was told that it was not for such person; that he did not leave the message there, but brought it back with him, and made inquiries on the streets if anybody had seen the man Williams whose name was on the message; that he did not know the man whose name was on the message; that he brought the message into the office and told the agent that he could not locate the man anywhere; that the agent told him to try again, and he took the message and tried to deliver it the second time, and after inquiring around he took the message back to the office, and had never seen the message since then; that he took the message to the person on Ninth street because inquiry had been made at the office for a message for a Mrs. Williams who was visiting on Ninth street just a day or two before this message came, and when it came he thought it was the message which this

woman was expecting, and he took it to the house where she was visiting, and she signed for it, but when she opened it she said it was not for her, and gave it back to him. There was introduced in evidence the delivery sheet showing the delivery of the message to Mrs. Williams on the morning the message was received, which she gave back to the messenger boy after reading it and finding out that it was not for her. The plaintiff showed that the addressee had lived in Pawhuska for two years prior to the date of the receipt of the message, and had all that time worked at the light plant, and was the engineer of the plant; that his name was in the city directory, and that a phone was in the office of the light plant; that the message was not delivered to him for five or six days after it was received at the office in Pawhuska; and that he had to call at the office of defendant before he got the message. The evidence showed that the message as received gave the address of the sendee as being Pawhuska, % Electric Light Plant, but such address was not placed upon the copy which was made and which was attempted to be delivered. Neither the messenger boy nor the agent knew W. T. Williams to whom the message was addressed.

We must say that the agent of the defendant made some effort to deliver the message in good faith. He perhaps did not make the effort that a person of ordinary prudence would have made, but he did exercise slight diligence to make the delivery of the message to the addressee, and acted in the matter of making delivery of the message as if it were a matter of slight importance. His conduct was such as might reasonably be expected of ordinary prudent persons in matters of slight importance to themselves.

We therefore are of the opinion that the defendant exercised slight care and diligence in endeavoring to make delivery of the message in question, and that no exemplary damages were recoverable under the rule announced in the case of *Western Union Telegraph Co. v. Reeves*, supra. We arrive at this conclusion from the uncontradicted evidence in the case, and hold that the evidence is insufficient to support any verdict for exemplary or punitive damages. The trial court should have required the plaintiff to accept the offer of the defendant to pay the actual damages which were sued for by the plaintiff, and the defendant should have paid the costs to that date, and judgment should have been rendered for such amount only.

The judgment appealed from is reversed, and this cause remanded to the trial court, with directions to enter judgment in accordance with this opinion.

PER CURIAM. Adopted in whole.

BOYD v. WINTÉ et al. (No. 7256.)

(Supreme Court of Oklahoma. Jan. 9, 1917.
Rehearing Denied May 15, 1917.)

*(Syllabus by the Court.)*1. APPEAL AND ERROR \S 522(1)—EXCLUSION OF EVIDENCE—ERROR—REVIEW.

An order of the trial court, sustaining an objection to the introduction of evidence by the defendant for the reason that the answer fails to state facts constituting a defense, is a part of the record proper, and an error in making such order may be reviewed in this court upon transcript accompanied by a petition in error duly presenting the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367, 2368, 2370, 2371.]

2. TRUSTS \S 70—"RESULTING TRUST"—TITLE TO PROPERTY.

"Resulting trusts" are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition or from accompanying facts and circumstances that the beneficial interest is not to go or be enjoyed with the legal title. In such a case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 95-97.]

For other definitions, see Words and Phrases, First and Second Series, Resulting Trust.]

3. TRUSTS \S 63½, 88—RESULTING TRUSTS—STATUTE OF FRAUDS—PAROL EVIDENCE.

Resulting trusts are not within the statute of frauds, and may be established by parol evidence, where such evidence is not otherwise incompetent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 98, 130, 131, 133.]

4. TRUSTS \S 80(1)—RESULTING TRUST—EVIDENCE.

The conveyance to the plaintiff in error in this case of the real estate involved herein under the circumstances alleged in his answer held to create a resulting trust, and held, further, that the plaintiff in error took no beneficial interest in said real estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134.]

5. MORTGAGES \S 290(2) — ASSUMPTION IN CONVEYANCE—CONSIDERATION.

A clause in a deed of conveyance of real estate, providing that the grantee assumes the payment of the mortgage indebtedness described therein, in order to be enforced against the grantee, must be supported by a consideration, and where the facts and circumstances surrounding the conveyance are such that a resulting trust is thereby created, and the grantee takes no beneficial interest in the real estate conveyed, such conveyance is not a sufficient consideration to support the agreement to assume the payment of such mortgage indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 743.]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Charles Winté against A. W. Boyd and T. M. Daniel and wife, in which H. F. Vulbrock and another filed cross-petitions against defendants. Judgment for

plaintiff and cross-petitioners, and defendant A. W. Boyd brings error. Reversed and remanded.

Wilson, Tomerlin & Buckholts, of Oklahoma City, for plaintiff in error. Keaton, Wells & Johnston and S. A. Horton, all of Oklahoma City, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Oklahoma county by the defendant in error, Chas. Winté, against T. M. Daniel and wife, and the plaintiff in error, to recover upon a promissory note executed by T. M. Daniel and wife and to foreclose a mortgage upon real estate in Oklahoma county to secure the same. The defendants in error H. F. Vulbrock and S. M. Gloyd filed cross-petitions to recover upon notes executed by T. M. Daniel and wife and to foreclose a mortgage upon said real estate to secure the same. Recovery was sought against the plaintiff in error because he had assumed the payment of said debts in a conveyance of said real estate to him from Daniel and wife. The answer of Boyd alleged that the insertion of the assumption of the mortgages in the deed was without his knowledge or consent and without consideration; that he permitted the title to be transferred to him by Daniel as an accommodation to the latter, and that there was no consideration passing from him to Daniel or from Daniel to him for said conveyance; that the deed was made under the following circumstances: Some time prior to its execution, Daniel and one Williams were engaged in the mercantile business in Packingtown, and were indebted to certain merchandise creditors; that they were in failing circumstances, and sold out their merchandise and business and prorated the proceeds to their creditors, leaving a deficiency; that thereafter Daniel came to the plaintiff in error Boyd, and stated that he intended to leave Oklahoma City, and asked permission to convey the legal title to the real estate to plaintiff in error, subject to certain outstanding mortgages, and further requested that he (plaintiff in error) attempt to negotiate a sale of the equity and apply the proceeds upon the amount remaining due to the merchandise creditors, and any amount remaining to be turned over to Daniel; that plaintiff in error, relying upon the understanding with Daniel that said deed should be subject to the mortgages and not to contain any assumption thereof, did not read the deed, and was ignorant of the assumption clause until he was so informed by one of the mortgagees; that upon being so informed he immediately repudiated said assumption of said mortgages, explaining to the mortgagees that he was not the beneficial owner of said property and had never parted with or received any consideration for the deed; that he, plaintiff in error, was trying to accommodate and

favor Daniel, and that the assumption clause was inserted fraudulently and without authority. Plaintiff in error further alleged that at the time of the delivery of said deed he had not examined the property and had never seen it since; that plaintiff in error was acting without any consideration or compensation, and that the deed was made to him merely as a matter of convenience and accommodation to Daniel. Plaintiff in error further alleged that he never received any beneficial use of said property; that if he had received any rents or profits he would have held same for the benefit of Daniel and his merchandise creditors, and disclaimed any interest in said real estate. Plaintiff in error further alleged that at most the deed was intended only as security for the benefit of the merchandise creditors of the said Daniel, and that the parties in interest have not changed their position or been injured in any manner by such assumption in said deed. Plaintiff in error prayed that the mortgagees take nothing as against him, that he be released and discharged from any personal liability by reason of the assumption clause in said deed, and that said deed be reformed and said assumption clause contained therein be decreed to be void. At the trial, after the plaintiff below and the cross-petitioners had rested, the defendant Boyd offered evidence in support of his answer, whereupon the plaintiff and cross-petitioners interposed an objection to the introduction of any evidence by the defendant Boyd because his answer failed to state facts constituting a defense. This objection was by the trial court sustained, to which defendant Boyd excepted, and thereupon the court directed the jury to render a verdict in favor of the plaintiff and cross-petitioners against him. Defendant Boyd thereafter moved for a new trial, which was overruled by the court more than 15 days after the rendition of judgment upon the verdict of the jury. Plaintiff then asked for and was granted an extension of time in which to make and serve a case-made for appeal to this court.

[1] We are met at the threshold of this cause by a motion of defendants in error to dismiss the appeal for the reason that the case-made was not served within the time allowed by the statute or any lawful extension thereof. It is contended by defendant in error that, the judgment of the court being rendered on sustaining an objection to the introduction of any evidence because the answer failed to state facts constituting a defense, no motion for a new trial was necessary, and, being unnecessary, the filing of a motion for a new trial did not operate to extend the time in which to make and serve a case-made for appeal, and, as the only errors assigned in the brief of plaintiff in error are based upon such ruling of the trial court, the motion for a new trial was wholly unnecessary to present the questions sought to be reviewed here, and therefore the case-

made was not served in time. While we are inclined to agree with the contention of defendants, yet we do not deem it necessary to determine that proposition, for the reason that the appeal was lodged in this court within six months from the date the trial court sustained the objection to the introduction of evidence, and it is properly certified as a transcript by the clerk of the trial court. It has been held by this court that the record proper is made up of the process, the return, pleadings submitted thereto, reports, verdicts, orders, and judgments, and an error appearing upon the record thereof may be raised for the first time in this court on a transcript thereof, accompanied by a petition in error duly presenting the same. *Tribal Development Co. v. Wells Bros.*, 28 Okl. 525, 114 Pac. 736; *Baker v. Hammett*, 23 Okl. 480, 100 Pac. 1114. The ruling of the trial court upon the objection to the introduction of evidence was an error of the court and a part of the record as made, as if said order had been made upon a demurrer to the answer, and is therefore properly reviewable by this court upon a transcript. The motion of defendants in error to dismiss should therefore be overruled.

It seems from the record that the trial court sustained the objection to the introduction of evidence for the reason that the allegation of fraud set up in the answer was merely a conclusion of law, and that no facts were set up therein showing fraud. If fraud were the only ground in the answer upon which plaintiff in error sought to escape liability upon the assumption of the notes and mortgages contained in the deed from Daniel and wife to him, we would have no hesitation in holding the judgment of the trial court correct. But it is contended by plaintiff in error that the facts alleged in the answer show that the assumption of the notes and mortgages contained in the deed and upon which the defendants in error relied for recovery against him was without consideration, in that he took the title to the real estate involved herein, not as the beneficial owner, but for the convenience of Daniel, and in order to sell the same and apply the proceeds to the satisfaction of Daniel's debts. It is first urged by plaintiff in error that the deed from Daniel to him constituted a mortgage. We are unable to agree with this contention for the reason that the facts set up in the answer do not show that any defeasance of said conveyance was in the contemplation of the parties, or that a redemption thereof by Daniel was ever contemplated.

[2-4] Plaintiff in error next contends that he held title to said real estate in trust, that Daniel was the beneficial owner, and that plaintiff in error was the mere holder of the naked legal title. The defendants in error meet this contention by urging the statute of frauds, which provides:

"No trust in relation to real property is valid, unless created or declared: First. By a written

instrument, subscribed by the grantor or by his agent thereto authorized by writing. Second. By the instrument under which the trustee claims the estate affected; or, Third. By operation of law." Section 6659, R. L. 1910.

Because of this statute, it is contended for defendants in error that parol testimony was not admissible to show that the deed to Boyd was not in fact an absolute conveyance, but only a conveyance in trust. This court, in the case of *J. I. Case Threshing Machine Co. v. Walton Trust Company*, 39 Okl. 748, 138 Pac. 769, had under consideration a conveyance absolute upon its face, made by a banking company to one of its employes for the purpose of having said employe negotiate a loan upon the real estate conveyed for the benefit of the bank. The loan was negotiated by the employe, and the real estate some time thereafter reconveyed to the bank. The *J. I. Case Threshing Machine Company* had obtained a judgment against the employe some time before the execution of the mortgage by him to secure the loan, the lien of which judgment would have attached to said real estate and have been prior to the lien of the mortgage executed by him had title been vested in said employe. In an action to foreclose the mortgage the Threshing Machine Company claimed to have a lien because of its judgment prior to the lien of the mortgage. Commissioner Sharp, who delivered the opinion of the court, says:

"No better illustration of a trust arising by operation of law could be stated than here. The conveyance is made without consideration to one occupying a position of confidence and trust toward the grantor. * * * Although the deed executed by the bank to Edmonds purported on its face to be a warranty deed, conveying the absolute title, yet having been made wholly without consideration by a corporation to one of its officers, for the corporation's benefit, while no writings were entered into declaratory of the terms and conditions and the purposes for which the conveyance was made, it is clear that it was not intended by the deed to convey to the grantee the absolute title or to vest in him a beneficial interest in said lands, but instead to convey only the naked legal title. * * * Resulting trusts not being embraced within the statute of frauds, their existence need not be evidenced by any writing, and may, therefore be established by parol evidence." *McCoy v. McCoy*, 30 Okl. 379, 121 Pac. 176; *Flesmer v. Cooper*, 39 Okl. 183, 134 Pac. 379.

In the instant case, the answer of plaintiff in error shows the conveyance of the real estate was made to him by Daniel without consideration, and that he had no beneficial interest therein, but was a mere holder of the naked title. The answer further alleges that the defendants in error have not changed their position or parted with anything of value upon the faith of the assumption agreement contained in the deed. We confess that we are unable to distinguish the facts in this case from the *J. I. Case Threshing Machine Company v. Walton Trust Co.*, supra, and upon the authority of that case we hold that the

plaintiff in error might establish the fact that he held this real estate as a mere trustee by parol.

[5] It is conceded by defendants in error that an agreement to assume and pay outstanding mortgages upon real estate contained in a deed must be supported by a consideration. If Boyd took no beneficial interest in this real estate by reason of the conveyance, he received no consideration to support a promise to pay the debts sought to be recovered from him, and the facts set up in his answer, showing that he took no beneficial interest, and that the land was conveyed to him in trust for the benefit of Daniel, if true, constitute a defense to the action of defendants in error, and the trial court erred in sustaining the objection to the introduction of evidence in support of his answer.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

HENTHORN et al. v. TIDD et al. (No. 7773.)

(Supreme Court of Oklahoma. Nov. 21, 1916.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 704 — JUDGMENT ON PETITION AND SEPARATE ANSWER—CONCLUSIVENESS AS BETWEEN DEFENDANTS.

Where two persons are sued in the same action, and one of them files a separate answer to the petition not in the nature of a cross-petition against his codefendant, and such codefendant makes default, a judgment on the issues joined by the petition and separate answer will not necessarily conclude and determine any of the merely relative rights of the defendants as between themselves.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1229.]

2. APPEAL AND ERROR \S 501(4) — INSTRUCTIONS—NECESSITY OF EXCEPTION—REVIEW.

Where the case-made fails to show that any exceptions were taken to instructions given at the trial, the Supreme Court will not consider errors assigned upon the giving of such instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2304.]

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by A. E. Tidd against A. J. Henthorn, J. F. Kellerby, and P. M. Mowry. Judgment for plaintiff, and defendants Henthorn and Kellerby bring error. Affirmed.

Wm. P. Harper, of Oklahoma City, for plaintiffs in error. Ledbetter, Stuart & Bell and H. A. Kroeger, all of Oklahoma City, for defendants in error.

HARDY, J. Defendant in error A. E. Tidd was plaintiff below, and will be so designated. Plaintiffs in error A. J. Henthorn and J. F. Kellerby and defendant in error P. M.

Mowry were defendants below, and will be so designated herein.

Plaintiff brought this action for damages, alleging: That defendants had entered into an unlawful combination and conspiracy to cheat and defraud plaintiff out of certain property in Oklahoma City by exchanging therefor certain lands situated in Lane county, Kan., and in furtherance of said conspiracy falsely and fraudulently misrepresented to plaintiff the location, character, and value of said land, and also the condition of the title thereto; and in pursuance of said false and fraudulent misrepresentations upon which plaintiff relied an exchange of properties was consummated. That said representations were false, and by reason thereof plaintiff was damaged in the amount claimed. Defendants Henthorn and Mowry answered by general denial, and defendant Kellerby filed amended and supplemental answers, in which issue was joined upon the allegations of plaintiff's petition, and he further pleaded that by reason of a judgment theretofore rendered in certain litigation to which both plaintiff and defendant Kellerby were parties, the matters and things herein involved were adjudicated and determined, and by reason of said judgment plaintiff was estopped to maintain this action. The issues were submitted to a jury, which returned a verdict in favor of plaintiff, and defendants Henthorn and Kellerby bring the case here.

It is contended that the court erred in holding that plaintiff was not estopped to maintain this action by the judgment set up in the answer of defendant Kellerby, and in overruling the defendants' motion to direct a verdict in their favor. The answer of defendant Kellerby alleged that in case No. 12944 theretofore pending in the district court of Oklahoma county, entitled *A. S. Works, Plaintiff, v. A. E. Tidd, J. F. Kellerby, and another, Defendants*, it was alleged by plaintiff that one James Bottomly sold and conveyed certain premises to A. E. Tidd, who assumed a certain mortgage thereon and agreed to pay same as a part of the purchase price thereof, as shown by deed conveying said premises from said Bottomly to said Tidd; that thereafter said Tidd sold and conveyed said lands for a valuable consideration to defendant Kellerby, and as a part of the purchase price of said property said defendant Kellerby assumed and agreed to pay the amount of said mortgage due thereon, and thereby became liable and agreed to pay plaintiff therein said sum, and plaintiff in said action prayed for judgment against both Tidd and Kellerby on their agreement to assume and pay the mortgage indebtedness due upon said premises, and for foreclosure of his mortgage. Tidd made default, and Kellerby answered in that action; the material portions of his answer being that he disclaimed any interest in or to the lands covered by the mortgage, set out in plaintiff's petition, and further alleged that

at one time he contracted orally for the purchase of said lands, but that said contract of purchase was never consummated, and denied that he had assumed the payment of said mortgage indebtedness. The premises upon which foreclosure therein was sought are one and the same as those out of which plaintiff herein alleges he was cheated and defrauded by defendants. That case proceeded to judgment, and a decree was entered in which the court found that defendant Tidd had assumed the payment of said note and mortgage, and further found that defendant Kellerby had disclaimed any interest in and to said lands, and therefore had no interest therein, and ordered a sale of said property to satisfy said judgment. No cross-petition was filed either by Tidd or Kellerby against the other, and no adjudication was had as to their respective rights in the premises. It is insisted here that the judgment rendered therein conclusively determined that no exchange of lands had been in fact consummated, and that the plaintiff Tidd was by said judgment estopped to assert to the contrary. The theory of the law is that when matters have been once fully investigated between parties and finally adjudicated by a court of competent jurisdiction that the same matters shall not be again litigated, and the principle is well established and declared in a multitude of decisions that a right, question, or fact which has previously been determined must be taken as conclusively established between those who were parties to the former litigation and those standing in privity of interest with them. *Pratt v. Ratliff*, 10 Okl. 168, 61 Pac. 523; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *Woodworth v. Hennessy*, 32 Okl. 267, 122 Pac. 224; *McDuffie v. Gelser Mfg. Co.*, 41 Okl. 488, 138 Pac. 1029; *Pioneer Telephone & Telegraph Co. v. State*, 40 Okl. 417, 138 Pac. 1033; *Prince v. Gosnell*, 149 Pac. 1162.

[1] The present case does not come within this rule. There were no issues joined between Tidd and Kellerby in the former suit, and consequently their respective interests as against each other were not involved, nor determined. A case in point is *Keagy v. Wellington National Bank*, 12 Okl. 33, 69 Pac. 811. The plaintiff in that action brought suit to recover upon a certain note made by defendant, and answer was filed pleading that the matters were *res adjudicata*. The opinion discloses that prior to that action defendant Keagy had executed a note to the Southern Kansas Mortgage Company, which note was secured by a mortgage upon certain lands in Sumner county, Kan. The note had been assigned to one Hyatt who, upon default being made thereon, brought an action in Kansas upon said note, asking for foreclosure of his mortgage. The plaintiff bank was made codefendant with Keagy, but made default. Judgment went against Keagy, and the mortgaged premises were sold to

satisfy plaintiff's lien. In the opinion the court said:

"If the bank had any lien upon the real estate it might have set up its interest by way of cross-petition and had its lien or interest determined in so far as it affected the interest of Hyatt, but a failure to do this does not affect any right the bank had against Keagy, its codefendant. It was not called upon in that action to litigate its differences with Keagy, but to assert any claims it had adverse to Hyatt, the plaintiff; or, failing so to do, be barred so far as his rights were concerned."

The rule of law announced by the court in the syllabus of the opinion is stated thus:

"Where two persons are sued as codefendants, and answer separately, and not by way of cross-petition or make default, the judgment of the court adjudicating the rights of the plaintiff as against such defendants will not be res adjudicata as to any of the merely relative rights as between the defendants themselves."

The court in its opinion quotes approvingly from *Harvey v. Osborne*, 55 Ind. 535, the following expression:

"Where two parties are sued in the same action, and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his codefendant, such codefendant cannot, under our Code of Practice, demur or reply to, or join issue in any manner upon such separate answer. And in such case, the finding and judgment of the court, on an issue joined on such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendant, as between themselves."

In *De Watteville v. Sims*, 44 Okl. 708, 146 Pac. 224, it was held that a judgment foreclosing a materialman's lien against a number of defendants, including a holder of a mortgage lien, who did not set up his mortgage in that action, would not preclude the latter from foreclosing his mortgage as against his codefendants in the first foreclosure, who acquired no interest in the property under or by reason of the first foreclosure, and were not privies to the plaintiff therein, and whose conflicting or hostile claims against said mortgage were not in issue, nor litigated in the first proceeding. 23 Cyc. 752; *Jackson v. Lemler*, 83 Miss. 37, 35 South. 306; *Miller v. Gillespie*, 59 Mo. 220; *Jones v. Vert et al.*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379; *Hoxie v. Farmers' & Mechanics' Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637; *Smith Bros. & Co. v. N. O. & N. E. R. Co. et al.*, 109 La. 782, 33 South. 769. The plea of former adjudication was not well taken, and the court committed no error in refusing to direct a verdict for defendant.

[2] Error is assigned upon the giving of certain instructions by the court at the trial, but an examination of the case-made fails to show that any exceptions were taken thereto at the time. This being true, the rule announced that this court will not review an instruction given by the trial court, unless exceptions were taken thereto at the time of the trial, would preclude consideration of the errors assigned. *Everett v. Akins*, 8 Okl. 184,

56 Pac. 1062; *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940; *Finch v. Brown*, 27 Okl. 217, 111 Pac. 391; *Stigler v. Wiley*, 36 Okl. 291, 128 Pac. 118.

The judgment is affirmed. All the Justices concur.

BROWN et al. v. TULL et al. (No. 4530.)

(Supreme Court of Oklahoma. Nov. 23, 1915.
Rehearing Denied May 8, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1046(5)—HARMLESS ERROR—REMARKS OF TRIAL JUDGE.

Remarks of a trial judge during the progress of the trial in the presence of the jury do not constitute reversible error, unless from a reasonable understanding of his words they would tend to prejudice the minds of the jury for or against either of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134.]

2. APPEAL AND ERROR ⇨1004(1)—HARMLESS ERROR—INSTRUCTIONS.

Instructions given by the court considered, and held free from prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Trial, Cent. Dig. § 475.]

3. SET-OFF AND COUNTERCLAIM ⇨29(2) — BUILDING CONTRACT.

In an action upon a building contract by the builder, the defendant may elect to counterclaim against the builder for any damages sustained by builder's failure to perform in accordance with his contract, instead of defending against any recovery because of such failure to perform.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 50.]

4. APPEAL AND ERROR ⇨171(1)—THEORY OF CASE BELOW—CHANGE ON APPEAL.

When the parties have joined issue and gone to trial upon one theory of the case, they will not be permitted in this court to change such theory and have the case considered upon another.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053, 1054.]

5. TRIAL ⇨320, 345—FORM OF VERDICT—DUTY TO CHARGE—OBJECTION.

The trial judge is not required to prepare forms of verdict, and if he does the party aggrieved must except to the form prepared at the time in order to avail himself of any error therein.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 757, 816-820.]

(Additional Syllabus by Editorial Staff.)

6. TRIAL ⇨424—ERRONEOUS INSTRUCTION—CURE BY OTHER INSTRUCTION.

In an action to foreclose a mechanic's lien, any possible error in refusing defendants' requested instructions as to the effect of the contractor's fraudulent change of the contract was cured by an instruction stating the law as to the alteration of contracts more favorably to defendants than the instructions refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 985, 986.]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by G. P. Tull and L. H. Tull, partners under the name of Tull & Son, and the Brown-Dingee Investment Company, against Eli Brown and another. Judgment for plaintiffs, motion for new trial overruled, and defendants bring error. Affirmed.

This action was commenced by the defendants in error, hereinafter styled the plaintiffs, against the plaintiffs in error, hereinafter styled the defendants, and one W. L. Garner in the district court of Oklahoma county to foreclose a mechanic's lien on certain real estate in Oklahoma City for the balance claimed to be due plaintiffs for plumbing and supplying fixtures for a building erected by defendants upon said real estate under a contract with W. L. Garner. The plaintiffs alleged that on June 15, 1910, they entered into a written contract with W. L. Garner, the building contractor with defendants, to do certain plumbing in and furnish certain fixtures for a building then being constructed by defendants, and that on July 5, 1910, the plaintiffs contracted in writing with said Garner to do certain additional plumbing upon said building; that Garner had paid the contract price due plaintiffs for the work provided for in the second contract, and that he had made partial payments on the first contract, and plaintiffs claimed a balance due them of \$725; that plaintiffs had performed the work and furnished the materials provided for in both contracts in accordance with the terms thereof; that on September 23, 1910, plaintiffs filed their mechanic's lien claim for the balance due, and thereafter served notice of the filing thereof upon defendants. The defendants denied generally the allegations of plaintiffs, pleaded that after the completion of work by plaintiffs, plaintiffs and Garner fraudulently altered the contract first entered into in a material manner, and pleaded that plaintiffs had failed to comply with both their contracts and performed the work done in a slovenly and unworkmanlike manner to the damage of defendants in the sum of \$1,200, and prayed judgment against the defendants in the sum of \$475. The plaintiffs replied, denying the averments in the answer. Both plaintiffs and defendants offered evidence tending to establish the allegations of their pleadings at the trial which resulted in a verdict for plaintiffs. In due time defendants moved for new trial, which motion being overruled, judgment was entered, to reverse which defendants bring the cause here for review.

Wilson & Tomerlin and E. E. Buckholts, all of Oklahoma City, for plaintiffs in error. Jno. H. Wright and Clarence J. Blinn, both of Oklahoma City, for defendants in error.

RUMMONS, C. (after stating the facts as above). Under the first assignment of error in their brief, the overruling of their motion

for new trial, counsel for defendants argued but one proposition, the failure of plaintiffs to prove the giving of notice of the filing of their mechanic's lien. But it seems that after the filing of the brief of defendants the plaintiffs secured leave from this court to correct the record, and pursuant thereto amended the case-made so as to show that notice of the filing of their mechanic's lien was given defendants as required by law; therefore we need not further consider this assignment.

[1] The second and third assignments of error go to the admission of incompetent, immaterial, and irrelevant testimony offered by plaintiffs, and to the exclusion of competent, material, and relevant testimony offered by defendants. Counsel for defendants under these assignments argue the proposition that defendants were denied a fair trial, and present several excerpts from the record to show that the trial judge was prejudiced against defendants, and that his remarks in ruling upon the admission or rejection of testimony indicated such prejudice to the jury. We have carefully examined the excerpts from the record shown in the brief of defendants, and have also examined the record, and find nothing in the colloquies between the trial judge and counsel for plaintiffs and defendants, over objections to the introduction of evidence and the rulings of the court thereon, to indicate any prejudice on the part of the trial court for or against either the plaintiffs or defendants from which a jury might reasonably infer that the court leaned to either side of the controversy. Our Territorial Supreme Court in the case of *City of Guthrie v. Carey*, 15 Okl. 276, 81 Pac. 431, say:

"No remarks of the court should ever be considered as reversible error, unless it be shown that by a reasonable construction of the language, and a reasonable understanding of his words, they would have a tendency to prejudice one side or the other in the mind of the jury."

In this case we fail to find any remarks in the record made by the trial court, save the ordinary colloquies between counsel and the court, which are bound to occur in the trial of nearly every case. We notice also that, in probably one-half of the cases complained of, the counsel for defendants took no exception to the rulings of the court, and no exception whatever was taken to the remarks of the court. We have also examined the rulings of the trial court upon the evidence set out in the brief of counsel for defendants, together with the evidence set out in their statement of the case, and we find no reversible error in the rulings of the court upon the introduction of evidence. We therefore conclude that defendants' second and third assignments of error are not well founded.

[2] The fourth and fifth assignments of error complain of the action of the court in refusing instructions requested by defendants, and of the instructions given by the court.

Counsel for defendants set out in their brief instructions 5 and 6 given by the court, to which they excepted, and which are as follows:

"5. If you believe from the evidence in this case, by a preponderance thereof, that the plaintiffs entered into contracts with the defendant W. L. Garner to do and perform certain work upon a building being erected by the defendants Brown & Dingee, and that plaintiffs have done and performed the said work which they agreed in said contracts to do, in the manner required by the said contracts, and that the plaintiffs have not been paid the total contract price for their work, that they would be entitled to a verdict at your hands for the amount which you find is due and unpaid upon such contracts, with interest at 6 per cent, thereon from the 23d of September, 1910. * * *

"6. If you, however, believe that the plaintiffs agreed to do and perform said work and labor according to the plans and specifications and contracts, and that plaintiffs did not do and perform the said work and labor according to the plans and specifications and the contracts, and by reason of plaintiffs' failure to so perform the said work the defendants have been damaged, you may set off such damages, if any you find the defendants to have sustained, against any claim the plaintiff may have established for work and labor, if you find such a claim to have been established."

[3] The defendants contend that these instructions do not submit to the jury the question of a failure of performance on the part of plaintiffs which might preclude a recovery by them, and submit authorities in support of the proposition that a failure to perform in accordance with the contract will defeat a recovery by the contractor. This is undoubtedly correct, but it is also true that in a building contract upon a failure by the contractor to substantially perform his contract, the other party may elect to recover damages for the breach instead of defending on the ground of nonperformance. *Thomas v. Warrenburg*, 92 Kan. 576, 141 Pac. 255.

[4] The defendants might in their answer have elected to stand upon the alleged breach of their contract by plaintiffs. In that case if the evidence disclosed a failure of performance on the part of plaintiffs, they could not recover. But having elected to recoup in damages, for the alleged breach by plaintiffs of their contracts, against any recovery to which the plaintiffs might be entitled, they are bound by that theory, and cannot in this court change the issue. *Borger v. Carabine*, 24 Okl. 609, 104 Pac. 906; *Wallace v. Killian*, 40 Okl. 631, 140 Pac. 102. The defendants not only tried the case in the court below upon the theory that they were entitled to recoup in damages for any breach of the contracts on the part of plaintiffs, the issues raised by the pleadings, but so far as the record discloses they never requested the trial court to charge the jury upon the theory of failure of performance, which they now set up here for the first time.

[5, 6] Defendants complain of the refusal of their requested instructions 6 and 7, which are as follows:

"Instruction No. 6. I charge you, gentlemen of the jury, that if you believe from the evidence that the plaintiffs and W. L. Garner fraudulently changed the contract sued on in this case and introduced in evidence, after the work was completed and for the purpose of rendering the defendants liable to the plaintiffs for the full amount of the contract, then I charge you that under the law this would vitiate the contract sued upon, and your verdict should be for the defendants.

"Instruction No. 7. I charge you, gentlemen of the jury, that if you believe from the evidence that the plaintiffs and W. L. Garner by mutual agreement and for the fraudulent purpose of rendering Brown & Dingee liable to the plaintiffs herein changed the contracts sued upon after the work was completed, then I charge you that your verdict should be for the defendants."

We think instruction No. 7, given by the court, which was not excepted to by defendants, cured any possible error there could have been in refusing the instructions requested. Instruction No. 7, given by the court, is as follows:

"The intentional destruction, cancellation, or material alteration of a written contract by a party entitled to recover any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act. In other words, the alteration of a written contract by one of the parties to it without the consent or knowledge of the other party vitiates the contract, and a recovery cannot be had upon that contract; but where a contract is executed in duplicate, the law provides that an alteration or destruction of one copy of such contract while the other exists, unaltered, does not vitiate the contract.

"Therefore, if you believe from the evidence that the contract sued on in this case has been materially changed by the plaintiffs, or with their knowledge or consent, and without the knowledge and consent of the defendants, such alteration vitiates such contract, and no recovery could be had thereunder by the plaintiffs. If you should further find and believe from the evidence that the contract sued on was executed in duplicate, and that but one copy of such contract was so changed, then the changing of that one copy would not vitiate the contract and a recovery might be had, notwithstanding the alteration of one copy of the contract."

It will be noted that this instruction states the law as to the alteration of the contracts, and the issue thereon, much more favorably to the defendants than the instructions refused, inasmuch as the jury were not by the instruction given required to find fraud or the intent with which the alteration, if any, might have been made.

The defendants finally complain of the form of the verdict prepared by the court. Trial judges are not required to prepare forms of verdict, and if they do exception must be taken by the party aggrieved before the matter can be heard here. *Houston T. & C. Ry. Co. v. Lemair*, 55 Tex. Civ. App. 244, 119 S. W. 1162. The record discloses no exception taken to the form of the verdict at the time, and defendants cannot now be heard to complain of it.

The issues have been presented to the jury upon conflicting evidence under proper instructions, and as we find no reversible er-

ror in the record, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

SWEET v. FRESNO HOTEL CO.

BRANDT BROS. v. SAME.

(S. F. 7268.)

(Supreme Court of California. April 19, 1917.
Rehearing Denied May 17, 1917.)

1. MECHANICS' LIENS §104 — BUILDING CONTRACTS—TIME OF PAYMENT.

A building contract, merely providing when 75 per cent. of the contract price is payable, does not conform substantially to Code Civ. Proc. § 1184, providing in effect that such contracts must, by their terms, declare that at least 25 per cent. of the contract price shall be payable at least 35 days after final completion; and so others than the contractor furnishing labor and material are entitled to lien for the full amount thereof.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 136.]

2. MECHANICS' LIENS §134 — FORM OF CLAIM.

A claim of lien by another than the chief contractor, containing a statement of the particulars required by Code Civ. Proc. § 1187, with nothing contradictory or destructive thereof, is sufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 208.]

3. MECHANICS' LIENS §277(6)—CLAIMS—VARIANCE.

There is no variance between claim of lien of subcontractors for value of work and material up to cessation of labor, estimated at contract price, stated also to be the value thereof, and evidence that this was the value of the work and material, plus 20 per cent. for their profits as subcontractors.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 553, 554.]

4. MECHANICS' LIENS §141—CLAIM OF SUBCONTRACTORS—GIVING NAME OF EMPLOYER.

Statement in claim of lien by subcontractors, that the contract made by them with F. & Co., the contractor, was made by the latter "on behalf of and for said owner," does not vitiate the claim as not giving the name of the person by whom they were employed; the quoted phrase being manifestly inserted on the theory of the principal contract being void for failure to make 25 per cent. of the contract price payable 35 days after completion, in which case Code Civ. Proc. § 1184, provides that work and material by others than the principal contractor shall be deemed done and furnished at the instance of the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 243-245.]

5. MECHANICS' LIENS §135—LIEN CLAIMS.

It is no ground for objection to claim of lien by S., stating that the work done by him was under contract between him and the contractor, that the contract, made a part of the claim of lien, though signed in his name, purported to be a contract of S. & Co., it appearing by the evidence that S. & Co. was merely a name under which S. was doing business, and that no one else was interested therein; it not being necessary that the claim make this explanation,

but enough that it asserts the ultimate fact that he made the contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 209.]

6. MECHANICS' LIENS §51—LOANS TO CONTRACTOR.

One merely paying the wages of a building contractor's employés, under agreement to do so and to be repaid the same with a commission, cannot have a lien for their labor; he in effect loaning money to the contractor to enable him to carry on the work, for which there can be no lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 53.]

7. MECHANICS' LIENS §39 — CONTRACT TO BESTOW LABOR.

Contract of S. with F., building contractor, whereby S. agrees to furnish all common and carpenter labor for completion of building, and to pay all wages that may become due the carpenters and common laborers, and F. agrees for such labor furnished to pay to S. each month, with commission, the amount of wages S. has paid to such laborers during the preceding month, is one to bestow labor on the building, entitling S. to a lien for labor furnished thereunder; and not a contract for loan of money, though it is provided F. shall make out and deliver to S. weekly pay rolls, and that it is understood that all men employed shall be satisfactory to F., and that he shall have the right to discharge any unsatisfactory to him, and to replace them with others selected by him.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 43.]

8. MECHANICS' LIENS §39 — SUBCONTRACTORS—AMOUNT OF LIEN—VALUE OF LABOR.

The value of the labor furnished by a subcontractor under contract to furnish the carpenter and common labor to complete the building, and see that such laborers worked when wanted, and attend to paying their wages, for which the subcontractor is entitled to a lien, is the amount of the reasonable wages paid to the men, with an additional sum for the value of the subcontractor's services, which the contract requires him to perform.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 43.]

9. MECHANICS' LIENS §161(4)—INTEREST.

A contractor cannot increase the burden of the owner by an agreement with the lien claimant, made after the work is done, to pay interest at an increased rate; but in such case, as in any other, there is right to interest at the legal rate, the amount owing, as well as the time of payment, being fixed and certain.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 283, 606.]

Department 1. Appeals from Superior Court, Fresno County; H. Z. Austin, Judge.

Two actions, one by Isaac Sweet, the other by Brandt Bros., both against the Fresno Hotel Company. From a judgment after consolidation of cases, plaintiff Sweet and defendant appeal. Reversed and remanded, with directions.

Frank H. Short, F. E. Cook, and Short & Sutherland, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant Fresno Hotel Co. Milton M. Dearing, of Fresno, for appellant Sweet. Johnston & Jones, of Fresno, and C. W. Miller, of Stockton, for respondent.

SHAW, J. The cases here presented are actions to foreclose mechanics' liens. All the parties appealed. The appeal of the plaintiffs Brandt Bros. was presented in case No. 6915, and has been decided; the judgment having been held good against their attacks. Brandt Bros. v. Fresno Hotel Co., 173 Cal. —, 159 Pac. 434. The appeals of the other parties are presented by the record in this case (No. 7268) and will now be considered.

The contract was made and filed and the work was begun prior to the enactment of the amendments of 1911 to the Mechanics' Lien Law. The rights of the respective parties are therefore dependent on the law existing before those amendments took effect, and our references to Code sections are to be understood as referring to them in their pre-existing form. The Fresno Hotel Company contracted with H. C. Farley & Co., a corporation, for the erection of a building by said Farley & Co., on certain lots in the city of Fresno belonging to the hotel company. The hotel company therein agreed, in consideration of the erection of said building, "to pay, or cause to be paid, to the contractor," the sum of \$199,500 "at times and in the manner following, to wit, 75 per cent. of the completed work done during the preceding month to be paid on the first of every succeeding month." It was also provided that at the final completion of the work the architect should certify to that fact in writing to the contractor, stating therein the amount then due. There were no provisions or agreements for the payment of the remaining 25 per cent. of the contract price, other than those above set forth, nor any statement that the same should be "payable at least thirty-five days after the final completion of the contract," as required by section 1184 of the Code of Civil Procedure. This contract was duly filed in the office of the county recorder on December 17, 1910, before the work thereunder was begun. The contractor proceeded with the erection of the proposed building until November 15, 1911, at which time it ceased work thereon and never resumed the same. On December 21, 1911, the hotel company, pursuant to the first clause of section 1187 of the Code of Civil Procedure, filed in the recorder's office a notice of cessation of labor on the building.

On January 12, 1912, the plaintiff Sweet filed in the recorder's office his claim of lien against the property for certain labor performed and materials furnished for and used in the building, under agreements with the original contractor. On January 15, 1912, plaintiffs Brandt Bros. filed their claim of lien against the property for certain work performed and materials furnished by them therefor and used therein, under agreements with the contractor. The present actions are for the foreclosure of these liens. The court found that the balance owing to Sweet for the materials furnished and labor performed

by him in the erection of the building was \$3,231.06, and that the balance owing to Brandt Bros. for the labor performed and materials furnished by them in the erection of said building was \$5,585.65. Judgment of foreclosure was duly rendered in favor of the respective plaintiffs for these sums.

[1] We will first consider the appeals of the hotel company. The judgment of the court below was given upon the theory that the contract was invalid as to third persons because of its failure to provide that one-fourth of the contract price should not be payable until 35 days after completion, and that, consequently, the plaintiffs were entitled to a lien for the full amount unpaid of the value of their labor and materials furnished, although the balance unpaid from the owner to the contractor was not sufficient to pay such claims in full. Section 1184 expressly declares that if a building contract does not "conform substantially" to its provisions, "the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." Our decisions uniformly hold that where such substantial conformity is wanting the contract price does not limit the amount of the liability as to liens. *San Diego L. Co. v. Wooldredge*, 90 Cal. 578, 27 Pac. 431; *Willamette, etc., Co. v. Los Angeles, etc., Co.*, 94 Cal. 234, 29 Pac. 629; *Merced L. Co. v. Bruschi*, 152 Cal. 374, 92 Pac. 844; *Burnett v. Glas*, 154 Cal. 256, 97 Pac. 423; *Nofziger L. Co. v. Solomon*, 13 Cal. App. 625, 110 Pac. 474. The hotel company claims that this defect in the contract is not a lack of substantial conformity with section 1184. The argument is that inasmuch as the contract does not declare that the final one-fourth shall be paid prior to the expiration of the 35 days after completion, but is silent as to the time of such payment, it does not expressly violate the section, and that the law itself becomes a part of the contract, with the result that, by force of the statute, that installment would not be payable until 35 days after completion. We do not so understand the provision in question. The part of the section to which all contracts must substantially conform reads as follows:

"No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: Provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract."

This language is mandatory. It does not, as the argument assumes, declare the legal effect of such contract; it relates to the

terms of the contracts and prescribes what such terms shall be; its declaration is, in effect, that such contracts must, by their terms, declare that at least 25 per cent. of the contract price "shall be payable at least thirty-five days" after final completion. There is a reason for this requirement. The contract must be filed in the recorder's office so that all laborers and other persons interested may see it and learn therefrom at first hand the time of payment. The purpose was to have it expressed on the face of the contract and not left to implication founded on principles of construction not universally understood. This purpose would be defeated if a failure to speak were held innocent on the theory proposed by the defendant. This contract contains an express agreement to pay the whole price, \$199,500. By the general principles of law whatever of this sum remained unpaid on final completion would be immediately payable. A contract which so completely disregards the express provisions of the section, which is silent where it is commanded to speak, and which defeats one of the important objects sought to be attained by section 1184, cannot be said to conform substantially thereto.

[2] We can see no substantial objection to the form of the respective claims of lien. They each state clearly the demand of the claimant, less just credits and offsets, the name of the owner of the property and of the contractor by whom the claimant was employed and to whom he furnished the material, the terms, the time given and conditions of the contract to do the work and furnish the materials and a description of the property charged with the lien. Section 1187, which prescribes the form of such claim, requires nothing more than the particulars above enumerated, and a claim which conforms to these requirements must be held sufficient. They contain nothing that is contradictory or destructive of the essential particulars above enumerated.

[3, 4] There was no variance between the claim of lien of Brandt Bros. and the proof in support of their claim. Their claim, though inaptly expressed, in effect was for the value of the work done and material furnished by them up to the time of the cessation of labor, estimated at the contract price which, the claim also states, was the value thereof. There was evidence that this amount was the actual value of the work and materials, plus 20 per cent. for their profit as subcontractors. The court below allowed nothing for the profit, but did allow for the value less the profit. This was sufficient to support the claim and the judgment. The statement in the claim of Brandt Bros. that the contract made by them with Farley & Co. was made by the latter "on behalf of and for said owner" does not vitiate the claim. The name of the contractor is plainly given, and the phrase quoted was manifestly inserted to give point to the theory that the

contract was void because of the failure to make 25 per cent. payable 35 days after completion. In such case the statute declares, as before stated, that the work and materials shall be deemed to have been done and furnished at the instance of the owner. It cannot be said that because of this phrase the name of the person by whom the claimants were employed is not given.

[5] The claim of Isaac Sweet states that the work bestowed by him on the building was done under three written contracts between him and H. C. Farley & Co., the contractor. The technical objection is made that these contracts, which were made a part of the claim of lien as filed, purport to be contracts of "Isaac Sweet & Co." or "I. Sweet & Co.," while they are signed only by Isaac Sweet and H. C. Farley & Co., and that they do not support a claim of lien by Isaac Sweet alone. The claim of lien directly asserts that the contracts mentioned were each made by Isaac Sweet. They are signed by Isaac Sweet, not by Isaac Sweet & Co. This is fully explained by the evidence that "Isaac Sweet & Co." was merely a name under which Isaac Sweet was doing business, and that no one else was interested in that business. They were therefore the contract of Isaac Sweet alone, and were correctly described as such in the claim of lien. It was unnecessary to make the explanation a part of the statement of the claim. The assertion of the ultimate fact that Isaac Sweet made the contracts was sufficient.

[6] One of these contracts was made on April 1, 1911, upon which the court below allowed a lien for \$628.30. After rectifying the previous contract of February 1st, which Sweet had partly performed and by which he had earned \$358.58 more than had been paid to him and declaring that the same was canceled, saving the debt for \$358.58 and a lien to Sweet on the building therefor, this contract proceeds as follows:

"In consideration of the above release and cancellation, and of the further payments and considerations hereinafter mentioned, Isaac Sweet hereby assumes and agrees to pay all of the wages due to carpenters and common laborers employed in the erection of the Fresno Hotel, until the same is completed; which said amount shall be returned to Isaac Sweet in the manner as follows: Seventy-five per cent. of the amount of the pay rolls each month, together with 10 per cent. commission on each weekly pay roll, payable on the following month between the 1st and 5th of the month and the balance 25 per cent. thirty-five days after the acceptance and completion of the building, weekly pay rolls to be made out by Farley & Co. and signed by them and delivered to said Isaac Sweet each week. Farley & Co. to have the right to hire and discharge any and all men, but their names shall be placed on the pay rolls when employed. Sweet to act in the capacity of superintendent, and to see that the work progresses."

This, on its face, is not a contract by Sweet to perform labor on the building or to have labor performed thereon by others in his employment. It is on his part an agreement to assume and pay all wages due to certain

classes of laborers employed on the building and on the part of Farley & Co. an agreement to return to him the money advanced for that purpose. The laborers to be paid thereunder were to be hired and discharged by Farley & Co., who was to make out weekly pay rolls for Sweet's information as to the amount to be paid to the men. So far as the work is concerned, Sweet's only function was to act as superintendent, and to pay the wages due from the contractor to the men. He was not the employer. In effect he was loaning money to the contractor and performing service as superintendent of the work, for which service he was to receive an amount equal to 10 per cent. of the wages earned by the men. The law does not allow a lien for money loaned to a building contractor to enable him to carry out his contract. *Godefroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360. The lien claim states, with respect to this contract, that it is for "carpenter labor and common labor" performed under it. This must be understood to refer to the labor performed by the men employed by Farley & Co. and whose wages Sweet paid. It does not cover compensation for his own services as superintendent. It follows, therefore, that the claim did not embrace anything for which he was entitled to a lien, and none should have been allowed thereunder.

[7] The defendant claims that the same rule should apply to the contract made on June 1, 1911. By the contract of June 1st Sweet expressly "agrees to furnish all common labor and carpenter labor necessary to the construction and completion of said building, and to pay all wages that may become due to the carpenters and common laborers, * * * paying such laborers weekly or at such other times as their wages may become due." Farley & Co. agreed "for such labor furnished in the erection of said building" to pay to Sweet, between the first and fifth days of each month, the amount of the wages Sweet had paid to such laborers during the preceding month. The contract further declares that Farley & Co. shall make out weekly pay rolls and deliver the same to Sweet at the end of each week, and that it was "understood that all men employed upon, in, and about said building shall be satisfactory to said" Farley & Co., "and that they shall have the right at any and all times to discharge any one not satisfactory to them, and to replace the same by persons selected by themselves." We cannot agree to the proposition that this contract was a mere reiteration or renewal of the previous contract of April 1, 1911. Its language was different from the previous contract in a very important particular, and was presumably made so with the purpose of changing its effect.

It may be true, as contended by the defendant, that the actual mode of carrying on the work and paying the men after June 1st

did not differ materially in appearance from that practiced before June 1st. But this similarity was not fatal to the validity, or destructive of the effect, of the new contract. The old contract was in effect an agreement by Sweet to advance money to pay the debts owing by Farley & Co.; the new one was an agreement by him to bestow labor upon the building, hiring the men himself and paying their wages. It was a lawful contract, for a lawful purpose. He had the lawful right to make it, notwithstanding the fact that the effect was to give him a right to a lien under the Mechanics' Lien Law which he did not have under the contract of April 1st. The evidence showed that he actually did select and hire the men and superintend them in the work under the contract of June 1st. The provision that Farley & Co. should have the right to discharge men that were not satisfactory to it and to replace them by other persons selected by itself did not make it the employer of the new men thus selected; it merely empowered it to make the selection of the men to be employed by Sweet. We think the plaintiff Sweet was entitled to a lien for the value of the labor furnished under this contract.

[8] The main point urged in support of the appeal of Sweet is that the court erred in refusing to allow him a lien for the 10 per cent. upon the pay rolls which he was to receive by virtue of his contracts with Farley & Co. of April 1st and June 1st, respectively. As we have concluded that Sweet was entitled to nothing under the contract of April 1st, the objection is immaterial with respect to that contract. We are of the opinion that the point is well taken with regard to the labor bestowed under the contract of June 1st. It appears from what we have already said that Sweet's relation to Farley & Co. under that contract was that of a subcontractor to furnish labor of certain kinds for the erection of the building. The contract contemplated some services by him. He was obliged to hire the men, see that they worked on the building, when wanted, and attend to the paying of their wages. For the labor furnished in this manner he was to receive a sum equal to the amount of the monthly pay roll, plus 10 per cent. He was entitled, under the law, to the value of the labor furnished. Under a contract of that kind the true value of the labor furnished would be the amount of the reasonable wages paid to the men, with an additional sum for the value of the services of the subcontractor which, as above stated, it required him to perform. For this aggregate value he was entitled to a lien. His right thereto is as clear as would be that of a subcontractor for construction to claim a lien for more than the actual market value of the materials purchased by him and used in the building. There was evidence to the effect that

10 per cent. of the pay roll was a reasonable charge for the contractor under such contract. The defendant does not point out any evidence to the contrary. It also appeared that the wages paid were the usual wages current in that vicinity. The court should have found the reasonable value by adding 10 per cent. to the amount of the pay roll as the contract provided. It concluded, as matter of law, that Sweet was entitled to nothing more than his actual outlay for wages, and in pursuance of that theory it found that the reasonable value of the work done under that contract was \$2,244.10, being the amount of the wages paid to the men. The amount should have been \$224.41 more.

[9] In October, 1911, after the labor claimed for by Sweet had all been furnished, he made a settlement with Farley & Co., whereby the latter agreed to pay him 10 per cent. interest on the balance due him. The court properly refused to allow interest at this rate. The lien is statutory, and it extends only to the value of the labor and materials bestowed upon the building. A contractor has no authority to increase the burden of the owner by an agreement with a lien claimant, made after the work is done, to pay interest at an increased rate. The court, however, erred in refusing to allow any interest. The amount owing to Sweet, as well as its time of payment, was fixed and certain. Interest at 7 per cent. should have been allowed thereon from the time it became due up to the time of judgment. *Burnett v. Glas*, 154 Cal. 260, 97 Pac. 423; *Pacific, etc., Co. v. Fisher*, 106 Cal. 233, 39 Pac. 758.

The result of our conclusions is that the judgment is correct so far as the lien of Brandt Bros. is concerned; that the lien of Sweet was unwarrantably increased by including therein the sum of \$628.30 under the contract of April 1, 1911; that the amount allowed under the contract of June 1, 1911, should be increased by adding the sum of \$224.41, making a total of \$2,468.51; and that the court should have allowed interest thereon at 7 per cent. from August 5, 1911, and interest on the sum of \$358.56 admitted to be due under the contract of February 1, 1911, from August 1, 1911. This day, it may be explained, was fixed by the parties in a subsequent agreement as the date on which interest should begin on the February contract, otherwise it would have begun at an earlier date. The facts appear with sufficient certainty in the findings to authorize a judgment to be entered in accordance with these conclusions. There is, therefore, no necessity for remanding the case for another trial. The proper result can be reached by directing a modification of the judgment. Since both parties succeed in part on their appeals, the costs should be divided equally between them. Although the judg-

ment in favor of Brandt Bros. is upheld, we think that as the cases were consolidated and the judgment for both parties was made in one entry, the entire judgment should be recast by the court below.

The judgment is reversed, and the case is remanded, with directions to the court below to enter a judgment of foreclosure in favor of Brandt Bros. for the amount found due them, including interest up to the date of such judgment, and in favor of the plaintiff Sweet in accordance with this opinion. It is further ordered that the plaintiff Isaac Sweet and the defendant shall each pay one-half of the costs of these appeals.

We concur: SLOSS, J.; LAWLOR, J.

REMSBERG v. HACKNEY MFG. CO.
(L. A. 3842.)

(Supreme Court of California. April 19, 1917.)

1. APPEARANCE ⇨24(5)—WAIVER OF DEFECTIVE SERVICE.

By answering and going to trial on the merits, a defendant makes a general appearance waiving any defects in the service, although he first appeared specially and moved to set aside the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 126.]

2. SALES ⇨23(3)—REQUISITES OF CONTRACT—ACCEPTING OFFER TO BUY.

A written offer to buy, signed by the buyer alone, becomes binding upon both parties when accepted and acted upon by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 46.]

3. EVIDENCE ⇨441(9) — PAROL EVIDENCE — WARRANTY.

Prior oral negotiations are merged into a written sales contract complete upon its face, where no fraudulent representations were made to induce its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2035.]

4. PLEADING ⇨264—AMENDED ANSWER—ADMISSIONS IN ORIGINAL ANSWER.

That defendant's original answer admitted making certain representations regarding goods sold is immaterial, where the amended answer asserted its purpose of standing upon a subsequent written contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803-805.]

5. SALES ⇨273(2) — IMPLIED WARRANTY — FITNESS FOR PURPOSE INTENDED.

Civ. Code, § 1770, providing that articles manufactured for a particular purpose are impliedly warranted reasonably fit, etc., is inapplicable to a plow purchased by description and not produced under an order or for a particular purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 773.]

6. SALES ⇨268(2) — IMPLIED WARRANTY — LATENT DEFECTS.

A finding that a machine sold was defective in material and workmanship does not bring the case within Civ. Code, § 1769, providing that articles are impliedly warranted to be free from latent defects, and that improper mate-

rials were not knowingly used in their manufacture.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 765.]

7. SALES § 272 — IMPLIED WARRANT — MERCHANTABILITY.

A finding that a plow when tested upon certain land failed to work, except to make a few irregular furrows, and to scratch the surface of the soil, does not establish a general unfitness equivalent to a want of merchantability, within Civ. Code, § 1771, declaring that the merchantability of goods is impliedly warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747.]

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by E. E. Remsberg against the Hackney Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Collier & Clark and James E. Shelton, all of Los Angeles, for appellant. E. E. Keech, of Santa Ana, for respondent.

SLOSS, J. Plaintiff is the owner of 160 acres of farm land in Los Angeles county. The defendant is a corporation organized under the laws of Minnesota, and engaged in the manufacture and sale of the "Hackney Auto Plow," a gas engine tractor advertised and sold for the purpose and use of plowing, hauling, and operating farm machinery. In 1912 the parties entered into a contract for the purchase by plaintiff of one of these implements. The auto plow was shipped to plaintiff who paid the full purchase price. Finding that the machine did not give the service which, as he contended, he had a right to demand, he undertook to rescind the contract, and brought this action to enforce the rescission. He was given judgment for the purchase price paid by him, with interest. The defendant appeals.

[1] Before answering to the merits, the defendant appeared specially and moved to set aside the service of summons, on the ground that there had not been such service as is required by the Code of Civil Procedure. Section 411, subd. 2. The motion was denied. We need not inquire whether the attempted service was, in fact, defective. By answering and going to trial on the merits, the defendant made a general appearance and submitted itself to the jurisdiction of the court. It thereby waived any right it may have had to insist that jurisdiction of its person had not been obtained. Although some of the earlier decisions in this state declare that a defendant who has appeared for the sole purpose of questioning the service of process upon him, and whose motion in this behalf has been denied, does not, by subsequently answering to the merits, lose his right to stand upon his objection to the jurisdiction (*Deidesheimer v. Brown*, 8 Cal. 339; *Lyman v. Milton*, 44 Cal. 630; *Kent v.*

West, 50 Cal. 185), the contrary rule has been firmly established by a number of more recent cases. "If a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection." *Olcese v. Justice's Court*, 156 Cal. 82, 87, 103 Pac. 317. In *Re Clarke*, 125 Cal. 388, 58 Pac. 22, the court, speaking through Temple, J., refers to *Deidesheimer v. Brown* and *Lyman v. Milton*, supra, and, in effect, overrules these cases. It is argued by appellant that the point was not necessarily involved in the *Clarke* Case. The declaration of Mr. Justice Temple has, however, received our approval in several cases (*Security, etc., Co. v. Boston, etc., Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *In re Yoell*, 131 Cal. 581, 63 Pac. 913; *Olcese v. Justice's Court*, 156 Cal. 88, 103 Pac. 317), and is in harmony with other rulings of this court, both before and since the decision of *In re Clarke* (*Desmond v. Superior Court*, 59 Cal. 274; *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547; *Zobel v. Zobel*, 151 Cal. 98, 90 Pac. 191).

[2-4] The basis of the right of rescission asserted by the plaintiff was the breach of warranties accompanying the sale. On January 12, 1912, the plaintiff gave to the defendant a written order reading as follows:

"Los Angeles, Cal., 1/12/12.

"Hackney Mfg. Co., Los Angeles, Calif.—Dear Sirs: Please deliver to me one Hackney Auto Plow equipped with disc plows at as early date as possible, it being understood that I am to receive same out of the first shipment you receive from your factory after this date, and for which I agree to pay the sum of \$1650.00, f. o. b. St. Paul, Minn., subject to a cash discount of 5 per cent. as per agreement entered into with and by Mr. L. S. Hackney.

"Yours truly, E. E. Remsberg."

At the same time he paid \$500 on account. Pursuant to this order, the defendant shipped the machine, and delivered it to plaintiff at Palmdale, in Los Angeles county, on February 18, 1912, at which time the plaintiff paid the balance then due on the purchase price. This order, though signed by the plaintiff alone, was, when accepted and acted upon by the defendant, a written contract binding upon both parties. 9 Cyc. 300; *Luckhart v. Ogden*, 30 Cal. 547; *Bloom v. Hazard*, 104 Cal. 310, 37 Pac. 1037; *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329. The plaintiff's complaint declared upon a number of oral representations and warranties. The defendant in his answer set up the writing. The court found that the written contract had been made after the alleged oral representations. At the trial the defendant objected to the introduction of any evidence to show the making of any oral representations precedent to the final consummation of the written agreement. This objection, based upon the ground that all prior oral negotiations were merged in the written contract, was sustained. The ruling was cor-

rect, the contract being complete upon its face, and there being no claim that the prior representations had been fraudulently made to induce the execution of the written agreement. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964. But, notwithstanding its exclusion of this evidence, the court found that the defendant had made a number of representations and warranties touching the fitness of the Hackney Auto Plow for the purposes for which it was designed, the degree of skill and knowledge required to operate it, the simplicity and strength of its devices, its power, and its ability to do work. These findings cannot afford any support to the judgment. They must be disregarded, either on the ground that they are unsupported by evidence, or that, as matter of law, they cannot affect the written contract, entered into after the making of all of these alleged representations and warranties. It is unimportant, if it were the fact, that the making of some of these representations was admitted in the original answer. By the amended answer, the defendant plainly asserts its purpose of standing upon the written contract, to the exclusion of any prior representations.

The rights of the parties must, therefore, be measured by the terms of their written agreement. The only warranties implied in a contract of sale of personal property are those declared in article 3 of chapter 2 of title 1 of part 4 of the Civil Code. "Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." Civ. Code, § 1764; *Sutro v. Rhodes*, 92 Cal. 117, 123, 28 Pac. 98; *Browning v. McNear*, 145 Cal. 272, 280, 78 Pac. 722. The article defines a number of warranties, but the only ones that can have any application to the present case are those declared by sections 1769, 1770, and 1771. These sections read as follows:

1769. "One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."

1770. "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

1771. "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

[5, 6] At the trial, the plaintiff seemed to place his reliance, in part at least, upon section 1770. His rejection of the machine was based upon its failure to do the work for which plaintiff desired to use it. But the contract was not such as to bring the case within the purview of section 1770. The article was not manufactured for the plaintiff under an order for a particular purpose. It was not manufactured under order at all. The defendant was in the business of man-

ufacturing and selling an article known as the Hackney Auto Plow, and the plaintiff bought one of these articles by description. The warranties defined in section 1769, i. e., that the implement was free from any latent and undisclosed defect arising from the process of manufacture, and that the manufacturer had not knowingly used improper materials therein, were implied in the contract, but there is neither allegation nor finding that these warranties were broken, and the evidence would not support such a finding. The finding that the machine was "defective both in material and workmanship" does not meet the requirements of section 1769. Furthermore, the evidence does not sustain the finding.

An examination of the decisions in other jurisdictions will show that the Code sections are in substantial accord with the generally accepted rules of the common law. The prevailing doctrine applicable to cases like the present is laid down in the following passage, found in 1 *Parsons on Contracts*, p. *586, quoted with approval by this court in *Bancroft v. S. F. Tool Co.*, 120 Cal. 228, 232, 52 Pac. 496, 498:

"If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. For, if the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose."

This doctrine is supported by a wealth of authority. In *Fuchs & Lang Mfg. Co. v. Kittredge & Co.*, 242 Ill. 88, 89 N. E. 723, the court said:

"In a contract for the sale of an article under its patent or other trade name there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty, though it does not answer his purpose."

In *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359, the court laid down the rule in these words:

"Where * * * the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied further than [that] it should be of good workmanship and material."

We cite a few of the many decisions which declare the principle in similar terms. *Thompson v. Gunderson*, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859; *Manufacturing Co. v. Cuming*, 35 App. Div. 376, 54 N. Y. Supp. 818; *Gachet v. Warren*, 72 Ala. 288; *Mason v. Chappell*, 15 Grat. (Va.) 572; *Lombard, etc., Co. v. Grt. Northern Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180; *Scott v. Vulcan Iron Wks. Co.*, 31 Okl. 334, 122 Pac. 186; *La Crosse Plow Co. v. Brooks*, 142

Wis. 640, 126 N. W. 3; *Ehrsam v. Brown*, 76 Kan. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877.

Though somewhat sweeping language was used in some of these cases, the question under consideration was whether the sale implied a warranty that the article was suitable for the special purposes of the buyer. The holding that there was no such warranty is not to be understood to exclude a warranty of general suitability or usefulness. This modification has been expressed in a number of well-considered cases. While recognizing that the sale, by the manufacturer, of an article of a specified kind by name or description does not carry with it an implied warranty of fitness for the particular purpose to which the purchaser designed to put it, these decisions declare, in effect, that there is an implied warranty of fitness for the general purpose for which articles of the kind are designed to be used. In *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, the court used this language:

"In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do. * * *

Similarly, in *Davis Calyx Drill Co. v. Mal-lory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, the opinion of the court contains this language:

"The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do."

See, also, *Hawley Furnace Co. v. Van Winkle Gin Wks.*, 4 Ga. App. 85, 60 S. E. 1008.

[7] Mr. Williston, in his work on Sales, suggests, and, we think, rightly, that the implied warranty of fitness for the general purposes for which the article is made and sold is a phase of the warranty of merchantability. "The principle already laid down that a manufacturer impliedly warrants his goods to be merchantable includes, therefore, the doctrine sometimes stated in this way—that the manufacturer of goods impliedly warrants that they are reasonably fit for the general purpose for which they are manufactured." Section 235. As we have already pointed out, section 1771 of our Civil Code declares that a warranty of soundness and merchantability attaches to a sale of goods "inaccessible to the examination of the buyer." It may well be that an allegation that the article here in question was not merchantable would have been supported by evidence that the machine was useless for the general purposes—principally plowing—for which it was designed and sold. But it is not alleged or found in terms that the Hackney Auto Plow purchased by plaintiff was

not merchantable, and the findings made do not necessarily import want of merchantability. It is not found that the machine would not plow under ordinary conditions of soil, or that it was not capable of plowing at all. The findings are that it did not do the work in accordance with the antecedent representations set up in the complaint, and that, when tested upon specific pieces of land, it failed to operate successfully or to plow said land, "except a few irregular furrows of uneven depth or to do any plowing except only to scratch merely the surface of the soil." This is not a finding of such "general" unfitness as to amount to a want of merchantability. While there is a finding that the auto plow was not "reasonably fit for the purposes for which it was designed and built," there was no issue to which this finding is responsive, the allegation of the complaint being that the machine was not reasonably fit "for the purposes for which it was ordered." Furthermore, we fail to find in the evidence any support for the finding which was made. In fact, the case was not tried on the theory that there had been a breach of warranty that the machine was merchantable. Plaintiff relied on the failure of the auto plow to comply with the specific representations made by the seller, and upon its want of fitness for the particular purposes to which the plaintiff intended to put the implement. This is shown not only by the complaint, but by the statements of the plaintiff himself in the letter relied upon as a notice of rescission.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

WALSH v. STANDART et al. (S. F. 7152.)
(Supreme Court of California. April 20, 1917.
Rehearing Denied May 17, 1917.)

1. FRAUDS, STATUTE OF §150(1)—PLEADING—DEMURER.

Allegation that defendants executed a written contract means that all of them executed it, and the defense that the contract was within the statute of frauds because not signed by all cannot be taken advantage of under general demurrer, though the copy attached as an exhibit did not show the signature of one defendant.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 360.]

2. FRAUDS, STATUTE OF §152(1)—AVAILABILITY UNDER GENERAL DENIAL.

Defense that contract sued on is within statute of frauds because not signed by one defendant is available under answer denying generally execution.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 363, 364, 371, 372.]

3. FRAUDS, STATUTE OF §115(2)—MEMORANDUM—SUFFICIENCY—LATER CONTRACT REFERRING TO PREVIOUS CONTRACT.

Although the contract sued on is not signed by one defendant, a later contract, reciting that the previous contract between defendants named should be void only in case this contract is com-

pleted, signed by defendants named, is a memorandum of the previous contract sufficient to satisfy statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 247-249.]

4. CONTRACTS \S 332(1)—PLEADING—RESCISION.

An allegation that plaintiff notified defendants that by reason of their failure and refusal to perform contract, plaintiff has elected to rescind and cancel contract, is not an allegation that contract has been rescinded.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1616-1618, 1619½, 1620.]

5. CONTRACTS \S 324(1)—NATURE OF ACTION—LOSS OF PROFITS—PLEADING—SUFFICIENCY.

In an action for breach of contract allegations of performance up to time of breach by defendants, of willingness to continue performance, of damages by reason of breach, together with allegation that plaintiff notified defendants that by reason of their failure and refusal to perform he has elected to rescind, states a cause of action for loss of profits; there being no averments of return or offer to return necessary in quantum meruit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549, 1550.]

6. APPEAL AND ERROR \S 882(12)—INVITED ERROR—GRANTING ERRONEOUS INSTRUCTION.

Party requesting erroneous instruction cannot complain that it was given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602.]

7. APPEAL AND ERROR \S 1004(1)—REVIEW—EXCESSIVE DAMAGES.

A verdict will not be set aside on ground of excessive damages, where amount awarded is not without substantial support in evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3944.]

Department 1. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by W. H. Walsh against John W. Standart and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Robt. L. Hargrove, of Madera, for appellants. Everts & Ewing and M. G. Gallaher, all of Fresno, for respondent.

SHAW, J. This is an action for damages for breach of contract. A demurrer to the complaint was overruled, and after answer filed the case was tried by a jury, and a verdict of \$5,000 returned in favor of the plaintiff. This amount was reduced to \$4,000 by order of the trial court, on motion for new trial. The defendants appeal from the judgment and from an order denying a new trial.

The contract sued on was dated April 4, 1911, the material portions thereof being as follows: The defendants agreed to cut and sell to plaintiff certain standing timber situate upon lands owned by the defendants, during the years 1911 to 1914, inclusive, the timber to be cut into logs by defendants and delivered by them to plaintiff upon the logway to the sawmill to be erected on said

premises by the plaintiff, the total amount so delivered in the four years not to exceed 6,000,000 feet. At the beginning of each season the plaintiff was to notify the defendants at least 15 days prior to the time he intended to start operating the mill for that season. The agreement further provided that plaintiff "is hereby granted a mill site, together with all lands necessary to be used in connection with the proper running of said mill" on the above land. The price of the lumber was fixed and other terms were stated which are not material to the questions presented. Upon certain contingencies, the defendants were to purchase the mill placed on the premises by the plaintiff as above specified. The preamble to the contract states that it is made "between George R. Standart, John W. Standart, and Lowell Standart, * * * parties of the first part, and W. H. Walsh, * * * party of the second part." The contract is signed by all parties except Lowell Standart.

The complaint alleges: That in pursuance of said contract the mill site was selected on said lands, and the plaintiff constructed the mill thereon, and was ready to receive said timber from the defendants and saw the same into lumber during the month of October, 1911. That during the month of October, 1911, "the defendants delivered to said mill certain logs, most of said logs being logs cut from dead timber on said lands by the defendants, and said dead logs not being of growing timber standing on said lands." That plaintiff continued to saw said logs until the closing season of the year 1911, but that plaintiff "in said month of October, 1911, did notify defendants that said logs so delivered by defendants were not in accordance with the terms and conditions of said contract and were not all logs cut from growing" timber on said lands, but were mostly dead logs of an inferior quality. That on or about the 15th day of March, 1912, as provided by said contract, the plaintiff notified the defendants that plaintiff was ready to proceed with the sawing for the season of 1912, demanding that defendants deliver to said mill, in accordance with the terms of said contract, the logs cut from the standing and growing timber on said described lands, but that the defendants refused to deliver any logs whatsoever in accordance with the terms of the contract, but filled the logway with decaying and dead timber cut from dead trees. That plaintiff thereupon refused to accept such logs, and demanded that defendants deliver logs cut from standing and growing timber, all of which defendants refused to do. That plaintiff prior to the commencement of this action notified the defendants that because of said refusal to perform their part of the contract plaintiff had elected to rescind and cancel said contract. It is further alleged that plaintiff had

performed said contract on his part up to the time of the breach thereof by the defendants, and was ready and willing and able to perform all of said contract to be performed by him, and that by reason of the breach of contract by defendants the plaintiff was damaged in the sum claimed.

[1] The appellants first insist that the court erred in overruling the demurrer to the complaint, the contention being that the contract sued on is one relating to the sale of real estate, and, further, that said contract, by its terms, was not to be performed within one year, and that inasmuch as it was not signed by Lowell Standart, one of the defendants, it is within the statute of frauds and void.

The allegation that the defendants executed the written contract means that all of them, including Lowell Standart, executed it. The demurrer admits the truth of the statement. The fact that the copy attached as an exhibit to the complaint does not show his signature thereto is not an allegation. At most it merely creates an uncertainty on the subject, a defect that cannot be reached by a general demurrer. There is no demurrer on the ground of uncertainty or ambiguity. The general demurrer was therefore properly overruled.

[2, 3] The defense of the statute of frauds is available, however, under the answer denying generally the execution of the contract. *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. Upon the trial the defendants objected to the admission of the contract in evidence, on the ground that it was not executed by Lowell Standart. This properly presented the questions attempted to be raised by the demurrer. But in a cross-complaint filed by the defendants a contract is set forth, dated July 29, 1911, and signed by all parties, including Lowell Standart, wherein reference is made to the contract sued on in the following manner:

"When this contract is completed and payments being made the previous contract between W. H. Walsh and George R. Standart, John W. Standart, and Lowell Standart will become void, but not if this contract is not carried out."

The answer to the cross-complaint expressly admits the execution of this contract. The evidence also shows that Lowell Standart executed the said contract of July 29th, and that it was not carried out. The passage quoted constituted a sufficient note or memorandum in writing of the previous contract of April 4th to satisfy the statute of frauds. This answers the objection.

[4, 5] The appellants next insist that even if the validity of the contract be conceded the plaintiff is entitled to recover, not under the contract, but only upon a quantum meruit, citing *McConnell v. Corona City Water Co.*, 149 Cal. 64, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, wherein the court said:

"One who has been injured by a breach of contract has an election to pursue any of three

remedies. He may treat the contract as rescinded, and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case the contract would be continued in force for that purpose."

The complaint is not wholly consistent on the subject of rescission. In one paragraph it alleges that:

"The plaintiff notified the defendants and each of them that by reason of their failure and refusal and neglect to carry out the said contract and to perform the same on their part to be performed the plaintiff has elected to rescind and cancel said contract."

This is not an allegation that the plaintiff had rescinded the contract, or that the contract had been rescinded. It merely alleges that the plaintiff gave the defendants the notice described. The complaint proceeds to allege that plaintiff had fully performed his part of the contract up to the time of the breach thereof by the defendants, and has been ready, able, and willing to continue its performance, that defendants have refused, and still refuse, to perform the contract, or any part thereof, and that by reason of the said breach of said contract by the defendants the plaintiff has been and is damaged in the sum of \$25,000. There are no averments of the return or offer to return by the plaintiff of the things he had received under the contract, or of a demand for the restoration to him by defendants of that which they had received under it, or of the reasonable, or any, value thereof, all of which should appear in a complaint on the quantum meruit, unless the common count is used, which is not the case here. Civ. Code, § 1691. The previous allegations show clearly that the plaintiff is complaining of the refusal of defendants to go on and of the consequent deprivation of the profits that would have accrued to him if logs sufficient to make the 6,000,000 feet of lumber had been delivered by the defendants to him within the four years, as they had agreed to do. The complaint is to be construed as stating a cause of action under the third alternative mentioned in *McConnell v. Corona, etc., Co.*, supra. It is of the same character as the actions considered in *Hale v. Trout*, 35 Cal. 229, *Fountain v. Semi Tropic, etc., Co.*, 99 Cal. 681, 34 Pac. 497, and *Alderson v. Houston*, 154 Cal. 10, 96 Pac. 884.

[6] The court, at the request of the defendants, repeatedly instructed the jury that if it should find that the contract had been rescinded and canceled before the action was begun, the plaintiff could not recover damages for a breach thereof. Whether this instruction is correct or not, the defendants cannot complain of it, since they requested it, and the verdict for the plaintiff is to be taken as a finding by the jury that the contract was not rescinded and canceled in the

manner contemplated by the instructions. There was no evidence of rescission by mutual consent. It is not claimed that there was any evidence that either party ever restored, or offered to restore, to the other everything or anything of value which he had received from the other under the contract, or of any actual rescission. The evidence showed a continual demand by plaintiff for the proper performance of the contract. There is no merit in the objection relating to the question of rescission.

[7] The only remaining question requiring notice is the contention that the evidence does not support the judgment for the amount of damages given. In view of the conflict in the evidence it is sufficient answer to such objection to point out that there was testimony on the part of witnesses for both plaintiff and defendants that the logs delivered by defendants were not in accordance with the terms of the contract, but were cut from dead and decaying logs, some of them being "worse than rotten," to quote one of defendants' witnesses. Considering the amount of timber to be cut under the contract, the testimony as to the market value of the same, and the probable profits to be made by the plaintiff, it cannot be said that the amount of damages awarded is without substantial support in the evidence.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

ARNOLD et al. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (S. F. 7251.)

(Supreme Court of California. April 20, 1917.
Rehearing Denied May 17, 1917.)

1. STREET RAILROADS §99(7)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where deceased, driving an automobile, saw the street car while he was 40 feet from the track and could have turned in two directions or stopped and avoided danger, his driving the car directly against the street car was such contributory negligence as to bar recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

2. MUNICIPAL CORPORATIONS §706(7)—COLLISIONS—AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

If a person does not have ordinary skill in driving an automobile, it is lack of ordinary care to attempt to do so, and such conduct is contributory negligence barring recovery for injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

3. STREET RAILROADS §99(7)—COLLISIONS—DRIVING AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

That deceased, driving an automobile, was surprised by proximity of a special car to the rear of the regular car does not excuse his contributory negligence in driving his automobile against said car, where he actually saw the special car when he was 40 feet away from the

track and with due care could have avoided injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

4. STREET RAILROADS §114(19)—COLLISIONS—LAST CLEAR CHANCE DOCTRINE—EVIDENCE.

Evidence held insufficient to show liability of street railway for death of automobile driver upon the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 246.]

5. NEGLIGENCE §83—COLLISIONS—"LAST CLEAR CHANCE DOCTRINE."

The "last clear chance doctrine" applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the other party, seeing or knowing his peril, or the facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring him, fails to use such care and thereby causes injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.]

For other definitions, see Words and Phrases. First and Second Series, Last Clear Chance.]

6. STREET RAILROADS §99(7)—USE OF STREETS—RIGHT OF WAY.

It is the duty of an automobile driver on approaching a street railway crossing to give way to a street car about to pass at the same time, if necessary in order to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

7. STREET RAILROADS §93(4)—USE OF STREETS—DUTY OF MOTORMAN.

A street railway motorman is not required to presume that an automobile driver will fail in his duty to give way to the car approaching the crossing at the same time as himself.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197.]

8. STREET RAILROADS §103(3)—COLLISIONS—LAST CLEAR CHANCE DOCTRINE.

The doctrine of last clear chance does not apply in favor of heirs of a deceased automobile driver whose car was struck by a street car, where when the deceased's peril could have been discovered, the collision and consequent injury were unavoidable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219.]

Department 1. Appeal from Superior Court, Contra Costa County; H. D. Gregory, Judge.

Suit by Elsa U. Arnold, for herself and as guardian ad litem for her minor children, against the San Francisco-Oakland Terminal Railways. From judgment for plaintiffs and order denying motion for new trial, defendant appeals. Reversed.

Geo. W. Mordecai, of San Francisco, and W. H. Smith, of Oakland (Chapman & Trefethen, of Oakland, of counsel), for appellant. Jay Monroe Latimer and J. E. Pemberton, both of San Francisco, for respondents.

SHAW, J. On the 23d of April, 1913, Joseph C. Arnold was killed by a collision between an automobile, which at the time he was driving, and a car run by the defendant

on its San Pablo avenue line. The plaintiffs, being the widow and children of Arnold, began this action to recover the damages which they have suffered from his death, alleging that the collision was caused by the negligence of the defendant. The cause was tried by a jury, a verdict was returned for the plaintiffs in the sum of \$30,000, and judgment was given accordingly. The defendant appeals from the judgment and from an order denying its motion for a new trial.

For the purposes of our consideration of the case it will be assumed that the evidence was sufficient to sustain a finding that the negligence of the defendant was an operative cause of the collision and injury complained of. The defendant claims that the evidence showed, as matter of law, that the negligence of Arnold contributed to the injury which caused his death.

The evidence as to the controlling facts on this question is not substantially conflicting. The defendant was maintaining and operating a double track street car line on San Pablo avenue running from Oakland to Richmond. Schmidt lane, a street 60 feet wide, runs from the east into San Pablo avenue at a point in Contra Costa county about a mile north of the Alameda county line. It does not extend west beyond San Pablo avenue. The western track is used for south-bound cars and the eastern track for north-bound cars. Its grade for about 300 feet south of the junction ascends toward the north 1 foot in 100. At the southeastern corner of the junction there is a two-story building, known as Timm's saloon, which obscured the view from the lane southward. For a distance of about 500 feet east from the junction other objects obscured the view from the lane southward. Schmidt lane descends toward the avenue for that distance at a grade of about 1 foot in 100. The part of San Pablo avenue south of Schmidt lane and east of the street car tracks, including the sidewalk, was 31.4 feet wide. North of Schmidt lane it was 50 feet wide. In front of Timm's saloon and extending around the corner was an awning supported by five posts, one on the north end and the others on the avenue front. This occupied 13 feet of the avenue, leaving 18 feet between it and the street car tracks. It projected 8 feet north of the south property line of the lane. The ground all about was practically level, and automobiles could travel the avenue either to the north or south. Arnold was 36 years old, mentally and physically sound, and in possession of his usual faculties at the time. He was familiar with the conditions at the junction. Driving westerly on Schmidt lane at about the center thereof he approached the junction at a speed of about 10 miles per hour, intending to cross the tracks and turn south on the avenue on the west side of the tracks. As he reached a point in Schmidt lane from 45 to 55 feet east of the eastern car track he

saw a north-bound car coming on the track at a distance from 65 to 85 feet south of the intersection of the projected line of Schmidt lane with the car tracks. Its speed was estimated at from 12 to 25 miles per hour. The automobile was a short, five-passenger machine, occupied by himself and three other persons, 11 feet in length over all and weighing about 1,600 pounds. The evidence was that with the use of ordinary care and skill it could be stopped within a space of 15 or 20 feet when going at the rate he was traveling, and that a person of ordinary skill, even when going much faster than he was going at the time, with ordinary care, could have turned from the lane, either to the north or to the south, on San Pablo avenue east of the car tracks without coming in dangerous proximity to a car passing thereon. Upon seeing the car Arnold first swerved slightly to the left or south and then swerved slightly to the north, and finally attempted to cross the tracks in front of the coming car. The result was that he collided with the car at a point about opposite the center of Schmidt lane.

[1, 2] The bare statement of the facts proves beyond question that the lack of ordinary care or skill on the part of Arnold was a directly contributing cause of his injury. He saw the car coming when he was not nearer than 40 feet from the tracks. He had abundant time and space to turn to the south, or to the north, or to stop, and avoid danger, if he had possessed ordinary skill and had used ordinary care. No other conclusion follows than that by the lack of ordinary skill or ordinary care he failed to take either course. The only thing that will excuse him of lack of ordinary care is the admission that he did not possess ordinary skill. If the latter be true, it was lack of ordinary care for him to trust himself to drive an automobile in a place of that kind. In either case his contributory negligence is established.

[3] The argument that Arnold was excusable because he was surprised by the close proximity of the special car to a car that had just passed the junction, and that he was not expecting another north-bound car so soon, is deprived of all force by the fact that he actually saw the special car in ample time to have avoided it. To say that the unexpected appearance of a car on the track was sufficient to startle him so as to deprive him of the use of his reason and senses is to convict him of being incompetent to drive an automobile at all on the public streets. There is no evidence that he was unskillful in driving an automobile. But, as we have said, if he was unskillful, it was negligence for him to undertake to drive it at such a place. The evidence proves beyond doubt that he saw the car in time to have avoided it with the use of ordinary care.

[4, 5] The evidence does not sustain the

plaintiff's contention that the defendant is liable under the doctrine of the last clear chance. This doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury. *Thompson v. Los Angeles, etc., Co.*, 165 Cal. 755, 134 Pac. 709; *O'Brien v. McGlinchy*, 68 Me. 552; *Holmes v. South P., etc., Co.*, 97 Cal. 169, 31 Pac. 834; *Sego v. S. P. Co.*, 137 Cal. 407, 70 Pac. 279; *St. Louis, etc., Co. v. Schumacher*, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361; *Illinois Central Ry. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459; *Green v. Los Angeles, etc., Co.*, 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68.

"A street car cannot go on the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary." *Scott v. San Bernardino, etc., Co.*, 152 Cal. 610, 93 Pac. 677; *Clark v. Bennett*, 123 Cal. 279, 55 Pac. 908; *Bailey v. Market Street Ry. Co.*, 110 Cal. 327, 42 Pac. 914.

[8, 7] It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, if necessary to avoid a collision, since he could give way while it could not. The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track. *Thompson v. Los Angeles, supra*. He could have stopped the automobile, or turned it aside, in safety if he had begun to do so when he was 25 feet away. He displayed no obvious intention to cross the track ahead of the car until the moment when, after swerving to the south, apparently in an attempt to pass south to the eastward of the tracks, he again swerved to the north, apparently with the purpose of turning northerly east of the track, or of passing in front of the street car. The latter swerve did not occur until Arnold had proceeded beyond the east property line of San Pablo avenue several feet. The evidence indicates that it took place when he arrived opposite the corner of the awning,

which was 13 feet west of the property line and 18.4 feet east of the car track. The motorman testified that as soon as he saw Arnold coming out of Schmidt lane he did everything that could be done to stop the car, and that he stopped it as quickly as it could have been stopped after that moment. This indicates that he started to stop the car even before he had reasonable cause to believe that Arnold would attempt to cross the track in front of the car. There is no substantial evidence contradictory of this.

[8] The doctrine of the last clear chance could not become applicable until Arnold's negligence had brought him so close to the track that he could not by ordinary care either stop or turn aside so as to avoid a collision, or until his conduct showed that he intended to hazard a crossing ahead of the car, and when these conditions became apparent the utmost care by either party would have been unavailing to prevent the accident.

There are no other errors complained of which in our opinion require consideration.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOB, J.

FISHER v. OLIVER. (L. A. 4008.)

(Supreme Court of California. April 16, 1917.)

1. APPEAL AND ERROR §607(1) — PREPARATION OF TRANSCRIPT—STATUTE.

The provisions of Code Civ. Proc. §§ 953a, 953b, 953c, relating to preparation of transcript on appeal, substituted for bill of exceptions under the new or alternative method, are not jurisdictional; hence delays in preparation and presentation of transcript caused by negligence of reporter and clerk did not invalidate the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2065.]

2. APPEAL AND ERROR §864 — EXTENT OF REVIEW — EVIDENCE TO SUPPORT "DECISIONS."

Code Civ. Proc. § 939, subd. 1, providing that exceptions to "decisions" defined by section 1033 as "assigning and filing of the findings of fact and conclusions of law," because not supported by evidence may be considered on appeal, when taken within 60 days from judgment entry, applies to appeals taken under section 940 as well as those under sections 941a, 941b, 941c, providing the new or alternative method.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461.

For other definitions, see Words and Phrases, First and Second Series, Decision.]

3. DEEDS §61—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH—ABSOLUTE DELIVERY.

The validity of a deed deposited with a third person to take effect at grantor's death requires absolute delivery, so as to place it beyond grantor's power to recall or control it in any event.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141.]

4. DEEDS §208(2) — VALIDITY — DELIVERY—RETENTION BY GRANTOR DURING LIFETIME—EVIDENCE.

Evidence showing that deceased made deed to sister and told her the property was hers and

showed the property to her, and while in the hospital handed deed to a brother with instructions to deliver and record it upon his death, but later took the deed back and retained possession of it until he died, held insufficient to establish valid delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 626.]

5. DEEDS §56(4)—VALIDITY—NECESSITY OF DELIVERY.

Save under exceptional circumstances, transfer of property by deed necessitates a delivery of the deed to terminate grantor's title, and where a deed remains in grantor's possession to be delivered and to take effect after his death, it is void for want of delivery during his lifetime.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 120.]

6. DEEDS §200—DECLARATIONS OF GRANTOR—DISPARAGING TITLE.

While after parting with title grantor will not be permitted to disparage the title which he has conveyed, since a parting with title accompanies delivery of the deed, where issue is whether grantor actually parted with title and made valid delivery, evidence of his acts and declarations made after time of alleged delivery are admissible.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601.]

Department 2. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Harriet A. Fisher against L. D. Oliver, administrator of William J. Fisher. Judgment for plaintiff, and defendant appeals. Reversed.

Hulme & Eckman and Elmer B. Sanford, all of Los Angeles, for appellant. Murphey & Poplin, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, sister of William J. Fisher, deceased, brought this action against the administrator of his estate to quiet her title to certain lands in the county of Los Angeles. Plaintiff's title admittedly rests upon an asserted conveyance to her of the lands by deed of her brother and his wife. The deed was never recorded, and it was found amongst the personal effects of the brother after his death. The question in the case is whether or not there was a legal delivery of the deed made by deceased in his lifetime. The court found that such delivery was made. From the judgment which followed defendant has appealed.

[1] Respondent interposes two preliminary objections to the hearing of this appeal upon its merits. Under the first she insists that in this appeal, taken under the new or alternative method, the reporter's transcript was not prepared and filed in time. Delays had occurred after the preparation of the transcript and its presentation to the judge for his approval and settlement and respondent had objected to the settlement by the trial judge for these reasons, and herein it is said that the phonographic reporter consumed 38 days in the preparation of his transcript instead of the 20 days allowed by

law; that instead of giving notice immediately the clerk wasted 22 days before giving notice to the attorneys. Respondent contends that the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure, are jurisdictional as to the preparation of the transcript, which is a substitute for the bill of exceptions, in thus relying on *Boling v. Alton*, 162 Cal. 297, 122 Pac. 461. But respondent's contention in this regard is fully answered by *Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1026, the decision in which case came under the review of this court and was here affirmed.

[2] Respondent next contends that, as this appeal is taken only from the judgment, the sufficiency of the evidence to sustain the findings cannot be considered, without regard to the question as to whether or not the reporter's transcript of the evidence was properly settled and certified. Herein she relies upon such cases as *Pico v. Cuyas*, 47 Cal. 174, which case has been frequently cited with approval. The decisions in all these cases, however, were directed to the law of appeals under the old method. This appeal, as has been said, is under the new or alternative method. The attack here made is that the "decision," as defined in section 1033, Code of Civil Procedure, is not supported by the evidence. Section 939, subd. 1, Code of Civil Procedure, provides that exception to the decision upon the ground that it is not supported by the evidence may be considered upon an appeal from the judgment when taken within 60 days from the entry of the judgment. In *Cortelyou v. Imperial Land Co.*, 166 Cal. 17, 134 Pac. 982, it is said:

"The appeal having been taken from the judgment within sixty days after its rendition and entry, the sufficiency of the evidence to support the findings may be reviewed on that appeal, as effectually as upon the appeal from the order refusing a new trial. And this is so where the appeal is taken under section 940 of the Code of Civil Procedure, as well as where it is taken under the new method prescribed by sections 941a, 941b, and 941c, of the Code of Civil Procedure."

It follows that neither of the preliminary objections by respondent to the hearing of this appeal upon its merits is well founded.

[3, 4] The evidence offered by respondent to establish delivery to her of the deed conveying title to the property in question may be briefly summarized. The written instrument, signed and acknowledged by the deceased and by his wife, was, as has been said, found amongst his personal effects after his death. In October, 1903—so testifies the brother of the deceased—the deceased went to a hospital in Los Angeles to undergo an operation of so serious a nature that the patient thought he might not survive it. While at the hospital awaiting the operation he handed a package of papers to the witness and said:

"Here are my papers. I want you to put them in your safe. In this package is a deed

to Harriet [respondent] for the Seventh street property. Now, if I pass over the river [to use his own phraseology], you go and record that deed as soon as you can.' I took the papers and put them in my safe. My brother was in the hospital about two weeks, and after he had been out three or four months he asked for his papers, and I handed the package to him just as I had received it. I did not open the package and did not see the deed to Hattie, and do not know that it was in the package except that brother said it was. He had often stated to me that he wanted to do something for Hattie, because she had taken care of our invalid mother; but he had never stated to me that he intended to give her any particular property. He also stated that he wanted to provide for his own folks too, referring to his wife. Subsequent to the making of the deed, he referred to it just in an ordinary way. I can't give his language, but he referred to his having already deeded that property to her."

Plaintiff's own testimony was that she resided in New York City and frequently received letters from her deceased brother, and three or four weeks after he had left the hospital she received one such letter "stating that he had deeded the valuable property to me." She did not have this letter, as she destroyed all which she received. About a year after he had left the hospital she visited him at his home near Los Angeles, in response to his invitation. While on that visit her brother said to her on a trip which they were making to Los Angeles:

"I am going to take you to the property which I deeded to you.' He did so, and stopped in front of the property and said: 'Hattie, I have deeded it to you; I have deeded it outright to avoid lawyers' fees. It is valuable property and I have placed a small mortgage on it. I will take care of it.' * * * Of course, it was understood that I was not to have the property until his death. He often spoke of his property in his letters, and about a year before his death he wrote me that he had just been to look over the property and said, 'I have had two conservative judges appraise the Seventh street property which I deeded to you. They have appraised it at \$100,000.'"

The foregoing facts present an epitome of all the evidence for respondent, and upon that evidence the court found that in taking plaintiff to view the property and in declaring to the plaintiff, as above quoted, that "this is the property I deeded; I have deeded it outright," etc., the deceased "then intended that said delivery of said deed should be and it was complete and absolute." The court further found that the withdrawal of the deed by the deceased from the custody of his brother and the taking of it into his own possession was "without the knowledge or consent of plaintiff," and "that such possession of said deed ever after the same was so returned to the deceased was held by him for the said Harriet A. Fisher, grantee therein, and so treated by him, and said deed was by him so recognized and treated as having been absolutely delivered to plaintiff and the title in and to said property vested in her." As against these findings of delivery appellant places reliance upon the two appeals in *Moore v. Trott*, which are reported, the first in 156 Cal. 353, 104 Pac.

578, 184 Am. St. Rep. 131, the second in 162 Cal. 268, 122 Pac. 462. At the same time respondent urges that the law and reasoning of these cases fully support the findings which the trial court made. These cases then call for consideration. Upon the first appeal this court was called upon to review a finding of delivery of a deed growing out of the following facts: Pat Moore, the grantor, was about to go to a hospital in Los Angeles to undergo a serious operation. He turned over certain deeds to one Tietzen, his friend, with an accompanying letter, from which the following are extracts:

"I am sending you some deeds to lands that I have made to be delivered to the parties in case of my not returning from the California Hospital, Los Angeles, where I am going for to have an operation performed. * * * The deeds that I am sending you you will please lock them in your safe, and in case I should die to immediately hand them to the parties named, telling them to put them of record as soon as possible. * * * You will please keep to yourself the names of the parties named in those deeds until you deliver them after I pass in my checks and take flight for the other world from whence none return."

Moore recovered from his operation, returned home, pursued his usual vocation for some time thereafter, and died without ever having retaken possession of the deeds which he had thus placed in escrow. Upon those facts the trial court found a perfected delivery to the grantees named in those deeds. This court in bank, after reviewing the evidence, reversed the finding as being unsupported by sufficient evidence, declaring that the evidence failed to establish the essential condition to the validity of such transfers, namely, that the delivery is absolute, "so that the deed is placed beyond the power of the grantor to recall or control it in any event." Manifestly the evidence to support the asserted delivery in this case, in so far as it may rest upon the instructions to the escrowee, the deceased's brother, at the time when the deceased delivered to that brother the package said to contain this deed, is far less strong than that which was before this court in the *Moore Case*, and which was by this court found to be insufficient. And this for the very obvious reason that in the present case the grantor actually took back and into his possession the deed which he had deposited with his brother, while in the *Moore Case* the grantor allowed the instruments to remain in escrow and they were in the possession of the escrowee at the time of the grantor's death. But it will be noted that the findings of the court, as above quoted, base the delivery upon the conduct and speech of the grantor after his withdrawal of the deed from his brother and while he continued in possession of it; respondent's contention being that herein this case presents the precise situation tendered to the consideration of this court upon the second appeal of *Moore v. Trott*. Upon the second appeal, bearing in mind that the deeds of

Moore remained in the hands of the escrowee up to the time of the grantor's death, much evidence was offered showing that after his return from the hospital he repeatedly affirmed that he had disposed of his property by deed, that he had left the deeds with Mr. Tietzen to be delivered when he should pass away, and that the deeds would be delivered when he would not be present. To certain of the grantees named in the deeds he said in terms that he had left their deeds with Mr. Tietzen, and that "Mr. Tietzen would give her the deeds after he [Moore] passed in his checks." This court was called upon to review the sufficiency of a finding of delivery under this added evidence, and held that this added evidence, coupled with the fact that the grantor had never recalled the deeds from the possession of the escrowee and had in all respects treated the deeds in the possession of the escrowee as conveying an immediate and irrevocable title, was sufficient to support the finding, saying that it is "fairly inferable that after his, [Moore's] return from the Los Angeles hospital, finding himself in failing health, he intended that the deeds which he had left with Tietzen should absolutely be delivered without power of revocation upon his part, and that he expressed this intent to the grantee under such circumstances as to perfect the delivery." But there still remains the all-important distinction between the second Moore appeal and the case here presented. In the latter the grantor did take possession of the deed and retained it and the management and control of the property until his death, and, as will be seen hereafter, he exercised such dominion over the property as to preclude the conception that he believed that he had parted with the ownership of it. His declarations that he had deeded the property, while he yet retained possession of the deed, had no efficacy to establish the delivery of a deed of gift such as this. The gift was as incomplete as would be the declaration by a donor that he had given away a specific article of personal property while he continuously thereafter retained the possession, dominion, and control of that personal property, using it with every indicia of ownership.

[5] For, saving under exceptional circumstances which do not here arise, ownership of real estate so far as that ownership is to be parted with by deed necessitates a delivery of that deed to terminate the grantor's title. And it is unquestionably the general rule that, where a deed remains in the possession of a grantor, to be delivered and to take effect after his death, the deed is void for want of delivery during his lifetime. *Moore v. Trott*, supra; *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1; *Devlin, Deeds*, par. 279; *Stevens v. Hatch*, 6 Minn. 64 (Gl. 19); *Stillwell v. Hubbard*, 20 Wend. (N. Y.) 44; *Walter v. Way*, 170 Ill. 104, 48 N. E. 421.

We have thus far considered the case presented by the evidence of respondent alone,

and the conclusion is unavoidable that that evidence, without regard to any conflict raised by the evidence of defendant, is insufficient to establish a delivery and so a conveyance of title to respondent. But it is pertinent to point out that the evidence on behalf of defendant, both that admitted and that erroneously refused admission by the trial court, wholly supports the view expressed that the deceased did not at all understand that he had parted with title during his lifetime. Thus it was shown that the deceased owned and continued in the use and occupancy of this property for eight years after his return from the hospital and after his conversation with his sister. Five years after this conversation with his sister he made application to the Germania American Trust Bank of Los Angeles for a loan of \$20,000, upon the property. The application was signed by the deceased, who therein stated that he was the owner of the property. The loan was granted, and he executed a mortgage to the bank for the amount of the loan, and in this mortgage covenanted that "there were no outstanding secret equities in the property and that the said William J. Fisher was the owner and the sole owner of the said property." Still further, the grantor sold a part of the land described in the original deed, and by other writings and declarations asserted the full ownership over the property which actually he exercised. Much, if not all, of this evidence was refused admission by the court, which based its rulings upon *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

[6] It has been pointed out by this court that *Bury v. Young* has been misunderstood, and the principle governing the admission and rejection of such evidence has been elaborately set forth in *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703, and *Donahue v. Sweeney*, 171 Cal. 388, 153 Pac. 708. It is unnecessary to do more than to say that the purport of these decisions is that, while it is true, as it always has been true, that a grantor, after parting with title, will not be permitted to disparage the title which he has conveyed, and while it is true that a parting with title accompanies the delivery of his deed, yet, when the very question in issue is whether the grantor has parted with title and whether in fact he has delivered his deed to this end, evidence of his acts, including herein his declarations after the time when it is contended he had so parted with title, is admissible and of great weight in the determination of this question. The view thus adopted and expressed by this court is not in contrariety with any well-adjudicated decision, but is distinctly affirmed as in such cases as *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 807.

We have held that respondent's evidence of delivery, standing alone and by itself, is in-

sufficient to sustain the court's finding to that effect. Upon the assumption that this evidence is all that respondent can produce, it follows that upon the reversal which must here be ordered the court will make its finding of nondelivery and enter its decree accordingly. In the possible event of a new trial, the court will admit the evidence of the acts and declarations of the grantor which upon the first trial it excluded.

The judgment appealed from is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.

SOUTHERN PAC. R. CO. v. BLAISDELL et al. (Civ. 2220.)

(District Court of Appeal, Second District, California. March 15, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

1. DEEDS ¶166 — CONTRACT RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE—REPUDIATION BY VENDOR.

Where purchaser was about to breach contract restricting sale of intoxicants on land and paid balance on purchase price before same was due, vendor's return of the money was not such repudiation as would prohibit enforcement of the forfeiture, since the vendor was not then obliged to receive payment, and was justified in declining to proceed until it could be assured that purchaser would not carry out his threatened violation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522-525.]

2. INJUNCTION ¶62(1)—BREACH OF RESTRICTION IN LAND CONTRACT.

Where purchaser had forfeited land by breach of a restriction against sale of intoxicants, an injunction against further breach was proper, since purchaser had no further right to occupy the land after forfeiture and cannot suffer any prejudice from injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124, 125, 129.]

3. VENDOR AND PURCHASER ¶92—CONTRACT RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE.

Upon breach of contract provision forfeiting land if used for sale of intoxicants, a vendor may refuse to execute deed and may quiet title against purchasers' claims, in view of Civ. Code, § 1109, providing that, where a grant made upon condition subsequent is defeated by a nonperformance, the purchaser must reconvey property to grantor.

4. DEEDS ¶150—RESTRICTING SALE OF INTOXICANTS—CREATION OF MONOPOLY.

Provision in deed forfeiting land if premises are used for sale of intoxicants, where made to secure to vendor a monopoly of such business, is void as against public policy, although otherwise such condition is valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480.]

5. DEEDS ¶150 — CONTRACT RESTRICTING SALE OF INTOXICANTS—CREATION OF MONOPOLY—EVIDENCE.

The fact that a vendor prohibited sale of intoxicants on all parcels of land conveyed under penalty of forfeiture does not imply that he was contemplating a monopoly of the business in absence of evidence to that effect, although not inconsistent with such claim.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against H. W. Blaisdell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rowen Irwin, of Bakersfield, for appellants. Frank McGowan, Frank Thunen, and Wm. M. Singer, all of San Francisco, for respondent.

CONREY, P. J. Under date of January 28, 1910, a contract was entered into between the plaintiff as vendor and the defendant H. W. Blaisdell as vendee, whereby the plaintiff sold to Blaisdell lots 15 and 16 of block 2 of the town of Moron in Kern county, which town afterwards was incorporated as the city of Taft. It was agreed that the conveyance when made should include a condition that the premises should never be used as a place of business for the sale of intoxicating liquors and that the title conveyed should revert to the vendor upon breach of that condition. The complaint asked for an injunction restraining the defendants from selling or keeping for sale intoxicating liquors upon the said lots, sought to quiet title to the same premises, and that plaintiff recover possession thereof. The appeal is from that portion of the judgment which granted the desired relief. No recovery was had as to lot 15. One-third of the contract price was paid at the execution of the agreement. The second payment was to become due January 28, 1911, and the final payment on January 28, 1912. The purchaser was permitted to take possession when the contract was made. On January 16, 1911, Blaisdell entered into a contract of lease with defendants Dover & Wilson for five years. The lease did not state the purpose for which the lessees were to use the premises. On the same day the same parties entered into a collateral contract that Dover & Wilson would discontinue the sale of intoxicating liquor on those premises within five days after demand made upon them in writing so to do. By that agreement Blaisdell stipulated that he would not molest or cause any trouble to Dover & Wilson with reference to the sales of liquors on said property, "unless compelled by the Southern Pacific Railroad Company under penalty of forfeiture." etc. The lessees proceeded to furnish the room located on lot 16 as a saloon, stocked it with intoxicating liquors, and commenced to do business there on the 13th day of March, 1911. On or about January 18, 1911, defendant Blaisdell paid to the agent in charge of the sale of plaintiff's land at Taft the full balance due upon the purchase price of said lots, and a few days later this money was returned to him. It does not appear that Blaisdell declined to receive this money, or that he ever made any demand for a deed. As soon as the actual business of the

saloon was commenced, notices declaring forfeiture of the contract were served by the plaintiff. Service was made on Dover and Wilson on the 13th day of March, 1911, and on Blaisdell on March 16, 1911, and on the other defendants within a few days thereafter.

[1] Defendants claim that the plaintiff repudiated its contract before any violation of the condition had occurred, and that, the plaintiff having thus failed to fulfill all conditions precedent thereto imposed upon itself, it is not entitled to enforce a forfeiture of Blaisdell's rights under the contract. This contention should not be sustained. First, it may be noted that on January 18, 1911, no money was due and the plaintiff was not obliged to receive payment. And if it be admitted that the money was returned because plaintiff had learned of the preparations which were being made to violate the conditions of the contract which provided against the sale of intoxicating liquors on the premises, then the vendor was justified in declining to proceed further with the contract until it could be assured that the purchaser would not carry into effect this threatened violation of his covenants.

[2] Appellants next urge that the plaintiff is not entitled to the permanent injunction which it seeks. Under this head, they say that the plaintiff has a plain, speedy, and adequate remedy at law; that plaintiff will not be irreparably damaged by failure to issue an injunction; and that equity will not lend its aid to bring about or enforce a penalty or a forfeiture. It seems unnecessary to go into this question. If the contract has been forfeited and if the plaintiff is entitled to a decree quieting its title as against the contract equities of the purchaser, it would seem that the defendants cannot suffer any recognizable or legal prejudice by the injunction, since they have no further right to occupy the lot on which the saloon business was conducted.

[3] We do not observe that appellants contend against the proposition that conditions designed to prevent the use of sold or conveyed premises as a place of business for the sale of intoxicating liquors are enforceable.

"Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record." Civ. Code, § 1109; *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

And since a reconveyance may be compelled where the grant has been made and the condition subsequent has been broken, it follows, of course, that, upon like breach of conditions subsequent as provided for in a contract to convey, the vendor may refuse to make the deed and may quiet his title

against the purchaser's claims under the contract.

[4, 5] Counsel for appellants insists, that it was incumbent upon the plaintiff to establish that the restrictive clause was applied impartially to all lots sold by it in the town of Moron, and that no forfeiture can be granted without proof of this fact. They rely upon *Burdell v. Grandi*, 152 Cal. 376, 92 Pac. 1022, 14 L. R. A. (N. S.) 909, 125 Am. St. Rep. 61. That was an action to recover possession of a lot for an alleged violation of a condition subsequent. The decision states that a condition of that character providing for a forfeiture in case of breach is valid; and holds that where the owner of land designed as the site for a town inserts in all deeds made by him a condition against the sale of intoxicating liquors on the land conveyed, solely for the purpose of reserving to himself a monopoly of such business, the condition is void as against public policy, and its breach will not work a forfeiture of the estate granted. In that case, the court had found, presumably upon sufficient evidence, that the purpose of the vendor in imposing the condition was to reserve in himself such monopoly. In the present case, the evidence shows that a great many sales by contract were made by the plaintiff, and that like conditions were incorporated in every contract and deed covering lots in the town that have been issued by the company. While the evidence thus shows that the plaintiff was making these conditions in all sales, such evidence is not inconsistent with the claim that the plaintiff may have intended to reserve a lot or lots for itself on which it alone might conduct the inhibited business. It would seem, however, that the defense that plaintiff was contemplating such monopoly cannot be implied from the facts proved herein; nor was any evidence introduced by the defendants tending to show such design to create a monopoly.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

SOUTHERN PAC. R. CO. v. BLAISDELL et al. (Civ. 2221.)

(District Court of Appeal, Second District, California. March 15, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

DEEDS — 175—RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE — RETURN OF MONEY.

A vendor was not estopped from enforcing forfeiture for breach of contract restricting sale of intoxicants on the land because it accepted payment in ignorance of violations, and the case is no different from that of a breach of such condition discovered after executing deed, in which case a reconveyance would be ordered, since, upon the purchaser's breach, his rights under the contract are at an end, and he cannot ask return of his money.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 545, 548.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against H. W. Blaisdell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rowen Irwin, of Bakersfield, for appellants. Frank McGowan, Frank Thunen and Wm. M. Singer, all of San Francisco, for respondent.

CONREY, P. J. This action in substance is one to enforce forfeiture of the interest acquired by the defendants or some of them under a contract of sale of real property; the cause of action being based upon defendants' breach of a condition providing against the sale of intoxicating liquors upon the sold premises. The contract is in like form and the complaint is in substance the same as in *Southern Pacific Railroad Co. v. Blaisdell et al.* (No. 2220 of this court) 164 Pac. 804, wherein judgment in favor of the plaintiff has been this day affirmed. The contract in this case provided for the sale and conveyance to H. W. Blaisdell of lots 26 to 30 in block 2 in the town of Moron in Kern county. It was dated January 28, 1910, at which time one-third of the purchase price was paid, and the second and third payments were to be made on January 28, 1911, and January 28, 1912, respectively. We will confine our discussion to the one proposition urged as a ground for reversal herein, not included in the other case. The judgment quiets the plaintiff's title to lot 29 only, and enjoins the defendants from selling intoxicating liquors upon that lot. The appeal is from that judgment.

Appellants claim that the plaintiff is estopped to enforce a forfeiture because it received from Blaisdell money on account of the contract price after a saloon had been opened in which the business of selling intoxicating liquors was conducted. There is evidence tending to show that on January 13, 1911, a saloon was opened on lot 29 under a lease from Blaisdell. Final payment on the contract was made by Blaisdell at about that time. The receipt given by plaintiff company for that money bears date January 24th. The witness McAllaster, who was in charge of the land business of the plaintiff in its office at San Francisco, testified:

"That the money came to that office three or four days before the date of the receipt; that 'the money was credited on the contract covering lots 26 to 30 because we did not know of any violation. Subsequently we learned of the violation, and learned of it before the deed was finally executed, and did not deliver the deed.'"

The answer of the defendants did not attempt to state a defense upon the ground that plaintiff had commenced and prosecuted its action without offering to return to Blaisdell the money paid by him. The defense most nearly touching this matter is found

in the allegation that on or about November 25, 1910, plaintiff consented that a saloon for the purpose of selling alcoholic and other liquors might be conducted upon the sold premises; that upon the faith of that consent the defendant Woods had expended a large sum of money; and that therefore the plaintiff should be estopped from enforcing the anti-saloon condition of the contract. There was a total failure to prove consent so alleged to have been given by the plaintiff, and there is no evidence that the defendant Blaisdell, or any one claiming under him, has ever demanded or offered to receive from the plaintiff any money on account of this contract.

If the deed had been executed, and then the grantor had sought to obtain a reconveyance because of a subsequently discovered breach of the condition stated in the deed, such action could have been maintained without returning to grantee the consideration paid for the property. We perceive no reason why the purchaser has any better right to claim return of money which he has paid on his contract, where no deed has been made, and where he is guilty of breach of a like condition and is made defendant in an action to have it declared that, by reason of such breach, his rights under the contract are at an end.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. YIP SING. (Cr. 630.)

(District Court of Appeal, First District, California. March 15, 1917.)

1. CRIMINAL LAW § 1159(3)—REVIEW—CONFLICTING EVIDENCE.

Where conflicting evidence sufficiently supports conviction, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

2. CRIMINAL LAW § 943 — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—CONTRADICTORY TESTIMONY.

Refusal to grant a new trial was proper where the alleged newly discovered evidence would merely contradict statements of certain witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2333, 2334.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Yip Sing was convicted of assault with intent to commit murder, and appeals from judgment and from order denying new trial. Affirmed.

B. V. Sargent, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant in this case was convicted of the crime of assault with intent to commit murder. The appeal is from the judgment, and an order denying the defendant a new trial.

The record before us does not support the contention that the trial judge was guilty of misconduct, prejudicial or otherwise, during the course of the trial.

[1] The evidence adduced upon the whole case, which was conflicting, sufficiently supports the verdict and judgment.

[2] The alleged newly discovered evidence would have done no more than contradict the statements of some of the witnesses who testified at the trial. This being so, the trial court committed no error in refusing to grant a new trial because of the discovery of such evidence.

The judgment and order appealed from are affirmed.

Ex parte DRENNAN. (Cr. 395.)

(District Court of Appeal, Third District, California. March 9, 1917.)

HABEAS CORPUS \S 22(1)—GROUND OF RELIEF.

Judgment of conviction of assault to commit rape is not void on its face, because under an indictment charging statutory rape, and so cannot be nullified through habeas corpus, even if there was error in admitting evidence of force, which question can be reviewed only on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 19½.]

Application of Robert Drennan for writ of habeas corpus. Petition denied.

Robert F. Drennan, in pro. per.

PER CURIAM. The petition for the writ must be denied. Inasmuch as the petitioner is confined in the penitentiary, is not represented by counsel, but has, in propria persona, made this application and is not an attorney, it is deemed proper to state briefly the ground of our refusal to grant the application or to issue the writ.

The petitioner was convicted of, and is now undergoing punishment for, the crime of an assault to commit the crime of rape. He claims that the judgment of conviction was and is void, because the crime of which he was found guilty was not within the crime charged in the information. The point is that he was therein charged with statutory rape, or carnally knowing a female incapable under the law of consenting to such an act, in which case force is not a necessary element, and which, where committed even with the actual consent of the female, is, under the law, a crime, and that, therefore, an assault is not a necessary ingredient of the crime. He cites and relies on the case of *People v. Akens*, 25 Cal. App. 373, 143 Pac. 795.

We considered this precise question when the petitioner's case was before this court on

appeal. *People v. Robert Drennan*, 25 Cal. App. 645, 145 Pac. 106. The case was not argued before this court, either orally or by briefs; but it was submitted on the record. We, nevertheless, examined the record, although, under the rule, we would have been authorized and justified in dismissing the appeal without any consideration of the record. In the opinion therein filed, however, we stated that there was disclosed by the record evidence tending to show that the female child upon whom the crime was alleged to have been committed objected to and protested against the conduct of the defendant, and from this testimony we said the jury were warranted in finding that there was an assault, and that the verdict as returned was therefore sustainable, notwithstanding that the prosecutrix was under the age of consent. In this connection, we cited the case of *People v. Akens*, supra, relied upon by the petitioner.

Whether testimony showing that the crime charged or the attempt to commit said crime was accompanied by force and against the will of the prosecutrix was inadmissible under the information was not pointed out by the defendant when his case was before us on appeal. But whether it was or was not inadmissible is a question which cannot be reviewed or considered to any purpose in a proceeding on habeas corpus. The remedy for the correction of errors occurring in the course of the trial of a case, either criminal or civil, lies wholly in an appeal, unless the judgment is absolutely void upon its face, in which case it may be nullified through the operation of a jurisdictional writ; but where it is not void upon its face, it is conclusive against the party against whom it is rendered until it is set aside on appeal for errors occurring at the trial. The judgment of conviction against the petitioner is not void upon its face, and the error of which he complains cannot be reviewed in a proceeding of this character.

The petition must, as stated, be denied; and it is so ordered.

SIMMONS et al. v. FIRTH et al. (Civ. 2213.)

(District Court of Appeal, Second District, California. March 8, 1917.)

1. APPEAL AND ERROR \S 1170(3)—HARMLESS ERROR—RULING ON DEMURRER.

Any error in overruling demurrer to contractor's complaint, for uncertainty in making no reference to engineer's certificate, did not affect defendant's substantial rights, and so under Code Civ. Proc. \S 475, and Const. art. 6, \S 4½, is not ground for reversal; the evidence received without objection showing that the engineer refused the certificate for alleged non-compliance with the contract, and the issuance of compliance, making the withholding of certificate unwarranted and no defense, being tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 4086, 4075, 4098, 4101, 4542.]

2. MECHANICS' LIENS §286(3) — PERFORMANCE OF WORK — TRIVIAL IMPERFECTIONS — QUESTION OF FACT.

Whether omissions from work of items in specifications constitute trivial imperfections, which Code Civ. Proc. § 1187, provides shall not be deemed lack of completion preventing lien, but shall be allowed for to the owner, is a question of fact for the trial court, to be determined in each instance from the evidence and circumstances.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 585, 586.]

3. MECHANICS' LIENS §93 — DEFECTS IN STRUCTURE—FAULTY SPECIFICATIONS.

Contractor claiming lien is not responsible for defects in structure resulting from faulty specifications furnished by owner's engineer.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124.]

4. MECHANICS' LIENS §93 — TIME OF COMPLETING WORK.

Failure of contractor claiming lien to complete work in specified time is not a defense, being due to owner's failure to deliver water according to contract, necessary for prosecution of work.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124.]

5. EVIDENCE §441(7) — PAROL EVIDENCE — VARYING WRITING.

Terms of written contract merely providing for supplying water for mixing concrete and mortar are not varied by evidence of oral agreement to deliver through a pipe near place of work.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1772-1777, 2042.]

6. CONTRACTS §245(2)—MERGER OF STIPULATIONS IN WRITING.

Rule that written agreement supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement on which the instrument is silent, and which does not purport to affect the terms of the instrument, as place of delivery of what the instrument merely provides shall be furnished the contractor for the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1130.]

7. APPEAL AND ERROR §1050(1)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Judgment for subcontractor being ordered to be paid out of amount found due the principal contractors from the owner, and lien only being declared in favor of the principal contractor, the owner was not prejudiced by any error in admission of evidence to sustain the claim of the subcontractor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Albert Simmons and another, partners as Simmons & Simmons against Emil Firth and others. From an adverse judgment, the named defendant appeals. Affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellant. Purlington & Adair, of Riverside, Geo. O. Mansfield and Shankland & Chandler, all of Los Angeles, and A. H. Winder, of Riverside, for respondents.

SHAW, J. In this action plaintiffs as original contractors sued to enforce a mechanic's lien for an unpaid balance alleged to be due them upon a contract made with Emil Firth, pursuant to which they constructed a concrete reservoir at an agreed price of \$5,995. The defendants other than Firth filed answers and cross-complaints, whereby they sought judgment against plaintiffs and the enforcement of liens upon the same property for materials furnished to plaintiffs as such original contractors for use and used in the construction of the reservoir. After a demurrer interposed by Firth to the complaint was overruled, he filed an answer thereto, which, among other things, contained a counterclaim against plaintiffs for a sum in excess of the amount of plaintiffs' alleged lien, and also filed answers to the cross-complaints. Upon the issues thus joined a trial was had, which resulted in a judgment in favor of plaintiffs and against Firth for a balance of \$2,259.61, which was declared a lien upon the property described in the complaint, all as prayed for therein, and gave judgment against plaintiffs in favor of cross-complainants, payment of which was ordered to be made from the proceeds of the judgment so rendered in favor of plaintiffs and against defendant Emil Firth. From the judgment so entered, Firth, adopting the alternative method in presenting the record, has appealed.

[1] Conceding the court erred in overruling defendant Firth's demurrer to the complaint for uncertainty (*Wyman v. Hooker*, 2 Cal. App. 36, 83 Pac. 79), in that it failed to make any reference to the engineer's certificate of completion of the reservoir required by the contract as a prerequisite condition to plaintiffs' right to final payment, or allege any excuse for not producing the same (*Coplew v. Durand*, 153 Cal. 278, 95 Pac. 38, 16 L. R. A. [N. S.] 791, and cases there cited), nevertheless, since it appears from the evidence received without objection that the engineer refused such certificate upon the ground that plaintiffs had not, as alleged by them, completed the reservoir in accordance with the terms of the contract and performed all the conditions thereof, the substantial rights of defendant were not prejudiced by the ruling, without which this court should not reverse the judgment (section 475, Code Civ. Proc.; section 4½, art. 6, Const.). The issue presented to the court for trial was whether or not plaintiffs in constructing the reservoir had complied with the contract, since if they had, the withholding of the certificate as evidence thereof was unwarranted, and want thereof could not be urged as a defense to plaintiffs' right to recover.

[2] Appellant attacks the finding of the court to the effect that, notwithstanding the fact that five items called for by the specifications of the aggregate cost of \$62.85 (which

the court held to be trivial and an allowance for which was made) were omitted, the reservoir was substantially completed on November 8, 1912, and on November 9th it was occupied and thereafter continually used by Firth. Section 1187, Code of Civil Procedure, provides that trivial imperfections in the construction of a building, improvement, or structure shall not be deemed such a lack of completion as to prevent the filing of a lien; and in *Schindler v. Green*, 149 Cal. 752, 87 Pac. 620, it is said:

"If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action."

The question is one of fact to be determined by the trial court in each instance from the evidence and circumstances in the case. Compared with the entire structure called for by the contract, it cannot be said upon the evidence presented by the record that these items were other than as found by the court to be trivial omissions for which defendant could be and was compensated in damages. To the same effect are *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686, and *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

[3] It is also claimed that the reservoir was defective in that it was not impervious to water, but constantly leaked; that the roof thereon constructed by plaintiffs was defectively constructed, by reason of which fact a large part thereof was blown off by the wind some time in December. It appears from the record that at the trial not only the specifications, but detail plans for the construction of the roof, were offered in evidence. These plans and details of construction, however, are not brought up in the record, and without them some of the specifications are incomplete. The contention of respondents is that not only the walls of the reservoir, but the roof constructed thereon, were in strict accordance with the plans and specifications, and there is evidence disclosed by the record which clearly tends to sustain such contention. That the walls of the reservoir were not impervious to water, is conceded; but the evidence of experts introduced on behalf of plaintiffs is to the effect that such leakage was due, not to faulty construction, but to the fact that the walls of the reservoir as called for by the specifications were not such as were calculated to render the reservoir impervious to water without the interior thereof being plastered, and that no reservoir built in accordance with the specifications furnished by defendant's engineer would hold water without more or less leakage. That the evidence sustains this contention admits of no doubt. The same observations are true with reference to the alleged defective construction of the roof, which it seems did not blow off until after the completion of the

structure and use thereof by defendant. The evidence tends to show that it was constructed in accordance with the detailed plans, not before us, and specifications furnished therefor by defendant's engineer, and that its failure to withstand the force of the wind was due to faulty specifications which did not provide for proper anchorage, and not to failure on the part of the contractors to construct the same in accordance therewith. One of the omissions claimed to exist was the alleged fact that plaintiffs did not install check valves in accordance with specifications. The specifications refer to detail No. 1 for method of outlet and inlet, and while this detail of plan is not incorporated in the record, we gather from the opinion of the trial judge it described the device as "a 10-inch check valve or flap valve." At all events, plaintiffs called upon the engineer for a design of valve to be used, and he drew a sketch and delineation of a valve the use of which he authorized and in accordance with which plaintiffs had the two valves made and installed the same. These valves, by reason of the leather cushion becoming hard and dry, though constructed as required by the engineer, leaked. But here, again, in the absence of any specifications therefor, plaintiffs appear to have followed the detailed drawing furnished them by the engineer, and, having done so, they should not be held responsible for such defect.

Appellant strenuously contends that the evidence was insufficient to justify the finding that the owner occupied and used the reservoir from November 9, 1912. Here again there appears to be a conflict of evidence; but there is testimony to the effect that defendant did exercise dominion over the reservoir by doing work upon the roof, other than that called for by the specifications, deemed necessary to protect the paper covering of the same from blowing off in case of storms, and on November 22d filled the same with water, and immediately upon taking possession commenced erecting a fence around the same; indeed, the testimony of defendant's inspector of the work is that he, as defendant's employé, built a fence around the edge of the reservoir, painted the ladders, and did other odd jobs deemed necessary, and filled the same with water to a depth of four or five feet, at which time he observed no leaks other than in the check valve, designated a flap valve. It may be conceded that as to all questions of fact submitted to the court for determination, there was a conflict of evidence, a large part of which offered on behalf of defendant was that of the engineer who prepared the specifications and who very naturally insisted that if followed they were sufficient for the purpose for which the reservoir was intended. It is likewise clear that the trial court regarded his testimony as unsatisfactory. Without discussing the evidence further, suffice it to say that it is am-

ple to support the findings attacked for want of sufficient evidence.

[4-6] The contract, dated May 31, 1912, provided that the reservoir should be completed within 60 days thereafter, and one of the grounds of the counterclaim and defense was plaintiffs' failure to comply with this provision. The court, however, held that defendant was estopped from availing himself of such defense for the reason that he neglected and failed to furnish plaintiffs a supply of water for mixing concrete and mortar. As to this, the specifications contained a provision that:

"Water for mixing concrete and mortar will be supplied by Emil Firth, the contractor to take same from nearest standpipe or pipe line."

It appears that at the time of entering into the contract, defendant had in course of construction a pipe line leading from his pumping plant to the site of the proposed reservoir, distant a mile and a half therefrom, a map of which line he at the time exhibited to plaintiffs, and in response to the inquiry as to when he would have the water there, told plaintiffs that it would be within a week and for them to assemble their tools and material for doing the work, and by the time they were prepared to commence the work he would have the water there; all of which, together with other evidence, tending to show there was an oral agreement made between plaintiffs and defendant Firth whereby the latter was to supply the water, not at the pumping plant, but from a standpipe or pipe line, the outlet of which was to be constructed to a point at or near the proposed reservoir. Appellant insists that the admission of all such evidence was erroneous in that it tended to vary the terms of the written contract. We are not in accord with this contention. While the agreement provided that Firth should supply water, it is silent as to the point at which he was required to deliver the same; hence the oral agreement covered a subject as to which the contract was silent. In our opinion, it was competent for plaintiffs to show by parol that the water which defendant agreed to supply for use in the construction of the reservoir was to be delivered by him through the pipe line then in course of construction at or near the proposed site of the reservoir. The written contract contained no provision fixing the point where the water should be delivered; thence the evidence adduced touching a subject as to which the contract was silent did not tend to vary any provision thereof. "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." *Savings Bank of So. Cal. v. Asbury*, 117 Cal. 96, 48 Pac. 1081; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Bradford*

Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083; *Wolters v. King*, 119 Cal. 172, 51 Pac. 35. In our opinion, the court did not err in admitting the testimony, the effect of which was to show that the delay complained of was due to defendant's failure to deliver a supply of water necessary in the prosecution of the work.

[7] The record discloses no prejudicial error upon which this court would be justified in disturbing the judgment in favor of plaintiffs and against Firth, for which it is declared a lien exists in favor of the former, the foreclosure of which is ordered.

This being true, the alleged erroneous rulings of the court in admitting evidence to sustain the claim of a lien in favor of Hook Bros., for which they were given a judgment against plaintiffs in the sum of \$780.61, in no wise concerns appellant, since such judgment is ordered to be paid out of the amount found due to plaintiffs from defendant Firth, for which a lien is declared, and, therefore, conceding the court erred in reaching the conclusion that Hook Bros. were entitled to judgment, defendant is not prejudiced thereby.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

LIPPERT et al. v. PACIFIC SUGAR CORP. (Civ. 1633.)

(District Court of Appeal, Third District, California. March 12, 1917. Rehearing Denied by Supreme Court, May 10, 1917.)

1. MASTER AND SERVANT §265(5) — ACTION FOR INJURY—RES IPSA LOQUITUR.

In an action for the death of a mechanical engineer caused by the explosion of the steam boiler, a "preheater" in a "sugar house" which it was not his duty personally to operate and which he had been told would carry nearly twice as much steam it was in fact calculated to carry, the doctrine of *res ipsa loquitur* is applicable, and it was competent for the jury to infer as a proposition of fact, either that there was some negligence in the management of the boiler or some defect in its condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 898, 955.]

2. MASTER AND SERVANT §264(10)—ACTION FOR INJURY—RES IPSA LOQUITUR—WAIVER.

Plaintiffs were not precluded from relying upon the doctrine of *res ipsa loquitur* because they also charged specific omissions of duties or acts of negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 870.]

3. MASTER AND SERVANT §287(2)—INJURY TO SERVANT—QUESTION FOR JURY.

How far the immaturity of the boy, less than 16 years of age, who was operating the preheater, contributed to the explosion of its boiler held for the jury under all the facts and circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1054-1056.]

4. MASTER AND SERVANT §279(5)—INJURY TO SERVANT—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that the superintendent in charge of the plant and the

boy who operated the heater, immediately before the explosion, allowed the steam in boiler of the preheater to reach 47 pounds' pressure which was 7 pounds more than the maximum working pressure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978.]

5. EVIDENCE — 584(1) — WEIGHT — DECLARATIONS OF DECEASED PERSONS.

Evidence of declarations of deceased persons is always more or less unsatisfactory, and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2424.]

6. EVIDENCE — 590 — HOSTILE WITNESS.

Fact that a witness was in charge of the defendant's plant as superintendent over the deceased, being to some extent responsible for the accident, justifies classing him as a hostile witness, though plaintiffs were compelled by circumstances to call him as a witness to establish certain facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439.]

7. MASTER AND SERVANT — 217(5) — INJURY TO SERVANT — ASSUMPTION OF RISK.

Where a mechanical engineer was killed by the explosion of the boiler of a preheater operated by an employé who was under immediate instructions of the superintendent of the plant and not of the deceased, instructions having been given to the employés that the boiler would carry 70 pounds' pressure, while in fact its working pressure was 40 pounds, there being no evidence that the preheater was out of repair, or that there was any imperfection calling for repair or complaint to defendant, or that it was not in thorough running condition, the explosion was not a risk which the deceased had assumed, although he was intrusted with oversight of all the machinery of the plant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 578.]

8. MASTER AND SERVANT — 281(2) — INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Where a mechanical engineer, intrusted with oversight of all the machinery of a sugar house, was given written instructions that the boiler of a preheater would carry 70 pounds' pressure, nearly double its actual maximum resisting capacity, he was not guilty of contributory negligence in relying on such statement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 676.]

9. MASTER AND SERVANT — 276(4) — INJURY TO SERVANT — EVIDENCE — SUFFICIENCY.

Evidence held to justify a verdict for plaintiff, and hence denial of defendant's motion for nonsuit and refusal to instruct the verdict for defendant were not error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

10. APPEAL AND ERROR — 959(1) — AMENDMENT OF COMPLAINT — DISCRETION OF COURT.

In allowing the plaintiffs to amend their complaint, the court was exercising a discretion confided to it, the abuse of which alone would justify reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826.]

11. MASTER AND SERVANT — 256(5) — AMENDMENT OF COMPLAINT.

Ruling of court allowing the plaintiff to amend the complaint to allege that the person operating the preheater was incompetent did not carry with it an implication that such employé

was in fact incompetent, but the implication was that there was sufficient support in the evidence on the point to go to the jury for determination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 815.]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Annie L. Lippert and Anne Josephine Lippert, a minor, by her guardian ad litem, and Annie L. Lippert, as administratrix of the estate of William Leo Lippert, deceased, against the Pacific Sugar Corporation. From a judgment for plaintiffs and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Gray, Barker & Bowen, of Los Angeles, H. Scott Jacobs, of Hanford, and W. C. Petchner, of Los Angeles, for appellant. Lent & Humphrey, of San Francisco, and H. P. Brown, of Fresno, for respondents.

CHIPMAN, P. J. This is an action for damages brought by the surviving wife and minor child of William Leo Lippert, who, on the 15th day of July, 1906, was killed by the bursting of a "preheater," used by defendant for the purpose of heating sugar beet juices. At the time of the accident Lippert was 28½ years of age, and the minor was 18 months old. The jury found for plaintiffs in the sum of \$20,000, and judgment was entered in their favor for that amount. The appeal is by defendant from the judgment and from an order denying its motion for a new trial.

Appellant makes the following points: (1) That deceased was employed as master mechanic and was intrusted with the oversight of all the machinery of the sugar house; (2) he, therefore, assumed the risks of his employment; (3) contributory negligence on the part of deceased; (4) "he fully knew and appreciated and apprehended all of the dangers surrounding his employment;" (5) that if the preheater was out of repair, it was patent to deceased and it was his duty to have remedied its condition; (6) if that was the condition of the apparatus, he should have complained of it to defendant; (7) when deceased was employed as mechanic and assistant superintendent he expressly assumed the duty of putting all machinery into thorough running condition.

Respondents, in their brief, say:

"The long and able opening brief of appellant * * * deals with adjudicated cases and legal principles applicable to litigation involving such propositions as 'equal means of knowledge,' 'comparative knowledge of masters and servants,' 'continuance of employment,' 'duties of servants to inform masters of defects and danger,' 'precaution against a known or apparent danger,' or 'duty of employer to repair.' The evidence in this case does not require consideration of any of those questions."

Respondents assign, as defendant's negligence: (a) Defendant's informing decedent that the preheater would safely carry a

steam pressure of 70 pounds when in fact it was only built for a maximum pressure of 40 pounds; (b) defendant's failure to use ordinary care in the selection of the culpable employé, John Wegman.

In December, 1908, deceased, who was then employed in a sugar factory at Chino, San Bernardino county, wrote to Mr. R. L. McCrea, assistant secretary of defendant corporation, the following letter:

"Mr. R. L. McCrea. Dear Sir: Recently learned that your company intends to start your plant at Corcoran. If the same is correct and you have not already selected a man to operate same, would like you to consider an application from me. If your company cares to consider with me the matter, kindly notify me as soon as possible. Will be in city in the latter part of the week; so would call at your office if you desired. Yours truly, Wm. L. Lippert."

Written in blue pencil:

"R/R Mr. Cole. Mr. P. has written Mr. Lockwood—& so good team."

A meeting was thereupon arranged, which took place in the defendant's office in Los Angeles, on the 26th day of March, 1909. As to what then occurred, Mr. W. C. Petchner, the secretary of defendant, testified:

"At that meeting, at which Mr. Lippert, myself, and Mr. Cole (vice president and general manager of defendant) were present, I referred to Mr. Lippert's application and told him we wanted somebody to take mechanical charge of the house; that Mr. Connolly (defendant's superintendent) had told us he would not care to undertake the mechanical charge of the house, and Mr. Connolly had stated Mr. Lippert was the one whom we should get, because he had been employed at the house in its construction, and in the installation of the machinery, and was supposed to understand all about it, and he would prefer to have such a man. I told this to Mr. Lippert and asked him what he knew about the house, and also asked him about his previous employment; I told him what duties we should expect from him; that he was to be there as the engineer to take charge of the mechanical part of the house, because Mr. Connolly was a superintendent merely, and not a machinist or engineer. I repeated all this explanation to Mr. Lippert, and asked him if he felt competent to take charge of the machinery of the house. He said he did; that that was his business; that he had been employed in the house the year previously, and that he had made out the plan of the house wiring and the placing of the machinery, and had taken part in the installing of the machinery in the house. * * * I took up my active duties at Corcoran in the month of January, 1909, and was there during all the time the factory was prepared for operation for that season, although I was away occasionally in San Francisco and Los Angeles. Mr. Connolly reported to me as his immediate superior while I was there, and up to the 15th of July, 1909. Mr. Lippert never made any report to me during that period or any time prior to the accident regarding any defects in the preheater."

Mr. Cole substantially corroborated Mr. Petchner's testimony as to the conversation above set forth. On March 23, 1909, Lippert wrote from Chino to Mr. Connolly, stating that he had some work to finish at Chino, and that he thought he could take the position at Corcoran about the first of April. He did commence work with defendant some time in April.

Mrs. Annie L. Lippert testified:

"I reside in San Francisco. I was married to William Leo Lippert in Oakland in 1906. At that time he was employed by the American Beet Sugar Company as master mechanic at Chino, Cal. He stayed at Chino several months, and came back to San Francisco, where we remained for a year and a half. Then Mr. Lippert went to work to Corcoran in the year 1908, where he remained about six months. Then he was sent for to go to work at Chino. When they employed him in the sugar factory at Corcoran, they asked him to take the house as master mechanic. He had previously worked at Corcoran, helping to install some of the machinery."

There was received in evidence a contract, dated November 14, 1907, between defendant and the American Foundry & Machinery Company, under which the latter was to furnish the former with an "evaporating system," and containing specifications as to the construction thereof. Said contract provided:

"Preheater to be of steel and to stand a working pressure of 12 pounds; steam chest to stand a working pressure of 40 pounds."

M. B. Kearney, a witness for plaintiffs, testified that he had worked as a steam-fitter in sugar factories in different states, and that he was employed as such at the Corcoran plant, although 8 or 10 years had elapsed since he had last worked in a sugar factory; that he commenced work there about the 1st of April; that he overhauled all the steam pipe that needed working on and put in some new pipe. Referring to the preheater, witness said:

"It is a large cylinder shaped piece of machinery between 8 and 10 feet in length, about 6 feet in diameter, with a number of brass tubes running through lengthways for the purpose of carrying steam."

Continuing, witness explained at length the construction of the preheater, the location of valves for the control of steam pressure, etc., and, as to its function in the making of sugar, said:

"There is an opening about in the center where the juice (of sugar beets) is admitted and drops down over those tubes and is heated by the steam; juice coming from elsewhere is pumped into the cylinder and spreads out over the heated steam pipe and passes off into the evaporators."

As to the "steam head" or "steam chest" which blew out and caused the death of Lippert, witness said:

"I think the steam head is square and has a lid of cast iron, and is set back a little, kind of concave. * * * It is bolted all around with bolts two or three inches apart."

He testified that, "about a week before the campaign started," he took the pressure valve apart and cleaned it; the preheater was steamed up for several days before the day of the explosion.

Washington A. Connolly was called as a witness by plaintiffs and testified:

"I was employed by defendant at Corcoran as superintendent or sugar expert for sugar manufacturing, from the 15th of March, 1909, until about the 21st of December, 1909. My duties were to take charge of manufacturing and producing sugar from beets and take charge of

chemical control of the house; that is, I would be superintendent over the chemists attending to the chemical part of the house—I was superintendent over all the employes of the Pacific Sugar Corporation outside of its office affairs. * * * Mr. Lippert was employed right along, I think, from in April or the 1st of May. He was hired as master mechanic by Mr. Petchner. I was told so by himself. His duties were to take full charge of all the machinery, and at the time he was hired, which was not in the manufacturing season, he was to repair and overhaul everything prior to the manufacturing campaign, which was supposed to start then about the 1st of July. * * * Mr. Lippert was next in authority to me."

Witness described the apparatus and said:

"I don't know what pressure this preheater, or the heads of this preheater, were supposed to be able to withstand, or were constructed to withstand. Q. Did you ever instruct Mr. Lippert as to what pressure they were able to withstand? A. There were no instructions given, except Mr. Lippert and I got together. Q. If you will answer me yes or no, we will get along quicker. You said you did not? A. No. Q. Did any one instruct Mr. Lippert as to the pressure? A. As to the pressure? Q. As to the pressure that the heads were supposed to carry. A. No, sir; not that I know of. No sir; I don't know what pressure the heads were supposed to carry." (Witness is handed a paper and asked if he knows in whose handwriting the word "Lippert" is.) "A. That is my handwriting. I presume I gave that paper to Mr. Lippert from the looks of it. That is my handwriting. Whether I gave it to Mr. Lippert or my clerk, it don't make a bit of difference, it was intended to go to Mr. Lippert. It was given to Mr. Lippert before the campaign started, I should judge about the 1st of July; something like that. That specifies preheaters. Mr. Lippert and I got those instructions up ourselves. That paper was received from nobody but myself."

The paper referred to was offered and received in evidence and marked "Plaintiffs' Exhibit A." It is of some length, and contains instructions for operating the various parts of the machinery in the factory. We quote:

"From here draw your juice into preheater 'level of juice as indicated by gauge glass.' The preheater is supposed to carry the full 70 pounds, on steam end and 12 on exhaust or supply end. I would suggest not to carry over 6 pounds on supply end; then we can regulate our pressure as required."

The witness continued:

"Before starting up the plant I called Mr. Lippert's attention to that safety valve, about its sticking. I told him the safety valve was apt to stick occasionally. We had not operated the plant except preliminarily the morning of the 15th of July, 1909. I cannot tell if the safety valve stuck that day. * * * A few minutes before the rear end of the preheater blew out I was around there talking to Mr. Lippert there manipulating the preheater, and as near as I can remember, I think I noticed a pressure of a little over 20 pounds on the steam end, and about 8 or 10 pounds on the low-pressure side. * * * I knew a boy named Wegman. His duties were to run the preheater and the evaporators. I employed him for that purpose. We ran a preliminary test of the preheaters about a month previous to that. Mr. Lippert was there at the time. It was tested more for leaks and things of that kind and to ascertain if the lines were all in good order. So far as I know it was not subjected to a water pressure test. There is a way to test the pressure as to what

a cast-iron head should withstand, the hydrostatic test. That is the only way unless you put the steam pressure on. You are liable to blow up anything in testing with steam. * * * I did not, nor as far as I know did any one else, tell Mr. Lippert at what to fix the safety valves on the preheater. That safety valve (referring to diagram) was to be set by my instructions to Mr. Lippert to carry not over 25 pounds. Those instructions were given verbally. Besides that, Mr. Lippert made a special safety valve and put it in farther on the other line. I never ran the preheater. It was practically a new apparatus to me. There was no test of the preheater made while I was employed by the company. * * * On the day this accident occurred the evaporators had just been started up—Mr. Lippert started them up himself. Mr. Wegman was there and Mr. Lippert was instructing him. This was the first day and the juice had just got started there. I employed Mr. Wegman. I don't think he had had any previous experience in that line. I had not given him any instructions so far. I told him what his duties were when I employed him. We hired him for the evaporator. * * * When the accident occurred I should judge I was about 25 feet from the preheater. All that I saw was steam. Just at the time when I was coming around the corner I saw Mr. Lippert reach up and get hold of the wheel—there was a wheel that was connected through to the steam valve supplying steam to the preheater."

On cross-examination witness said:

"When I wanted information respecting the working of the machinery or the condition of it in the house I would go to Mr. Lippert. I had no technical knowledge of it at all, but resorted to Mr. Lippert for information concerning the technical points of the machinery. * * * Mr. Lippert told me that he knew all about the preheater, as he helped to build it and tested it the previous year. That was about the synopsis of it. He always said that he was afraid of the preheater, because he said some day the thing would blow up."

The deposition of John Wegman, taken on behalf of plaintiffs, was read in evidence. He deposed as follows:

"I will be 18 years of age the 9th day of August, 1911. I reside in Visalia and am now working in an automobile shop. I was working in the sugar factory at Visalia, and Mr. Sieland, the superintendent, sent me down to Corcoran. There I was introduced to Mr. Connolly, the superintendent, who sent me to Mr. Williams, the best end foreman. Mr. Williams showed me the next day the different valves on the evaporators and preheater."

Witness described the machinery and continued:

"This preheater had valves on it. There was one valve I know to leave the steam in, that ran down towards the front end of it. Mr. Lippert had his hand on it. It is made of iron and had an iron wheel on the end. The wheel was blown off at the time of the explosion. * * * There was a safety valve on top of the preheater. I don't know what its use was. I don't know about the uses of the pipes in the preheater nor how it operated. * * * When I went to work at the sugar factory the work I was to do was to run the evaporators and the preheater. Mr. Williams he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators. He told me to carry 5 or 6 pounds on the first evaporator and the next evaporator I don't know just exactly what he told me, nor do I remember now what he told me to carry in the pre-

heater. I had never seen nor operated a preheater before. We had started up the preheater the morning of the day Mr. Lippert was killed. We got the evaporators hot and full of juice, and it was just getting started. When the accident occurred and Mr. Lippert was killed he had hold of the valve and I was right off to one side of them. He had hold of the valve that you turn the steam in with into the preheater. I stood there for a second, not more than a second, and then I started away, and just as I started away, the preheater blew out. While I was standing there those couple of seconds I noticed the steam gauge on the preheater. It registered about 23 pounds. I don't know who turned the steam into that preheater; Mr. Lippert had hold of the valve at that time; that is all I know. * * * Q. Did you have any conversation at all with Mr. Lippert in regard to that preheater? A. No, sir; I never had no conversation with him at all. He just come around and asked me how things were running. At the time I stood those couple second and looked at the steam gauge, I noticed the preheater steam head was leaking a little bit, a little around the bolts."

The witness stated that the mechanics had screwed up the bolts; that the bolts did not give way, but that the sheet of iron that covers the preheater blew out. At the time of the explosion he was about a foot and a half away from the preheater and received an injury on his wrist. He did not know at what pressure the safety valve was set, and did not remember what amount of steam he was supposed to carry in the pre-heater.

M. B. Kearney was recalled and gave further details of what occurred at the time of the accident, and James Mack Hale was also sworn as a witness for plaintiffs and testified to facts similar to those given by other witnesses.

R. S. Bulla, connected with beet sugar factories since 1890, part of the time as superintendent, testified on behalf of defendant. He described the operation of evaporators and preheaters, although he said the preheater at the Corcoran plant was the only one he had ever seen. He said:

"A boy of 16 years is perfectly able to watch the system of four evaporators and one preheater and to observe the steam and juice level in each one. * * * The master mechanic is master of the mechanical department. It is his duty to regulate the steam pressure on the evaporators. By regulating the evaporators, I mean the setting of the relief valves and giving the evaporator man in charge those instructions of how far and how high the steam pressure might rise, and in regulating the reducing valves and allowing no more steam in than he considers, in his opinion as an engineer, is safe for the machine."

G. D. Kiefer, a witness for defendant, testified:

"I reside at Corcoran, where I have lived for almost 5 years. My trade is that of a machinist. I went to work for the Corcoran sugar factory on the 4th of March, 1908. * * * Mr. Lippert was master mechanic there, in which capacity I have had conferences with him. * * * At the time of the explosion I was probably 15 or 20 feet from the preheater—within a few minutes before the explosion. I could see the preheater from where I was. Just before the explosion Mr. Lippert and I sat on the water line. We talked about the preheat-

er. I wanted him at that time to cut it off; I told him that it was a detriment and no use to the factory. He said that the machinery was put there to run, and he was going to run it; we came back in around the preheater, and steam was coming out through the bolt holes on the south end of it. Mr. Lippert called Mr. Connolly; Mr. Connolly had been talking to Mr. Wegman whom he had at that time been showing how to run the evaporator. Mr. Connolly came over and spoke to Mr. Lippert a few words, and I walked back. * * * Then Mr. Lippert started to working with the wheel of the long valve that leads to the main steam line, as I understand it. I turned around and left the factory, or attempted to. I left because I did not think it was policy to stay around. I was afraid of it. The steam was issuing from the steam chest then. * * * The only thing Mr. Lippert said at that time was that he was afraid to start the preheater. I had talked with him before that. He said that he did not believe that the steam lines were connected up properly. He said he thought that the steam lines could be fixed so they would work—that he was going to try to run them to the preheater."

On cross-examination witness said:

"In the position I held at the time, I was not supposed to know anything about the machinery. My trade is a machinist, but I was the yardman there, I had control of the yard. If anything happened to the machinery out there, I went to Mr. Lippert. Mr. Lippert had entire charge of the machinery part of the factory."

Upon the close of plaintiffs' case, defendant moved for a nonsuit on the grounds: (1) That no negligence on the part of defendant has been shown; (2) deceased was guilty of contributory negligence; (3) deceased assumed the risk of the employment. The court denied the motion for nonsuit.

In *Shearman & Redfield on Negligence*, § 60, the following rule is declared:

"Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In *Rose v. Stephens, etc., Co.* (C. C.) 11 Fed. 438, it is said:

"In the present case the boiler which exploded was in the control of the employes of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable."

It was further said that, while the rule is more frequently applied in cases against carriers of passengers than in any other class, there is no foundation for limiting the rule to carriers. "The presumption," said the court, "originates from the nature of the act, and not from the nature of the relations between the parties."

[1, 2] The cases are industriously cited and considered in *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. Referring to the case of *Young v. Bransford, 12 Lea (Tenn.) 232*, which supports a contrary doctrine, attention

is called to the following language in the reported opinion of that case:

"At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.'"

We are satisfied that this is a case where the doctrine of *res ipsa loquitur* is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in *Cassady v. Old Colony Street Railway Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, where it was said:

"The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine [*res ipsa loquitur*] because, instead of resting her case solely upon it, she undertook to go further and show particularly the cause of the accident. This position is not tenable. It is true that where the evidence shows the precise cause of the accident, as in *Winship v. New York, N. H. & H. R. Co.*, 170 Mass. 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been if it had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

Plaintiffs may therefore rely on the presumption of defendant's negligence, although they endeavored, as did defendant, "to show particularly the cause of the accident."

Deceased was shown to have been competent "to be there as the engineer, to take charge of the mechanical part of the house," for which purpose he was employed, as a witness testified. He had a general knowledge of the plant and the machinery there in use, for he had helped to install some of it. It was not, however, a part of his duty personally to operate the different machines of the plant, or any one of them. Other persons were in personal charge of their operation. The evaporators, including the preheater, the explosion of which caused the death of Lippert, were, by Superintendent Connolly, placed in charge of the boy, Wegman, less than 16 years old. Wegman was told by Connolly to report to Williams, the beet foreman, for instructions how to run the preheater, and Wegman testified that no instructions were given him by deceased, and that all he had were given by Williams to

whom Superintendent Connolly sent him. He testified:

"Williams, he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators."

Wegman could not remember what his instructions were as to the pressure he was to carry in the preheater. This was quite an important fact for Wegman to know; and, as he had no knowledge except as he got it from Williams and as Connolly sent him to Williams, it is fair to presume that Williams had the information given in the superintendent's written instruction that "the preheater is supposed to carry the full 70 pounds on steam end," and so instructed Wegman. Connolly testified that there were six copies made of these instructions, and they show on their face that they were intended for the information of the foremen of the different departments of the plant. Wegman testified that he "had never seen nor operated a preheater before." Witness Bulla testified that:

"A boy of 16 years is perfectly able to watch the system of four evaporators and one preheater and to observe the steam and juice level to each one."

[3] The jury were informed in great detail by witnesses as to the component parts of the plant and their several offices, and illustrative diagrams were used to aid in the explanation. We think, with the information placed before them, they were as well qualified to form an opinion of Wegman's competency as was the witness Bulla. How far the immaturity in years or the ignorance of Wegman contributed to the explosion of the boiler was a matter for the jury to determine under all the facts and circumstances. He testified that a second or two before the explosion he had been standing near the preheater, and noticed that the steam gauge registered 23 pounds. Connolly testified that a few minutes before the explosion he was around there and "noticed a pressure of a little over 20 pounds on the steam end." Witness Kearney, a steam-fitter, employed by defendant, was sent by Lippert to tighten up some bolts around the steam head that were leaking. He gave, in his testimony, a very complete description of the preheater. He testified that Lippert came to where he was working and told him to take his helper and go to the preheater as it was leaking slightly; that he went to the boiler with his helper; that Wegman was there, whose duty was "to see that the steam gauges were kept at a certain stage"; that Williams was there also; that he, the witness, and his helper tightened up the bolts where the leak mostly was and after tightening up the bolts he "looked up at the steam gauge and saw it registered in the neighborhood of 47 pounds"; he "turned to Williams (who was Wegman's instructor), the beet foreman, and said: 'How much steam do you generally carry in that preheater?' He looked up at the gauge and

said: "That's right." Thereupon Kearney and his helper left, Kearney remarking to his helper: "Pack up your tools and let's get out of here." He testified that they had walked over to the machine shop where they had been working, a distance of 50 or 75 feet, when the explosion occurred. He immediately returned and found Lippert in the pit close to the boiler where he died in about 10 minutes. Lippert was not at the boiler when Kearney was tightening the bolts and when Kearney spoke to Williams, but he seems to have returned to the heater during these few seconds, and about all we can learn from the testimony is, as testified by Wegman:

"He (Lippert) had hold of the valve that you turn the steam in with into the preheater."

Williams did not testify at the trial. Wegman's testimony was that the steam gauge read 23 pounds, but against this is the testimony of Kearney, a steam-fitter, who had called Williams' attention to the fact that the gauge showed 47 pounds, and seems to have hastened to get away, although Williams replied: "That's right." The machinery had been tested before "starting up," and apparently all the parts were in working order. Lippert did not live to explain what he intended to do when he took hold of the valve that controlled the intake of steam to the heater. Under the circumstances the only reasonable conjecture that can be indulged is that with steam escaping around the bolt heads and somewhat around the edges of the boiler head, as the testimony showed was occurring, he would naturally endeavor to shut off the pressure. But it was too late. At that second, according to Wegman's testimony, the explosion occurred.

[4] We think the jury were justified from the evidence in finding that Williams and Wegman allowed the steam pressure to reach 47 pounds, which was 7 pounds more than the maximum "working pressure" which the maker of the preheater had stipulated it was to stand. Superintendent Connolly admitted that he gave the written instructions, which allowed a pressure of 70 pounds. In his testimony he seems to have sought to make Lippert equally responsible for the instructions. He did not testify, however, that Lippert knew anything about the contract between defendant and the maker of the boiler; nor did he testify that Lippert had anything to do with formulating that part of the instructions relating to the pressure. He at first testified that no instructions were given to Lippert upon this point. When confronted with the written instructions he admitted that they were in his handwriting and were given to Lippert before the campaign started, and added: "Mr. Lippert and I got those instructions up ourselves." Lippert knowing nothing of the specifications made by the boiler maker, and Connolly knowing what they were, it is not at all likely that Lippert fixed or had anything to do in stating the pressure which the preheater would with-

stand. Connolly testified that he called Lippert's attention to the safety valve, that it "was apt to stick occasionally," but he did not know that it stuck that day, and there was no evidence that it was out of order. He testified that:

"The safety valve (referring to diagram) was to be set by my instructions to Mr. Lippert to carry not over 25 pounds. Those instructions were given verbally."

He also testified that Lippert instructed Wegman. Wegman testified that all the instructions he received were given by Williams, to whom Connolly sent him.

[5] We do not think the jury were compelled to accept at its face value the testimony of Connolly as to verbal instructions or conversations with Lippert, who being dead could not explain or refute them. Connolly may not intentionally have misstated any fact, but his memory may have been at fault. Evidence of alleged declarations of deceased persons is always more or less unsatisfactory and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence. *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; *Austin v. Wilcoxson*, 149 Cal. 24, 84 Pac. 417.

[6] Connolly's connection with the accident and the responsibility resting upon him in a greater or less degree for the unfortunate accident justifies classing him as a hostile witness, although circumstances compelled plaintiffs to call him as a witness to establish certain facts.

[7] Recurring to the grounds for a reversal of the judgment, as stated by defendant in its brief, it may be conceded as proven that deceased "was intrusted with the oversight of all the machinery of the sugar house," but it does not follow that "he assumed all the risks attending his employment." There was no evidence that the preheater was out of repair, or that there was any imperfection in it calling for repair or complaint to defendant, or that it was not in thorough running condition. In fact, it was not an indispensable part of the plant, for Connolly testified that defendant dispensed with it altogether after the accident. No reasonable cause for the explosion can be assigned, based upon any evidence, other than it was caused by an excessive pressure of steam to which the preheater was subjected by the employé of defendant, whose duty, under the authority of defendant, it was, to operate this machine. There was evidence that this employé was performing this duty under the immediate instructions of Williams, and not under the direction of Lippert at the time the explosion occurred. If Williams was governed by or had in mind the written instructions, which we think must be presumed, he may not have been at fault, but surely defendant was in giving them, and the responsibility thus passed to defendant for the accident.

[8] We can see no ground for sustaining defendant's contention that the explosion was caused by Lippert's contributory negligence. He, too, was authorized to assume that the preheater would withstand 70 pounds pressure, nearly double its actual maximum resisting capacity. Considering all the facts and circumstances, the primary cause of the accident seems more reasonably traceable to the erroneous instructions given by the superintendent upon a very vital matter than to any other cause, and for this defendant alone is responsible. But if from all the evidence no reasonable explanation of the accident, acquitting defendant of blame, was shown, the verdict and judgment may rest upon the presumption of defendant's negligence.

[9-11] In its opening brief the specifications of errors called to our attention are, in substance, that the court erred in not granting defendant's motion for nonsuit on the ground of the insufficiency of the evidence and the refusal of the court to instruct the jury to return a verdict for defendant. Also on the ground that the court permitted plaintiffs to amend their complaint at the conclusion of the evidence for plaintiffs by charging defendant with culpability in the selection of an incapable employé, to wit, John Wegman. There is also a general specification of the insufficiency of the evidence in certain particulars. We do not think the court would have been justified in granting the motion for a nonsuit nor in directing a verdict for defendant. There was sufficient evidence to sustain the verdict and judgment. In allowing plaintiffs to amend their complaint, the court was exercising a discretion confided to it, the abuse of which alone could justify reversal. The ruling of the court did not carry with it an implication that Wegman was in fact incompetent to perform the duties assigned to him. The implication was that there was sufficient support in the evidence on the point to go to the jury for determination.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

ROLLERI v. ROLLERI. (Civ. 2065.)
(District Court of Appeal, First District, California. March 15, 1917.)

DIVORCE — 307—SUPPORT OF CHILD—ALLOWANCE—DISCRETION OF COURT.

Where husband and wife, pending the husband's suit for divorce, agreed that the wife should take custody of their minor child and support him, and should receive in full of her claims to the husband's separate property the sum of \$2,000, and the husband recovered a judgment for divorce, and the court embodied in the judgment an order in accordance with the agreement, and subsequently the wife moved for an allowance for support of the child, and it appeared that she still had on hand between \$1,500 and \$2,000 of the \$2,000 which she had re-

ceived from her husband, that the money was available for the support of the child, and that the husband on his part had fully performed all conditions of the agreement, the action of the court in denying the wife's motion was not an abuse of discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 800.]

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action for divorce by Domenico Rollerl against Rosie Rollerl. From orders denying defendant's motion subsequent to divorce for an allowance for support of her child, she appeals. Affirmed.

W. R. Biaggi, of San Jose, for appellant.
B. A. Herrington and James L. Atteridge, both of San Jose, for respondent.

PER CURIAM. The plaintiff sued the defendant for a divorce. Pending suit the parties came together and entered into an arrangement with reference to their property rights. The property, whatever there was, was the separate property of the husband. They entered into an agreement by which the wife—the defendant—was to take the custody of the minor child (whose interests are now sought to be advanced) and was to support him, and was to receive in consideration thereof and in full of all her claims to the property of the plaintiff the sum of \$2,000. The plaintiff recovered a judgment against his wife for divorce, and the court embodied in that judgment an order in accordance with the aforesaid agreement of the parties. Later on the defendant in the case moved the court for an allowance for the support of the child. Upon the hearing of that motion it appeared that she still had on hand something between \$1,500 and \$2,000 of the sum of money which she had received in accordance with the agreement with her husband, and that that money was in a form to be available for the support of the child—whose support she had undertaken at the time she received it. It appeared on the other hand that the plaintiff on his part had fully performed all the conditions of that agreement. The court denied the motion, and the only question before us is as to whether it was an abuse of discretion for the court so to do.

We are satisfied from the record that there was no such abuse of discretion. The orders appealed from are therefore affirmed.

VAN TASSELL v. HEIDT et al. (Civ. 2068.)
(District Court of Appeal, First District, California. March 15, 1917.)

HUSBAND AND WIFE — 333(9)—ALIENATION OF AFFECTIONS — INSUFFICIENCY OF EVIDENCE.

In an action by a wife against the parents of a woman for having alienated from his wife the affections of a man who had sought illicitly the regard of the daughter, where the evidence

does not show that defendants were ever guilty of conduct tending to alienate the affections of the husband, judgment for plaintiff against them will be reversed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Myrtle K. Van Tassell against Ella Heldt, Laura Heldt, administratrix, and others. From a judgment for plaintiff, Laura Heldt, and others appeal. Reversed.

Chas. M. Cassin and James L. Atteridge, both of San Jose, and W. M. Gardner, of Santa Cruz, for appellants. John H. Leonard and W. P. Netherton, both of Santa Cruz, for respondent.

PER CURIAM. From the examination which the court has made of the entire record in this case, and dealing with the matter of the insufficiency of the evidence to justify the decision of the court, we are satisfied that the evidence is wholly insufficient to warrant the findings and decision of the trial court. This being an action against the parents of a young woman, who alone have appealed, for having alienated from his wife the affections of a man who had illicitly sought the regard of said daughter, the evidence does not show that the defendants in the action were ever guilty of conduct tending to alienate the affections of the husband from his wife so as to subject them to an action for damages. In other words, there is no sufficient evidence to support the findings and judgment of the trial court in so far as the appellants, the father and mother, are concerned. That being so, and without reference to the question of the error which the court made in the admission of hearsay evidence, which seems to have been repeated, but which may not have been sufficiently objected to, we think that the judgment against the appellants ought to be reversed; and it is so ordered.

L. & E. EMANUEL, Inc., v. OBERLIN BROS. CO. (Civ. 2018.)

(District Court of Appeal, First District, California. March 15, 1917.)

VENUE ⇨21—CHANGE OF VENUE—PLACE OF DEFENDANT'S RESIDENCE.

Where a contract was made in Fresno county, and to be performed there, and defendant's principal place of business was in that county, defendant was entitled to have the case tried therein, though a small part of the work was to be done and delivered in San Francisco, but plaintiff was to install such work in defendant's store in Fresno.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the L. & E. Emanuel, Incorporated, against the Oberlin Bros. Company. From an order denying defendant's motion for change of place of trial, defendant appeals. Reversed, with directions.

Everts & Ewing, of Fresno, for appellant. Milton L. Schmitt, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from an order denying its motion for a change of the place of trial.

From the record it appears that the contract involved in the action, entered into by correspondence, was made in Fresno county, and was to be performed there. It also appears that the defendant's principal place of business is in that county. Under familiar rules, therefore, the defendant was entitled to have the case tried in the county of Fresno. It is true that a small part of the work to be done by the plaintiff, under said contract, consisted in the alteration of some show cases, which when so altered were to be delivered for shipment to Fresno f. o. b. San Francisco; but these cases and other fixtures to be manufactured by plaintiff in San Francisco were to be installed by it in the defendant's store in Fresno, so that this part of the contract like the remainder must be regarded as performable in Fresno county.

The order is reversed, and the court is directed to grant defendant's demand that the place of trial of the action be changed from the city and county of San Francisco to the county of Fresno.

FARIAS v. FARIAS. (Civ. 2026.)

(District Court of Appeal, First District, California. March 15, 1917.)

JUDGMENT ⇨159—VACATION OF DEFAULT—EXCUSABLE NEGLIGENCE—SUFFICIENCY OF APPLICATION.

Motion under Code Civ. Proc. § 473, allowing vacation of default where suffered through excusable neglect, to set aside default judgment in action for divorce, and filed five months after default, merely charging that defendant's attorney was away and neglected to enter appearance or move for further time, and not supported by attorney's affidavit, and in view of a letter written by attorney to client indicating that whatever steps were taken were to be merely for delay, was insufficient to show excusable neglect under the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Ada Farias against William Farias. Defendant appeals from order denying motion to vacate default judgment. Affirmed.

George L. Keefer and Ben W. Utter, both of Los Angeles, for appellant. George Appel, of San Francisco, for respondent.

PER OURIAM. This is an appeal from an order denying a motion to vacate a judgment by default in an action for divorce.

The action was commenced by the plaintiff and respondent against the defendant and appellant in the city and county of San Francisco on October 27, 1913. The defendant was served with summons in the county of Los Angeles on November 19, 1913. Within a few days thereafter he wrote to an attorney in San Francisco named Montagu, sending him \$15 to be applied on account of court costs and attorney's fees, and directing him to appear for defendant in the action. No appearance was filed, and no application for an extension of time within which to appear was made to either the court or counsel for plaintiff, and the time for making such appearance expired on December 19, 1913. The default of defendant was entered on the 17th of January, 1914, and an interlocutory judgment entered shortly thereafter. The appellant made no move to set aside said default nor for relief from said judgment until July 3, 1914, when he appeared and made a motion to set aside said default under section 473 of the Code of Civil Procedure, which said motion was predicated upon the affidavit of said defendant to the effect:

That the reason why no appearance was filed by said defendant prior to the entry of said default was that "said Montagu had occasion to go out of the city and county of San Francisco for a few days, and the said Montagu went out of said city, and was absent about the time it was necessary to file a demurrer in said action to prevent a default being entered against defendant; that when said Montagu was out of the city of San Francisco attending to other business he inadvertently overlooked the said case of defendant, and failed to file a demurrer or answer, and failed to get an extension of time within which to appear in said action. * * * Said attorney was so engrossed with other business out of the city of San Francisco that he overlooked the case and failed to appear."

No affidavit is presented from Montagu in support of defendant's said motion; and it is very evident from the foregoing quotations from his affidavit that the matters which are therein stated are purely of hearsay, and therefore of little, if any, value as evidence, and are entirely insufficient to make out a case of excusable neglect under section 473 of the Code of Civil Procedure.

In addition to this there was evidence before the trial court in the form of a letter which was written by Montagu to the defendant prior to the time when his default for nonappearance in the case could be entered, indicating that whatever steps were to be taken in the action were to be merely for delay, or, in the language of said attorney, "to bother and stall her if emergency requires it."

With the foregoing facts before it, it is clear that the trial court committed no abuse of discretion in refusing to set aside the judgment upon the defendant's tardy and in-

sufficiently supported motion for such an order. We find, therefore, no merit in this appeal.

Order affirmed.

PEOPLE v. SEARLE. (Cr. 655.)

(District Court of Appeal, First District, California. March 15, 1917. Rehearing Denied by Supreme Court, May 10, 1917.)

1. HOMICIDE \S 255(1) — EVIDENCE—SUFFICIENCY—STATUTE—"MANSLAUGHTER."

In view of Pen. Code, \S 192, declaring that "manslaughter" includes the unlawful killing of a human being without malice, by a lawful act which might produce death, or without due caution, in a homicide case in which defendant admitted that about the time deceased was wounded a loaded rifle which he was handling was accidentally discharged, evidence held to sustain a jury's finding that the homicide resulted from defendant's failure to exercise due care and circumspection in discharging the fatal shot, and that his conduct amounted to criminal negligence, rendering him guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 539.]

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

2. HOMICIDE \S 228(1) — EVIDENCE—SUFFICIENCY—CORPUS DELICTI.

Evidence that deceased shortly after a shot was fired was mortally wounded by a bullet under circumstances which would exclude any inference that the wound was self-inflicted was direct evidence of death and cogent and irresistible evidence of violence sufficient to prove the corpus delicti.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 471.]

3. CRIMINAL LAW \S 406(1)—EVIDENCE—ADMISSIONS AND CONFESSIONS—ADMISSIBILITY.

Where there was ample evidence tending to show that a crime had been committed by some one, admissions and confessions of the defendant made voluntarily were properly received in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 785, 894, 895.]

4. HOMICIDE \S 151(1)—EVIDENCE—BURDEN OF PROOF.

As every killing is unlawful unless expressly excused or justified by law, upon proof that the killing was done by defendant, and nothing further, the presumption of law is that it was malicious and an act of murder, and it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 276.]

5. CRIMINAL LAW \S 636(5)—JURY'S VIEW OF PREMISES—WAIVER OF OBJECTION.

While defendant had the right to be present when the premises were being visited by the jury, he could waive this right, and did do so when it was expressly stipulated by counsel that no one need accompany the jury except the sheriff.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1474, 2120.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Frank Searle was convicted of manslaughter.

ter, and from the judgment and from an order denying his motion for a new trial, he appeals. Affirmed.

A. B. Tinning, of Martinez, and T. H. Delap, of Richmond, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged in an information by the district attorney of the county of Contra Costa with the crime of murder. He was tried, convicted of manslaughter, and sentenced to imprisonment in the state prison at San Quentin for a term of eight years. The present appeal is from the judgment and from an order denying defendant's motion for a new trial.

Appellant presents but three grounds of appeal, viz.: Insufficiency of the evidence to support the verdict; that the corpus delicti was not proved independently of the extrajudicial admissions of the defendant; and that the view by the jury of the scene of the crime in the absence of the defendant was a violation of his constitutional right.

Dealing with the first point urged, the defendant is alleged to have shot one Patrick Conroy on June 4, 1916. The testimony shows that the deceased was found that afternoon about 5 o'clock mortally wounded on a ranch in the county mentioned. He and one Joe Hickey, two itinerant laborers, were friends and companions, and had been such for a period of eight years. On the afternoon of said June 4th, walking along the railroad track in the vicinity, they came to a small shed on a ranch belonging to one I. T. Coe, which they selected as their resting place for the night. They unrolled their blankets, and Conroy went to get some water at a pump about 400 feet away from the shed. About 5 minutes thereafter Hickey heard a shot. He paid little attention to it, but a few minutes later, Conroy not having returned, he proceeded to the pump to look for him, and there found Conroy prone upon the ground with a bullet wound in his head. He immediately ran to the county road close by to summon help, and there met Coe and the defendant. First aid was given to Conroy, and the defendant was sent by Coe, by whom he was employed, to a town a mile away for medical aid. The defendant was a stranger in the county, and at this time had been employed by Coe for about two weeks only. He slept in a cabin some 200 feet from the pump near which the body of the deceased was found. About a week before the shooting Coe had loaned the defendant a loaded Winchester rifle. About half an hour before Conroy was shot the defendant had left Coe, with whom he had been working repairing a fence, to do the evening chores. Later he returned. During his absence Coe heard the report of a gun, and it was a few minutes after defendant's return to

where Coe was still working on the fence that Hickey arrived with the news that his "partner" had been shot. Shortly after the defendant had been dispatched for a doctor, Hickey, who was assisting Coe in his ministrations to the wounded man, caught a glimpse of a man going around the cabin occupied by the defendant. Early the next morning Conroy died. When Hickey announced that his companion had been shot, the defendant (who, it appears, had taken that day several drinks of intoxicating liquor) volunteered the statement that some men or boys had been shooting rabbits in the neighborhood, and that he had heard several gunshots that afternoon, seeking perhaps to convey the inference that Conroy had been shot through the carelessness of hunters. Suspicion attached to the defendant, and he was put under arrest that night. At first he stoutly denied that he had discharged any gun, or that he had hidden a gun, or even that Coe had loaned him one. Later, however, he admitted that a loaded rifle had been borrowed by him from Coe; that at about the time the deceased was wounded while handling the rifle it was accidentally discharged; that while on his way for the doctor he went to his cabin, took the rifle, and hid it where it was subsequently, and prior to his confession, found by an officer. The defendant offered himself as a witness at the trial and in the course of his testimony said, "Of course, I could not tell whether I shot him or not."

[1] The evidence is sufficient to warrant the jury in finding that the defendant killed the deceased. It does not, however, show that the killing was intentional, but it does sustain the view, which doubtless was adopted by the jury, that the homicide resulted from failure on his part to exercise due care and circumspection in discharging the fatal shot; that his conduct amounted to criminal negligence, rendering him guilty of manslaughter.

Section 192 of the Penal Code declares:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: * * * 2. Involuntary * * * in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

"An unintentional homicide committed through the negligent handling of a firearm in a way indicating a reckless disregard of life is manslaughter. It is negligence to point a firearm at another without examining to see whether or not it is loaded, or to handle or use it in a place where a discharge is likely to injure another, as in a highway." *Michie on Homicide*, vol. 1, p. 253.

So, where parties were playing or skylarking and defendant recklessly handled his gun. *Murphy v. Commonwealth (Ky.)* 22 S. W. 649; *Henderson v. State*, 98 Ala. 35, 13 South. 146. In the first-mentioned case the fact that the shot was caused by defendant's finger accidentally slipping on the trigger was held to be an insufficient excuse.

[2, 3] Equally without merit is the defendant's claim that the corpus delicti was not proven independently of the extrajudicial statements of the defendant. The deceased shortly after a shot was fired was found mortally wounded by a bullet under circumstances that exclude any inference that the wound was self-inflicted. We have therefore direct evidence of death, and cogent and irresistible evidence of violence independent of the evidence of the defendant. Here, as in the case of the *People v. Carlson*, 8 Cal. App. 730, 732, 97 Pac. 827, there was ample evidence tending to show that a crime had been committed by some one, and therefore the admissions and confessions of defendant made voluntarily were properly received in evidence.

[4] Every killing is unlawful unless expressly excused or justified by law. The homicide being shown, it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him. The mere fact of the killing having been proved to have been done by the defendant, and nothing further, the presumption of law is that it was malicious and an act of murder. *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. Bush*, 71 Cal. 602, 12 Pac. 781; *People v. March*, 6 Cal. 543; *People v. Roberts*, 6 Cal. 214.

[5] Coming now finally to the point that it was prejudicial error to allow the jury, in the absence of the defendant, to review the scene of the alleged crime, we have no doubt that the defendant had a right to be present when the premises were being visited by the jury, but it is settled that he may waive this right (*People v. White*, 20 Cal. App. 156, 128 Pac. 417), and in this case it was expressly stipulated by counsel that no one need accompany the jury except the sheriff.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

STATE v. TANNER. (No. 1903.)
(Supreme Court of New Mexico. April 7, 1917.)

(Syllabus by the Court.)

1. FALSE PRETENSES §7(1)—DEFINITION.

A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 5.

For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

2. FALSE PRETENSES §6—GIVING OF WORTHLESS CHECK—OFFENSE.

The giving of a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved, and said representation relates to an existing fact,

so that a prosecution for obtaining money by false pretenses may be maintained.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 4.]

Appeal from District Court, Bernalillo County; H. W. Reynolds, Judge.

Joseph B. Tanner was indicted for obtaining cattle by false and fraudulent pretenses, his motion to quash the indictment was granted, and the State appeals. Judgment reversed, and cause remanded for trial.

The substance of the indictment returned against the appellee in the district court of Bernalillo county is that Joseph B. Tanner on the 15th day of June, 1912, did unlawfully, willfully, feloniously, falsely, fraudulently, designedly, by false and fraudulent representations and pretenses, by trick and deception, and by means of a check, cheat and defraud one E. A. Miera, and obtain from him certain cattle of the value of \$5,405, which he had heretofore agreed to sell to the said Tanner; that the said Miera accepted the check in payment of the sum of \$4,605 because the said Tanner represented and pretended to the said Miera that the check was good for the amount named in the check at the First National Bank of Farmington, and that said bank would pay the check when presented to it for payment; that the said Tanner had and intended to have money on deposit at said bank to pay said check when presented for payment; that these representations and pretenses were then and there false and fraudulent, and that the said Tanner knew they were false, and that the check would not be paid when presented for payment; that afterwards, on or about the 24th day of June, 1912, said check was presented for payment at said bank and payment refused for the reason that Tanner knew and intended that payment would be refused at the time of making and delivering the check, and intended to stop payment on said check at said bank before it could or would be presented for payment; that the said Tanner did not intend to have, and knew that he would not have, money in the bank to pay said check when presented for payment; that the giving of the check, and the check itself, was, at the time and place of the giving, a trick, deception, a false and fraudulent representation, statement, and pretense, and an instrument used and practiced by the said Tanner to induce, and which did induce, the said Miera to part with the said cattle to the said Tanner; that the said Miera relied upon the representations, statements, pretenses, and check as good and true, and parted with and delivered the said cattle to the said Tanner on the 15th day of June, 1912. The defendant, Tanner, moved to quash the indictment on the ground:

"That it does not state facts sufficient to constitute an offense against the laws of the state

of New Mexico, or to charge this defendant with any crime or offense against said laws."

This motion to quash was granted by the trial court, from which judgment the state took an appeal.

F. W. Clancy, Atty. Gen., and A. B. Renahan, of Santa Fé, for the State. John Venable and R. P. Barnes, both of Albuquerque, for appellee.

HANNA, C. J. (after stating the facts as above). It does not appear under what section of the statutes of this state the indictment was drawn. There are three sections of the Code of 1915, which are applicable to the facts of the case, and under either of which it is contended by appellant the indictment is sufficient. The sections referred to are 1551, 1553, and 1560. It is not necessary for us to determine at this time under what section the indictment was drawn, as the only question presented for our consideration is the question of law, which, as stated in the brief of appellant, is:

"Whether or not the indictment alleges a false pretense as to an existing or past fact, or whether it merely alleges a false pretense as to a future fact or event."

[1] There is no controversy between the parties as to what constitutes a false pretense. As defined in Bishop's New Criminal Law, vol. 2, § 415:

"A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 11 R. C. L. 831.

It is contended by appellee that the false and fraudulent representations charged in the indictment are no more than representations or pretenses that the check in question would be paid by the First National Bank of Farmington, N. M., when presented for payment, and that he (Tanner) had and intended to have money on deposit in said bank to pay the check when presented, which amounted to no more than a promise as to a future happening or condition, and therefore was not a false representation relating to a past or existing fact.

By appellant, on the other hand, it is contended that the defendant represented and pretended to the said Miera that the check was good for the amount therein named at the drawee bank; that the said drawee bank would pay the same when presented for payment, and that he, the said Tanner, had and intended to have money on deposit at said bank, out of which the said bank would pay the said check on presentation, whereas, in truth and in fact, the said check was not and would not be then and there good for the amount of money therein specified at the drawee bank, as the defendant then and there well knew; and whereas, in truth and in fact, the said check would not be paid by the drawee bank on the presentation thereof for payment, as the said defendant then and there well knew.

[2] The contention of either appellant or

appellee is supported if we consider but a portion only of the indictment without regard to other allegations contained therein. A careful reading of the indictment discloses that it is charged that the defendant represented that he had money on deposit to meet the check, and equally clearly alleges that this representation was false, as the said Tanner then and there well knew. The indictment further charges that the check was not good for the amount of money specified at the drawee bank as the said Tanner well knew, and would not be paid on presentation, as he well knew. These allegations can clearly be denominated, allegations pertaining to present facts. From this point on the allegations of the indictment in a measure support the contention of appellee because dealing with future facts, wherein it is alleged that said Tanner, at the time of making and delivery of the said check, intended that the check should not be paid on presentation, and that he, the said Tanner, would stop payment on the said check at said drawee bank before it could or would be presented to it, and did not intend to have and well knew he would not have money at the said bank applicable to the payment of the said check on its presentation for payment. Appellee cites the case of *People of the State of Colorado v. John B. Orris*, 52 Colo. 244, 121 Pac. 163, 41 L. R. A. (N. S.) 170, in support of his position, wherein it was held that:

"Securing property for a check which the maker represents as good and will be paid when he in fact intends to stop payment upon it, does not render him guilty of obtaining property by false pretenses within a statute making punishable any person who, by any false pretense, obtains from any other person any valuable thing with intent to cheat or defraud."

As pointed out in the case note to the foregoing case in L. R. A., it was conceded in the Colorado case that the drawer had money in the bank upon which the check was drawn; the sole question being whether the defendant's intention to stop payment on the check related to a past, present, or future fact. To that extent the Colorado case differs from the case at bar as we have indicated, for the reason that in the indictment under consideration it is charged that Tanner represented that the check was good for the amount of money named at the First National Bank of Farmington; that the said Tanner had and intended to have money on deposit in said bank to pay the said check when presented; that these representations were then and there false and fraudulent as said Tanner knew, etc.

As pointed out in the same case note in L. R. A., it is generally held that the giving of a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved, and that said representation relates to an existing fact, so that a prosecution for obtaining money by false pretenses may be maintained.

Smith v. People, 47 N. Y. 303; 2 Wharton's Crim. Law, 1611; 11 R. C. L. 35.

We are not unmindful of the fact that some courts hold that a state of mind is a fact, and that therefore a false statement as to the intention of the accused is a false pretense as to an existing fact, while other courts have held that a representation as to an intention is not within the statute. See authorities collected in note in 19 Cyc. 397.

We are not called upon, however, to determine which of these two conflicting lines of authorities we will follow, as, in our opinion, all that has been charged in the indictment as to the intention of the defendant, Tanner, in the matter of stopping payment upon the check may be treated as surplusage, as the charging part of the indictment in the matter of the representations as to having money in the bank at the time the check was drawn, which he knew at the time to be a false representation, is a sufficient charging of present fact without regard to the matter of the intention of stopping payment.

We therefore conclude that the action of the trial court in sustaining the motion to quash was erroneous, and that the judgment of that court must therefore be reversed, and the cause remanded for trial.

PARKER, J., concurs. ROBERTS, J., did not participate.

LEYBA v. ALBUQUERQUE & CERRILLOS COAL CO. (No. 1963.)

(Supreme Court of New Mexico. April 7, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT § 101, 102(8)—MASTER'S DUTY—SAFE PLACE TO WORK.

It is the duty of the master to exercise reasonable care and skill to the end that the place where he requires his servant to perform labor shall be as reasonably safe as is compatible with its nature and surroundings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173.]

2. MASTER AND SERVANT § 206, 226(2)—ASSUMPTION OF RISK—SCOPE.

The servant assumes all the ordinary risks of the service and all of the extraordinary risks, i. e., those due to the master's negligence, of which he knows and the dangers of which he appreciates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 562.]

3. MASTER AND SERVANT § 226(2)—ASSUMPTION OF RISK—"EXTRAORDINARY RISK"—MASTER'S NEGLIGENCE.

An "extraordinary risk" is not one which is uncommon or unusual in the sense that it is rare, but is one which arises out of unusual conditions not resulting in the ordinary course of business, as by reason of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 662.

For other definitions, see Words and Phrases, Second Series, Extraordinary Risk.]

4. MASTER AND SERVANT § 288(1)—ASSUMPTION OF RISK—QUESTION FOR JURY.

When the evidence is of such a character that the proper inferences to be drawn from it as to the assumption of risk by the servant is a question with respect to which different opinions may not unreasonably be formed, it must be submitted to the jury under proper instructions from the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068, 1069, 1087, 1088.]

Appeal from District Court, Santa Fé County; E. C. Abbott, Judge.

Action by Juan B. Leyba against the Albuquerque & Cerrillos Coal Company. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed, and remanded for new trial.

The appellant, plaintiff below, brought this action for damages on account of personal injuries against the Albuquerque & Cerrillos Coal Company, a corporation, alleging that during the months of February, March, April, and May, 1913, he was employed by the defendant company in the handling, running, dumping, and operating of certain tram cars along the tramways of the said defendant company, and that during the time referred to there was a runway for the employees so engaged along and adjacent to the said tramway which was about four feet lower than the track of the tramway; that it was necessary for such employees in the handling and moving of the cars referred to to insert a sprag between the spokes of the wheels when seeking to retard the motion of said cars, this being the only appliance or instrumentality furnished by the said company with which to retard said cars or to stop the same; that in May, 1913, the plaintiff discontinued his employment with such company, but, thereafter, on the 20th of December of the same year, he was re-employed by the said company, and a few days later was reassigned to the same work as that in which he had been formerly engaged by the said company; that during the interval between his first and second employment the defendant company had caused changes to be made in the said runway by raising it to a level with the tramway, a portion of the new runway being constructed of dirt and a portion thereof of planking; that the portion so constructed of planking was not constructed on a level with the portion constructed of dirt, but was raised about three inches above the dirt portion of the runway, leaving an impediment of an abrupt, square-edge plank three inches high across said runway; that the said tram cars were being operated upon a downgrade on said tramway, by reason whereof it became necessary to retard the motion of and to stop the said tram cars by use of sprags, which are heavy sticks or poles, which by an insertion between the spokes of the wheels operate as blocks, causing the cars to stop when so applied; that when using these sprags in the stopping of

the cars it was necessary for the plaintiff to walk or run along the runway parallel to and on a level with the tramway, and while moving at the same speed of the said tram cars, and while watching the wheels of the car, to insert the sprag and thus stop the car; that it was the duty of the said defendant company to exercise reasonable care and caution in furnishing its employes with a safe and suitable place to work in performing their duties in operating and spragging the cars, and that the method by which the plank part of said runway was constructed formed a dangerous obstruction and impediment to said employes, which was such as to cause the plaintiff to stumble and fall when he came in contact therewith; that the impediment was negligently and carelessly constructed under the direction of the superintendent of said company and without reasonable care and caution, which said condition was at said time known to the said defendant company, whose attention had been called thereto, but that said company, through its superintendent, failed, neglected, and refused to change or repair the same, but permitted the said runway to remain in such dangerous condition; that said plaintiff had not been on or along said runway since said plank portion had been constructed, prior to the time he was injured, and had no knowledge of the existence of said impediment and obstruction, and neither knew nor appreciated the risks to which he was subjected nor the dangerous condition of the said runway.

Plaintiff further alleged that, while performing the duties for which he had been employed, upon reaching the end of the dirt runway he came in contact with the said obstruction, and, stumbling upon the same, lost his balance, and while so unbalanced the sprag turned with the wheel and struck the plaintiff in the leg, knocking plaintiff's leg out from under him and dragging his right leg under a tram car, with the result that his leg was crushed to such an extent that it had to be amputated.

Other allegations not necessary to be referred to are set out in the complaint, which concludes with a prayer for judgment.

The answer of the defendant company, so far as it is necessary for our consideration, set out that the method of retarding the tram cars on said tramway by means of sprags is safer than any brake or brake appliances with which said tram cars could be equipped and conforms to the usage prevailing among prudent and skillful employers engaged in the coal-mining business, and that the tram cars, the platform and runway, and any abrupt rise therein, if any there was, and the method of retarding and stopping said tram cars by means of a sprag, were in plain view of the plaintiff when he entered the defendant's service, and so remained during all the time of his employment, and that, with full notice and knowledge of the construction, condition, and operation of the

said tram cars, tramway, platform, and runway, and the method of retarding and stopping said tram cars, plaintiff voluntarily entered upon the work he was employed to do, which, among other things, was the retarding and stopping of said tram cars by means of said sprag while working upon said runway and platform, and continued therein up to and until the date of his alleged accident, without objection or complaint, and by similar allegations not necessary to more fully set out, the defendant, by its answer, pleads an assumption of risk on the part of the plaintiff, the answer further pleading contributory negligence.

It is not necessary to refer to the reply other than to state that it put in issue all new matter contained in defendant's answer.

At the conclusion of plaintiff's case the defendant moved for a directed verdict upon several grounds, the only one which this court is called upon to consider being that the evidence discloses that plaintiff had assumed the risk in entering the employment of the defendant company, and that therefore the defendant was not liable. The court sustained this motion, saying:

"The court holds that the plaintiff in assuming the employment assumed the risk of the employment."

From the judgment rendered upon the directed verdict, this appeal was prayed.

Catron & Catron and Reed Holloman, all of Santa Fé, and E. E. Studley, of Raton, for appellant. R. E. Twitchell, of Santa Fé, and W. H. King, of Denver, Colo., for appellee.

HANNA, C. J. (after stating the facts as above). The only question before this court for its determination is whether or not the injury in question grew out of conditions of such a character as justified the trial court in holding, as a matter of law, that the plaintiff assumed the risk and cannot recover the damages sought. We will therefore refer only to that portion of the evidence having to do with the condition out of which the injury grew, and we find from the record that, while the plaintiff had been employed in the mine in question for several months earlier in the year, that his employment had terminated, and that in the interim between his first and second employment the change in the runway where the accident occurred had been made. At the time of the injury he had been employed but two days in his work of spragging the cars of the defendant company, and he testified positively that he was injured at the place in question, and the evidence of other witnesses bears him out in this. There is some difference in the testimony as to whether or not the obstruction in the runway was two inches in height or six inches above the level of the earth adjacent thereto. The appellant testified that the planks were two inches above the level of the earth, while from the testimony of another witness

It might be argued that the plank runway was about six inches above the level of the remaining portion of the runway. Whatever this fact may be, however, it appears from the evidence that the condition was recognized as a dangerous one to which the attention of the defendant had been called with the suggestion that the same be remedied, the superintendent of the defendant company, however, refusing to remedy the condition, stating that it was all right.

In this connection it is the contention of the appellee that the risk was patent, and therefore assumed by the plaintiff, he being a man of experience in the work in which he was engaged; that, the condition being openly visible, he must be presumed to have noticed it. There might be some merit in this contention if the evidence was all one way upon this point, but the witness Newman was not certain as to the character of the obstruction. He said that it might be about six inches, while the other evidence upon this point indicates a less obvious condition.

It is shown by the evidence that a number of persons using the runway had stumbled over the same obstruction at different times. It is therefore clear from the evidence that the place, under the circumstances, was of a more or less dangerous character, and that the attention of the employes of the defendant company had been called to this condition. The condition had not been long existing but arose out of the change made in the runway which had been made a short time before the accident.

[1, 2] In the case of *Van Kirk v. Butler*, 19 N. M. 597, 145 Pac. 129, this court, after recognizing the general rule that it is the duty of the master to exercise reasonable care and skill to the end that the place where he requires his servant to perform labor shall be as reasonably safe as is compatible with its nature and surroundings, said:

"A servant, engaging for the performance of specified services, takes upon himself the ordinary risks incident thereto."

But, as we have pointed out in the opinion referred to, if the facts of the case should disclose that the risk is not of an ordinary kind, but of an extraordinary character, the rule as to the assumption of ordinary risk by the servant should not apply. Our conclusion there stated was that the servant assumes all the ordinary risks of the service and all of the extraordinary risks, i. e., those due to the master's negligence, of which he knows and the dangers of which he appreciates.

[3] In defining an extraordinary risk in the opinion just referred to, we said that it is not one which is uncommon or unusual in the sense that it is rare, but is one which arises out of unusual conditions not resulting in the ordinary course of business, as by reason of the master's negligence. We further stated, and believe that the same reasoning applies to the case at bar, that:

"The reason why the doctrine of the servant's nonassumption of extraordinary risk has arisen, as an exception to the common-law rule of assumed risk, or accepted risk, as it is designated by some authors, may be said to rest primarily upon the consideration that, as the master has control of the conditions which affect the servant's safety, he is the party who ought in fairness to be held responsible if those conditions are not such as a prudent man would maintain under the circumstances. It is also said that extraordinary risks are not assumed because they are not the natural and ordinary incidents of the servant's work."

Applying these principles of law, which this court has heretofore adopted, it would seem to be clear that a condition in the runway of the defendant's mine existed which was recognized to be a dangerous one and which employes had sought to have remedied, but which the superintendent of the defendant company had refused to correct.

The evidence discloses that the servants of the defendant company engaged in work such as the work of the plaintiff on the occasion of the injury were required to use this runway in their work, which was of such a character that they were not at all times able to observe the place where they were about to step, by reason of the fact that they were required to run alongside the tram cars with one hand upon the car and with their eyes upon the wheel in order that, with the other hand, the oak stick or sprag could be inserted between the spokes of the wheel, thereby blocking it and causing the cars to slow up or stop, all of which clearly and imperatively required that the master should use reasonable care in preserving the runway in a safe condition, which, judging from the evidence introduced in this case, it neglected and failed to do.

It can hardly be said that the condition was an ordinary condition pertaining to the business or the character of work done. It was, on the other hand, an extraordinary condition, arising out of the change in the runway which has been referred to, and, so far as the evidence discloses, it does not appear that the plaintiff had any knowledge of the condition.

If the contention of appellee be correct upon the proposition that there is evidence to support the contention that the obstruction was of such a character that a knowledge of its condition must necessarily be imputed to the plaintiff, with the result that we should hold that he assumed the risk because of its obvious nature, we would point out that there is other evidence in the case to the effect that the obstruction was but two or, at most, three inches in height, and this conflict of evidence would certainly make it possible for at least two inferences to be drawn, one which would impute a necessary knowledge to the plaintiff, and the other which would support him in his contention that he had not noticed the obstruction.

[4] In this connection it was held by this court in the case of *Crawford v. Western Clay & Gypsum Products Co.*, 20 N. M. 555,

151 Pac. 238, that when the evidence is of such a character that the proper inferences to be drawn from it, as to the assumption of risk by the servant, is a question with respect to which different opinions may not unreasonably be formed, it must be submitted to the jury under proper instructions from the court.

Therefore, as we have indicated, it is our conclusion that the state of facts here in question did not constitute an ordinary risk, but an extraordinary one, resulting from the negligence of the master; and, as we have indicated, it not appearing that the servant knew of the condition, we conclude that the trial court was in error in directing a verdict for the defendant.

The judgment of the district court will therefore be reversed, and the cause remanded for a new trial.

PARKER, J., concurs.

ROBERTS, J., did not participate.

RATON WATERWORKS CO. v. CITY OF RATON. (No. 1776.)

(Supreme Court of New Mexico. April 5, 1917.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE §105(3) — STALE CLAIM—RECOVERY.

Where the findings of trial court, supported by substantial evidence, show that claim asserted by plaintiff is stale and it would be inequitable to permit him to assert it with success at the later day, *held*, that such facts bar recovery.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327-341.]

Error to District Court, Colfax County; T. D. Lieb, Judge.

Suit by the Raton Waterworks Company against the City of Raton. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 157 Pac. 656.

Morrow & Alford, of Raton, and J. G. Northcutt, of Trinidad, Colo., for plaintiff in error. H. L. Bickley, of Raton, and A. T. Rogers, Jr., of Las Vegas, for defendant in error.

HANNA, C. J. This is a controversy between the Raton Waterworks Company, a private corporation, and the city of Raton. The former brought suit in the district court of Colfax county to enforce specific performance of an alleged contract and to enjoin and restrain the latter from prosecuting suits looking to the condemnation of any property involved in the waterworks system of the water company, the plaintiff in error. The gist of the complaint is that the plaintiff in error was granted a franchise in 1891 to supply water to the inhabitants of the then town

of Raton, and the right to do all things necessary and incidental thereto; the grant having been made by an ordinance of the town of Raton. That grant or ordinance contained a provision to the general effect:

That the town of Raton, "after the expiration of five years," shall have "the right to purchase the waterworks with all the rights, properties, and franchises at a fair valuation, which shall be determined by three disinterested persons, nonresidents of the town, one of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be made as herein provided, the town shall pay the said valuation with 10 per cent. added."

On December 5, 1911, the common council of the city of Raton, the successor of the town of Raton, adopted a resolution. The preamble thereof recited, among other things, that more than five years had elapsed since the granting of the said franchise, and that the city desired to exercise its right to purchase the waterworks system, pursuant to the provisions of section 7, the substance of which is quoted above. The resolution then provided that the city was thereby authorized to proceed as speedily as possible to exercise said right and that it select its appraisers as provided in said section 7. The plaintiff in error alleged that this, together with other action on the part of the said city council, constituted an election to purchase the property, and that thereafter nothing remained to be done except to fix the valuation of the property. The complaint alleges that the valuation was never made, by the neglect of the city of Raton, but it does not allege that it appointed its own appraiser under the terms of the grant, and we assume that its default in this respect is due to the contention made by it that it first became the duty of the city to appoint its appraiser. The complaint, however, alleges upon information and belief that the city did appoint a certain named person as its appraiser. The findings of the court, however, are to the effect that no appraiser was ever appointed by the city, and this finding is conclusive and not subject to attack because no exception was taken thereto. The answer proceeded on the theory, and alleged facts in support thereof, that there had never been an election by the city to exercise its rights to purchase the plants and works of the plaintiff in error, and that the action of the common council, under the statute and Constitution of this state, could not legally be made binding in this respect on the city. It is also asserted that, even should these actions on the part of the common council be held to constitute an election to purchase the property, the same is of no consequence in this cause, because the same was abandoned by both parties. In addition the city, by way of new matter, alleged facts tending to show that the plaintiff in error has, without protest, sat silently by and watched the city expend a

large sum of money in the construction of its own waterworks system, and that the plaintiff in error has not only been guilty of gross laches, but is estopped now to declare that the city exercised its option to purchase the property of the plaintiff in error. The trial court sustained all the contentions of the city and made exhaustive findings of fact and conclusions of law, to none of which findings did plaintiff in error except.

Briefly, those are the facts of this case: The plaintiff in error has assigned a number of alleged errors in the action of the trial court. It has briefed but one question, viz. Did the resolution heretofore mentioned constitute an election on the part of the city to purchase the property of plaintiff in error? In order to make that question of any importance it also argues that the trial court erred in holding that it has been guilty of laches or that it was estopped by its conduct in any way. The only other question argued by it concerns its alleged right to relief by way of specific performance. We believe the bill is wholly without equity. The findings of the trial court preclude the plaintiff in error from obtaining any relief, and that result ensues whether the action of the city council in adopting the resolution cited supra constitutes an election on the part of the city to purchase the property of plaintiff in error or not. Assuming that it did constitute such an election, the plaintiff in error is without equity in the premises. The court found that a copy of said resolution was transmitted to plaintiff in error a few days after the resolution was adopted; that neither party by their conduct or actions construed the said resolution as an exercise of the city's right to purchase the property; that if they ever did so construe it they both abandoned such construction, agreement, and contract; and that the actions of the parties have been wholly inconsistent with any such construction or any such alleged option or agreement to purchase. It also found that neither party commenced or performed any act or proceedings to effectuate any such alleged agreement to purchase until upon the day the complaint herein was filed, when plaintiff in error advised defendant in error that it had appointed its appraiser, but this was subsequent to the election held by the city to determine whether it should issue and sell bonds to construct its own plant and action taken with reference to such construction. The court found, further, that the water company declined to sell its works to the city, and continually asked the city for a renewal of its franchise. The fourteenth finding of the court is to the effect that, although the plaintiff in error was served with a copy of the said resolution adopted by the common council of the city of Raton, it took no steps whatever to effectuate a sale of its property to the city under the alleged elec-

tion, and for more than two years and seven months stood by in silence and allowed the city to do a number of acts which consummated the construction of its own waterworks system. Plaintiff even protested the application of the city to appropriate water sufficient to carry out its plans to furnish water to its own inhabitants. Those findings, as we have heretofore, stated, are conclusive. Obviously the plaintiff in error is in no position to obtain a reversal of the judgment of the trial court under such circumstances. The bill was entertained by the court, but the effect of the court's finding made it necessary to dismiss it because the same was wholly without equity. Even assuming that an election to purchase had been made by the city, the agreement was abandoned by the acts and conduct of the parties, and plaintiff in error cannot be heard to assert its stale claim at this late day. It would avoid the application of the doctrine of laches in this case, on the ground that laches cannot arise nor estoppel fall at one's door so long as negotiations on the subject-matter of the litigation are pending between the parties. The court's finding numbered 13 robs that contention of any importance; for it holds that:

"There were no negotiations pending between the plaintiff and the defendant for the selling by the plaintiff to the defendant of said waterworks system under section 7 of said franchise, nor under said resolution of December 6, 1911, but there were some negotiations between said parties upon the proposition to purchase upon other and different terms, entirely independent of said franchise and resolution, but the water company during such negotiations declined to sell. * * *"

In view of the established fact that the claim of plaintiff in error, viz. that the defendant in error had elected to purchase its property and rights under the clause in the franchises, had become stale and that it would now be equitable to permit the plaintiff in error to assert it with success, the judgment of the trial court must be affirmed; and it is so ordered.

PARKER, J., concurs. NEBLETT, District Judge, sat in the hearing, but, having been elevated to the United States District Bench for New Mexico did not participate in this decision.

HERBST v. ROGERS. (No. 1960.)
(Supreme Court of New Mexico. April 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 629(3)—FAILURE TO FILE TRANSCRIPT OF RECORD—WAIVER.

The failure of appellant to file transcript of record in this court within time specified by law is waived, where no advantage thereof is taken until after transcript has been filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2756.]

2. EXCEPTIONS, BILL OF \S 40(1) — SETTLEMENT AND SIGNING—EXTENSION OF TIME.

Bills of exceptions must be settled and signed on or before ten days before the original return day, unless time therefor is specifically extended. *Held*, extending time for filing complete transcript in this court does not extend time to settle and sign bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 44, 45, 57.]

3. EASEMENTS \S 42—GRANT OF INDEFINITE EASEMENT—ENLARGEMENT.

Assuming that grant of an indefinite easement cannot be enlarged or changed beyond its terms as subsequently defined by practical construction, that doctrine has no application in face of findings of trial court, which, when reasonably construed, hold that no practical construction of the grant was made by the parties.

[Ed. Note.—For other cases, see Easements, Cent. Dig. \S 97.]

Appeal from District Court, Chaves County; J. T. McClure, Judge.

Action between James B. Herbst and William E. Rogers. Judgment for Rogers, and Herbst appeals. Affirmed.

Reid & Hervey, of Roswell, for appellant. U. S. Bateman, of Roswell, for appellee.

PARKER, J. [1] 1. Appellee has moved to strike out certain portions of the record and to dismiss the appeal on four grounds, only two of which are argued or supported by brief. He insists that the appeal should be dismissed because the transcript of record was not filed until after the return day. There is no merit in that contention. While the statute (section 4490, Code 1915) requires appellant to file the transcript of record in this court at least ten days prior to the return day, this requirement was waived because the transcript was filed prior to the taking of advantage of such default. He further insists that this cannot be the rule, for in such event the perfecting of the appeal might be delayed for many years. The answer to that contention is that, unless the transcript is filed in the time required by law, the appellee has his remedy by proffering in this court, before such default is cured, a skeleton transcript and motion to docket the case and affirm the judgment of the trial court. Failing to do this or taking any action with reference thereto until after the transcript has been filed, appellee lost any right he might have had by his own lack of action. *Armijo v. Abeytia*, 5 N. M. 533, 536, 25 Pac. 777; *Sacramento Irr. Co. v. Lee*, 15 N. M. 567, 571, 113 Pac. 834; *Eagle M. & I. Co. v. Lund*, 15 N. M. 696, 113 Pac. 840.

[2] 2. The other proposition argued by appellee on the motion is that the bill of exceptions is not properly before the court, for the reason that the same was settled and signed long after the return day of the appeal, and no extension was ever granted for signing and settling the same.

The decree was rendered on January 5, 1916, and the appeal granted therefrom on January 10, 1916. The return day was therefore May 20, 1916, but the transcript of record must have been filed in this court on or before May 10, 1916. Subsequent to the granting of the appeal, two orders were entered by the trial court, one extending the time to "perfect his appeal herein and file a completed transcript in the Supreme Court," the other extending the return day to June 20, 1916. Appellee's contention is that neither of these extension orders extended the time to settle and sign the bill of exceptions, either specifically or automatically or by necessary implication. Appellant elected to proceed by way of bill of exceptions, under section 4495, Code 1915, rather than by certifying, the record of proceedings by the trial court under section 4493, Code 1915. Under our practice the bill of exceptions must be settled and signed at least ten days prior to the return day, the last day upon which the transcript may be filed in this court. Under section 4505, Code 1915, the time in which the bill of exceptions must be settled and signed may be extended by the district judge, provided the application therefor is made prior to ten days before the return day of the appeal. The real question is whether the extension of time of the return day and the day for filing complete transcript in this court automatically extended the time to settle and sign the bill of exceptions. In *United States v. Sena*, 15 N. M. 187, 106 Pac. 838, the court held that settling and signing the bill of exceptions subsequent to the time specified by law was unauthorized. In *Costilla Land & Dev. Co. v. Allen*, 17 N. M. 343, 345, 128 Pac. 79, it was said that the purposes of section 4490, Code 1915, providing for an extension of time to file a complete transcript in this court, and section 4505, Code 1915, providing for extension of time for settling and signing bills of exceptions, were entirely different. The court strongly intimates in that case that if a party would have his time extended for settling and signing the bill of exceptions, he must first make application therefor within the time required by law, and that the court must specifically grant the extension, and that extending the time to file a complete transcript in this court does not automatically extend the time for settling and signing the bill of exceptions. In *Pople v. Orekar*, 161 Pac. 1110, this court said:

"The statutes governing the question under consideration were fully considered by this court in the case of *Costilla Land & Development Co. et al. v. Robert Allen et al.*, 17 N. M. 343, 128 Pac. 79, and it was there pointed out that section 2 of chapter 120, Laws 1909, appearing as section 4490, Code 1915, only authorizes an extension of time within which to file a complete transcript, and under this section no authority exists for extending the time for settling and signing the bills of exceptions."

The law requires the application to be made some time between the granting of the appeal and ten days prior to the original return day. The fact that the return day is extended by the trial court, by the extension of time to file a complete transcript in this court, or otherwise, is entirely without bearing on the question as to whether the time to settle and sign the bill of exceptions was extended. The record in the case at bar discloses that the bill of exceptions was settled and signed long after the original return day, and fails to disclose any order extending the time to settle and sign the same. Therefore the bill of exceptions must be stricken from the record.

[3] 3. The only question raised on the merits of this case by the appellant is contained in the second assignment of error. It is as follows:

"The court erred in holding and decreeing that defendant, having fixed the place, manner, and means of diverting his water and exercising his right and enjoying his easement, may change the same at will by adding a further and different burden to the servient estate."

In 1900 an artesian well was drilled upon the boundary line of two lots situate in the North Springs River addition to the city of Roswell. Thereafter a number of grants of water rights therefrom were made, one of them being to appellee's immediate predecessor in title. That grant entitled the grantee to water from said well sufficient to fill a one-inch pipe, but was otherwise indefinite. The well is situate about one foot from an alley, and directly across the alley lies the land of appellee. The same water right was granted to appellee as was granted to his immediate predecessor in title. Shortly before the bringing of this suit the appellee learned, by investigation, that his water supply from said well came from two $\frac{3}{4}$ -inch pipes connected to the Carleton $\frac{3}{4}$ -inch pipe which crossed his land, which was in turn connected to a three-inch feed pipe on the well. Believing that he was entitled to take his water from pipes in direct connection with the well, the appellee was about to make such a connection when enjoined by the appellant. The authority cited by appellant is to the general effect that after the grant of an indefinite easement has been made definite by the acts of the parties, no greater burden can be imposed upon the servient estate thereafter without its owner's consent. Some of the cases so holding are *Onthank v. L. S. & M. S. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 35; *Allen v. San Jose L. & W. Co.*, 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93, and note; *Capen v. Garrison*, 193 Mo. 335, 97 S. W. 368, 5 L. R. A. (N. S.) 851, and note; *Cram v. Chase*, 35 R. I. 98, 85 Atl. 642, 43 L. R. A. (N. S.) 824, and note; *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497, 44 L. R. A. (N. S.) 254. The trial court held that the appellee and his

predecessors in title had used water from the well for more than ten years; but that appellee was not estopped in any wise by his conduct. That finding necessarily and manifestly implies that, while it is true that appellee did use or take water from the well, still he did not exercise his election under the terms of the implied easement; hence is free now to make his election as to the manner and mode of conveying his water from the well to his land under the terms of the grant. In view of the fact that there has been no practical construction of the easement or grant by appellee, or his predecessors in title, the judgment of the trial court was evidently correct. There is substantial evidence to sustain that finding, and the contention of appellant is obviously inapplicable to the facts of the case.

The judgment of the trial court is therefore affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

SECURITY INVESTMENT & DEVELOPMENT CO. v. CAPITAL CITY BANK.
(No. 2028.)

(Supreme Court of New Mexico. April 12, 1917.)

(Syllabus by the Court.)

QUIETING TITLE ~~§ 30~~—ANSWER OR COUNTERCLAIM—JUDGMENT CREDITOR OR ASSIGNEE.

Neither a judgment creditor, nor his assignee, can maintain an answer or counterclaim in a suit to quiet title under sections 4387 and 4388, Code 1915.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 80.]

Appeal from District Court, Santa Fé County; G. A. Richardson, Judge.

Suit to quiet title by the Security Investment & Development Company against James W. Norment and others, in which the Capital City Bank appeared and filed answer containing a counterclaim and sought to have its lien declared prior to the estate of the plaintiff. From an order striking its appearance and answer from the files, the Capital City Bank appeals. Affirmed.

E. R. Wright, of Santa Fé, for appellant.
J. H. Crist, of Santa Fé, for appellee.

PARKER, J. This is a suit to quiet title to certain lands in Santa Fé county, brought by the Security Investment & Development Company, a corporation, against James W. Norment, the county of Santa Fé, unknown claimants, and unknown owners. The Capital City Bank appeared and filed an answer, containing a counterclaim, and praying that its lien be declared prior and paramount to the estate of the plaintiff. The rights of the Capital City Bank, the appellant here, were based upon an assignment of a certain judgment rendered against James W. Norment,

plaintiff's immediate grantor, the assignment having been made and a copy of the transcript of judgment having been filed in the office of the county clerk of Santa Fé county prior to the conveyance of the lands involved from Norment to the plaintiff, the appellee. The trial court, upon the motion of appellee, entered an order striking the appearance and answer of appellant from the files, the ground for such action being that appellant had no interest in the subject-matter of the litigation sufficient to maintain its defense or counterclaim. From that action the appellant appealed.

1. The sole question on this appeal is whether the appellant has sufficient interest in the subject-matter to maintain his defense and counterclaim. It takes the position that it has an interest as well as a claim in the premises in dispute by virtue of its lien. The lien was acquired under section 3079, Code 1915. Section 4387, Code 1915, the statute under which this suit was brought, provides the following:

"An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto."

Section 4388, Code 1915, provides for the procedure for such suits, and requires the complaint therefor to contain certain matters, and that certain classes of persons shall be made parties defendant. The plaintiff is required to set forth the nature and extent of his estate in the premises, allege adverse claims to the estate on the part of defendants, and pray for the establishment of his estate against such adverse claims. It further provides:

"Any or all persons whom the plaintiff alleges in his complaint he is informed and believes make adverse claim to the estate of the plaintiff * * * and all unknown persons who may claim any interest or title adverse to plaintiff, may be made parties defendant. * * *"

If a person having a general lien on the premises in dispute may properly come in and plead as a defendant and set up that lien interest as an estate adverse to the estate and title of the plaintiff, and may also plead a counterclaim based upon such lien, then the contention of appellant must be sustained; otherwise, it must be denied. The appellant cites a number of cases which it asserts sustains its contention, chief among them being the case of *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295, by Sanborn, J.; but the decision of the territorial Supreme Court in *Stanton v. Catron*, 8 N. M. 355, 374, 45 Pac. 884, 890, controls our decision in this case. In that case the plaintiff brought a creditor's bill and on appeal attempted to sustain his suit upon the theory that he could maintain, under the pleadings, a suit to quiet title. The court, in disposing of this contention, referred to section 2214, C. L. 1884, which is identical with section 4387,

Code 1915. It held that the statute did not contemplate a controversy between conflicting liens, or between a judgment creditor and a purchaser, and that the plaintiff must have an interest greater than a lien interest. The court said:

"The bill in this case shows the complainant to be a judgment creditor claiming a general lien, by virtue of his judgment, upon the lands in controversy. No title to the property is asserted. What relation does a judgment creditor bear to the land of the debtor upon which he has a general lien by virtue of his judgment? Not that of an owner of the property, or one having an interest or right in the title to the land itself, but simply that of a general lien upon the lands, which confers upon the judgment creditor the right to levy upon and sell the same to the exclusion of other adverse interests subsequent to the judgment. The title to the land is not transferred by the judgment from the judgment debtor to the judgment creditor, but remains in the judgment defendant. Other judgment creditors may levy upon the land and sell it. The debtor may sell and dispose of the land and pass title thereto in any way he sees fit, subject, of course, to the rights of the creditor under the lien of his judgment. The judgment creditor is simply vested with the power to make the general lien of his judgment effective in pursuing the remedy which the law gives in issuing execution, levy, and sale of the land. By following up diligently the remedy which the law has given him, he may thus vest himself with a title in the specific land on which theretofore he had only a general lien. Until this is done no title to the land passes to or is vested in him. His judgment is simply a link in the chain which may be lengthened into a title in his favor. This view we understand to be sustained by the Supreme Court in the case of *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 433 [7 L. Ed. 189]; *Brown v. Pierce*, 7 Wall. 207 [19 L. Ed. 134]; 1 *Black on Judgments*, § 400, and cases cited; *Young v. Templeton* [4 Ea. Ann. 254] 50 Am. Dec. 563."

The principles set out in that case are controlling here. The appellant in the case at bar had no standing before the court in the suit to quiet title, because its right and interest in the premises was based upon a judgment lien which does not constitute title; nor is such claim within the purview of the statute. Its counterclaim is likewise without merit in this suit.

The trial court therefore properly struck its appearance and answer and counterclaim from the files, and the judgment of the trial court is therefore affirmed, and it is so ordered.

HANNA, O. J., and ROBERTS, J., concur.

STATE ex rel. MEYERS CO. v. RAYNOLDS,
Judge. (No. 1937.)
(Supreme Court of New Mexico. March 22, 1917.)

(Syllabus by the Court.)

1. CONSTITUTIONAL POWERS OF SUPREME COURT.

By section 3 of article 6 of our Constitution there is conferred upon the Supreme Court a superintending control over all inferior courts

and the power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction, and all other writs necessary or proper for the complete exercise of its jurisdiction.

2. APPEAL AND ERROR §946—DISCRETION OF TRIAL COURT—REVIEW—CONSTITUTIONAL PROVISIONS.

In all matters resting within the jurisdiction of an inferior court, and upon which it has acted in a judicial capacity, this court will refuse to review its proceedings or to revise its rulings in the absence of a showing of gross abuse of discretion, or inadequacy of remedy by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3812.]

Roberts, J., dissenting in part.

Original mandamus by the State of New Mexico, on relation of the Meyers Company, against Herbert F. Raynolds, Judge, etc. Rule discharged.

This is an action in mandamus, brought in this court on the relation of the Meyers Company, against Hon. Herbert F. Raynolds, district judge of the Second judicial district. The petition for the writ, without referring to formal matters, is predicated upon the following facts:

On April 8, 1914, a complaint was filed in the district court of Bernalillo county by Ernest Meyers against the Meyers Company. About a year later an amended complaint in the same cause was filed, which was subsequently demurred to; the demurrer being overruled. The cause of action sued on was predicated upon the fact that the Meyers Company had been carrying on its books for some time a credit in favor of Alex D. Shaw & Co., of New York, of \$501.88, which, it was claimed by Ernest Meyers was not a legal liability of the Meyers Company, and at the time when he sold his interest in said company he provided by a contract between himself and the purchasers of his interest that, whenever the Meyers Company should thereafter be released from liability to the said Shaw & Co. for the balance carried on the books, that such amount should be credited to himself, and that he should thereafter be entitled to demand and receive such amount, but that he should not be entitled to demand or receive payment thereof until the claim of said Shaw & Co. had been "legally extinguished or abandoned." The complaint filed by Mr. Meyers asserted that the claim had been legally extinguished, in that it was barred by the statute of limitations, and that Shaw & Co. had assigned "any claim it may have had" in the said sum to the plaintiff, Ernest Meyers, the plaintiff therefore seeking to recover the amount of this account, which had been carried on the books of Meyers & Co. as a balance due Shaw & Co.

Issue was joined by the filing of an answer, and the cause proceeded to trial before a jury. During the course of the trial Francis E. Wood, attorney for the Meyers Company, introduced in evidence a release

signed by Ernest Meyers in favor of Shaw & Co., and in this connection it is asserted that in so doing he made representations concerning the character of this release which amounted to fraud, and that at the time he had knowledge of the fact that the release was of no validity, force, or effect.

Thereafter, at the close of the defendant's evidence, Mr. Wood moved the court to direct a verdict in favor of the defendant on the following grounds: First, that the contract sued on was neither made nor ratified by the defendant; second, assuming that it had been, the claim of Shaw & Co. had never been legally discharged or abandoned, but, on the contrary, still existed as binding as it had ever been; third, that the complaint showed no indebtedness of the Meyers Company to the plaintiff; and, fourth, that the plaintiff's claim had been settled, satisfied, and discharged.

This motion was sustained by the court, and a verdict directed for the defendant. Plaintiff promptly filed a motion for a new trial, and later a supplemental motion, neither of which motions were acted upon at that term. A new trial was subsequently granted, but, the court's attention being directed to the question of jurisdiction to grant a new trial at that time, the order was set aside.

At the following term of the court the plaintiff filed a further motion, setting up that the defendant had procured the alleged release from Meyers by false and fraudulent representation, and that the plaintiff's attorney had offered it in evidence with full knowledge of such representations.

A motion to strike this latter motion was interposed, and the matter came on to be heard before the court upon the two motions on April 22, 1916, at which time the district court made an order setting aside the verdict and granting a new trial, upon the ground that the release offered in evidence was offered as proof of payment, and that such offer was a fraud upon the court, because defendant's attorney knew that the claim had not been actually paid. Thereafter the Meyers Company, through its counsel, Mr. E. R. Wright, interposed a motion to vacate and set aside the order setting aside the verdict and ordering a new trial, and for a judgment in favor of the defendant upon the verdict of the jury previously rendered, upon the following grounds: That the facts before the court and appearing from the record and papers on file in the case, and the facts occurring on trial thereof, as appears from the minutes of the official stenographer reporting the case, show that the court was compelled by the record and the testimony given upon such trial to direct a verdict in favor of the defendant; that the verdict was predicated upon the ground that the contract sued upon was not the

contract of the defendant, nor ratified nor adopted by it; that if it were the contract of the defendant it conclusively appeared from the record that the claim of Shaw & Co. against the Meyers Company had never been legally discharged or abandoned according to the terms of the contract annexed to the complaint; that the facts before the court when it set aside the verdict upon the ground of fraudulent imposition on the court were wholly insufficient in matter of law to warrant the court in finding that any fraud or imposition was practiced upon the court in said case; that the granting of said motion was a gross and unwarranted abuse of discretion and unauthorized exercise of power; that the court upon the facts before it had neither power nor discretion to set aside the verdict and award a new trial of said cause, and, even if the court misunderstood or was misled or deceived by the facts set forth in its opinion, the court would still be compelled upon the record as presented to have directed a verdict for this defendant upon other questions; and, lastly, because the complaint in said cause failed to state any cause of action.

The petition for the writ concludes with a general allegation that petitioner is without a speedy, adequate, or any remedy at law to compel the court to enter a judgment in its favor upon the verdict of the jury; that it is compelled without warrant or authority of law to submit to a further trial of the cause, the court being without right or discretion to grant the motion of the plaintiff for a new or further trial, and that the exercise of such asserted right by the court constitutes gross abuse of power or discretion, if any such discretion existed in the court; that the record in the case fails to show that the court was warranted on the facts in finding that any fraud or imposition had been practiced upon the court, for which reason the petitioner is entitled to the judgment upon the verdict of the jury.

It does not appear from the petition for the writ that the last-mentioned motion of petitioner, seeking the setting aside of the order setting aside the verdict of the jury, has ever been disposed of by the district court.

The return of the district judge, so far as it is necessary for us to give consideration thereto, denies that relator, the Meyers Company, is without speedy and adequate remedy at law, and sets up certain facts upon which the court predicated its conclusion that the directed verdict had been obtained by reason of the fraudulent conduct of attorney for the defendant, asserting that the said release was believed by the trial court to be a bona fide release and proof of the payment of said claim of plaintiff against the defendant, as it was so represented to be before the court and jury by the said Francis E. Wood, and that the district judge, relying upon such representations, directed the verdict re-

ferred to for the defendant, which was subsequently returned, and which was afterwards set aside upon the motion interposed by counsel for plaintiff, wherein it was charged that the said counsel for defendant had perpetrated fraud upon the court.

The honorable district judge, in the final paragraph of this return, asserts that the motion to vacate and set aside the instructed verdict was called for hearing before him as judge of the Second judicial district of New Mexico, within and for the county of Bernalillo, and that respondent, as judge of said court, and after considering the affidavits filed by the plaintiff, hearing the argument of counsel, and considering the brief filed by the respective parties and by Francis E. Wood individually, granted said motion to vacate and set aside the instructed verdict, and reinstated the cause upon the ground that the said verdict was procured through the deceit and fraud knowingly and intentionally practiced upon the court by the said Francis E. Wood as attorney for the defendant, all of which respondent alleges were judicial acts of the district court of the Second judicial district of New Mexico.

Renehan & Wright, of Santa Fé, and Mar-ron & Wood, of Albuquerque, for relator. H. C. Miller, of El Paso, Tex., for respondent.

HANNA, C. J. (after stating the facts as above). From the statement of facts it appears that relator seeks, by mandamus, to compel the district judge of the Second judicial district for the county of Bernalillo to sign and enter judgment in his favor upon the verdict of the jury rendered by said court's direction at the March, 1915, term of said court.

[1] By section 8 of article 6 of our Constitution there is conferred upon the Supreme Court a superintending control over all inferior courts and the power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction, and all other writs necessary or proper for the complete exercise of its jurisdiction.

[2] The Constitution of the state of Wisconsin contains a provision similar to that of ours, which has been construed by the Supreme Court of that state, some members of that court holding that the power of superintending control is unlimited and unrestrained; that it extends to judicial and ministerial errors; that it includes control of the proceedings of inferior courts; that said court may, upon writs framed by itself to meet the special purpose and in the nature of writs of mandamus, direct the vacation of orders erroneously made, may direct the inferior court to proceed in a legal and proper manner, and may control discretion of the inferior court, where that discretion has been abused, in the denial of legal rights. It has also been held by some of the judges that the power extends to correcting errors in

judicial proceedings where it is necessary to prevent injustice and the demand is urgent and will not admit of delay. *Bailey on Habeas Corpus*, p. 862; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

The leading case in Wisconsin upon the subject is *State ex rel. v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. To the last citation is appended an extensive note where numerous authorities are collected, considering the various phases of the question.

In this Wisconsin case it is held that under the superintending power given the Supreme Court by the Constitution that court may by mandamus compel an inferior court to perform a duty imposed by statute which is not discretionary in its nature, and may also compel action in cases where discretion is to be exercised, when it clearly appears such discretion has not been exercised, or that action has been taken in manifest disregard of duty or without semblance of legal power, and where it further appears that there is no remedy by appeal, or that such remedy, if existing, is entirely inadequate, and the exigency is of such an extreme nature as to justify the interposition of such extraordinary superintending power. See, also, *State v. Judge of Civil District Court*, 52 La. Ann. 1275, 27 South. 697, 51 L. R. A. 71; *People v. Court*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; *State ex rel. v. Judge, etc.*, 35 La. Ann. 873.

The foregoing statement from the Wisconsin case of *State ex rel. v. Johnson* is no more than a broad statement of the general principles governing the jurisdiction of the Supreme Court in the exercise of its superintending control. Like all other statements of general principles, the application thereof to concrete cases presents much difficulty. In most of the cases to which our attention has been directed the court has considered the matter from but one standpoint, and has applied but one portion of the rule which has been broadly stated *supra*. The Wisconsin cases referred to are of particular value in our consideration of this question, by reason of the fact that they cover the entire field of the question of superintending control by the superior over the inferior tribunal.

Later cases are collected in a case note found appended to the case of *State ex rel. Francis E. McGovern v. Orren T. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941.

From the statements of the general rule as announced in the Wisconsin case, *State v. Johnson*, *supra*, it is evident that this court in the exercise of its superintending control could by mandamus direct the district court to act, even though the right to obtain a review by appeal or writ of error existed, where such remedy is entirely inadequate, but in this case there is no attempt to do more than assert that the remedy by appeal is inadequate,

no showing as to the alleged inadequacy of the remedy being attempted or made.

For this reason we conclude that the circumstances do not justify the issuance of the writ applied for.

We do not understand that it is contended by relator that there was no jurisdiction in the district court to enter the order vacating the verdict of the jury. This seems to be admitted. A careful examination of the petition and the argument of counsel seems to indicate that the essential objection of relator is based upon the alleged absence of right or discretion in the district court to grant the motion of the plaintiff for a new or further trial, and that the exercise of such asserted right constitutes a gross abuse of such power or discretion.

The argument of counsel is primarily directed to the point that the action of Mr. Wood in introducing the evidence in question did not constitute a perpetration of fraud. It becomes a question of fact and is argued as such. Affidavits pro and con were introduced, all of which were before the court, and in his conclusion he has resolved this question against the contention of relator. In so doing he has doubtless exercised judicial discretion, and if such discretion was abused his action is subject to review by appeal.

We have examined the entire record before us carefully without finding the condition which is argued to exist by the relator, namely, that there was no evidence of fraud. Our conclusion is to the contrary.

In view of these conditions we are under the necessity of holding that there is no merit in relator's contention that a gross abuse of judicial discretion has been presented for our consideration. This being our opinion and conclusion, the rule must be discharged; and it is so ordered.

PARKER, J., concurs.

ROBERTS, J. (dissenting in part). If by the majority opinion it is the purpose to follow the rule adhered to in *Missouri (Smith & Keating Imp. Co. v. Wheeler)*, 27 Mo. App. 16, and cases cited), and to hold that, where a trial court improperly grants a new trial, the complaining party may protect his right by excepting to the action of the court, and taking no further part in the cause until final judgment is entered against him, appeal to this court, and secure a review of the action of the court in awarding a new trial, I can concur; for I believe the form of the remedy is not so important so long as a remedy is afforded. I do not agree that relief should be denied merely because the petitioner has failed to point out wherein the remedy by appeal is inadequate. The right to review the action of the court in setting aside the verdict by appeal either exists or does not exist. If there is no such right, the allega-

tion in the petition that "petitioner is without a speedy, adequate, or any, remedy at law," is sufficient to invoke the remedy, if it be true, as alleged, that no fraud or deception was practiced upon the court and no evidence of such fraud appears.

While thus concurring in the statement of the law applicable to this case, for the reason above stated, I cannot give my assent to the conclusion upon the facts as set forth in the majority opinion. In view of the rule of law announced by the majority of the court, no discussion of the facts was necessary, but because the opinion sets forth the views of the majority as to the facts, I believe I would be shirking my duty if I failed to set forth my view in regard thereto, formed from a careful and painstaking consideration of the record.

In this connection and before proceeding further, I desire to state that I do not entertain the slightest doubt as to the honesty of purpose and good faith of Judge Reynolds in setting aside the verdict, but I do believe that he entertained an erroneous view as to the propriety of Mr. Woods' action and motive in offering in evidence the release in question.

In order that my viewpoint may be more clearly understood, it is perhaps advisable that I should state the facts as I gather them from the record in this case.

In the year 1912 Ernest Meyers, of Albuquerque, owned all the capital stock in a corporation capitalized at \$30,000 engaged in the liquor business in that city. In the month of January he entered into a contract with Alphons Mathiew and Stephen E. Roehl by the terms of which he sold to said parties two-thirds of such capital stock, which, of course, gave them control and management of the company. The contract was in writing, and was carefully drawn by skillful lawyers, and contained extensive provisions specifically prescribing the rights and duties of the respective parties as stockholders in such company. Among other provisions the contract contained the following provision:

"The Meyers Company is carrying upon its books a credit to L. B. Shaw & Co. of New York amounting to \$501.88, which it is claimed by the party of the first part is not a legal liability of the Meyers Company, and that the Meyers Company will never be called upon by the said L. B. Shaw & Co. to pay the same. Now, whenever the Meyers Company shall be released from liability to the said L. B. Shaw & Co. for the said balance of \$501.88, the said credit shall be transferred on the books of the Meyers Company to the credit of the said party of the first part, and he shall be thereafter entitled to demand and receive the same; but the said party of the first part shall not be entitled to demand or receive payment of the said balance until the claim of the said L. B. Shaw & Co. therefor has been legally extinguished or abandoned."

Shaw & Co. neglected to bring suit on its claim or to press the same for payment until after the same had been barred in this state by the statute of limitation.

That Ernest Meyers disputed the validity of this claim is readily inferable from the above-quoted clause of the contract. For some time prior to March 29, 1913, Shaw & Co. had been pressing Meyers & Co., the corporation, and Ernest Meyers, as an individual, for payment, as shown by letters filed here as exhibits. The company refused to pay because it alleged that, if it should make payment, without its liability having been established, it would be liable to refund to Ernest Meyers the money which it held as indemnity. Apparently Ernest Meyers had become hostile to the corporation, and was desirous of securing the adjustment of matters so that he could secure the money returned under the contract, or have paid it to Shaw & Co., with whom he had become quite friendly.

On September 10, 1913, Meyers & Co., in reply to a letter from Shaw & Co. urging settlement, wrote them a letter, from which I quote the following:

"If you can secure us the proper release from Ernest Meyers, or if you can give us a bona fide legal bond which would hold us harmless in case any action was taken by Ernest Meyers, this question of liability might be considered."

On October 29th and November 7th the following letters were written by Shaw & Co. to Meyers & Co.

"New York, Oct. 29, 1913.

"The Meyers Co., Inc., Albuquerque, N. M.—
Dear Sirs: We are pleased to inclose you herewith copies of Mr. Ernest Meyers' letter to us of the 4th inst., our reply to him of the 9th inst., and his letter to us of the 21st inst. We are writing him to-day as per copy inclosed herewith, all of which are self-explanatory. We hope, therefore, to forward you this release within the course of the next ten days.

"We trust that with this various correspondence which has passed between Mr. Meyers and ourselves that you will be convinced that there is not as you state 'a nigger in the woodpile.' We appreciate, however, the position you take, and it is not only our desire to have the question settled financially, but we are just as anxious to convince you of our sincerity and good faith.

"We remain yours very truly."

"New York, Nov. 7, 1913.

"The Meyers Co., Inc., Albuquerque, N. M.—
Dear Sirs: We are pleased to inclose you herewith the release mentioned in our letter of the 29th ult. duly signed by Ernest Meyers.

"Trusting that you will give the matter your very kind attention, we remain yours very truly."

The release referred to was as follows:

"Albuquerque, N. M., Nov. 1, 1913.

"Whereas, by article 8 of the contract between the Meyers Company, Incorporated, of Albuquerque, N. M., and myself, dated January 1, 1912, said company is required to make a certain payment to me in the matter of Alex D. Shaw & Co., of New York, on the happening of certain events therein stated:

"Now, therefore, in consideration of the sum of one dollar and other valuable consideration to me in hand, receipt of which is hereby acknowledged, I hereby release said Meyers Company from any payment to me of the sum of \$501.88 or any part thereof mentioned in said article 8 as a credit to said Alex D. Shaw & Co.
[Signed] Ernest Meyers."

Apparently no reply was made by the Meyers Company to the Shaw & Co. letter inclosing the release. A subsequent letter was written on December 4, 1913, by Shaw & Co. to the Meyers Company, calling attention to the letter of November 7th, and asking for a remittance. On December 27, 1917, Meyers & Co. wrote Shaw & Co., stating that the matter had been placed in the hands of their attorneys, Messrs. Marron & Wood, and asking that any further communication regarding the matter be addressed to Marron & Wood. Whether any letters passed between Messrs. Marron & Wood, and Shaw & Co. is not apparent from the record, but no remittance was made by Meyers & Co. to Shaw & Co. Later, on the 21st day of April, 1914, Alex D. Shaw & Co. executed the following assignment, so-called, to Ernest Meyers:

"State of New York, County of New York.

"Know all men by these presents, we, Alex D. Shaw & Co., a copartnership, for and in consideration of the sum of one dollar in hand paid by Ernest Meyers, of Albuquerque, Bernalillo county, N. M., the receipt whereof is hereby acknowledged and confessed have assigned, set over and quitclaimed, and by these presents do hereby assign, set over, and quitclaim, unto the said Ernest Meyers, all our right, title, and interest, claim, or demand against the said Ernest Meyers or the Meyers Company, a corporation organized and existing under and by virtue of the laws of the state of New Mexico in and to the sum of five hundred one and 88/100 (\$501.88) dollars recently on deposit with the Meyers Company for the payment of certain account against the Meyers Company, Incorporated, for merchandise, which account against Alex D. Shaw & Company we are informed and believe has been barred by the statute of limitations."

This assignment was acknowledged before a notary public. Thereafter, in April, 1914, Ernest Meyers instituted a suit in the district court against the Meyers Company to recover the sum of \$501.88, in which complaint it was alleged that Ernest Meyers deposited this money with the Meyers Company, and that such sum should be left with said company until any claim that said Alex D. Shaw & Co. might have in and to said sum should be legally extinguished or abandoned and the said defendant released from liability to the said Alex D. Shaw & Co., and a copy of the agreement was attached to the complaint as an exhibit. The complaint further set up the assignment from Shaw & Co. to Ernest Meyers, attaching the same as an exhibit to the complaint. To the complaint Meyers & Co. filed a demurrer, one of the grounds set forth being that "it does not appear that the account against this defendant in favor of Alex D. Shaw & Co. as specified in paragraph 8 of said contract has ever been legally extinguished or abandoned." The demurrer was overruled, and an answer was filed. When the case was called for trial, Mr. Wood, attorney for Meyers & Co., objected to the introduction of any evidence on the ground that the complaint failed to state sufficient facts to constitute a cause of action, it being his contention that Shaw & Co. had no in-

terest whatever in the \$501.88 deposited with Meyers & Co., that Shaw & Co. had only a claim against the corporation, as such, and that the purported assignment attached as an exhibit to the complaint showed clearly that Shaw & Co. had not released or extinguished its original indebtedness against Meyers & Co., and that in this Shaw & Co. had undertaken only to release its interest in the fund on deposit in which it had no interest.

The answer pleaded payment. When Ernest Meyers was on the witness stand as a witness, testifying in his own behalf, Mr. Wood had him identify the release which he had executed to this fund and, which had reached the hands of the Meyers Company through Shaw & Co. He also exhibited to Ernest Meyers a copy of a letter written to him by Shaw & Co. requesting the release, which Meyers identified, and stated that he had in his files the original of the letter. On redirect examination Mr. Miller, the attorney for Ernest Meyers, asked him three or four questions about the release one of which was as to whether or not he had ever delivered the release to the Meyers Company, to which he replied that he had not.

Later Mr. Wood offered the release in evidence, to which Mr. Miller objected, on the ground that the release was not attached as an exhibit to the answer, but Mr. Wood replied that the answer pleaded payment, and that the release was evidence of it. Later Mr. Wood moved for an instructed verdict in favor of Meyers & Co. on four grounds: (1) That the contract was not made or ratified by the defendant; (2) because the Shaw & Co. claim was not legally discharged or abandoned; (3) in substance, because the complaint stated no cause of action that would support any judgment; (4) "upon the ground, further, that the evidence shows that whatever obligation did exist, either to the Meyers Company or to Alex D. Shaw & Co. on the part of the plaintiff, or to the plaintiff, has been fully settled, satisfied, and discharged."

The court sustained the motion for an instructed verdict, and in sustaining the same failed to set forth the ground upon which its action was predicated. On the 8d day of April, 1915, and within five days succeeding the trial, Mr. Miller, attorney for Ernest Meyers, filed a motion for a new trial in which he set forth three grounds: (1) Because the court erred in refusing to permit the plaintiff to show that it was the intention of the parties to the contract marked "Exhibit 1" to bind the corporation to the performance of the eighth paragraph of said agreement instead of creating a personal liability; (2) "because the court erred in holding that the defendant had not ratified the contract marked 'Exhibit 1';" (3) "because the court erred in directing a verdict in favor of the defendant and against the plaintiff." On the 22d day of June, 1915, Mr. Miller filed a supple-

mental motion for a new trial upon the following grounds:

"Because, subsequent to the trial of this cause plaintiff has discovered evidence which will establish the fact that the contract Exhibit A attached to the amended complaint was ratified by the Meyers Company, Incorporated, the defendant herein; that said evidence is new, material to the issue, and not cumulative, nor will be brought to impeach any evidence or testimony or any witness who has been heretofore examined in this cause; that the existence of this evidence was not known to the plaintiff, nor could he have discovered and produced the same by the use of reasonable or utmost diligence at the former trial; that said evidence appears in the affidavit of the plaintiff hereto attached marked 'Exhibit A' and made a part of this ground in support of the motion for new trial as fully as if incorporated herein."

Thereafter the court at the September term sustained the motion for a new trial and set aside the verdict. At the following March term, upon motion filed by Mr. Wood, the court set aside the order awarding a new trial, because, not having decided the motion therefor or continued the same under the statute, the court had no power to grant the motion. Thereafter, and almost a year after the trial, Mr. Miller, attorney for Ernest Meyers, for the first time filed a motion in court to set aside the verdict and award Ernest Meyers a new trial because of fraud and deceit practiced by Mr. Wood on the court in introducing the release from Ernest Meyers in evidence under the plea of payment. This motion was granted by the court on a finding that Mr. Wood had been guilty of intentionally and fraudulently deceiving the court by the introduction in evidence of this release.

I do not doubt the assertion of Judge Reynolds in his return that he was misled by this release, but I do not believe that Mr. Wood, by the introduction of the release in evidence, intended to deceive or mislead Judge Reynolds. I am satisfied that Mr. Miller attached no importance to this release at the time it was offered in evidence or at the time the motion was made for a directed verdict. Even when Ernest Meyers was on the stand he contented himself by simply asking him as to whether or not he had ever delivered the release to Meyers & Co., to which he replied that he had not. Mr. Meyers was Mr. Miller's client, and presumably Mr. Miller was fully conversant with all the facts of the case; at least Mr. Wood probably so assumed. Mr. Miller says in an affidavit filed in the case that he had been taken by surprise by the introduction of the release in evidence. If this be conceded to be true, certainly he knew of the facts when 60 days later he filed his supplemental motion for a new trial in which he fails to mention the release. Evidently Mr. Miller did not believe that the court directed a verdict because of this release, as in neither his original motion nor in his supplemental motion for a new trial which he filed does he refer in any manner to it, but bases his motion upon the assumption that the court directed a verdict

upon some one of the other grounds of the motion.

The complaint in the case did not state a cause of action, and certainly justified the action of the court in directing a verdict on that ground alone. It failed to show the legal extinguishment or abandonment of the Shaw & Co. claim against Meyers & Co., which must have been made to appear before any right existed on the part of Ernest Meyers to recover the money in question. That the complaint was thus defective and that the release from Shaw & Co. did not accomplish, legally, the purpose for which it was evidently intended, was recognized by Mr. Miller, because, when the court set aside the verdict upon his motion a year after the trial, he immediately filed an amended complaint in which he sets forth a release subsequently procured from Shaw & Co. which was in proper form and accomplished the purpose evidently intended by the first release of satisfying and discharging all claim against Meyers & Co., thereby enabling Ernest Meyers to take down the money.

It cannot be said that Mr. Wood improperly offered the release in evidence under the plea of payment because actual cash had not passed between the parties, if the release amounted to a legal and valid discharge of all claim which Ernest Meyers had in and to the money in question. The general rule in this regard is illustrated by the following quotations:

"In an action to recover an alleged unliquidated indebtedness, the defendant, under a plea of payment, is entitled to give proof of any valid agreement between the parties which would operate to discharge the debt." *McLaughlin v. Webster*, 141 N. Y. 76, 85 N. E. 1081.

"In an action upon a promissory note, held by the plaintiffs as collateral security, where the defendant sets up in his answer the defense of payment, he may give in evidence any facts which in law amount to a satisfaction of said note, as against such plaintiffs." *The Farmers' Bank v. Sherman*, 33 N. Y. 69.

"Under the general issue, or a general plea of payment, payment in anything that has been accepted, or received as payment may be proved. And in these cases it is a question for the jury whether what may have been given and received was a payment or not, in the particular case. * * * A plea of payment is not one of those in which it is necessary to set out all the facts, particularly to show that what has been done amounts in law to a payment; but it is sufficient to allege the fact of payment, and it is then determined by the evidence given, whether the fact is made out or not." *Louden v. Birt*, 4 Ind. 566.

"The weight of modern authority does not confine the evidence under plea of payment to money payments alone; the general rule seeming to favor the reception of evidence of anything tendered by the obligor and received by the obligee in satisfaction and discharge of the debt." 16 Pl. & Pr. 207.

To the same effect are the cases of *Walker v. Crawford*, 56 Ill. 444, 8 Am. Rep. 701, and *Richabaugh v. Dugan*, 7 Pa. 394.

Whether or not the release was given without consideration or whether, under the circumstances, Meyers & Co. were entitled to

avail themselves of the benefit of this release would present a question of law. It might be that the court could properly have held that the release was invalid, but certainly an attorney offering the release in evidence with the other party to the cause, represented by an attorney, all of whom were cognizant of the facts which induced the execution of the release, and the party executing the release being then a witness on the stand, would not, under such circumstances, intentionally and knowingly undertake to deceive the court trying the case.

Meyers & Co. had not agreed to pay Shaw & Co. should the release from Ernest Meyers be procured and forwarded to them. They had agreed in such event to take up the claim for consideration, but had refused, without such release, to even consider the matter of payment, because of the liability under the contract which would be assumed by them by so doing. I grant that Shaw & Co. probably assumed from the language in the letter that payment would be made in case the release was procured and sent to them. In the money referred to in paragraph 8 of the contract, as I have stated, Shaw & Co. had no interest, and this sum was not to be used, strictly speaking, to pay Shaw & Co., but only for the purpose of reimbursing Meyers & Co. should they legally be called upon to pay the Shaw claim. This money was the property of Ernest Meyers, subject to the agreement under which it was retained by the Meyers Company, if the corporation was bound by the contract, with which he could do as he pleased, in so far as his own title thereto was concerned. Shaw & Co. evidently procured from him for the benefit of the Meyers Company a release of his claim and interest therein. This release was forwarded to Meyers & Co. without condition or limitation, but simply upon the strength of a letter from Meyers & Co. that if they had such release "this question of liability might be considered."

In explaining the motives which actuated him in this regard Mr. Wood in his affidavit stated:

"It was apparent to me then * * * that the whole negotiations were covered by the written correspondence and, there was no promise or direct representation of the Meyers Company, outside of the correspondence, that the correspondence demonstrated what the parties had done, whatever might have been their intention to do. It was apparent to me from this correspondence that confronted, with the alternative of giving up one claim or the other, Shaw & Co. and Meyers, then acting together, he decided to surrender Meyers' claim and rest on Shaw & Co.'s claim, and that the consideration for the delivery of the release to the Meyers Company was its promise, not as the affidavit states, to pay Shaw & Co., but, instead, to give consideration to the original honesty and justice of their claim, and the only hint of anything further was that contained in former letters to the effect that, if the justice of Shaw & Co.'s claim were established, they would be willing to pay it, notwithstanding the statute of limitations. This seemed to me to be a sufficient legal considera-

tion for their action in giving the release. There was no thought or hint that any fraud was committed by Meyers Company on Shaw & Co. to get the release. I knew of none then nor did I suspect any. * * * As before stated, it was impossible to tell from the complaint the exact theory upon which the plaintiff was proceeding. It occurred to me as possible that he had no theory other than a confused idea that there were some rights there which a court could enforce. On the other hand, it was altogether possible that the complaint had been thus vaguely drawn purposely and with the object of taking advantage of any cause of action which might develop on the trial from the evidence and which the court might be asked by amendment to cover with the complaint. It therefore seemed necessary to fully protect by the proof the theory upon which I was conducting the defense. These theories were: First, that as this action was apparently proceeding on the contract that this was not the contract of Meyers Company, and was not enforceable against them; second, that at any rate Meyers had no claim against the Meyers Company until Shaw & Co.'s claim was legally dismissed, and, the allegations being merely that it was barred by the statute of limitations, that was plainly not a dismissal within the meaning of the contract which would give Meyers a cause of action against the Meyers Company; third, that the evidence plainly shows that Meyers and Shaw & Co., who were then acting together, had elected to give up and discharge the Meyers claim and rely upon the Shaw & Co. claim; fourth, that the complaint stated no cause of action, and therefore would not support any judgment. Upon this defense of action to rest on the Shaw & Co. claim and keep it alive the release was competent evidence, and, it seems to me, conclusive evidence, and was proven and offered in evidence for that purpose."

It may be that the court would not have admitted the release in evidence, or would have given no weight to it had the facts been fully disclosed, but, as I view the matter, looking at it from Mr. Wood's viewpoint, the duty did not rest upon him to attack the validity of the release which he was offering in evidence. It had been signed by Ernest Meyers and placed in the hands of his client, for the purpose, as Mr. Wood stated he believed, to clear the way for action on the Shaw & Co. claim, should Meyers & Co. conclude it was a just claim. With astute counsel sitting across the table from him, and with the party who executed the release upon the stand, and presented with the release for identification of his signature, I cannot see upon what theory Mr. Wood was required to assume the burden of bringing before the court the facts which induced the execution and delivery of the release, if, as he states, he entertained the honest belief that the release was valid and binding.

We may assume, for the purpose of argument, that the release was invalid, and that the court, had it been conversant with all the facts, would have so held. But certainly it should not be held that Mr. Wood purposely and knowingly perpetrated a fraud upon the court, if reasonable minds might differ as to whether the release was valid and binding.

Suppose, for example, that a lawyer should institute suit upon a promissory note for a

client, and the party sued has a valid defense to the note which will defeat a judgment if it is set up and established, and the lawyer knows the facts; he files the suit, and the defendant answers, defending upon some other ground; is the lawyer who files the suit guilty of fraud and deceit because he does not call the attention of the court and the party to the defense which will defeat the action?

I cannot give my assent to a rule which would subject attorneys to the risk of disbarment or of being adjudged guilty of deceit and fraud, because all the facts relative to a position assumed by an attorney or a proposition advanced by him are unknown to or are misunderstood by the court, either because the party advancing the proposition does not clearly explain the matter to the court, or because his adversary sits quietly by with full knowledge of all the facts and permits the court to labor under a misapprehension and possibly make a mistake. When Mr. Wood introduced this release in evidence it was the duty of Mr. Miller to have had his client fully explain to the court all the circumstances under which, and the purpose for which, the release was executed. When all these facts were laid before the court, then it would have been within the province of the court to have determined the legal effect of the release.

For these reasons, I cannot concur in the majority opinion.

DE BURG v. ARMENTA. (No. 1948.)

(Supreme Court of New Mexico. April 7, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 997(3)—DIRECTED VERDICT—QUESTIONS FOR REVIEW.

If at the close of the evidence in an action of law, each party requests the court to direct a verdict in his favor, and the court acts upon the invitation thus given and directs the jury to return a verdict for one of them and against the other, the only questions open on appeal are: First, was there substantial evidence supporting the conclusion of the court; and, second, did any error of law occur during the trial?

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4024.]

(Additional Syllabus by Editorial Staff.)

2. ADJOINING LANDOWNERS \S 90(2)—EJECTMENT—DIRECTED VERDICT—SUFFICIENCY OF EVIDENCE.

In ejectment a directed verdict for defendant on the ground that plaintiff's evidence failed to show any encroachment of defendant's house over the line of plaintiff's lot, and that the evidence of such line was vague and uncertain, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. \S 72.]

3. TRIAL \S 177 — REQUEST FOR DIRECTED VERDICT—EFFECT.

By their requests for a directed verdict the parties in effect request the court to find facts,

and are therefore concluded by its finding if supported by substantial evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 400.]

Appeal from District Court, Bernalillo County; H. W. Reynolds, Judge.

Action in ejectment by Dolores Otero de Burg against Manuela Armenta. Judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed.

The appellant, Dolores Otero de Burg, brought this action in ejectment in the district court of Bernalillo county against the defendant, Manuela Armenta, alleging that she was the owner of a certain lot, known as lot 26 in block 3 of the Perea addition to the city of Albuquerque, as the same is designated on a plat of that addition filed in the office of the probate clerk and recorder of Bernalillo county; that the defendant is the owner of lot 27 adjoining said lot 26 belonging to plaintiff, and that said defendant in constructing a house on said lot 27 encroached on plaintiff's lot 26 approximately 3 inches in width for the whole length of said lot on the division line between said lots 26 and 27. Plaintiff prays for a writ of possession, commanding the sheriff to deliver to plaintiff this strip of land, and for such other relief to which she may be entitled. The defendant answered, admitting ownership in lot 27 and putting in issue the ownership of lot 26, and further set up that after the purchase by her of the lot in question she procured a competent surveyor to lay out the line of the lot, and proceeded immediately to erect a house thereupon and within the borders of her lot as she believed them to be, and further alleged estoppel by pleading knowledge of the fact that she had erected the house upon her lot with the full knowledge of the plaintiff and her predecessors in title, without objection or protest against such erection and other matters of alleged estoppel which it is not necessary, at this time, to consider. After the taking of considerable evidence, at the close of the case both parties moved for an instructed verdict, whereupon the court instructed the jury for the defendant on the ground that the plaintiff failed to sufficiently identify the property for which suit was brought. From the verdict and judgment thereupon the plaintiff prosecutes this appeal.

H. B. Jamison, of Albuquerque, for appellant. Marron & Wood of Albuquerque, and A. B. Renehan, of Santa Fé, for appellee.

HANNA, C. J. (after stating the facts as above). [1] It has been well stated to be a familiar rule that if at the close of the evidence in an action at law, each party requests the court to direct a verdict in his favor, and the court acts upon the invitation thus given and directs the jury to return a verdict for one of them and against the other,

the only questions open on appeal are: First, was there substantial evidence supporting the conclusion of the court, and, second, did any error of law occur during the trial? *Beutell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; *Home Savings Bank of Des Moines, Iowa, v. Woodruff et al.*, 14 N. M. 502, 94 Pac. 957; *Empire State Cattle Co. v. A., T. & S. F. Ry. Co.*, 147 Fed. 457, 77 C. O. A. 601; *Western Express Co. v. United States*, 141 Fed. 28, 72 C. C. A. 516; *Phoenix Ins. Co. of Brooklyn, N. Y., v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *United States v. Bishop*, 125 Fed. 181, 60 C. C. A. 123; *Insurance Co. of North America v. Wisconsin Cent. Ry. Co.*, 134 Fed. 794, 67 C. C. A. 300; *McCormick v. National City Bank of Waco*, 142 Fed. 132, 73 C. C. A. 350, 6 Ann. Cas. 544; *West v. Roberts et al.*, 135 Fed. 350, 68 C. C. A. 58; *Bradley Timber Co. v. White et al.*, 121 Fed. 779, 58 C. C. A. 55; *Magone v. Origet*, 70 Fed. 778, 17 C. C. A. 363; *Merwin v. Magone*, 70 Fed. 776, 17 C. C. A. 361; *Chrystie et al. v. Foster*, 61 Fed. 551, 9 C. C. A. 606; *First National Bank of Albuquerque v. Stover*, 21 N. M. 453-471, 155 Pac. 905, L. R. A. 1916D, 1280; *Kirtz v. Peck*, 113 N. Y. 226, 21 N. E. 130; *Sutter v. Vanderveer*, 122 N. Y. 652, 25 N. E. 907.

[2] The only essential question presented is whether the trial court erred in instructing the jury to return a verdict for the defendant upon the ground of defendant's motion that the plaintiff's evidence failed to show or establish any encroachment of the defendant's house over the line of the plaintiff's lot; and upon the further ground that the evidence of such encroachment was vague, indefinite, and uncertain as to the extent thereof, and that such evidence was also vague, indefinite, and uncertain as to the lines of the defendant's lot, or as to whether the north line of the defendant's lot was at right angles with the street, or to what extent, if any, the defendant's house did, as a matter of fact, encroach upon or cross the line between the said lots, so that under the evidence, as given, it would be impossible to establish what portion, if any, of the lot is encroached upon by the defendant's house, and impossible to render a verdict upon which a definite judgment for a definite amount of land could be rendered; and upon the further ground that the plaintiff failed to establish the outlines of the property or lots in question by any competent evidence from which it could be determined where the lines were. As pointed out, the court sustained the motion of the defendant, assigning as reasons therefor failure of proof to sufficiently identify the property for which the suit was brought, and that the plaintiff had not proved her case. The question of the action of the trial court, therefore, hangs upon whether or not the line between lots 26 and 27 was established with that certainty required to show that the defendant had encroach-

ed upon the lot of plaintiff. It appears that plaintiff first offered proof of her ownership of lot 26 of block 3 of the Perea addition, consisting of portions of an abstract of title referring to a certain map of the addition.

The first witness called in behalf of the plaintiff was a surveyor, one J. G. Doane, who testified to recently making a survey of the lots in question; that he found that the block in which the lots were situated was eighteen hundredths of a foot short of the measurement given by the plat, which difference he apportioned among the other lots in proportion to their lengths as platted, and that this showed lots 25 and 26 to be 46.97 feet instead of 47 feet, as shown on the plat. According to his survey the foundation stones for the defendant's house at the northwest corner only projected 3 inches over the dividing line between the lots in question. It is argued here, upon evidence presented to the trial court, that this witness in fixing his lines arbitrarily apportioned to each of the lots in the block, in proportion to the space occupied by it on the west boundary of the block, its equivalent part of this shortage, instead of applying the shortage to the fractional lot as had been done by the person making the plat, and that had the shortage been all applied to the fractional lot, the measurement of this witness would have shown no encroachment. The testimony of this witness was in some respects somewhat impaired by the cross-examination, so that it cannot be clearly or definitely stated that his testimony conclusively showed an encroachment by the defendant on the lot of the plaintiff.

The next witness called for plaintiff was also a surveyor, Mr. James N. Gladding, who had made a survey of the property for the plaintiff, but in doing so had paid no attention to the position of the defendant's house, and was unable to say whether or not it encroached upon the line as found by him; his testimony being largely directed to the location of certain monuments and corners. An examination of the record discloses no particular value in his testimony so far as fixing the extent of any encroachment of the defendant on the lot of the plaintiff, and upon this question is apparently valueless.

Mr. John B. Burg, the husband of plaintiff, was the next witness for the plaintiff, and he testified to an encroachment on the lot of plaintiff by the house constructed by defendant, stating such encroachment to be 3 inches at the foundation and 7 inches at the eaves. He also testified that the line established by Mr. Gladding conformed to the line established by Mr. Doane.

The defendant was called in her own behalf, and testified that she had built her house some years before, and had at that time had her lot line located by a surveyor, who placed stakes upon the ground, and that her house was erected within the lines thus established.

The second witness for the defendant testified to the fact that he had helped build the house, and that it was constructed with reference to the stakes set by the surveyor, to which cords had been attached, the house being constructed within such lines thus established.

Nicolas Blea, the third witness, also testified to the same facts as testified to by the second witness.

Mr. Pitt Ross, a surveyor, was then called, who testified that he had located the lines of the defendant's property before she built her house, and had surveyed out the correct lines as he ascertained it from the map of the Perea addition, marking the line with the usual surveyor's stakes and nails, that stakes were put at the four corners of the lot, and that the house was built a month or so afterwards. Upon cross-examination of this last witness it was developed that on a partial survey made the day before he had found that the foundation extended an inch and a half north of the lot line. The manner of arriving at this conclusion, however, did not appear, and the witness designated his last survey as a partial survey. This was the condition of the evidence at the time of the motion interposed by both parties for an instructed verdict.

The trial court was evidently more impressed by the fact that the plaintiff had failed to prove an encroachment by the defendant upon the lot of plaintiff, and at least considerable doubt had been thrown upon the case of plaintiff by the testimony of witnesses for the defendant.

[3] By the request for a directed verdict the parties, in effect, requested the court to find the facts, and are therefore concluded by the finding made by the court if the same be supported by substantial evidence. The defendant in this case had procured a survey to be made, and she and two other witnesses testified to the fact that the house was constructed within the lines of that survey. The trial court evidently agreed with these witnesses, and found against the contention of plaintiff, for which reason it would appear that the case should be affirmed; and it is so ordered.

PARKER, J., concurs. ROBERTS, J., did not participate.

GARBER v. SPRAY.

(Supreme Court of Wyoming. May 7, 1917.)

1. APPEAL AND ERROR §1078(1)—REVIEW—WAIVER OF OBJECTIONS—GROUNDS.

An alleged defect of parties plaintiff not referred to in brief, except in stating questions presented in justice court upon motion to set aside judgment, will be treated as waived on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

2. PARTIES §75(3)—WAIVER OF DEFECTS—PARTIES PLAINTIFF.

Where objection to defect of parties plaintiff is not made until filing of motion to set aside judgment, the error, if any, is waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 167.]

3. JUSTICES OF THE PEACE §91(1)—PLEADINGS—REQUISITES IN GENERAL.

A petition in justice court, informing defendant of nature of plaintiff's claim, of grounds relied on to support action, and so explicit that a judgment thereon will bar another suit for same cause of action, is sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-309, 323.]

4. JUSTICES OF THE PEACE §91(6)—TRESPASSING ANIMALS—PETITION—SUFFICIENCY.

In an action in justice court to recover damages for trespass of cattle, petition held sufficient to support judgment against objection after entry that it did not allege or state facts showing that defendant's alleged acts were unlawful or wrongful.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 321.]

5. JUSTICES OF THE PEACE §119(1)—JUDGMENTS—FINDINGS—NECESSITY.

A judgment of a justice court is generally held sufficient without formal statement of a finding, where it shows a determination of cause upon the evidence, thereby indicating, upon a liberal construction, at least a general finding.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 373, 376.]

6. JUSTICES OF THE PEACE §130—JUDGMENT—CONSTRUCTION.

Justice court judgments are to be liberally construed with more regard to substance than form.

7. JUSTICES OF THE PEACE §114—JUDGMENT—FINDINGS TO SUPPORT—SUFFICIENCY.

A finding of fact by justice of the peace on only controverted point in evidence is sufficient to support a judgment; it being unnecessary to make findings as to matters admitted or not denied in pleadings.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 366.]

8. TRIAL §388(1)—FINDINGS—NECESSITY.

A judgment without findings is not void, but merely irregular or erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 908.]

9. JUSTICES OF THE PEACE §44(9)—JURISDICTION—AMOUNT IN CONTROVERSY.

In a suit to recover \$200 as damage to one-half interest in crop of rye, justice court has jurisdiction, although the owner of the other half interest might sue; defect of parties plaintiff having been waived.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 168, 169.]

Error to District Court, Platte County; William C. Mentzer, Judge.

Action in justice court by Verna Spray against L. A. Garber. From a judgment of district court affirming judgment of the justice for plaintiff, defendant brings error. Affirmed.

Kinhead & Henderson, of Cheyenne, for plaintiff in error. Oscar O. Natwick, of Wheatland, and Marion A. Kline, of Cheyenne, for defendant in error.

POTTER, C. J. This case is here on error for the review of a judgment of the district court in and for Platte county, affirming on petition in error the judgment of a justice of the peace. The action was commenced before the justice of the peace by the defendant in error, Verna Spray, the summons reciting that the plaintiff—

"sues on a civil action to recover the sum of \$200, same being for damages done to a crop of rye owned by plaintiff by reason of trespass thereon by defendant's cattle."

Both parties appeared at the time specified in the summons, and the plaintiff thereupon filed a written petition, alleging that:

She is, and at all times during the year 1915 was, the owner of a certain described tract of land in Platte county, and a one-half interest in a crop of rye growing thereon. That the defendant is the owner of a large number of range cattle, and that "On the 29th day of May, 1915, the defendant took down the wires and broke down the fence which inclosed the field in which said rye was growing, and drove a large number of his cattle into said field of rye, and left said cattle for many hours in said field of rye to eat and graze on the same, and at many other times during the year of A. D. 1915 the said defendant took down the wires of said fence and tore down said fence and drove his cattle upon said field of rye, and left them there to eat and graze on the same, until said field of rye was completely destroyed. That plaintiff's one-half interest in said rye was worth the reasonable sum of \$200 and upwards."

There was a prayer for judgment for \$200 and costs. The plaintiff was represented at the trial in the justice's court by an attorney, and defendant was present, but without an attorney. After the examination of witnesses for the plaintiff and defendant, respectively, a jury having been waived, and all the evidence had been received, judgment was rendered in favor of the plaintiff for \$150 damages, the finding and judgment being entered in the docket as follows:

"This court found upon the evidence given in the above case that the L. A. Garber, defendant, cattle had damaged the Verna Spray, plaintiff, field of rye; therefore this court rendered judgment for damage against the defendant and in favor of plaintiff for \$150 and cost of this action."

The case was tried and judgment rendered on September 24, 1915, and on the fifth day thereafter the defendant filed with the justice a motion to set aside the judgment, stating as grounds therefor that the amount in controversy was \$400, and therefore beyond the jurisdiction of the justice's court, that there was a defect of parties plaintiff, and that the petition and finding were each insufficient to support the judgment. That motion was overruled, to which an exception was taken, and a bill of exceptions was allowed and signed by the justice, but not embracing any of the evidence, and thereupon the plaintiff filed a petition in error in the district court, praying that upon the record the judgment be reversed and the action dismissed. Upon a hearing in that court it was found that no prejudicial error had been committed, and the judgment was affirmed, to

which the defendant, plaintiff in error in that court and this, excepted.

[1, 2] The points involved will be considered in the order in which they are discussed in the brief of plaintiff in error. The alleged defect of parties plaintiff does not seem to be relied on here, for it is not referred to in said brief, except in stating the questions presented in the justice's court upon the motion to set aside the judgment, and may therefore be treated as waived. But the defect, if any, was waived by failure to make the objection at the proper time and in the proper manner. *Gilland v. U. P. Ry. Co.*, 6 Wyo. 185, 43 Pac. 508; 2 *Waterman on Trespass*, § 461.

[3, 4] There was no demurrer to the petition, nor was it otherwise objected to before trial or judgment, or until the filing of the motion to set aside the judgment, but it is contended that it falls, in substance, to state a cause of action, and is therefore insufficient to support the judgment, for the reason that it does not allege or state facts to show that defendant's alleged acts were unlawful or wrongful. If it should be conceded that upon a timely and proper objection, or even after verdict and judgment the petition would be insufficient if filed in a cause commenced in the district court, it is not clear that it might properly be held to be insufficient under the rule for determining the sufficiency of pleadings in a justice's court. Strict formality and accuracy are not required of pleadings in such courts, and mere technical defects are to be disregarded, especially when the objection is not timely made; but, though it is essential that they be sufficient in substance to form an issue, and that a declaration, complaint, or petition, particularly when in writing, shall state the material facts constituting the cause of action, the general rule is that in such courts it is only necessary that the pleadings shall clearly apprise the opposite party of the grounds relied on to support or defeat the action, and that the petition or complaint shall contain enough of substance to inform the defendant of the nature of plaintiff's claim, and be so explicit that a judgment thereon will bar another suit for the same cause of action. 12 *Ency. Pl. & Pr.* 696-707; 24 *Cyc.* 555-560; *Bump v. McGrannahan* (Ind. App.) 111 N. E. 640; *Flannigan v. Nash*, 190 Mo. App. 578, 176 S. W. 248; *Connelly v. Parrish*, 189 Mo. App. 1, 176 S. W. 546; *Prest-O-Lite Co. v. Widrig*, 179 Mich. 230, 146 N. W. 178. This Michigan case is cited by the plaintiff in error, and it holds a declaration for obtaining money under misrepresentation, fraud, and deceit in a justice's court to be insufficient, but, after having stated the general rule substantially as above, the court said:

"The object of a declaration is fully accomplished when the defendant is fully apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial"

—and further:

"It is true that it has been held by this court that almost any declaration must be held sufficient, in justice's court, which indicates the general nature of the plaintiff's claim. It was so held in *Daniels v. Clegg*, 28 Mich. 32. There the 'plaintiff declared in trespass to his damage \$100 for injury to buggy and horse.' But, in the declaration which we are considering, the plaintiff by its declaration simply says: 'You have obtained money by misrepresentation, fraud, and deceit to my damage.' It is not even alleged what the misrepresentation was, nor what the fraud and deceit was. Under such a pleading, the plaintiff could shift position at will, and defendant never could know what he had to meet."

And in that case the declaration had been objected to before the introduction of evidence by motion to strike it from the files as too vague, indefinite, and uncertain and stating no cause of action. And the same question was raised by a motion to direct a verdict. Applying the rule aforesaid as to pleadings in justice's courts, which we think is generally accepted as the true rule, there seems to be no reasonable ground for holding that the defendant could have misapprehended the nature of plaintiff's claim, or that he was not fully informed by the petition of the nature of the claim, or that the petition was not sufficiently explicit to render a judgment thereon a bar to another suit for the same cause of action.

But the petition would have been sufficient in an action brought in a higher court having jurisdiction, as against an objection made for the first time after verdict or judgment. The words "wrongfully and unlawfully" are used in a petition in an action for trespass in place of the common-law allegation "with force and arms." 2 *Kinlead's Code Pl.* § 1181. The words "with force and arms" as formerly employed in pleading at common law were the only words, except that it was against the peace, used to describe the act as wrongful or unlawful, aside from charging that the defendant broke and entered plaintiff's close, and, in a case like this, the facts as to destroying the herbage. *Crosby v. Wadsworth*, 6 East, 602, 102 Eng. Rep. Reprint, 1419; 1 *Chitty on Pl.* (16th Am. Ed.) 147, 402; *Stephen on Pleading*, 39; *Andrew's Stephen's Pl.* (2d Ed.) § 94, p. 161; *Herndon v. Bartlett*, 4 Port. (Ala.) 481. In the case last cited the court said:

"The court has omitted to notice the argument of counsel, on the omission of the word 'unlawfully.' In both counts of the declaration it is alleged that the taking was with force and arms, and we should be disposed to consider this a sufficient allegation of unlawfulness did we deem it was necessary to insert it in form or substance in the declaration."

And the customary form of averring that the act was done "with force and arms" or "against the peace," or both, was not regarded as matter of substance, but the omission to so allege was a mere formal defect, which could be taken advantage of only by special demurrer, in the absence of which it was

cured by verdict. 1 *Chitty on Pl.* 402; 2 *Waterman on Trespass*, § 991; 21 *Ency. Pl. & Pr.* 817; *Wilcox v. Conway*, 115 Mass. 561; *Prouty v. Mather*, 49 Vt. 415; *Griffin v. Gilbert*, 28 Conn. 493; *Moll v. Sanitary District*, 228 Ill. 633, 81 N. E. 1147; 38 *Cyc.* 1102. That is the rule also as to the words "wrongfully" and "unlawfully," and no special form of stating that the act was wrongful is required, but it is sufficient if the wrong can be inferred from the facts stated. 38 *Cyc.* 1081; 21 *Ency. Pl. & Pr.* 818; *Clague v. Hodgson*, 16 Minn. (Gil. 291) 329; *Pomeroy v. M. & C. R. Co.*, 16 Wis. 640; *Wilkinson v. Applegate*, 64 Ind. 98; *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679.

In *Chitty on Pleading*, above cited, after stating that the only mode of taking advantage of the omission of the words "with force and arms" is by special demurrer, the author adds that in one case Lord Holt had said that the words might be omitted. And the words are omitted in the form for a declaration in trespass to land given in *Chitty* (16th Am. Ed. vol. 2, pp. 615, 617) under the Common-Law Procedure Act of 1852. By that act special demurrers were abolished, and only statements necessary to be proved were essential in pleading. The action of trespass at common law was for an injury committed with violence either actual or implied, and the violence would be implied where the injury was direct and immediate, and committed on the person or tangible and corporeal property of the plaintiff; as where one entered wrongfully, though peaceably upon plaintiff's land. *Gould on Pl.* (6th Ed.) p. 40; 1 *Waterman on Trespass*, § 2. It might not be difficult to infer the wrong in this case from the averment that defendant, after taking down the wires and breaking the fence, drove his cattle into the field of rye, alleged to have been owned in part by the plaintiff, and left them there to graze thereon, especially in view of the principle, seeming to be well settled, that matters in justification of the act charged, such as license, legal authority, and the like, must be specially pleaded. 38 *Cyc.* 1090, 1091; 2 *Waterman on Trespass*, §§ 1005, 1006; *McRae v. Blakeley*, *supra*; *Wilkinson v. Applegate*, *supra*; *Moll v. Sanitary District*, *supra*. But we need not decide that question, for we think it clear that as against the objection aforesaid after judgment the petition must be held sufficient.

The contention that the finding is insufficient to support the judgment is based, as we understand, upon the theory that the fact, as found by the justice, that the defendant's cattle had damaged the plaintiff's field of rye is not enough to establish the liability of the defendant for the alleged trespass; and it is argued that, where there are special findings of facts, though not requested by either party, there must be a finding of every essential fact to support the judgment or the findings will be insufficient.

[5, 6] A much less degree of technicality and formality in the form of judgment, as well as in other matters of procedure, is required in justice courts than in courts of record. 1 Black on Judgments, § 115; 1 Freeman on Judg. (4th Ed.) § 53. And a judgment of such a court is generally held sufficient without the formal statement of a finding, where it shows a determination of the cause upon the evidence, thereby indicating, upon a liberal construction, at least a general finding. Thus the following was held a valid entry of judgment in justice court:

"After hearing the evidence and law, judgment was given for plaintiff for \$20 against Charles Karcher, and costs, \$13.50, making in all \$33.50." Hunter v. Karcher, 8 S. D. 554, 67 N. W. 621.

In McGeehan v. Bedford, 128 Wis. 167, 107 N. W. 296, the following seems to have been regarded as sufficient:

"Case called. Plaintiff present by H. O. Drier, his attorney, who filed a written complaint showing an indebtedness of \$90, besides the interest to the amount of \$6.30, of which no part has been paid. Court waited one hour. Defendant did not appear. It is therefore ordered and adjudged that the plaintiff shall have and recover of the defendant the sum of \$96.30, principal and interest, besides the costs."

And it was held in that case that the omission to state on the docket the fact that evidence was given to support the judgment did not establish the invalidity of the judgment, since the statute did not require the fact to be entered on the docket. In Nebraska the following was held sufficient, it being preceded by a recital showing the examination of witnesses and submission of the case to the court:

"After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the sum of," etc. Rhodes v. Thomas, 31 Neb. 848, 48 N. W. 886.

And similar judgments in justice courts have been held sufficient in several other cases. Michaut v. McCart, 55 Neb. 654, 75 N. W. 1106; Coad v. Read, 48 Neb. 40, 66 N. W. 1002; Haag v. Burns, 22 S. D. 51, 115 N. W. 104; Hughes v. Chicago, I. & L. Ry. Co., 50 Ind. App. 278, 98 N. E. 317. These cases are referred to merely to show the application of the principle that justice court judgments are to be liberally construed, and with more regard to substance than to form.

[7, 8] But it does not necessarily follow from the contention that the special finding aforesaid omits some facts necessary to establish defendant's liability that such finding is insufficient upon the issues in the case and the evidence to support the judgment, even if it should be conceded that the rules as to special findings in courts of record are applicable with equal force to trials in justice courts, a question we do not decide. For all that the record discloses, the only controverted point in the evidence may have been the fact mentioned in the finding. And the defendant was not entitled to a further

or any special finding of facts, nor was any necessary, for the reason that there was no answer or other pleading by the defendant, so far as the record shows, and therefore the allegations of the petition were not denied, and there was no affirmative defense to be considered. It is said in 38 Cyc. at page 1973, that it is not necessary for the court to make findings as to matters admitted or not denied in the pleadings, or otherwise agreed upon; and that seems to be the well-settled rule. Hawkes v. Dodge County Mut. Ins. Co., 11 Wis. 196; Pomeroy v. Gregory, 66 Cal. 572, 6 Pac. 492; Carlisle's Adm'rs v. Mulhern, 19 Mo. 57; Goodyear Rubber Co. v. Eureka, 135 Cal. 613, 67 Pac. 1043; State v. Rocky Mountain B. T. Co., 27 Mont. 394, 71 Pac. 311; Allen v. Hollingshead, 155 Ind. 178, 57 N. E. 917; Anderson v. Alseth, 8 S. D. 242, 66 N. W. 320; Humboldt Mill. Co. v. Northwest Pac. Ry. Co., 166 Cal. 175, 135 Pac. 503; Watson v. Lawson, 166 Cal. 235, 135 Pac. 961; Sutherland v. Bloomer, 50 Or. 398, 93 Pac. 135. A judgment without findings is not void, but merely irregular or erroneous (1 Black on Judgments, § 185; 1 Freeman on Judg. [4th Ed.] § 185; Sch. Dist. v. Western Tube Co., 13 Wyo. 304, 80 Pac. 155), and a reversal of the judgment in this case on that ground, the same not being jurisdictional, would not result in dismissing the action, but in the cause being retained in the district court for trial and final judgment as in cases of appeal (Comp. Stat. 1910, § 5132), and the trial would be de novo upon the pleadings and issues filed and made in the justice court. Id. § 5264. Hence it is difficult to see how the defendant could have been prejudiced by the failure to make further findings.

This question has been considered without passing on the points suggested by counsel for defendant in error that, no exception having been taken to the finding or judgment, the plaintiff in error is not in a position to complain of the finding as defective or insufficient, and that the exception to the overruling of the motion to set aside the judgment does not entitle him to raise the question for the reason that such a motion is unauthorized in justice court where a trial has occurred upon the appearance of both parties.

[9] The contention that the amount involved was beyond the jurisdiction of the justice, which is limited in civil actions by Constitution and statute to cases where the amount in controversy, exclusive of costs, does not exceed \$200, cannot be sustained. The plaintiff sued to recover the damage to her one-half interest in the crop of rye which was alleged to be \$200, and thus within the justice's jurisdiction. Defect of parties having been waived, she was entitled to recover, upon proper proof, the damage to her interest, and she was awarded the sum of \$150. Having sued only for the damage to her interest,

we think the amount in controversy was the amount claimed, and within the jurisdiction of the justice court. The fact that the owner of the other half interest might sue and recover the damage to his interest does not, we think, affect the question.

We conclude, therefore, that the district court did not err in affirming the judgment of the justice of the peace, and that its said judgment must be affirmed. It will be so ordered.

BEARD, J., concurs. SCOTT, J., did not sit.

WOOD et al. v. WOOD et al. (No. 889.)
(Supreme Court of Wyoming. May 7, 1917.)

1. WILLS \Leftrightarrow 400 — CONTEST — REVIEW — PRESUMPTION.

On appeal in a will case it may be assumed that the testimony of petitioner and subscribing witnesses referred to in the judgment admitting the will to probate was merely the formal proof usually taken of a will offered for probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873.]

2. WILLS \Leftrightarrow 400 — CONTEST — REVIEW — PRESUMPTION.

In view of Comp. St. 1910, § 5441, prescribing that where there is a contest of a will the proofs of the subscribing witnesses shall be reduced to writing and filed with the papers in the case, whether the will be sustained or rejected, where the bill of exceptions on appeal from a judgment admitting the will to probate does not state whether proofs of the subscribing witnesses were offered in evidence at the trial or whether the subscribing witnesses were then sworn and examined, but the bill of exceptions does not purport to contain all of the evidence, the court may assume that the will was produced, and its due execution and competency of testator sufficiently proved by the subscribing witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873.]

3. STATUTES \Leftrightarrow 228 — CONSTRUCTION — STATUTE COPIED FROM ANOTHER STATE — DECISIONS OF OTHER STATE.

As Comp. St. 1910, § 5440, regarding manner of contesting wills and proof of insanity and undue influence affecting the validity of a will was taken from the Code of California, and contains substantially the same provisions, the California decisions construing their statute on the question of burden of proof ought to be accepted and followed, and are at least strongly persuasive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307.]

4. WILLS \Leftrightarrow 52(1), 163(1) — ACTION TO CONTEST — EVIDENCE — BURDEN OF PROOF — STATUTES.

Comp. St. 1910, § 5394 (Laws 1915, c. 149, § 1), provides that any person of full age and sound mind may will his property. Section 5418 provides for the admission of a will to probate in the absence of contest on the testimony of one of the subscribing witnesses that the will was duly executed, and that the testator was of sound mind. Section 5444 provides that in case of contest if the court is satisfied that the will was duly executed and that the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, or undue influence, a certificate of the proof and

the facts found signed by the judge and attested by the seal of the court must be attached to the will. Section 5440 provides that a contestant must file written grounds of opposition to probate, serving a copy on the petitioner and others interested, any one or more of whom may demur thereto on any of the grounds of demurrer provided under the law, or the petitioner and others may jointly or separately answer the contestant's grounds, traversing or otherwise avoiding the objection, and that when demurrer be filed or issue of fact raised by the pleadings involving the validity of the will, the case entered regularly for trial and issues tried and determined by the court. *Held*, that while it is necessary for the proponent in the first instance to establish a prima facie case by the formal proofs of the subscribing witnesses, in view of the presumption in favor of the sanity of the testator, the burden is upon the contestant to show by a preponderance of the evidence that the testator was not of sound mind at the time the will was executed or that he was so influenced by others that he was not a free agent in making the will, unless the case be brought within the exception where previous incompetency is sufficiently shown to change the burden.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101, 103, 104, 108, 109, 383, 389, 399, 400.]

5. WILLS \Leftrightarrow 329(4) — ACTION TO CONTEST — INSTRUCTIONS.

In an action to contest a will, an instruction that insanity or unsoundness of mind must be established with "reasonable certainty" was explained, if not limited, by the statement immediately following that the evidence of insanity should preponderate or the will be taken as valid, and another instruction on which the verdict is made to depend upon the preponderance of the evidence, and a later instruction explaining that preponderance of the evidence does not mean the greater number of witnesses, but the weight and value given the evidence of the witnesses by the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 777.]

6. TRIAL \Leftrightarrow 295(1) — INSTRUCTIONS — CONSTRUCTION AS WHOLE.

The effect of the instructions is not to be determined alone upon a single statement to which exception is taken, but the charge must be taken as a whole in determining its natural effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

7. APPEAL AND ERROR \Leftrightarrow 701(1) — REVIEW — STATEMENT.

In action to contest a will in the absence of a statement of the evidence to enable the court to determine whether a statement "that uncertainty or unsoundness of mind must be established with reasonable certainty" was in fact prejudicial, the appellate court will not order a reversal on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2933.]

8. APPEAL AND ERROR \Leftrightarrow 701(1) — REVIEW — STATEMENT.

In the absence of evidence, the appellate court will not order a reversal on the ground that instructions were argumentative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2933.]

9. APPEAL AND ERROR \Leftrightarrow 701(1) — REVIEW — STATEMENT.

In the absence of the evidence, the appellate court will not order a reversal on the ground that one of the instructions declares that influence is not ordinarily considered undue which

arises out of "flattery," that being mentioned as one of several things that might influence testator without being undue, viz., sympathy, kindness, attachment, or affection, gratitude for past services, desire of gratifying another's wishes or of relieving distress, claims of kindred and family, love, esteem, social relations, prejudice, passive encouragement of resentment and flattery, since even if erroneous the prejudicial effect would largely depend upon the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2933.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Petition by Daniel J. Wood and others for the probate of the will of Levi Wood, deceased. From a decree for the proponents admitting the will to probate, and appointing the named proponent executor, the contestants N. D. Wood and others bring error. Affirmed.

Burgess & Kutcher, of Sheridan, for plaintiffs in error. La Fleiche & Diefenderfer and Metz & Sackett, all of Sheridan, for defendants in error.

POTTER, C. J. This is a will contest. There was a verdict and judgment sustaining the will, and the case is here on error. Levi Wood, a resident of the county of Sheridan, in this state, died on the 7th day of November, 1914, at an advanced age, 86 years as we understand, leaving an estate in said county consisting of real and personal property, and a will dated and executed on December 30, 1902. That will was filed in the office of the clerk of the district court in said county and a petition for its probate was filed therein by Daniel J. Wood, a son of the testator and named in said will as the executor. By the said will one-fourth of the decedent's estate was devised and bequeathed to his said son Daniel J. Wood, one-fourth to his son Thompson Wood, one-fourth to certain grandchildren named in the will, in equal shares, and one-fourth to certain other grandchildren therein named, in equal shares. The petition for the probate of the will alleged that at the time the will was executed the testator was of the age of 74 years or thereabouts, and was of sound and disposing mind, and not acting under restraint, duress, menace, fraud, or undue influence, and in every respect competent, by last will, to dispose of all his estate. Two of the testator's sons, Neri D. Wood and Frank J. Wood, filed objections to the probate, alleging that the testator was of unsound mind and mentally incompetent to make the will when it was made and executed, and that it was executed as the result of undue influence on the part of Daniel J. Wood and his wife. Thereafter another son, George B. Wood, was allowed to become a party to said objections. Amended objections having been filed, an answer was filed by the proponent of the will denying the averments of the contestants as to unsoundness of mind of the testator and undue influence, and alleging that

at the time the will was executed said testator was of sound mind, and that the same was duly executed, attested, and witnessed in the manner and form as therein recited, and as the same purports to have been executed and witnessed.

A jury trial was had upon the issues thus framed, resulting in a verdict for the proponent and against the contestants upon all the issues, and finding that the instrument offered for probate is the last will and testament of Levi Wood, deceased. Special findings were returned with the verdict in answer to two questions submitted by the court as follows:

"First. Was the testator, Levi Wood, of sound or unsound mind at the time he signed the will in question? Ans. Sound mind.

"Second. Was the will which was signed by Levi Wood, or any provision therein, the result of undue influence by Dan Wood or his wife over the testator? Ans. No."

Thereupon a judgment was entered overruling the objections to the probate of the will and ordering its admission to probate, and that the proponent, Daniel J. Wood, be appointed executor; and thereupon letters testamentary were issued appointing said Daniel J. Wood as such executor.

The judgment recites as to the preliminary proceedings that the cause having come on regularly to be heard on the petition of Daniel J. Wood for the admission to probate of a certain instrument of writing purporting to be the last will and testament of Levi Wood, deceased, and for the issuance of letters testamentary to the petitioner, and it appearing that objections to the probate of said will had been filed by Neri Wood and Frank J. Wood, the hearing was continued, and thereafter on application George B. Wood was permitted to become a party to said objections, and the court permitted amended objections to be filed by said contestants, and on July 16, 1915, a time theretofore set by the court, due and proper notice having been theretofore published, as required by law, the court heard the testimony of the petitioner, which was reduced to writing and filed in said cause, and the testimony of the two subscribing witnesses to the will, whose testimony was also reduced to writing and filed in said cause,

"and it appearing to the court from such testimony that said instrument in writing is the last will and testament of said Levi Wood, deceased, and that it was executed in all particulars as required by law, and that said testator, at the time of the execution of said will, was of sound and disposing mind and not acting under duress, menace, fraud, or undue influence, and the court, being satisfied with such proof, and that a prima facie case had been made out in support of said will, reserved his decision thereon, and directed that the trial of the amended objections interposed as aforesaid proceed, whereupon, on said 16th day of July, A. D. 1915, the same being one of the days of the regular June, A. D. 1915, term of said court, the said objectors and contestants, being present in person and by attorneys, and the said proponent and the heirs and devisees named in said will, being present in person and by counsel, a hearing on the issues

raised by said amended objections and the answer thereto, was proceeded with before a jury."

Following a recital of the verdict and referring thereto, it is stated in the judgment:

"And the court being fully advised in the premises finds that said verdict should be adopted by the court as the findings of the court in said matter, and the court does further find from a consideration of all the evidence offered at the hearing of said objections that the instrument offered for probate is the last will and testament of Levi Wood, deceased, and that the same is entitled to be admitted to probate as the last will and testament of Levi Wood, deceased."

[1] We think it proper to assume that the testimony of the petitioner and subscribing witnesses referred to in the judgment recital aforesaid was merely the formal proof usually taken of a will offered for probate. The statute prescribes that where there is a contest the proofs of the subscribing witnesses shall be reduced to writing and filed with the papers in the case, whether the will be sustained or rejected. Comp. Stat. 1910, § 5441. Such proofs appear on file in this case, together with the formal testimony of the proponent, and from them it appears that each of the subscribing witnesses testified to the necessary facts to show a due execution of the will, and that each also testified that the testator, at the time the will was executed, was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence; and it was stated also in said written testimony of the proponent that the decedent was of sound and disposing mind when the will was executed.

[2] The bill of exceptions does not state whether these proofs were offered in evidence at the trial or whether the subscribing witnesses were then sworn and examined. But it does not purport to contain all of the evidence. On the contrary, only a small part of the evidence seems to be in the bill, presumably so much only as counsel for plaintiffs in error deemed necessary or sufficient to show their right to complain of the instructions, for they state in their brief that the expense of bringing into the record all of the large amount of evidence taken at the trial was prohibitive, and that the errors relied upon would be confined to the instructions. We understand counsel for the defendants in error to state in their brief that upon the trial the proponent produced the will, and proved its execution and attestation in due form by calling to the stand and examining the two attesting witnesses, and proved also by them the capacity of the testator at the time the will was executed; that such proof was offered and put into the record by the proponent with due formality, thus making a prima facie case, which, in the absence of a contest, would entitle the will to be admitted to probate. However, if such evidence was necessary to establish a prima facie case, that is to say, either the introduction of the formal proofs of the subscribing witnesses or their testimony to

the same effect by an examination on the trial, this court may assume that the will was produced, and its due execution and the competency of the testator sufficiently proved by the subscribing witnesses to establish a prima facie case, in the absence of a contrary showing by the bill of exceptions which confessedly contains only a part of the evidence.

[3, 4] The main contention of the plaintiffs in error in this court is that the trial court erroneously instructed the jury that the burden of proof as to the alleged incapacity of the testator was upon the contestants. By the first instruction, immediately after stating that proof had been introduced of the execution and attestation of the will in form as required by law, and unless there is a valid ground of objection embraced in the objections the will would be probated, the court charged the jury as follows:

"The burden of proof, therefore, is upon the contestants to show by a reasonable preponderance of the evidence that on the 30th day of December, 1902, the said Levi Wood was insane, or of unsound mind, or that he was influenced and dominated by others in the particular act of making the said will and of disposing of his property in such manner that he was not acting as a free agent in making the will. Unless, therefore, you find by a preponderance of the evidence that one or both of the two aforesaid objections exists in reality, you should find in favor of the validity of the will."

The court further charged the jury on the same point by the fifth and sixth instructions as follows:

5. "The jury are instructed that when a will is proved, including soundness of mind and memory, on the part of the testator, by the testimony of two subscribing witnesses, as in this case, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity or of unsoundness of mind must be established with reasonable certainty; the evidence of insanity should preponderate, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only, of the sanity of the testator, the presumption in favor of sanity, if proved as above stated, must turn the scale in favor of the sanity of the testator."

6. "The court instructs the jury that the law presumes, and it is your duty to presume, that every man who has arrived at the years of discretion is of sound mind and memory and capable of transacting ordinary business and capable of disposing of his property by will or otherwise, until the contrary is shown, and the court instructs you that it is your duty to hold that Levi Wood at the time he executed the will offered in evidence was of sound mind and memory, and so to hold until you believe by the preponderance of the evidence that he was otherwise."

In support of the contention that these instructions were erroneous in placing upon the contestants the burden of proving by a preponderance of the evidence that the testator was of unsound mind when the will was executed, it is argued that although upon the proponent establishing a prima facie case the burden of proceeding shifted to the contestants, the burden of proof remained with the proponent throughout the case; and that this is the effect of our statutes

providing for the disposal of property by will only by a person of full age and sound mind (Comp. Stat. 1910, § 5394, Laws 1915, c. 149, § 1), for admitting a will to probate, in the absence of a contest, on the testimony of one of the subscribing witnesses that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution (Comp. Stat. 1910, § 5418), and, in case of a contest, if the court is satisfied, upon the proof taken, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, that a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will (Id. § 5444).

We believe it to be true that the usual statutory provision in this country declaring the right to dispose of property by will is similar to that found in section 5394 of our statutes, authorizing such disposition only by a person of sound mind. But, except when previous insanity or incapacity of that nature has been admitted or proved allowing the presumption of a continuance of such condition until the contrary is shown, there is an apparent irreconcilable conflict in the authorities upon the question of the burden of proof as to capacity or incapacity of the testator, in a proceeding contesting the probate of a will on the ground of the testator's alleged incapacity, though that conflict is said to be more apparent than real and more verbal than substantial. 1 Schouler on Wills (5th Ed.) § 174. We do not understand it to be contended that the exceptional situation aforesaid was shown in this case, nor does the part of the evidence brought into the record here establish it, at least not sufficiently to entitle the case to be considered from that standpoint, and no instruction referring to such a condition seems to have been requested. We have, therefore, to consider the ordinary rule in such cases. There is much less difference of opinion on the question when the contest is instituted after a will has been admitted to probate, and the object of the proceeding is a revocation of its probate; in such a case it seems to be quite generally held that the burden is upon the contestant to establish alleged incapacity. And the conflict where the objection is to the probate of a will is such that either view—that the burden of proving the sanity of the testator is on the proponent or the burden is on the contestant to prove the contrary, if alleged—is sustained by abundant and eminent authority.

The English rule seems to be that the onus probandi is upon the party propounding the will, as the moving party, who must satisfy the court that the testator made the will, and that he was of sound and disposing mind,

but, since sanity is to be presumed until the contrary is shown, that presumption is sufficient to sustain the will upon proof of execution in proper form, where no other evidence is offered, and though there be some evidence of incompetency there may be a finding in favor of the will, if such evidence does not disturb the jury's belief in the testator's competency; but when the whole matter is before the jury on evidence of both sides, they ought not to affirm the document to be the will of a competent testator, unless they believe it really is so. *Barry v. Butlin*, 2 Moore's P. O. 480, 12 Eng. Rep. Full Repr. 1089; *Sutton v. Sadler*, 3 C. B. (N. S.) 87, 140 Eng. Rep. Full Repr. 671; *Williams on Executors*, 21-23; *Schouler on Wills* (5th Ed.) § 173. Substantially the same rule is adopted in some of the states in this country; that is to say, that the burden is upon the proponent throughout the case, though upon his showing by the testimony of the attesting witnesses that the will was duly executed and the testator was of sound mind at the time, it is then incumbent on the contestant to proceed with his evidence as to the testator's capacity, after which the proponent may offer rebutting evidence. A very few of the cases taking that view deny the existence or probative value of a presumption of sanity, in a proceeding contesting probate. See *McGinnis v. Kempsey*, 27 Mich. 373; *Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. But most of the cases on that side of the question concede such presumption upon the making of a prima facie case by formal proof of the will, and that it aids in sustaining the burden placed upon the proponent. This is illustrated by the Massachusetts cases.

Perhaps the most frequently cited case in support of the proposition that the burden remains with the proponent on the whole evidence is *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524. The court, in that case, seems to have denied the probative value of the presumption in favor of sanity, where there is any evidence of incapacity. But a different view was expressed in *Baxter v. Abbott*, 7 Gray (Mass.) 71. In that case the jury had been instructed that the legal presumption, in the absence of evidence to the contrary, was in favor of the testator's sanity, and that the proponent was entitled to that presumption in sustaining the burden of proof which the law put upon him, but that the presumption might be rebutted by evidence satisfying the jury of the testator's unsoundness of mind. That instruction was approved; the court, by the same judge who wrote the opinion in the *Crowninshield* Case, saying:

"A majority of the court think the instruction to the jury, that the legal presumption, in the

absence of evidence to the contrary, was in favor of the sanity of the testator, was correct. We all agree that it does not change the burden of proof, and that this always rests upon those seeking the probate of the will. See *Crowninshield v. Crowninshield* (Mass.) 2 Gray, 532. The opinion in that case expresses my own view as to the existence of the legal presumption."

The Massachusetts rule is further stated in *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862, as follows:

"The true rule is that the presumption is enough to sustain the burden of proof, until evidence is introduced which tends to control it. On the introduction of such evidence, the case is to be determined upon the whole evidence, including the presumption of sanity, and if the preponderance of the evidence is in favor of sanity, the burden of proof is sustained and the jury will find for the executor. If, upon the whole evidence, including this presumption, the scales are in even balance, the finding will be for the contestant, on the ground that the executor has failed to sustain the burden of proof."

A similar rule prevails in Virginia and Indiana. *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 928; *Steinkuehler v. Wempner*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673. And in Minnesota, based on a statute regulating the proof of wills construed as peremptory. *Layman's Will*, 40 Minn. 371, 42 N. W. 286. And the general doctrine that the proponent has the burden of proving sanity by a preponderance of the evidence is maintained also in Maine, Mississippi, Nebraska, Oregon, and Texas. See cases cited in 40 Cyc. 1021, note 12. And in New York, according to the later Surrogate decisions, that seems to be the rule, although the early case of *DeLafield v. Parish*, 25 N. Y. 9, has been understood as holding that the burden is upon the contestant to prove mental incapacity after sufficient evidence has been introduced by the proponent to make a *prima facie* case. *Van Den Heuvel's Will*, 76 Misc. Rep. 137, 136 N. Y. Supp. 1109; *Knight's Will*, 87 Misc. Rep. 577, 150 N. Y. Supp. 137; *King's Will*, 89 Misc. Rep. 638, 154 N. Y. Supp. 238.

In some other states, which we find noted as holding that the proponent has the burden of proving competency by a preponderance of the evidence (see 40 Cyc. 1021), a more liberal rule is expressed as to the effect of the presumption of sanity. In New Hampshire, one of such states, it is said (*Perkins v. Perkins*, 39 N. H. 163):

"It is therefore proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary. In some sense it is not improper to say that the burden of proving the insanity of the testator is on the party opposing the will. If he relies on that fact, he must, of course, lay evidence before the jury sufficient to outweigh the presumption of law and the proof on the other side, and to convince the jury, or he must have a verdict against him. This question has been discussed elsewhere with much diligence and keenness, but it is, after all, a question merely verbal; a question of the propriety of certain forms of expression; for we appre-

hend that whatever may be the terms used, the course of practice is everywhere the same."

And in Connecticut (*Barber's Appeal*, 63 Conn. 393, 27 Atl. 978, 22 L. R. A. 90), after stating the order of proof—first the *prima facie* case by proponent, then the contestant's evidence, followed by rebutting evidence of the proponent—the court concluded by saying that:

"The evidence of the contestants would be offensive and affirmative in its character, and that of the proponents defensive and negative, and on the whole case the question would be whether the evidence of the contestants sufficiently preponderated over the rebutting and special evidence of the proponents, including the evidence of the attesting witnesses, to overcome the presumption of sanity which constituted the proponents' *prima facie* case. In other words, leaving the presumption of sanity out of the case, was there more evidence of insanity than of sanity? So that, putting it again into the case, there would still be as much."

In the later case of *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70, Judge Baldwin, delivering the opinion of the court, said that:

The presumption of sanity "has a just relation to the law of trials, and in civil causes where sanity is in question and the evidence preponderates on neither side, ought to control the verdict."

And further:

"The important thing for the jury to understand in the case at bar was that the proponents had something to rely on beside the positive evidence which they had introduced to show testamentary capacity; that this was to be considered together with that evidence; and that it consisted in a presumption, recognized in law as based on the general facts of life, which had probative force enough to turn the scale, if otherwise, taking into account all that either party had put in evidence, the balance should seem to them to stand equal."

That case would seem to sustain the last part of the fifth instruction in the case at bar, as to the effect of the presumption of sanity when the evidence is equally balanced or leaves the matter in doubt.

A case from Georgia (*Evans v. Arnold*, 52 Ga. 169) is cited in support of the contention that the proponent must prove sanity by a preponderance of the evidence, and the case is cited to the same point in 40 Cyc. 1021. But the later cases in that state hold to the contrary. In *Credille v. Credille*, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 157, and *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 66, 27 L. R. A. (N. S.) 1, it is held that the burden, in the first instance, is upon the propounder of the alleged will to make out a *prima facie* case by showing the *factum* of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily, and when this is done, the burden of proof shifts to the caveator. And in *Freeman v. Hamilton*, 74 Ga. 317, it was said that when the propounder showed the testamentary capacity of the testator, and that the will was made freely and voluntarily, then the onus was changed, and the bur-

den of proof was on the caveators to make their grounds of objection good.

The Missouri case of *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807, is cited in support of the same contention of plaintiffs in error, and it seems to sustain the proposition; but the expressions of the court in later cases appear to be inconsistent with it in that respect. In *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537, the court say:

"When a will is contested it devolves upon the proponents to prove the execution of the will, that the testator was of requisite age and that he was sane (citing cases). This makes out a prima facie case, and it then devolves upon the contestants to establish incompetency or undue influence."

And, after referring to the evidence concerning the testator's capacity, the court concluded upon that point as follows:

"Clearly, therefore, the charge of incompetency was not established by the testimony, nor the prima facie case made out by the proponents overthrown, and there was therefore nothing for the jury to consider, and the court did right in directing a verdict for the defendants upon this issue."

In *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314, the court say that in *Sehr v. Lindemann*, supra, it was expressly ruled that upon making out a prima facie case by the proponents of the will, it then devolved upon the contestants to establish incompetency or undue influence. And in *Bensberg v. Washington University*, 251 Mo. 641, 158 S. W. 330, after stating that upon the issue whether the writing produced be the will of the testator or not the burden lies upon the proponent, and that he must establish not only the execution of the will, but the mental capacity of the testator, the court say:

"It has however been uniformly held by this court that when the proponents of the will have made a prima facie case it devolves upon the contestant to overthrow it by evidence"—citing *Sehr v. Lindemann*, supra, *Gibony v. Foster*, supra, and *Teckenbrock v. McLaughlin*, 209 Mo. 533, 539, 108 S. W. 46.

In many of the states it is held that the burden rests upon the contestant to show alleged incapacity by a preponderance of the evidence, when by the formal proofs of the attesting witnesses a prima facie case is established. That is the rule in Alabama, Arkansas, California, Delaware, Idaho, Illinois, Iowa, Kentucky, Maryland, Montana, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, and Wisconsin. *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *Smith v. Boswell*, 93 Ark. 66, 124 S. W. 264; *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. 906; *Doyle's Estate*, 73 Cal. 564, 15 Pac. 125; *In re Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Head v. Nixon*, 22 Idaho, 765, 128 Pac. 557; *Carpenter v. Calvert*, 83 Ill. 62; *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; *Goldthorp v. Goldthorp*, 115 Iowa, 430, 88 N. W. 944; *Hull v. Hull*, 117 Iowa, 738, 89 N. W. 979; *Philpott*

v. Jones, 164 Iowa, 730, 146 N. W. 859; *Milton v. Hunter*, 13 Bush (Ky.) 163; *Flood v. Pragoff*, 79 Ky. 607; *Watson's Ex'r v. Watson*, 137 Ky. 25, 121 S. W. 626; *Higgins v. Carlton & Scaggs*, 28 Md. 115, 92 Am. Dec. 666; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Trumbull v. Gibbons*, 22 N. J. Law, 117; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; *Horah v. Knox*, 87 N. C. 483; *In re Thorp*, 150 N. C. 487, 64 N. E. 379; *Grubbs v. McDonald*, 91 Pa. 236; *McNitt's Estate*, 229 Pa. 71, 78 Atl. 32; *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049; *Puryear v. Reese*, 6 Cold. (Tenn.) 21; *Frear v. Williams*, 7 Baxt. (66 Tenn.) 550; *Van Alstine's Estate*, 26 Utah, 193, 72 Pac. 942; *Will of Cole*, 49 Wis. 179, 5 N. W. 346; *Will of Silverthorn*, 68 Wis. 372, 32 N. W. 287; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; and other cases cited in 40 Cyc. 1021, note 11. To the above list of states should be added Georgia and Missouri, from the above-cited later decisions in those states, and also the District of Columbia. *Leach v. Burr*, 188 U. S. 510, 516, 23 Sup. Ct. 393, 47 L. Ed. 567. And though the burden is said in the New Hampshire and Connecticut cases, above cited, to be upon the proponent, there would seem to be no substantial or practical difference between those cases and the cases last above cited, since they require that on the question of testamentary capacity the contestant's evidence as to incapacity shall preponderate over the proponent's evidence and the legal presumption of sanity to justify a finding against the will.

Affirming the principle that the contestant has the burden of proving incompetency the Pennsylvania court say in *Grubbs v. McDonald*, supra:

"It is true, complaint is made, * * * that the burden of proof was thrown upon the contestants to prove want of testamentary capacity. * * * But what else could the court do under the rule as laid down in *Landis v. Landis*, 1 Grant Cas. (Pa.) 248, and in many other authorities, that 'the law presumes every one of full age competent to make a will, of sufficient mental capacity to do the act; and allegations to the contrary must be proved.' Testamentary capacity is the normal condition of one of full age, and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but in a positive, manner."

There is a clear discussion of the question in the Maryland case of *Higgins v. Carlton*, supra, a leading case on the subject, and the court say that they could discover no satisfactory reason why the presumption of law in favor of sanity should not be applied to wills, as well as to any other instrument in writing, that such a reason was not to be found in the fact that the statute requires the testator to be of sound and disposing mind, and, quoting from *Swinburne* a statement to the effect that because of the pre-

sumption of sanity until the contrary is proved, the fact is one not to be proved, though alleged, say that, as a logical conclusion from such presumption, the burden of proof is on the person asserting unsoundness of mind, unless a previous state of insanity has been established, in which case the burden is shifted to the one claiming under the will; and conclude by saying that the authorities placing such burden upon the one alleging incapacity rest upon sound reasoning, "harmonize with the ancient rule of presumption in favor of sanity, and thereby escape the fallacy 'of requiring a party to give positive proof of the existence of a fact, which the law presumes, in the absence of all proof.'"

The decisions holding the burden to be upon the contestant as to alleged incapacity are in accord with the view expressed in *Greenleaf on Evidence*, § 691, viz.:

"In regard to insanity or want of sufficient soundness of mind, we have heretofore seen, that though in the probate of a will, as the real issue is whether there is a valid will or not, the executor is considered as holding the affirmative, and therefore may seem bound affirmatively to prove the sanity of the testator; yet we have also seen that the law presumes every man to be of sane mind until the contrary is shown. The burden of proving unsoundness or imbecility of mind in the testator is therefore on the party impeaching the validity of the will for this cause."

And Judge Redfield expressed the same opinion in his work on Wills. 1 Redf. on Wills, pp. 31, 32.

The sixth instruction in the case at bar appears to have been taken from *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; at least it is a literal copy of an instruction approved in that case, except that it omits the words "in the first instance" from the first part of the sentence instructing that it was the duty of the jury to hold that the testator was of sound mind at the time he executed the will; that part of the instruction in said case reading:

"And the court instructs you that, in the first instance, it is your duty to hold that David Craig, at the time he executed the will offered in evidence, was of sound mind and memory, and to so hold until you believe, by the preponderance of the evidence, that he was otherwise."

Such omission, however, is obviously not material, though by using the omitted words the reason for the final part of the instruction "and to so hold," etc., is made more apparent.

The instructions in the case at bar assumed that it was necessary for the proponent, in the first instance, to establish a prima facie case, by the formal proofs of the subscribing witnesses, for they state that such proof was made, and the burden placed upon the contestants was to show by a preponderance of the evidence that the testator was of unsound mind at the time the will was executed, or that he was so influenced by others that he was not a free agent in making the will; thus, in that respect, within the rule of the cases last above cited, and if not sus-

tained by the clear weight of authority, certainly, we think, by authority of no less weight than that to the contrary. And if we were to decide the question upon a general consideration of the authorities, without regard to statute regulating the proceeding, we think the more reasonable rule is that which requires alleged testamentary incapacity to be shown by a preponderance of the evidence.

That rule is less confusing in explaining the effect of the presumption of sanity; and that there is a presumption of sanity entitled to be considered, at least upon formal proof showing prima facie the testator's capacity, is established by the undoubted weight of authority. The difference between such rule and the seemingly conflicting one conceding the presumption in favor of the will, but declaring the burden to be upon the proponent to prove a will by a competent testator, is so slight and technical that it appears to us to be of little, if any, practical importance. Under the latter rule, as explained in the Massachusetts case of *Clifford v. Taylor*, supra, the finding is to be in favor of the will, unless the contestant's evidence preponderates over both the presumption and the evidence of the proponent, which necessarily implies that if upon the evidence, excluding the presumption, the scales are in even balance, the will must be sustained. That case sustained an exception of the proponent to an instruction that the presumption of sanity "stands until it is rebutted," on the ground that in connection with other parts of the charge the word "rebutted" might have been understood as meaning "that the moment an issue is presented by a denial of sanity the presumption becomes of no effect." That proposition was held to be incorrect, and what was said to be the true rule was stated as quoted in an earlier part of this opinion. That case, though stating it differently, in effect supports the rule that the contestant has the burden of showing incompetency. But it is much better, we think, to state the presumption, and because of it, that the burden is on the contestant.

Our statute regulating the contest proceeding also favors that conclusion. It provides that any one appearing to contest a will must file written grounds of opposition to the probate thereof and serve a copy on the petitioner and other residents of the county interested in the estate, "any one or more of whom may demur thereto upon any of the grounds * * * provided for under the laws of Wyoming, or the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections"; and that whenever such demurrer shall be filed, or any issue of fact raised by the pleadings, involving the decedent's competency, his freedom from duress, menace, fraud or undue influence, the due execution

or attestation of the will, any other question substantially affecting the validity of the will, "then all pending matters relating thereto must be suspended until the next term of the court held in that county, or at the same term under the direction of the court, and the case entered regularly for trial on the trial docket thereof, and the issues joined must be tried * * * by the court." Comp. Stat. 1910, § 5440. This section is found in the Probate Code, which was adopted from California in 1891, and the corresponding section of the Code of that state has been construed as placing the burden of proof upon the contestant, both before and since the statute was enacted here. Of the several cases so construing the statute the following only need be cited: *Estate of Dalrymple*, 87 Cal. 444, 7 Pac. 906, decided in 1885; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125, decided in 1887; *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795. We quote from the very clear statement of the reasons for such construction in the rehearing opinion in the *Latour Case*:

"In every case of a contest of a will before probate there are, in law and in fact, two distinct, and to some extent independent, proceedings before the court. One is the petition of the proponent for the admission of the will to probate. The other is the contest, an affirmative proceeding, based on the written grounds of opposition filed by the contestant. There is no pleading on the part of the contestant that is addressed to the petition, or that is in the nature of an answer to it. * * * The contest is inaugurated by the filing of the 'written grounds of opposition,' in which must be set forth the facts upon which the contestant bases his assertion that the will is invalid. * * * To this pleading on the part of the contestant the proponent, or other person interested, files an answer, and thus raises an issue for trial. * * * The hearing of these two proceedings must come at the same time, and it is this circumstance which causes the confusion about the proper method of procedure. When the contest comes after probate, as it may do under section 1327, Code Civ. Proc., this matter is much simpler, and it would not be seriously contended that the contestant should not then have the burden of proof. At that time the proceeding on the petition has been already heard and determined, and its distinct character is easily perceived. There is, however, no essential difference in this respect between a contest before probate and one subsequent thereto. In either case the hearing of the formal proceeding for probate is presupposed. Where the contest is before probate, and comes on for disposal simultaneously with the petition, the hearing of the contest does not dispense with the hearing and disposition of the petition. In such a case the regular and orderly method of procedure is for the proponent to first present his preliminary proof in support of his petition. These averments, it must be remembered, are not controverted by any pleading. The so-called 'written grounds of opposition' provided for in section 1312 * * * is not a response to the petition, controverting or avoiding its allegations. It is a pleading collateral to the petition, and related to it only to the extent that it cannot be filed until there is a petition filed, and that it is in some sense subordinate to it, so that if the petition is dismissed, or if it is denied after the hearing of

the formal preliminary proof, the contest falls with it. This preliminary proof is addressed to the court alone. If a jury has been called to try the issues arising upon the contest, the preliminary proof is for the court, and not for the jury, unless the court directs the contrary, or the parties treat it as part of the case for the jury. If, after hearing this proof, the court is of the opinion that a prima facie case is made in support of the will, it should reserve its decision upon the petition and direct the trial to proceed upon the contest in the manner specified in section 607. * * * the contestant, as plaintiff, first introducing his evidence in support of his written grounds of opposition, and the proponent, as defendant, then producing his evidence in support of his answer thereto, and in rebuttal of the evidence on behalf of the contestant. If the preliminary proof does not satisfy the court, it should thereupon refuse probate and end the proceeding without further ceremony."

In Idaho, Montana, and Utah, under a like statute, the California construction has been followed. *Head v. Nixon*, supra; *Farleigh v. Kelley*, supra; *Van Alstine's Estate*, supra. It is true that our statute aforesaid is not in all respects a literal copy of the corresponding section of the California Code, for it omits the concluding provision thereof that, "on the trial, the contestant is plaintiff and the petitioner is defendant," and also the provision that the issue of fact must be tried by a jury, on written request of either party filed within a stated time. But in other particulars our statute is substantially the same as the section construed in California. And the decisions aforesaid of that state are at least strongly persuasive, for, as they show, and especially the opinion aforesaid in the *Latour Case*, the character of the proceeding, under the statute, is such that the contestant becomes the plaintiff and the petitioner the defendant, without an express declaration to that effect. It is said in Montana (*Farleigh v. Kelley*, supra) that the fact that the petitioner's answer need be nothing more than a general denial of the allegations of the written grounds of opposition emphasizes the evident intention of the Legislature that the contestant shall have the laboring oar throughout the trial. And in Utah (*Van Alstine's Estate*, supra), the holding that the contestant has the burden of proof, and therefore the right to open and close the argument, follows a specific reference to the provision that the petitioner and others may answer the grounds alleged by the contestant. So that, if we are not bound by the previous construction of the statute in California, because of the stated difference between our statute and the one there construed, we are of the opinion that, since the part of our statute prescribing the manner of proving a will, and framing the issues in a contest opposing the probate thereof, is the same as in California, and was adopted from that state, the construction there given the statute as to the matter now under consideration ought to be accepted and followed. And we are satisfied that as our statute stands, for the reasons so

well stated in the rehearing opinion in the Latour Case, its effect is to place upon the contestants the burden of showing alleged incompetency of the testator, unless the case should be brought within the exception where previous incompetency is admitted or sufficiently shown to change the burden.

It appears in this case that, in accordance with the instructions as to the burden of proof, the contestants were allowed to open the argument to the jury, which seems also to have been the closing argument, for the record states that the contestee then waived argument.

[5, 6] The contestants complain further of the statement in the fifth instruction that insanity or unsoundness of mind must be established with reasonable certainty. Standing alone that might constitute prejudicial error. It does not stand alone. It was explained if not limited by the statement immediately following that, "the evidence of insanity should preponderate, or the will be taken as valid." And in the sixth instruction the verdict is made to depend upon "the preponderance of the evidence." Also in the first instruction, though in one of the two places therein stating the burden to be upon the contestants to show the invalidity of the will by a preponderance of the evidence the expression is "reasonable preponderance," and that is complained of. A later instruction explained what is meant by a preponderance of evidence as used in the instructions; and it was said to mean not the greater number of witnesses, but the weight and value given the evidence of the witnesses by the jury. We do not think that the court intended or that the jury could have understood that anything more was necessary to a finding against the will than a belief resulting from a preponderance of the evidence. The effect of the instructions in that respect is not to be determined alone upon the single statement to which exception is taken. As said by Judge Baldwin in Sturdevant's Appeal, supra, concerning a conceded unguarded remark of the trial court in charging the jury:

"But no charge delivered by a trial court is to be judged by the same standards as a statement of law carefully elaborated and deliberately pronounced by a court of appeals, sitting in banc. * * * A charge must be taken as a whole in determining its natural effect."

[7-9] But without the evidence to enable the court to determine whether the statement complained of was in fact prejudicial, we would not be inclined to order a reversal on that ground. And the same may be said respecting the complaint as to other instructions on the ground that they are argumentative, and that one of them declares that influence is not ordinarily considered undue which arises out of "flattery"; that being mentioned as one of several things that might influence a testator without being undue, viz.:

"sympathy, kindness, attention, attachment, or affection, gratitude for past services, desire of gratifying another's wishes, or of relieving distress, claims of kindred and family, love, esteem, social relations, prejudice, passive encouragement of resentment and flattery." Even if erroneous on either ground claimed, the prejudicial effect would largely depend upon the evidence, and the objections are therefore not of the class entitled to be considered as ground for reversal in the absence of the evidence. We have thought that there might be some doubt about the propriety of considering the instructions relating to the burden of proof, without the evidence; a reversal for error in the charge on that subject has been denied in several cases in other states for the reason that an examination of the evidence has shown the verdict to be clearly right. It follows that the judgment must be affirmed.

Affirmed.

BEARD, J., concurs. SCOTT, J., did not sit.

McCORNICK & CO. v. BASSETT, County Treasurer. (No. 2893.)

(Supreme Court of Utah. March 1, 1917.
Rehearing Denied April 10, 1917.)

1. TAXATION ~~§~~47(5)—DOUBLE TAXATION OF CAPITAL STOCK—RELATED CORPORATIONS—"OWNER"—"HAS BEEN TAXED."

Where plaintiff bank owned all the stock in building corporation in which it had invested one-half its capital stock, and which was evidently organized by the bank for its convenience, and the two concerns being in fact merged, the bank was the "owner" of the building held by the building company, within meaning of Const. art. 13, §§ 2, 3, and Comp. Laws 1907, §§ 2505-2509, providing that corporate property shall not be doubly taxed, and the phrase "has been taxed" in such Constitution and statutes does not refer only to property represented by capital stock which has been directly and actually taxed in the name of such corporation in view of Const. art. 13, § 2, and Comp. Laws 1907, § 2505, subd. 1, providing that provisions shall not be so construed as to authorize taxation of capital stock when property represented by such stock has been taxed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 109.

For other definitions, see Words and Phrases, First and Second Series, Owner.]

2. TAXATION ~~§~~319(2)—DOUBLE TAXATION OF CAPITAL STOCK — ASSESSMENT — PRESUMPTION.

Where bank furnished assessor statement as required by Comp. Laws 1907, § 2507, showing ownership of building held by building company of which bank held all the stock and in which it had invested one-half of its capital stock, and assessor erased that property from list and assessed it to building company, but assessed capital stock as given without deducting value of building, it will be presumed that the assessment of bank's capital stock also covered such property, thus making double taxation.

3. TAXATION ~~22~~47(5)—DOUBLE TAXATION OF CAPITAL STOCK—RELATED CORPORATIONS.

Taxation of a bank's capital stock without deducting value of realty owned by building company of which bank held all stock representing one-half of bank's capital which realty was taxed to building company, was double taxation, prohibited by Const. art. 13, §§ 2, 3, Comp. Laws 1907, §§ 2505-2509.¹

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 109.]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by McCornick & Co., Bankers, against Fred C. Bassett, County Treasurer of Salt Lake County. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

This is an action against the treasurer of Salt Lake county to recover for money paid under protest by plaintiff, McCornick & Co., Bankers, a corporation, hereinafter called bank, on account of taxes alleged to have been unlawfully levied and collected. The bank, at the time the taxes were levied and collected, was doing a general banking business in Salt Lake City, Utah. It was capitalized for \$600,000, represented by 6,000 shares of capital stock of the par value of \$100 per share. The bank owned all of the stock of another corporation of the name of McCornick Building, hereinafter called the building company. This second corporation owned a certain building and the land upon which the building stands, known as the McCornick Building, situated in Salt Lake City, Utah. The bank conducted and carried on its business in this building. \$300,000 of the assets of the bank—the equivalent of one-half of its paid-up capital stock—were invested in the capital stock, and the whole thereof, of the building company. The building and the land upon which it stands were, in the year 1913, assessed to and in the name of the building company.

It is alleged in the complaint, and admitted in the answer, that the property was, for the purpose of taxation, valued at \$168,200, and "that on or about the 15th day of November, 1913, said McCornick Building paid to defendant, as treasurer of Salt Lake county, the sum of \$6,341.41, said sum being the taxes levied and assessed against the real estate and improvements above described, for state, county, and municipal purposes." On the 27th day of February, 1913, the cashier of the bank listed on a printed form or blank furnished him by the assessor the capital stock of the bank at \$600,000, its surplus and reserve fund at \$120,000, and its undivided profits at \$79,143, making a total of \$799,-

143. He also listed three pieces of real estate owned by the bank and situate in Salt Lake City, Utah, at \$11,120. This sum was deducted from the \$799,143, representing the value of the capital stock, surplus, and undivided profits, leaving the assets of the bank as shown by the statement in which they were listed at \$788,023. The assessor then reduced this sum 20 per cent.—a reduction which, the record shows, was made by assessors generally in arriving at the value of the capital stock of banks throughout the state for the purpose of taxation—leaving the assessed valuation of the bank's capital stock at \$591,018.

It is alleged in the complaint, and admitted by the answer, "that on or about the 13th day of November, 1913, plaintiff was compelled to pay and did pay, under protest, to defendant as such treasurer, the sum of \$22,281.87, said sum being the amount of taxes assessed and levied against 6,000 shares of the capital stock of the plaintiff for state, county, and city purposes for the year ending December 31, 1913. That for the purposes of said tax, said 6,000 shares of capital stock of plaintiff were assessed by the county assessor of Salt Lake county at a valuation of \$591,018, and that said tax was levied upon said shares assessed at such valuation." It is also alleged in the complaint "that said stocks so assessed represented in part the real property and improvements thereon, hereinbefore described (the McCornick Building), and which real property was separately assessed as aforesaid." The defendant in his answer denies that the capital stock of the bank represented the real property and improvements last mentioned. It is admitted that the bank duly complained and protested to the county board of equalization of Salt Lake county against the assessed valuation of its capital stock, and at the same time petitioned the board for an abatement of such valuation to the extent that such valuation is represented by the McCornick Building and the land upon which the building stands, and that the board of equalization refused to allow a deduction or abatement of any part of said levy and tax.

The cause was tried to the court. From a judgment rendered in favor of defendant, plaintiff appeals.

Pierce, Critchlow & Barrette, of Salt Lake City, for appellant. H. L. Mulliner, of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). The important question presented by this appeal is: Was the bank (appellant) entitled to have the sum at which the real estate and improvements thereon of the building company was assessed deducted from the value of its capital stock as fixed by the assessor for taxation purposes? It is con-

¹ Com. Nat. Bank v. Chambers, 21 Utah, 324, 61 Pac. 560, 56 L. R. A. 346; East Livermore v. Banking Co., 108 Me. 418, 69 Atl. 306, 15 L. R. A. (N. S.) 862, 13 Ann. Cas. 631; Lewiston Water & Power Co. v. Asotin County, 24 Wash. 371, 64 Pac. 544; Dexter Horton Nat. Bank v. McKenzie, 69 Wash. 314, 124 Pac. 915; People v. Badlam, 57 Cal. 594; Cooley on Taxation (2d Ed.) p. 225.

tended that since the bank owned all of the capital stock of the building company at the time the taxes in question were levied and collected, it, in effect, owned the real estate mentioned—assessed to and in the name of the building company—and that such real estate and improvements constituted a substantial portion of the bank's assets upon which the valuation of its capital stock, as fixed by the assessor for the purpose of taxation, was based, and that it necessarily follows that the taxing of the real property mentioned, and the taxing of the capital stock of the bank, the value of which, it is contended, is partly based upon and derived from the ownership of the property by the bank, is double taxation to the extent of the assessed valuation of the real property and is in contravention of section 2, article 13, of the Constitution of Utah, which, so far as material here, provides that:

"All property in the state * * * shall be taxed in proportion to its value, to be ascertained as provided by law. *The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed.*" (Italics ours.)

Section 3, same article, provides that:

"The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

These provisions of the Constitution in plain and explicit terms provide that there shall be a uniform rate of taxation in this state so that every person, company, and corporation will be compelled to bear, as nearly as may be, his, her, or its pro rata of the burdens of general taxation according to the value of the taxable property of such person or corporation. And it is not contemplated that, when property is once assessed for general taxes according to its value and at the same rate as other property subject to the same tax is assessed, it may again be taxed in some other way when the burden of both taxes falls on the same person, and while other property subject to the same tax is assessed but once. To meet the requirements of the Constitution in that regard, in so far as they relate to the taxation of the capital stock and assets—property—of banking corporations, the Legislature presumably enacted sections 2505, 2507, 2508, and 2509, Comp. Laws 1907. Subdivision 1 of section 2505, and the part of section 2 of the Constitution which we have italicized, are identical. Section 2507 provides, so far as material here, that:

"The stockholders in every bank or banking association, organized under the authority of this state or of the United States, must be as-

essed and taxed on the value of their shares of stock. * * * The cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate," etc.

Section 2508 provides:

"In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state."

Section 2509 provides:

"In making such assessment, there must also be deducted from the value of such shares such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association."

Section 2643 provides in general terms that property shall not be "assessed more than once." The cashier of the bank, as required by section 2507, Comp. Laws 1907, furnished the assessor with a statement in which he had listed the McCornick Building, and the land upon which it stands as an asset of the bank. This piece of property and the improvements thereon were later, presumably by the assessor, erased—eliminated—from the statement and assessed to and in the name of the building company. It is not claimed, nor can it be successfully urged, that the manner or method of listing and assessing the property was irregular. It appears that that statute (section 2507, supra) was followed in that regard. The complaint is that the amount for which the McCornick Building and the land upon which it stands were assessed was not deducted from the assessed valuation of the bank's capital stock.

Counsel for respondent contend that the phrase, "has been taxed," as used in the constitutional and statutory provisions mentioned, refers to property only that is represented by the capital stock of a corporation, which property has been "directly and actually" taxed in the name of such corporation. As herein pointed out, section 2, article 13, Constitution, and subd. 1, § 2505, Comp. Laws 1907, provide that the provisions therein contained "shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such * * * corporation, represented by such stocks, has been taxed."

[1] The first question is, Was the McCornick Building, within the meaning of the law, the property of the bank? and, second, was the value of that asset of the bank merged in and did it constitute a part of the as-

sessed valuation of the capital stock? As suggested by counsel for the respondent in their printed brief "appellant placed this corporate entity between it and this real estate for its own advantage." And again they say, "It must have had many advantages, otherwise plaintiff would not have chosen this species of personal property rather than the ownership of the realty."

The record shows that the bank invested \$300,000, a sum equal to one-half of the amount for which it was capitalized. While there is no direct proof offered on the point, yet we think it may be fairly inferred from the record that the bank furnished the funds with which to organize and establish the building company to take over this real property for its (the bank's) convenience in conducting and transacting its business, and while there were ostensibly two concerns they were, in effect, merged into one business enterprise. In other words, they constituted two corporations in name only. Mr. Whitney, cashier of the bank, on cross-examination, testified on this point as follows:

"When I say that \$300,000 of the capital stock of McCornick & Co., Bankers, was invested in the building, I mean that that much money was invested in the stock of McCornick Building. It was not invested in the building directly, but the stock meant the ownership of the building, and we owned it all."

While it is true that the legal title to the real estate was in the building company, the bank, under the undisputed facts, was the real owner of the property in the sense that the term "owner" is used in the constitutional and statutory provisions under consideration.

[2] Counsel for respondent contend that the record does not show that the valuation placed on the capital stock of the bank by the assessor represented in part the value of the real estate under consideration, and that "it is presumed that the assessor did his duty in making the assessment according to law, and that he made all deductions that should have been properly made." While there is no proof on this point, yet we think the only inference deducible from the facts is, that the valuation placed on the stock by the assessor represented in part the real estate. The cashier, when he listed the capital stock of the bank and placed its value at \$600,000 in the statement furnished by him to the assessor, listed and entered thereon the real estate in question as an asset of the bank. This particular piece of property was, as stated, eliminated from the statement, but no revision was made in the figures furnished by the cashier to the assessor showing the value of the stock before any deductions were made for the other parcels of real estate assessed to and in the name of the bank. The figures contained in the statement which, in the language of the statute, were "to aid the assessor in determining the value of such shares of the capital stock" are as follows:

Capital stock.....	\$600,000
Surplus and reserve fund.....	120,000
Undivided profits.....	79,143

799,143

Real estate assessed to bank.....	11,120
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788,023

Deduction of 25 per cent.....	197,006
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\$591,018

Capital stock assessed at.....	\$591,018
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It will be observed that the stock was assessed at approximately \$98.50 per share, nearly par value. It was not shown, nor is it claimed, that the bank owned any property other than that enumerated in the statement, as prepared by the cashier, before the erasures herein referred to were made. The presumption therefore is that all of the assets of the bank were included, and that the value of the real estate (McCornick Building) was merged in and represented in part the value of the capital stock as ultimately fixed by the assessor for the purpose of taxation. Manifestly this must be so because it was the cashier in the first instance, and not the assessor, who listed the capital stock at \$600,000. To this was added the surplus fund and the undivided profits. He also listed in the statement the other assets, referred to, of the bank, including the McCornick Building. The assessor made no changes whatever in the figures furnished him by the cashier showing the value of the capital stock, surplus fund, and undivided profits. What he did in the premises was to accept and adopt the figures furnished him by the cashier as to the value of the capital stock and the two funds mentioned, and then, from the sum total, make the deductions mentioned.

[3] We are of the opinion, and so hold, that the taxing of the capital stock of the bank, the value of which was, in part, represented by the real estate in question, without deducting therefrom the assessed value of such real estate was, under the circumstances, double taxation to the extent of the assessed value of the real estate and in contravention of the provisions of the Constitution herein set forth. *Com. Nat. Bank v. Chambers*, 21 Utah, 324, 61 Pac. 560, 56 L. R. A. 346; *East Livermore v. Banking Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A. (N. S.) 952, 13 Ann. Cas. 631; *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *Dexter Horton Nat. Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915; *People v. Badlam*, 57 Cal. 594; *Cooley on Taxation* (2d Ed.) p. 225.

The case is reversed, with directions to the lower court to set aside its judgment of dismissal and enter judgment in favor of appellant against the treasurer of Salt Lake county, as such, in conformity with the views herein expressed. Appellant to recover its taxable costs.

CORFMAN, J., concurs.

FRICK, C. J. I concur. At first blush I was inclined to the opinion that the plaintiff

was not in a position to successfully avail itself of the claim that the tax in question, in a strict legal sense, constituted double taxation. After much reflection, however, and with some hesitation, I have become convinced that under the peculiar provisions of our Constitution, which are quoted by Mr. Justice McCARTY, the tax in question does constitute double taxation. If that conclusion be sound, then must it follow that the defendant may not retain the amount sued for in this action.

**BIG COTTONWOOD TANNER DITCH CO.
v. SHURTLIFF et ux. (No. 2793.)**

(Supreme Court of Utah. Dec. 27, 1916. Rehearing Denied May 5, 1917.)

1. WATERS AND WATER COURSES §158(2)—AGREEMENT BY OWNER OF WATER RIGHT—BINDING FORCE.

An owner of a water right could agree to any arrangement as to the use of water which was satisfactory to himself and to the other water users on the ditch, and his agreement as to the amount of water to which he was entitled, if acted upon by the other water users, bound him and those who came through him.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 187.]

2. WATERS AND WATER COURSES §143 — RIGHTS OF LANDOWNER—QUANTITY.

No landowner is entitled to more water from a ditch for any specific purpose than is reasonably necessary to supply his needs for that purpose, regardless of the quantity that has been used and the length of use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

3. WATERS AND WATER COURSES §145—APPROPRIATION—DIVERSION TO OTHER USE.

A landowner may not appropriate water from a ditch for one purpose and then apply it or any part of it to another purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20.]

4. WATERS AND WATER COURSES §152(4)—PREVENTION OF WASTE.

Where parties have acquired a vested right to the use of water for beneficial purposes, and have adopted the usual and customary means of conveying it from the point of diversion to the place of use in vogue in this arid region, namely, an open ditch with bed and banks consisting of the natural soil through which it is constructed, they cannot be compelled to substitute and install a more expensive method of diversion in order to prevent loss by seepage and evaporation. They may, however, be compelled to keep their ditch in good repair, so as to prevent unnecessary waste.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

5. WATERS AND WATER COURSES §143—APPROPRIATION—WASTE.

Claimants of water may not waste it, either by applying more than is reasonably necessary to supply their needs for culinary, domestic, or live stock purposes, or in conducting the water from the main source of supply to their premises.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

6. WATERS AND WATER COURSES §144—APPROPRIATION—IRRIGATION—WASTE WATER.

Where a continuous open stream of water is permitted to flow to certain premises for culina-

ry, domestic, and live stock purposes, a reasonable amount of excess water passing the premises may be used in a garden or orchard, or for other irrigation purposes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

7. WATERS AND WATER COURSES §152(12)—WATER RIGHTS—APPEAL.

In a case involving water rights, though the trial courts possess a better opportunity to reflect the equities of the case than does the Supreme Court, when it is apparent that the trial courts have failed to reflect justice in a particular matter in view of the whole evidence, the parties to the record have the right to invoke the judgment of the Supreme Court on the particular matter.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

8. WATERS AND WATER COURSES §152(12)—WATER RIGHTS—APPEAL.

In cases involving water rights in arid regions, the appellate court should be very slow to interfere with judgments unless it is clear that equity and justice require such interference.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

9. WATERS AND WATER COURSES §144—IRRIGATION—ROTATION—DUTY OF COURTS.

The courts are under duty to prevent discrimination and inequality among water users who have adopted a system of rotation on any particular irrigation system or stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

10. APPEAL AND ERROR §14(4)—CROSS-ERRORS—APPEAL OF CODEFENDANT.

Where a codefendant appeals, another codefendant may not, upon such appeal, assign cross-errors against respondent, and secure modification of the judgment in so far as it affects him; the proper procedure is to file a cross-appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 57.]

11. APPEAL AND ERROR §14(4) 747(4) — CROSS-ASSIGNMENTS—OFFICE.

To modify an independent portion of the decree not touched by the appeal is not the office of mere cross-assignments, but the peculiar province of a cross-appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 57.]

McCarty, J., dissenting in part.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the Big Cottonwood Tanner Ditch Company against Vincent Shurtliff and wife, Mary E. Shurtliff. From the decree, defendants appeal. Reversed in certain particulars, and cause remanded, with instructions; otherwise, affirmed.

Stewart, Stewart & Alexander, of Salt Lake City, for appellants. D. W. Moffat, of Murray, for respondent.

FRICK, J. This action was originally commenced by the plaintiff, hereinafter called "respondent," against Vincent Shurtliff and his wife, Mary E. Shurtliff, hereinafter called "appellants," to restrain them from interfering with the water in a certain ditch. The complaint was afterwards amended, and all the water users (claiming water rights in four certain ditches) were made parties to the action. All claimants thus came into

court, and each one, including the appellants, set forth his claim to the use of water and the amount thereof in the several ditches aforesaid. It developed at the trial—indeed, it was practically conceded by all claimants—that they were all tenants in common respecting the water flowing in any particular ditch as well as in the waters flowing in the four ditches, and that the title to the waters flowing in all of the ditches was derived from a common source, to wit, Big Cottonwood creek. It is important to keep in mind this feature of the case. The case was tried and determined upon that theory.

Upon this appeal appellants' rights to the use of water in only one of the four ditches is in question, namely, the ditch known as the South Branch of the Big Cottonwood Tanner Ditch.

It was made to appear that nearly all of those who owned water rights in the four ditches formed a corporation, which is the respondent here. The corporation was organized for the purpose of controlling, apportioning, and distributing the water in all of the four ditches to the various owners thereof. The appellants, and a few others, refused to become members of the respondent corporation, and thus its officers, since about 1902, or 1903, have controlled and distributed the water to those who did not become members as well as to those who did. Appellants, it seems, have always claimed more water than said officers were willing to distribute to them out of the South Branch Ditch aforesaid. The respondent, in its complaint, alleged that appellants interfered with the water in said South Branch, and that they at times diverted and used water therefrom contrary to the regulations prevailing for the distribution and use of the water, and that they diverted more water than they were entitled to from said ditch. Upon the other hand, appellants averred that the respondent arbitrarily, and without right or authority, has restricted them in the use of water for irrigation as well as for culinary and domestic purposes.

After a hearing, the district court of Salt Lake county determined and fixed the rights of all the water users who did not consent to what was claimed by the respondent constituted their rights in the several ditches, and entered a decree in accordance with the findings of fact and conclusions of law in that regard. The court determined and fixed appellants' rights to the use of water in the South Branch Ditch in the following terms:

"The court further finds that Vincent Shurtliff and Mary E. Shurtliff, his wife, have received and are entitled to receive through the South Branch of the Big Cottonwood Tanner Ditch from the 1st day of January until the 30th day of June of each year forty-one (41) shares of water right, from the first day of July to the 31st day of December of each year, twenty-nine (29) shares of water right."

The court also found and adjudicated that appellants were not entitled to any addition-

al water for culinary or domestic use, and enjoined them from in any way interfering with the water flowing in said South Branch Ditch.

The appellants alone appeal from the findings, conclusions of law, and decree in so far as the same affect them.

One of the other parties to the action has also assigned cross-errors to which we shall refer later.

Appellants' counsel, with much vigor, insist that the court erred: (1) In awarding them only 41 shares of the water of said South Branch Ditch from the 1st day of January to the 30th day of June and only 29 shares during the remainder of each year; and (2) in not awarding them any water for culinary and domestic use in addition to the shares awarded to them.

There is really no dispute between the parties to the appeal respecting the law, nor is the evidence upon the questions that must control here seriously in conflict. While it is true that appellants strenuously insist that they are entitled to more water from the ditch in question for irrigation purposes than the quantity awarded them in the decree by reason of appropriation and use, yet the evidence stands uncontradicted that in the year 1879, in order to arrive at some definite understanding respecting the division and distribution and use of water as between the several ditches as well as among the owners of water rights in said ditches, the water users, including those on said South Branch Ditch, held a meeting, which they called an arbitration meeting, by which the rights of the several ditches, as well as the rights of the several owners of water rights in each ditch, were determined and fixed. A Mr. Robert Hawker, the predecessor in interest of the appellants, and from whom, in 1883, appellants purchased the land they now own and with respect to which they claim the water right, was a member and participant of that meeting. By that meeting, among other things, it was agreed and determined that the appellants were entitled to 41 shares of water out of said South Branch Ditch from January 1st to July 1st, or July 10th, in each and every year, and to 29 shares to the end of the year. One share of water was intended as representing one acre of land. It seems that thereafter water certificates, or "water tickets," were issued to each owner in accordance with his rights in the ditch from which he obtained his water supply. Mr. Richard Howe, who was familiar with the facts, in referring to what was done, and especially to what Mr. Hawker, the then owner of appellants' land, said, testified as follows:

"It was after they had gotten their certificates, or what I would call certificates, from the board of arbitrators as to the amount of land they had allowed them water for, and Robert Hawker met my father when I was with my father, right on the corner, northwest corner of the Shurtliff place now, right in the

street. They together discussed the matter. Robert Hawker said, 'Well,' he says, 'I feel perfectly satisfied with the award they have made me.' My father says, 'I think they cut me down about two acres too low.'"

Mr. Fowlkes, who was water master long after the arbitration agreement was entered into, namely, during the years 1899 to 1902, inclusive, testified that he issued water tickets to appellants for 41 shares during the first half and for 29 shares during the last half of each year. Indeed, the evidence to that effect is overwhelming.

Appellants' counsel, however, contend that their clients cannot be bound by the arbitration agreement, since, as they contend, appellants were not parties to it; and, further, that they have always protested against the amount of water allowed them, namely, the 41 shares and the 29 shares for the periods aforesaid. Moreover, counsel insist that their clients should be allowed a specific quantity of water, measured in second feet, in accordance with their appropriation rights. With all due respect for counsel's contention in that regard, we are clearly of the opinion that they are in error upon both propositions.

[1] In considering the first proposition, it must be remembered that appellants succeeded to all the rights possessed by Mr. Hawker; no more, no less. Hawker, as the owner of the water right, in case of dispute, could agree to any arrangement which was satisfactory to himself and to the other water users on the ditch. His agreements, if acted upon by the other water users, would not only be binding upon him, but would also bind all who claim through or under him, and, in view that appellants claim under him, they are bound by his agreements. Appellants are therefore bound by the arbitration agreement of 1879. True, there was a slight modification of that agreement in 1889 to which appellants were not parties, but that modification in no way affects any of appellants' rights. Indeed, the court awarded appellants the same shares of water and for the same periods of time that were awarded to Hawker in 1879, and always distributed to him, and, after he sold to appellants, to them. Referring now to counsel's second proposition, namely, that the amount of water appropriated by Hawker and his predecessor in interest, a Mr. Olson, should be awarded to appellants, cannot prevail. This case is not one where the original appropriations can be considered for any purpose. In this case the water owners, as stated before, are tenants in common of all the water in a particular ditch, and each is entitled to the proportion or shares agreed on by the arbitration agreement aforesaid. Neither the parties nor the court can now go behind that agreement, since it is now, and for many years has been, the basis of each water user's rights in any one of the several ditches, just as the trial court has determined in this case. Counsel's second contention, in so far as the same seeks to depart from

the number of the shares of water allotted to appellants for irrigation purposes, must therefore also fail.

Counsel, however, further contend that appellants, ever since the early '70's, were entitled to, and have always used, a certain quantity of water for culinary and domestic purposes. Counsel claim that for that purpose appellants and their predecessors in interest have always had a continuous flow of one-half of a second foot of water, and insist that the court grievously erred in refusing to allot to them that quantity of water for those purposes.

While it is true that some of the water masters and others testified that the appellant Vincent Shurtliff refused to abide by the arrangement entered into by the water users of the water flowing in the ditch from which appellants diverted the water allotted to them, and that he, as some of the witnesses put it, "was a law unto himself," yet the evidence is practically without dispute that Mr. Hawker, appellants' predecessor in interest, used a continuous flow or stream of water for culinary, domestic, and live stock purposes, and that the appellants continued to do so, although they did so over the protests of other users on the ditch. Mr. Hawker, however, lived near the ditch in question and obtained his water for culinary and domestic purposes directly therefrom. Some years after appellants had purchased the Hawker farm, they erected a dwelling about one-fourth of a mile from the point where the water is diverted from the ditch in question, and, after moving into the dwelling, they, subject to the protests aforesaid, continued to use a continuous stream of water from the ditch by means of a small diverting ditch, and their counsel contend that the quantity that was diverted to appellants' premises through the small diverting ditch as aforesaid for culinary, domestic, and live stock purposes, was at least one-half of a second foot of water, and for that reason they now contend that the court erred in not awarding to appellants a continuous flow of one-half second foot of water in addition to the amount awarded them for irrigation purposes. The measurements made from time to time show that the continuous flow claimed and used by appellants at the point of diversion was, if anything, in excess of one-half of a second foot of water. The taking of that quantity of water was, however, made a frequent occasion for disputes between them and the other water users from the ditch, and especially between them and the officers of the respondent corporation whose duty it was to apportion the water among the several users, and to settle those disputes this action was commenced for the purpose of enjoining the appellants from using said continuous stream of one-half second foot of water in addition to the water awarded to them for irrigation purposes. The district court awarded the appellants the quantity of

water for irrigation purposes hereinbefore stated, but refused to allow them separate water for culinary, domestic, and live stock purposes, and enjoined them from taking any water from the ditch in question except in the manner, at the time, and in the quantities stated in the decree. The district court therefore denied appellants a continuous flow of water for culinary, domestic, and live stock purposes and limited them to the amount of water that was allowed them for irrigation purposes.

The respective theories entertained during the trial by court and counsel are, in a measure, illustrated by the following colloquy which occurred during the trial:

"Mr. Stewart: What I was about to suggest, the court would award them a given amount which the court would think reasonably equitable and consistent with their necessity, then they would have to provide means of getting it there.

"The Court: Do you think the court ought to make that kind of a decree?

"Mr. Stewart: I think the court must make a decree awarding culinary water to those entitled to a constant flow of culinary water.

"The Court: Have you figured as to the result of that? Because I don't think there is any question about it. There is no question in my mind. It will take all the water for culinary purposes. There will be no water for irrigation at all if every other user on the stream, the corporation, 90 per cent., we will say in round numbers, own 90 per cent. of the culinary water, and entitled to a continuous stream, and you owning your share, and that takes all the water; how are you going to get any water for irrigation?"

In answer to counsel's further argument, the court said:

"I am merely basing it upon the evidence as I remember it in the Progress Case. We spent days introducing evidence of people who had rights to culinary water under the Tanner Ditch."

The claims that counsel make are also shown by their assignments of error. In assignment No. 10, it is urged that the district court erred in denying appellants' claim for a continuous stream of water for the reason, stating it in their own language that:

"The evidence clearly shows that these defendants (appellants) have heretofore continuously used and are entitled to a constant and continuous stream of culinary water * * * running to the defendants' home and premises."

In another assignment, counsel state that the court erred in finding that appellants are not entitled "to water for culinary, domestic, and live stock purposes separate and apart from irrigation water," and in that connection it is insisted that appellants "are entitled to the said one-half second foot of water for culinary, domestic, and stock purposes." The foregoing are all the assignments that relate to the water for culinary purposes.

In counsel's brief it is argued that the court erred in denying appellants' claim to a constant flow of water for culinary, domestic, and stock purposes separate and distinct from the right to water under the basis of

an apportionment by "turns"; that is, for irrigation purposes.

I have set forth counsel's claim in their own language merely to show just what it is. It is thus made very clear that counsel contend that appellants were entitled to a certain quantity of water for irrigation purposes, and that entirely apart from that they were also entitled to a continuous flow of water for culinary, domestic, and live stock purposes. The claim for irrigation purposes, so far as quantity is concerned has already been disposed of, and their claim to have the apportionment made by the court modified will be considered later. The question now to be considered is: Are appellants, under the evidence, entitled to a continuous stream of water for culinary, domestic, and live stock purposes, and, if so, to what quantity of water are they entitled?

[2] While it is true that counsel claim a continuous flow of one-half second foot of water, yet it is also true from their argument that counsel recognize the now well-established principle that no one is entitled to more water for any specified purpose than is reasonably necessary to supply his needs for that purpose. It is also intimated in counsel's argument that conditions might arise, where a tenant in common claims a continuous flow from an irrigating ditch, such claimant perhaps "would have to provide means of getting it there"; that is, from the main ditch to the point of use. In the writer's judgment, although, under the evidence, appellants should be decreed the right to divert a continuous stream or flow of water for culinary, domestic, and live stock purposes from the South Branch of the Big Cottonwood Tanner Ditch, nevertheless the question to be determined is the quantity that should be awarded to them in the decree for such purposes.

It has become elementary doctrine in the arid region that no one is entitled to a greater quantity of water for any particular use or purpose than is reasonably necessary to supply the needs of the claimant for the specified purpose. This is true, regardless of the quantity that has been used for such purpose and the length of time it may have been used. The doctrine is well and clearly stated in a recent case emanating from the Supreme Court of Oregon, entitled *Little Walla Walla Irr. Union v. Finis Irr. Co.*, 62 Or. 348, 124 Pac. 666, 125 Pac. 270, in the following words:

"The actual amount of water needed for the use to which it is to be applied is the limit to which a party is entitled to water for irrigation, regardless of the fact that he may have actually diverted much more water for a long period of time."

Indeed, that is the rule laid down by our statute. Comp. Laws 1907, § 1288x20.

In *Union Mill & Min. Co. v. Dangberg* (C. C.) 81 Fed. at page 94, Mr. Justice Hawley, United States District Judge for Nevada,

after referring to the fact that the law is progressive, in his usual clear and vigorous style, after stating the elementary principles which control the appropriation and use of water in the arid regions of the United States, says:

"He (the claimant) will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation."

[3, 4] Moreover, the claimant may not appropriate the water for one purpose and then apply it, or any part of it, to another purpose. The courts also have the power to prevent a claimant from wasting water, and within reasonable limits may prevent waste through the means or channels that the claimant uses for diverting and taking the water from the main stream to the place of use. While that branch of the law may still be in a stage of development, yet some courts have expressed themselves quite forcibly upon the subject. In *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. at page 430, 94 Pac. at page 341, 15 L. R. A. (N. S.) 238, the Supreme Court of Colorado in speaking through Mr. Justice Gabbert, in referring to what may constitute waste by the means used in conveying water, said:

"The law contemplates an economical use of water. It will not countenance the diversion of a volume from a stream which, by reason of the loss resulting from the appliances used to convey it, is many times that which is actually consumed at the point where it is utilized. Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated, or by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss, or loss of a volume which is greatly disproportionate to that actually consumed. *Montrose Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233 [48 Pac. 532]. An appropriator, therefore, must exercise a reasonable degree of care to prevent waste through seepage and evaporation, in conveying it to the point where it is used. In cases where this question arises, the purpose for which the appropriation is made and the proportion of the diversion actually applied to a beneficial use, as compared with the volume diverted, would doubtless be important matters to consider."

In *Courthouse Rock Irr. Co. v. Willard*, 75 Neb. at page 411, 106 N. W. at page 464, the Supreme Court of Nebraska, in referring to this subject, says:

"It is an essential purpose of our irrigation laws to require an economical use of the waters of the state. The plaintiffs have an adjudicated right to the use of 30½ cubic feet of water a second of the waters of Pumpkin Seed creek, so far as they beneficially use the same; but they are not permitted to take water from the stream which they cannot apply to a beneficial use, or, what amounts to the same thing, they are not entitled wastefully to divert water into a canal which is so defective as to waste and dissipate the water, which otherwise might serve a good purpose, if used by other appropriators or ri-

parian owners whose priorities are inferior or subsequent to the rights of the plaintiff."

So, in 2 *Kinney, Irrigation* (2d Ed.) § 1913, the author says:

"As was said in a preceding section, there is always some necessary loss by seepage and evaporation in conducting the water from the point of diversion to the place of use and its application at that point. But any loss by means of defective appliances for conducting the water will not be treated as necessary loss, but as waste. So, also, where there is excessive seepage from the ditches and canals which might with a reasonable effort and expense be prevented. Water is too valuable to be wasted, either through an extravagant application to the purpose for which it was appropriated, or, again, by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss. With water each year growing scarcer as compared with the needs for it, as the law now stands in all the jurisdictions it will not countenance a diversion of a volume or quantity of water from a stream which, by reason of the loss resulting from the defective appliances used to convey it, is many times that amount which actually reaches the point of use and is there consumed for the purpose for which it is appropriated."

Now, the testimony of all the witnesses who testified upon the subject is that appellants' means of diverting and conducting the water they use for culinary, domestic, and live stock purposes is through a small diverting ditch constructed and maintained by themselves. In speaking of the character of the soil over or in which that ditch is constructed, Mrs. Shurtliff, one of the appellants, testified:

"The bed of the ditch is * * * very gravelly, porous soil. Much of it (the water) is lost before it reaches the house."

Mr. Doremus, a civil engineer who measured the water flowing in the ditch used for culinary, domestic, and live stock purposes, testified:

"The larger portion of that water * * * was lost in transportation and seepage, and some passed beyond the point of use."

[5, 6] It is not necessary to refer further to the testimony on this point, since it is all one way. The testimony is likewise undisputed that appellants did not usually own a large number of live stock. They always owned a few cows and other live stock, sometimes a few more than at other times, perhaps a few hogs, some chickens, ducks, etc. The amount required for family use is likewise not large. Appellants concede, as all must concede, that one-half second foot of water contains many, many times the quantity that they actually required for culinary, domestic, and live stock purposes. If there were any doubt regarding that matter, however, it can easily be dispelled. One-half of a second foot of water, according to the standard of measurement adopted by our statute, under ordinary conditions amounts to a flow of 224 gallons per minute, 13,464 gallons per hour, and 323,136 gallons for each 24 hours. True, it is contended that water that was not used for culinary, domestic, and live stock purposes was,

nevertheless, permitted to run into an orchard that was on the place to irrigate the trees growing therein. As we have seen, however, the constant stream that is claimed by appellant is for culinary, domestic, and live stock purposes, and not for irrigation. Indeed, no one in this arid region would be permitted to claim a constant stream for irrigation purposes, even though the claim were made by a prior against a subsequent appropriator. As between tenants in common, however, such a claim is not to be thought of. I shall not attempt, nor is it necessary to offer, further argument that appellants' needs cannot and do not require such a large quantity of water for culinary, domestic, and live stock purposes. Nor can they claim water for culinary, domestic, and live stock purposes and then devote it, or any considerable part of it, to irrigating purposes. That they may not do that, the law, as I have pointed out, is well settled. Neither may they waste water either by applying more than is reasonably necessary to supply their needs for culinary, domestic, and live stock purposes or in conducting the water from the main source of supply to their premises or point of use. It cannot be successfully disputed, therefore, that only a very small part of the water that appellants claim is necessary to supply their needs for the purposes aforesaid. Neither can there be any dispute that they may not, under the law, apply any of that water for irrigation and in that way enlarge their right to the use of water. True it is that, where a continuous open stream of water is permitted to flow to certain premises to be used for culinary, domestic, and live stock purposes, there necessarily must be some excess water pass the premises, or what is generally termed waste water. No doubt, such waste water, if reasonable in amount, may be used in a garden or orchard, or for other like purpose. The question, however, is: May a single family, which is shown to be not a large one, claim a flow of water of 13,464 gallons every hour, or a quantity of practically 1,000,000 gallons every three days, for culinary, domestic, and live stock purposes? I think no reasonable person would so contend. But, as we have seen, the testimony is that most of the water that is diverted from the main ditch into appellants' diverting ditch is lost between the point of diversion and the point of use (the dwelling of appellants), which two points, by measuring along the course of the small diverting ditch, the evidence shows are about one-fourth of a mile apart. The loss, the testimony shows, is caused by seepage by reason of the gravelly and porous nature of the soil. The question therefore arises: Does this vast amount of seepage constitute waste?

No doubt, if water were plentiful it might not be so regarded. Where, however, as the testimony discloses, water is as scarce as it is in the vicinity where all the water in question is being used, it seems to me to be a

frightful waste of water. The ordinary duty of water is about 70 acres to the second foot. That is, a continuous flow of one second foot of water will be sufficient to properly irrigate about 70 acres of land. A half second foot of water will therefore suffice for one-half of that quantity, or for 35 acres. The appellants are allowed a little more than one-half a second foot of water to irrigate their 41 or 42 acres of land. They thus claim for culinary, domestic, and live stock purposes almost as much water as they and their neighbors are allowed to irrigate a small farm of about 40 acres. What does that mean? Let us assume that there are 10 water users along the main ditch from which appellants divert their water, each one of whom claims one-half a second foot of water for culinary, domestic, and live stock purposes. That would be sufficient water to irrigate about 350 acres of land. The mere statement of the fact shows that to allow appellants one-half a second foot of water for the purposes aforesaid would constitute a frightful waste of water, and that such would be the fact whether the water is wasted at the point where it is used or in conducting it to the point of use. Moreover, it is a matter of common knowledge that neither ordinary ditches nor natural streams sustain such a percentage of loss in flowing a distance of only one-fourth of a mile, nor anywhere near such a percentage. If such a percentage of loss for so short a distance were normal or natural, irrigation would have to cease in this part of the country. Indeed, it never could have been successfully attempted. Upon the other hand, if it requires one-half second foot of water to supply the needs of an ordinary family which owns no more live stock than is owned by the appellants, then again would it be impossible to obtain sufficient water for irrigation purposes. That, it seems to me, was the view entertained by the district court, and for the further reason that all of the water claimants whose rights are involved in this action are tenants in common, and because practically all of the claimants obtain their water for culinary use from other sources, the district court no doubt deemed it equitable to deny to all claimants the right to a continuous flow of water for such purposes. While both my experience and observation lead me to the conclusion that it is not always wise for this court to interfere with a decree which fixes the rights of the water users where, as here, the case shows careful consideration, and where the judge has had the advantage of personal inspection of ditches and sources of supply, and where, as here, we know the judge to be very careful and conscientious, yet, under the evidence in this case, the appellants would be entirely deprived from the use of water for the purposes aforesaid if the decree as it now stands shall be affirmed. One way out of the dilemma was the one adopted by the district court, and perhaps that way was the

most equitable and, at any rate, the least objectionable to all of the other water users who are cotenants with appellants. Another way would be to award to appellants the one-half second foot of water claimed by them upon the ground that the evidence shows that they, in the past, have diverted that quantity from the main ditch. The method adopted by the court, in view that appellants have no other means of obtaining water for culinary, domestic, and live stock purposes from any source, as I view it, would not only work a gross injustice and hardship upon them, but it would deprive them of a vested right. Upon the other hand, if the appellants should be awarded a continuous flow of the one-half second foot demanded by them, it would, in the long run, work a like gross injustice upon all of the other water users who are cotenants with appellants, and would likewise deprive them of vested rights. It must, however, not be assumed that appellants have a vested right to the one-half second foot of water; but their vested right is limited to a sufficient amount to supply their needs for the purposes aforesaid. Nor did they acquire a vested right in the quantity diverted by them so long as that quantity was not reasonably necessary for the purposes for which it is claimed. A mere cursory reading of the record forces the conviction that water in the vicinity involved in this litigation is too valuable to permit it to be wasted to such a frightful extent as must be the case if appellants are permitted to divert a continuous flow of water amounting to the enormous quantity of 323,136 gallons each day for culinary, domestic, and live stock purposes. Can this court, or any other court for that matter, prevent appellants from permitting the waste?

It is contended, and such has been the ruling of some courts, that, although waste may result from conveying water in or through a ditch in the way that water is ordinarily conveyed, yet the court cannot prevent such a waste by compelling the user to pipe the water in order to stop the waste. I have, however, also quoted from recent cases where it is held that if unreasonable waste results from conveying water through a defective flume, or even through a ditch, the courts have the power to prevent the waste if it can be done by the application of reasonable means of conveyance. It seems to me those cases are sound, and, in view that water in this arid region is life, and is too valuable to be wasted for any purpose, courts should prevent waste whenever it is possible to do that by the application of reasonable means of diversion and conveyance and by such as are not prohibitive by reason of their cost. It would seem that in this case most any means that could be applied, other than the diverting ditch in question over the gravelly and porous soil which would save the water thus wasted, would cost much less than would be the value of the water that would be thus

saved, and for that reason the cost of better means not only would not be prohibitive, but in the long run would be a matter of economy. As I view the record, it is, however, not necessary at this time for this court to determine, nor is the evidence sufficient for us to determine, whether the appellants should be required to substitute any particular means of conveying the water allotted to them for culinary, domestic, and live stock purposes other than the small diverting ditch now in use. As pointed out, court and counsel, during the trial, differed with respect to appellants' right to any water for culinary, domestic, and live stock purposes, and the court then intimated that it would not allow them any water for those purposes in addition to the quantity of water that would be awarded to them for general irrigation purposes. The question of waste by reason of the gravelly and porous nature of the soil in which appellant's small diverting ditch is constructed and maintained, and whether the ditch itself could not be so repaired or improved and maintained as to prevent at least the greater portion, if not all, of the waste, was not considered by the court. Nor did the court consider or pass on the question of what quantity of water would be reasonably sufficient to supply appellants' needs for the purposes aforesaid. Nor were those questions fully developed by the evidence. The state of the record, therefore, is not such that we can make proper findings upon those questions, or direct findings to be made thereon. It may well be that, when the court hears the evidence respecting the quantity of water appellants may require for culinary, domestic, and live stock purposes, and goes thoroughly into the facts regarding the construction and physical condition of appellants' small ditch, and with regard to whether the waste occurs throughout the entire length of that ditch, or only at particular places therein, and whether the waste as it now occurs can be prevented by the use of reasonable means of diversion, the party may be satisfied with the order the court may make in that regard. Moreover, it may well be that the parties may be able to amicably agree upon some reasonable means of diverting and conducting the water to prevent the great waste that is now going on when the quantity of water is once established to which appellants are entitled for culinary, domestic and live-stock purposes.

I am of the opinion, therefore, that the findings and conclusions of law made by the court that the appellants are not entitled to a continuous flow of water from the main ditch for culinary, domestic, and live stock purposes should be set aside, and that the case should be remanded to the district court to hear further evidence upon the matters above suggested, and to make such findings of fact, conclusions of law, and decree with respect thereto as the evidence may warrant and such as are in harmony with the views ex-

pressed in this opinion. If either party is dissatisfied with the court's findings and decree concerning the matters just stated, such party may appeal to this court, and we shall then be better able to lay down some permanent rule regarding the means that water users must adopt to prevent unreasonable and unnecessary waste of water.

Appellants, however, complain of another matter with respect to which they contend the trial court committed serious error. From the great weight of the evidence it is made to appear that appellants' farm is located right under the foothills and one of the first, if not the first, that is watered from the South Branch Ditch; that the soil is loose, gravelly, and very porous, and it requires more water than does ordinary soil; that in applying the water used for irrigating the lands lying lower down on the ditch in question such lands obtain the benefit of much, if not all, of the seepage from the higher or upper lands, such as appellants', and therefore the lower lands, during the irrigation season, require considerable less water for the same acreage and for like crops than do the upper lands, and especially lands with soil like that of appellants. It was made to appear that, in distributing the water for irrigation, what is known as the rotating system has for many years been applied by the water users on the several ditches, including the South Branch Ditch. That system has been continued by the respondent corporation, but it seems the periods of time for the use of water have been lengthened or extended. Appellants insist that respondent has fixed and threatens to continue in force the periods for the use of irrigating water at nine-day periods, so that each user on the ditch will obtain the entire stream flowing therein once in approximately nine days. Appellants produced much evidence to the effect that in view of the porous and gravelly character of their land, it requires the use of water oftener than once in nine days. Indeed, their evidence is to the effect that they need it as often as once in five or six days in order to produce full crops. The evidence is also to the effect that many of the users lower down the ditch who have the benefit of seepage, and whose lands are composed of heavier and firmer soil, need water less often and require less in quantity than appellants, and that such lands can produce crops if watered at intervals of nine days. The court made general findings upon that phase of the case, and there is nothing in the decree with respect to it, except a general statement which agrees with the findings, which is as follows:

"The court further finds that regulations should be adopted and provided so that the owners of water right, including the defendants herein to whom water is awarded, shall take all or such portion as they may be entitled to in as nearly a continuous flow as is reasonably possible, taking into consideration the necessity of rotation of turns for the purpose of increasing the efficiency and beneficial use of said water,

in order that the owners thereof may have such part of the same as is necessary for their culinary, domestic, and stock purposes."

[7-9] The appellants complain of these findings. Here again we meet a situation concerning which no hard and fast rule can be stated. In these matters the trial courts, as a general rule, possess a far better opportunity to reflect the true equities of a given case than do we, and yet when it is apparent that the trial courts have, for some reason or for no reason, failed to reflect justice in a particular matter in view of the whole evidence, the parties to the record have the right to invoke, in this class of cases, our judgment upon that particular matter. It seems to us that the facts of this case clearly demonstrate that mere uniformity may be far from equity or equality. Here it is quite apparent that a lower water user with a different soil may not require the water as often, nor for the same length of time, in order to mature his crops, as is the case with the user higher up the stream. In such a case, is there no way that a court of equity may bring about at least approximate equality? If there is none, then it is plain that some such owners must suffer injustice. Here again the record is not sufficient for us to give nor to direct what the action should be. In justice to the trial court, it should be stated, however, that the case was not heard nor tried with the purpose of dealing with that phase of the case; and yet the question is involved, and, if the parties cannot be given relief in this case, we cannot see how they ever can obtain any. We repeat that cases like the one at bar call for the highest and most careful exercise of the equitable powers of courts. Moreover, appellate courts should be very slow to interfere in this class of cases, unless it is clear that equity and justice require such interference. Under the facts and circumstances of this case, however, it seems to us that it is practicable to bring about some more equitable distribution of the water than the one proposed, namely, a rotation period of nine days or more. If we, however, undertook to indicate what other period of rotation should be adopted, in view of the record as it now stands, we might, perhaps, do more harm than good. In view that the rotation of the use of waters for irrigation very materially aids in saving as well as in enlarging the duty of water, the courts favor, whenever possible, that system. While the question of whether the courts possess the power to compel rotation against a nonconsenting water owner may not be thoroughly settled, and while the question is not before us in this case, yet the duty of the courts to prevent discrimination and inequality among the users who have adopted a system of rotation on any particular system or stream cannot be doubted. See 2 Kinney on Irrigation (2d Ed.) §§ 909, 910. We shall therefore subject to the right of review, leave the whole matter in that regard to the judgment

of the trial court, in whose judgment and ability to find some equitable solution for the difficulty presented in this case we have the fullest confidence.

Upon the questions, therefore, involving the fixing of the quantity of water appellants are entitled to for culinary, domestic, and live stock purposes from the 'South Branch Ditch and the prevention of the waste thereof and means of diversion they shall be required to use, and the further question relating to the periods of rotation and the length of time the upper water users shall have the use of the water as compared with the users lower down the ditch, the judgment must be reversed. The judgment therefore is, accordingly, reversed in those respects, and the case is remanded to the district court of Salt Lake county to hear such additional evidence as the court may deem proper and necessary to make the necessary findings of fact and conclusions of law upon the questions that are left open, and to enter such a decree as to the court may seem proper and equitable, keeping in view the general propositions we have endeavored to lay down in this opinion.

[10, 11] Finally, there are cross-assignments to be disposed of. One of appellants' codefendants has assigned what are termed cross-assignments of error, by which it is sought to have certain findings and certain parts of the decree modified in favor of the party making the cross-assignments aforesaid. In the case of *Railroad v. Board of Education*, 35 Utah, 13, 99 Pac. 263, we had occasion to announce the rule respecting the propriety of assigning cross-errors on one appeal. It is there held that the respondent may always assign cross-errors against the appellant, not only to support the judgment, but also to obtain affirmative relief against the appellant. It may also be that a codefendant may assign cross-errors against his codefendant who is the appellant for the purpose of maintaining the judgment against such codefendant and appellant. We, however, know of no authority which goes to the extent of holding that where a codefendant appeals another codefendant may, upon such an appeal, assign cross-errors against the respondent in the action and in whose favor the judgment appealed from was rendered. In this case the party who assigns the cross-errors neither seeks to maintain the judgment against the appellant, nor does he assail appellants' contentions. What he seeks is a modification of the judgment in so far as it affects him. This we are powerless to grant upon the assignment of cross-errors which are assigned by a codefendant. If the party who assigns cross-errors desired to reverse or modify the judgment as it affects him and the respondent, the very thing he seeks to do here, he should have filed a cross-appeal from the judgment. We have no power to interfere with the judgment, except upon the appeal presented by the appellants.

Moreover, that part of the decree the appellants complain of, and that portion which is sought to be modified by the assignment of cross-errors, have no connection. To grant what appellants seek in no way modifies or affects that portion of the decree which is sought to be modified by the assigned cross-errors. To grant the relief, therefore, which is sought by the cross-assignments, would result in modifying an independent portion of the decree which is not touched by the appeal. To do that is not the office of mere cross-assignments of error, but is the peculiar province of a cross-appeal. We therefore cannot consider or pass upon the merits of the cross-assignments of error.

For the reasons before stated, the judgment or decree, appealed from is reversed in the particulars hereinbefore stated, and the cause is remanded to the district court, with instructions to make findings and to enter a decree in conformity with the views herein expressed. In all other respects, and as to all other parties, the judgment or decree is affirmed. Appellants to recover costs on appeal.

MCCARTY, J. (dissenting in part). I concur in the conclusions reached by my Associates on all points except those relating to the extent of certain of the defendants to divert from plaintiff's canal continuous streams of water for culinary and domestic purposes which, in some cases, is also used for irrigating gardens and orchards. Attention is invited to the probable loss of water by seepage and evaporation in case those who have acquired a vested right to a constant stream for culinary and domestic purposes are permitted to continue to exercise such right. Reference is also made to the amount of water in second feet that it would require to furnish each of these parties with a given quantity of water for the beneficial purposes for which they have heretofore appropriated and used it. Of course, these parties are not entitled to divert or have turned to them more water than is reasonably necessary for the beneficial uses to which they have heretofore applied it. If, however, it is necessary for each of them to divert a given quantity of water from the canal to supply their homes with potable water for culinary and domestic purposes, and they have by long and continuous use acquired a vested right to divert or have turned to them such quantity of water, I know of no rule of law or principle of equity by which they, or any of them, can be deprived of, or curtailed in, such rights in order to increase the supply of their cotenants for farming purposes.

The evidence, without conflict, shows that defendants Vincent Shurtliff and his wife, Mary (Sadie) E. Shurtliff, and their predecessors in interest, have continuously, and practically uninterruptedly for about 10 months of each and every year, for more than 40 years, diverted from plaintiff's ca-

nal, referred to in the record as the South Fork of the Tanner Ditch, a stream of water of not less than one-half second foot, and conveyed the same in an open ditch to their residence and there used the same for culinary and domestic purposes. The record also shows that this stream of water has also been used by the Shurtliffs during the irrigation season for irrigating an orchard and garden. On this point Mrs. Sadie E. Shurtliff testified in part as follows:

"We bought our place in the fall of 1883 and took possession in the spring of 1884, and have lived there ever since. * * * Ever since we have been there we have used a stream of water for culinary, domestic, and stock purposes from the South Fork of the Tanner Ditch. We have been entirely dependent upon it. We have lived in the house where we now live 19 years. We have always had from 10 to 15 dairy cows, from 40 to 50 head of young stock, from 8 to 10 head of horses, and some poultry. * * * We used the stream of water that now runs to our house for culinary purposes, and there is land there with orchard and gardens in it, and we let it run there too."

She further testified:

"From my experience in using this culinary water, and from the use to which it has been put right from the beginning, I would say that it would not be possible to get along with less water than we have had."

A. F. Doremus, a civil engineer, testified in part as follows:

"I measured the culinary stream of water leading from the South Fork of the Tanner Ditch down to the Shurtliff house (April 7, 1913). It measured substantially half a second foot. I measured it at a point near where it is diverted from the South Fork of the Tanner Ditch. * * * It seems there was a considerable decrease in the flow. * * * There was a less flow at the house than at the point where I measured it. It appeared to me that the condition of the water wasn't any too good for drinking purposes, still they use it for that purpose, and apparently for stock purposes. * * * They could not consume it all. There would be some that would pass, but, as far as the volume there, it seemed to me necessary for the purity of the water. * * * I did not follow it out to where it went to (after it passed the house). It seemed to me it was flowing in an orchard below."

Vincent Shurtliff, one of the defendants, testified:

"The stream which Mr. Doremus measured is about the size stream I have diverted since moving into my new house (19 years). This size stream is necessary in order to reach me and supply me with culinary water and water for domestic purposes."

And again:

"Besides using this stream for culinary purposes, I had an orchard at the north of my house, and also had an orchard at the south, a little southeast, and I would water these two tracts of land and also the land that runs right down by the creek. Probably it would amount to three acres, maybe four."

The evidence shows that the bed of the ditch through which this culinary stream of water flows is "very gravelly and porous," and that "much of it (the water) is lost before it reaches the house."

No claim is made, nor does the evidence show, that the ditch has been, or is being,

maintained in a condition that causes unnecessary waste by seepage or evaporation, considering the character of the land on which it is located. The means, therefore, by which this stream of water is, and for more than 40 years has been, conveyed from plaintiff's canal to the point where it is used for culinary and domestic purposes and for irrigating an orchard and garden, are the same as those usually, and almost universally, used by farmers and other water users throughout the farming district of this arid region, namely an open trench or ditch with bed and banks consisting of the natural soil through which it is constructed. The Shurtliffs and their predecessors in interest have, by the continuous and practically uninterrupted use of this culinary stream for more than 40 years, acquired a vested right to use it for the purposes mentioned. Article 17, Constitution Utah.

It has been suggested that, in order to prevent loss by seepage and evaporation, or to reduce such loss to a minimum, the Shurtliffs should be required, as a condition precedent to their right to continue to divert and use the water for the purposes mentioned, to adopt a more economical method of conveying the water to the place of use than the one heretofore and now being used by them. No particular method is suggested. The only means of diversion other than the open trench or dirt ditch in vogue in this state that we know of is the conduit ditch or canal lined with wood, stone, or cement, and the pipe line, either of which is much more expensive to construct than is the open, unlined trench or ditch. The Shurtliffs, and their predecessors in interest, having adopted the usual and customary means of diverting and conveying to their premises the culinary stream of water mentioned, in vogue in this state, I know of no rule of law or principle of equity that can be invoked to support a decree compelling them to construct or install a more expensive method of diversion. But, as I have heretofore suggested, they have acquired a vested right to continue to appropriate by their present means of diversion the same volume of water from plaintiff's canal heretofore diverted and used by them. They are protected in this right by article 17 of the Constitution of this state, which provides:

"All existing rights to the use of any of the waters in this state for any useful or beneficial purpose, are hereby recognized and confirmed."

At the time the Constitution was adopted and went into effect, this culinary stream of water was being, and for more than 20 years had been, continuously and uninterruptedly used by the Shurtliffs and their predecessors in interest for the purposes mentioned.

The following authorities also support the foregoing conclusions: Long, Irr. § 42; 3 Farnham, Water and Water Rights, § 675; 1 Wiel, Water Rights (3d Ed.) 526; Little Walla Walla Irr. Union v. Finis, 62 Or. 348,

124 Pac. 686, 125 Pac. 270; Barrows et al. v. Fox, 98 Cal. 63, 32 Pac. 811.

In the last case cited the court said:

"Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste."

I therefore, as to this point, think that on a remanding of the case the trial court should make findings and enter a decree awarding the Shurtliffs the right to take from plaintiffs' canal at the intake of the ditch one-half second foot of water for culinary and domestic purposes and for irrigating a garden and orchard.

STRAUP, O. J. I concur in the result reversing the judgment. I think the court dealt too scantily with the Shurtliffs. They, for purposes of irrigation, were well entitled to 42 shares of water out of the South Branch Ditch, each share representing enough water to irrigate one acre for growing and maturing crops. The court, I think, meant to give them that, though the decree is not as definite in such respect as it should be. It therefore ought to be reframed so as not to leave that in doubt.

I also think the court granted too long an interval, once every nine days during the irrigating season, in which the Shurtliffs may use the water. They, during such season, and for growing and maturing crops, ought to be permitted to use the water at least every six days. Considering the situation and the character of the lands, I, on the record, do not see how they can grow and mature crops with a longer interval of rotation. I think the decree, without further hearing, ought to be so modified. That question was fully gone into and developed, and I see no necessity for any further hearing thereon.

In addition to these waters, the Shurtliffs also acquired a clear right in and to a constant flow of water at their premises for culinary, domestic, and live stock purposes. This the court denied them. In that we all agree that the court erred and thereby deprived the Shurtliffs of a vested right. The important question, of course, is: How much water is necessary for such purposes? It may well be conceded that they are not entitled to a constant flow of one-half second foot at their premises. The perplexing question is: What quantity of water at the point of diversion at the South Branch Ditch is required to produce a constant flow of sufficient potable water at their premises for culinary, domestic, and live stock purposes? On the record, I am not prepared to say what quantity is so required, and hence am not prepared to say that a one-half second foot at the point of diversion is too much, or that a less quantity will suffice. That, as I understand

it, is the very question we leave open to the trial court to ascertain and fix. And I think it ought to be left that way, uninfluenced by us, inasmuch as the trial court proceeded on the theory that the Shurtliffs were entitled to no culinary water, and hence found it unnecessary to hear or determine what quantity was required to be diverted to produce a constant flow of sufficient potable water at their premises. For this purpose I think the case should be remanded.

Nor do I express any opinion as to the means of conveying the water from the point of diversion to the premises. Since, however, the matter is referred to, I feel called upon to observe that the Shurtliffs are entitled to all the waters appropriated and used by them and their predecessor for culinary, domestic, and live stock purposes. Their right to them is vested and may not be taken from them. Of course, the waters, as all waters, must be devoted to a beneficial use and must not be wasted. The Shurtliffs, from the point of diversion to their premises, conveyed the water in an open ditch running through porous and gravelly soil. It is apparent that to convey to their premises a constant flow of water coursed through such a ditch and under such conditions a greater quantity of water is required to be diverted than if the water coursed through some other soil, and a still less quantity would be required if it were flumed or piped. I do not see how the Shurtliffs could complain if a sufficient constant flow of potable water for their need were delivered to them at their premises by a tight ditch, or flume, or pipe, thereby reducing the amount of water required to be diverted; but I do not see how the Shurtliffs can be required to bear such additional cost or expense. An open ditch in this state is a usual and ordinary method of conveying water. To prevent unnecessary waste, water users, of course, must keep their ditches in good repair. But I do not understand that the question of unnecessary waste is determinable on the character of the soil through which the water user is required to run his ditch. Because one water user is fortunate to course his water through clay soil with perhaps little loss by seepage, while another is unfortunate as to be required to course his through gravelly and porous soil and bound to lose some of it through seepage, I do not think it may be said that the latter, for that reason, commits waste and hence is required to resort to some other and more expensive means of conveyance. Certainly he can have only what he appropriated and diverted. But if in conveying it, without negligence, though in an open ditch through porous and gravelly soil and bound to lose more water than another coursing water through other soil, I do not think it may be said that he, for that reason, wasted water, and therefore is not entitled to his appropriation, whatever that may be. And

so if the Shurtliffs appropriated and diverted a one-half second foot of water at the point of diversion, and such quantity of water coursed through an open ditch constructed in a good husbandlike manner through the character of soil in which it is required to be constructed, to produce a constant flow of sufficient potable water to supply their needs for culinary, domestic and live stock purposes, then I do not see how the court may deprive them of that quantity of water on the theory of waste, or to make a less quantity of water suffice by requiring them, at their own expense, to convey the water to their premises by some other means.

RUSSELL v. WATKINS. (No. 2933.)

(Supreme Court of Utah. Feb. 20, 1917. Rehearing Denied May 5, 1917.)

1. APPEAL AND ERROR ¶520(5)—RECORD—SUFFICIENCY—MOTION FOR NONSUIT.

Whether motion for nonsuit should have been sustained will not be reviewed, unless it is apparent from the record that the motion was made before the trial court and properly included in the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2363, 2366.]

2. WITNESSES ¶412, 414(1)—CORROBORATION—UNDISPUTED TESTIMONY—REMOTE—CONDITION OF MACHINERY.

In action for injuries in motor vehicle collision, where defendant's testimony that his brakes were all right was undisputed, exclusion of testimony of repairman to whom defendant took the car 12 days after the accident was not error; being both remote in time and corroborative of undisputed testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1287.]

3. HIGHWAYS ¶184(4)—COLLISIONS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In action for injuries in highway collision, instruction that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances, or doing what such person would not have done, and that in considering the question who was negligent the jury should test it by the definition of negligence, and take into account all facts and circumstances developed, though not well worded, was not erroneous.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 474.]

4. TRIAL ¶139(1)—QUESTION FOR JURY—WEIGHT OF NEGATIVE TESTIMONY.

The weight of negative testimony of witnesses as to giving warning signals ordinarily is for the jury; but when physical conditions and attending circumstances render it highly improbable that they could hear, the rule is otherwise.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

5. HIGHWAYS ¶175(1)—COLLISIONS—NEGLIGENCE.

In action for injuries in collision on highway between motorcycle and automobile, automobile driver was not liable for negligence, if any, in permitting brakes to become deficient where, when the danger was discovered, the collision could not have been averted, regard-

less of the character of the brakes, or even had he reversed the power.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

6. HIGHWAYS ¶175(1)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where plaintiff was a passenger on the rear of the motorcycle, which the driver rode on the wrong side of the highway at a high speed without protest from plaintiff, and in turning out for a team they were injured, plaintiff was contributorily negligent, and could not recover from the owner of the automobile which they then struck.¹

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Frank Russell against Richard C. Watkins. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

M. M. Warner, of Salt Lake City, for appellant. C. R. Hollingsworth and Joseph E. Evans, both of Ogden, for respondent.

COREMAN, J. This was an action brought to recover damages for personal injuries sustained by plaintiff by reason of the alleged negligence of the defendant in the use and operation of an automobile upon the public highway. At the commencement of the action the plaintiff was under age, but on the trial had arrived at maturity; and thereafter, by stipulation, the case was prosecuted without guardian. The case was tried to a jury, resulting in a verdict in favor of the plaintiff, upon which judgment was entered by the court against the defendant for the sum of \$1,000. From this judgment the defendant appeals.

The plaintiff in his complaint in substance alleged that the defendant was guilty of negligence in that he negligently failed to sound the horn on his automobile; that he negligently drove the same at an excessive and unreasonable rate of speed; that he negligently operated and managed said automobile; and that he negligently permitted the brakes thereof to be out of repair so as to be ineffective. The defendant denied all acts of negligence, and set forth in his answer, with great particularity, the facts relating to the accident and the manner in which it occurred. He also averred that the accident and consequent injury of the plaintiff were caused by the negligence of the driver of the motorcycle, herein referred to, and through the negligence of the plaintiff himself.

Briefly stated, it appears from the evidence that the plaintiff, Frank Russell, a young man then between the age of 19 and 20 years, on the 8th day of May, 1914, was invited by one Walter Garner to make a trip

¹ Lochhead v. Jensen, 42 Utah, 99, 129 Pac. 347; Atwood v. Utah Light & Ry. Co., 44 Utah, 366, 140 Pac. 137; Martindale v. Oregon Short Line R. R. Co., 160 Pac. 255.

from Ogden to Salt Lake City and return on a motorcycle. The trip was made together, Garner, the owner, driving, handling and controlling the motorcycle, the plaintiff occupying a seat to the rear of Garner, their intent and purpose being on arriving at Salt Lake City, to attend together a track meet there. Leaving Salt Lake City at about 5:15 for their return trip to Ogden they had proceeded along the public highway, known as the Davis county road, between Salt Lake City and Ogden, for about 10 miles, when they observed a team and vehicle approaching them. The team and vehicle were on the extreme left hand or west side of the road traveling south. The motorcycle on which they were riding was then traveling north on the west or same side, contrary to the rule of the road. The team and vehicle were in charge of and being driven by one Mr. Bryson, and behind the vehicle were being led two young spirited horses, tied with halter straps or ropes. Behind the vehicle on the same or west side of the road the defendant was also driving south from Ogden in his one-seated automobile or roadster motor car, and on nearing the horses and vehicle under the control of Bryson, when within 40 or 50 feet, proceeded to turn out to the left, and near the center of the highway, for the purpose of passing the Bryson vehicle and horses. At the same time the plaintiff and Garner proceeded, when within about 150 feet of the Bryson vehicle, to cross from the west to the east side of the highway. The highway at this point was 60 feet in width. It had recently been worked, was rough at the center, and the public was then traveling two paths, one on the east and one on the west side.

It appears from the undisputed testimony that neither the plaintiff nor Garner had seen the automobile approaching from the rear of the Bryson vehicle, nor had the defendant seen the approach of the motorcycle to the front, and that the views of the drivers of both motorcycle and automobile were so obscured by the Bryson vehicle and horses that neither was conscious or aware of the immediate presence of the other until, on turning out from the west traveled track of the highway, when their machines almost instantly collided, resulting the death of Garner and the injuries to plaintiff complained of in this action, and for which judgment was had in plaintiff's favor against the defendant in the sum of \$1,000, as before stated. It appears from the evidence that the plaintiff was not experienced in the use of a motorcycle; that the defendant Watkins for many years had owned and personally operated an automobile on the public highways throughout the state while in the performance of his official duties, and the carrying on of his business and professional work, as state school architect. It further appears from the evidence that the parties met and the acci-

dent occurred at about 6 o'clock p. m.; that Garner, for some reason unaccounted for, in the operation of his motorcycle, had, shortly before meeting the Bryson vehicle, crossed from the east traveled to the west traveled track of the highway, and that the plaintiff had silently acquiesced in Garner running his motorcycle on the wrong side of the highway and seeking to again cross from the west to the east traveled track on meeting the Bryson vehicle. From the evidence it further appears that when the defendant approached the Bryson vehicle and horses at the rear with his automobile, the horses tied to the rear of the vehicle became restless and began moving about, the horse on the east moving or shying out to the east of the vehicle, thus requiring the defendant to drive his machine to a greater distance to the east in order to make for safety in passing; that the recognition of the respective occupants and the meeting of the automobile and the motorcycle on the highway was almost instantaneous.

Defendant on appeal makes seven assignments of error. Those which are material and apparently relied upon by appellant we will now discuss.

[1] 1. It is contended by appellant that at the conclusion of the plaintiff's testimony a motion for nonsuit was interposed by defendant, and that the same should have been sustained by the trial court. We have diligently searched the record on appeal, and, after doing so, we are very certain no such motion appears therein. Therefore it is useless for this court to consider the merits or demerits of such a motion without it being apparent from the record here for review that such motion was made before the trial court and properly included in the record on appeal here alone considered.

[2] 2. It is also contended that the exclusion by the court of the testimony of the witness Whiting, when questioned by defendant's counsel concerning the condition of defendant's automobile and its brakes, when the defendant had brought the car to the witness for repairs some 10 or 12 days after the accident, as well as to the condition some time before the accident, when certain repairs were made upon it by witness, was error. At most, had this testimony been introduced and received, it would have been corroboration of the undisputed testimony of the defendant himself as to the condition of the brake rod and the brakes of the automobile, and, owing to the conditions sought to be testified to, being at a time so remote from the time of the accident, we are of the opinion the court very properly excluded it, and the defendant could not have been prejudiced thereby.

3. Defendant complains of certain instructions given by the court, particularly instructions numbered 4 and 9, as being prejudicial

to him. The fourth instruction was in the following language:

"The court charges you as a matter of law that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what a reasonably prudent person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. In considering the question as to who was negligent in this case, you should test it by the definition of negligence given you in this charge, and take into account all of the facts and circumstances developed in the case relating to the question."

[3] It may be that this instruction could have been better worded for the purpose of conveying the court's meaning to the jury; however, we cannot conceive how a jury, by giving the words any consideration at all, could conclude otherwise than that the court intended that the jury was to be the sole judges of the testimony and find who was negligent; and then again we are of the opinion that, conceding the exception well taken as to this particular instruction, the instruction following (numbered 5) clearly cures the defect contended for by counsel.

It is contended that the ninth instruction complained of was not justified under the evidence, in view of the testimony of the plaintiff given at the trial concerning conditions under which he remained an occupant or rider of the motorcycle immediately before the accident. Again, we have but to refer to instruction No. 10, given by the court, to find that the defendant could not have been prejudiced by this instruction as given, and that the instructions of the court, taken as a whole, and as the court expressly instructed the jury they should be considered, contains no error prejudicial to the rights of the defendant to a fair trial.

4. The fifth and sixth assignments of error, to the effect that there is no legal evidence to sustain the verdict of the jury, and that, therefore, the court erred in entering final judgment thereon, and in denying defendant's motion for a new trial, may well be considered together, and present a more difficult problem for consideration. Admittedly, the plaintiff's right to recover from the defendant in this case was predicated upon one or more of three alleged acts of negligence of the defendant in the use and operation of an automobile upon the public highway, and, as tersely stated by both parties in their briefs, are, to wit: (1) Omission to give any signal of approach; (2) driving at an unreasonable rate of speed, under all attending circumstances; (3) defective brakes, preventing the automobile from being stopped within a reasonable distance. It was incumbent on the plaintiff to establish with some degree of certainty that defendant's acts of omission, or commission, contributed to and was the proximate cause of the injuries of which he complains. Necessarily, for the proper and just determination as to whether

the defendant should be held to answer for the plaintiff's injuries, due consideration should be given as to the conditions and circumstances confronting the defendant immediately before and at the time of the accident.

As to the first proposition, that of the defendant failing to signal his approach, before the accident, we have searched the record in vain for any tangible evidence to sustain plaintiff's contention. The direct and positive testimony of the defendant himself concerning his nearing the place of the accident, namely, "I came up behind a man that had a wagon and two horses at the back, and I honked my horn before I endeavored to turn out; it was about, I should think, 40 or 50 feet before I tried to turn out; I couldn't get his attention, however"—stands in the record, to our minds, wholly uncontradicted. True, some of the witnesses testifying for plaintiff, particularly the plaintiff and the witness Bryson, say that they "did not hear" a warning. When we take into consideration that the plaintiff, according to his own testimony, was at the time without thought and wholly unaware of the approach of defendant's automobile, that he was seated on a motorcycle moving at the rate of 15 or 20 miles an hour, that his view of the traveled road was obscured by Bryson's approaching wagon and horses, and of necessity had to cross immediately to the east side of the highway for safety and in passing the Bryson vehicle, and that the witness Bryson was, at the same time, apprehensively riveting his attention on the motorcycle approaching him, on account of his own safety, and through fear of the horse he was driving making him trouble, we may well believe these witnesses "did not hear" the horn sounded by the defendant on his approach.

[4] The weight of negative testimony of witnesses, as to the giving of signals, ordinarily is for the jury to determine; but, when physical conditions and the attending circumstances are such as to render it highly improbable that they could hear, we think the rule should be and is otherwise. *Jordan v. Osborne*, 147 Wis. 623, 133 N. W. 32; *Menard v. Boston, etc.*, R. R., 150 Mass. 386, 23 N. E. 214. In the Massachusetts case, last above cited, the court, in speaking of the weight of this class of testimony, says:

"A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

The second charge of negligence on the part of the defendant, that of driving his automobile at an unreasonable and excessive rate of speed, under the attending circumstances, to our mind, is equally untenable.

Plaintiff's counsel properly contends that if the record contains substantial evidence to support the acts of negligence charged in the complaint, or even if there is only a con-

flict in the testimony, the finding of the jury will not be disturbed in this court on appeal. But here, after a careful perusal of the record, we can find no testimony upon which to base a finding that defendant was, under the attending circumstances, driving his machine at a greater rate of speed than any prudent and careful operator would do. The evidence clearly and conclusively shows that he had his machine under perfect control; that he had, as a precaution, slowed down the engine and changed the gears as a precaution in passing two young and fractious horses; that he was lawfully driving on the right-hand side of the road; that on approaching the horses tied to the rear of Bryson's wagon he had a clear view beyond, and no motorcycle was to be seen; that he did not assume, and, as a matter of law, no duty was imposed upon him to assume, that others would violate the rule of the road by traveling toward him on the wrong side of the road, and, unexpectedly, as to him, move from the wrong to the right side of the highway from immediately in front of the Bryson horses and wagon.

These, as to attending circumstances, are the undisputed facts as disclosed by the record on this appeal.

The Utah Laws (Session Laws 1915, c. 80, § 8), as to speed limit, provides:

"No person shall operate a motor vehicle or motorcycle upon any public street or highway at a speed greater than is reasonable and safe, having due regard for the width, grade, character, traffic and common use of such street or highway; or so as to endanger life, limb or property in any respect whatever."

Again, relative to the approach of another, driving an animal in the same direction:

"And if traveling in the same direction, he shall use reasonable caution in order to avoid frightening the animal or causing accident; and in approaching or passing such animal the operator shall not use the exhaust cut-out of his vehicle, or cause any other unnecessary noise."

Under all the conditions and circumstances, and after careful examination and consideration of the record, we can find no evidence supporting the contention of the plaintiff that defendant was driving at any greater speed than was ordinary and reasonable, and therefore such contention must fail.

Coming to the last charge of negligence complained of against the defendant, there is absolutely no evidence whatever tending to show that defective brakes in any manner contributed to the accident. The defendant testified that the brakes were reined shortly before, and that they were in perfect working condition at the time. He also testified that there was no opportunity to use the brakes before the collision between his machine and the motorcycle occurred. To use the exact language of the defendant:

"Q. Was it possible for you, taking into consideration the length of time that intervened from the time you first saw this automobile, or this motor coming here, to change the position of your car at all? A. No, sir; it wasn't the fractional part of a second until I seen them before it was struck—it wasn't the fractional

part of a second; if I had brakes or something that would reverse I couldn't have stopped the accident; it wasn't time."

[5] While some of the witnesses for the plaintiff testified that the defendant, immediately after the accident, made some remark that his brakes were out of order, or that they were not working, the testimony is not only in conflict, but very uncertain, as to whether the remarks of defendant related to the condition of the brakes before or after the accident as testified to by the defendant; that in the collision the brake rod had been broken or the end threads stripped of their holding. Anyway, in view of the undisputed testimony, that no opportunity availed to apply the brakes and had they been applied the accident could not have been avoided under the circumstances, the evidence as to the brakes conclusively appears of no materiality. Consequently we find no merit in the contention that defective brakes in any way contributed to the accident. The answer of the defendant in this action charges the plaintiff with contributory negligence, and appellant's counsel in his brief cites numerous authorities in support of his contention that under the testimony, as shown by the record, plaintiff is chargeable therewith. The court, under proper instructions, submitted the question of the plaintiff's negligence to the jury; and the effect of the verdict in favor of the plaintiff and against the defendant is to say that the plaintiff was not negligent.

Here again we are of the opinion that the verdict of the jury, under the evidence, cannot be sustained, and that in arriving at a verdict in favor of the plaintiff and against the defendant the jury clearly disregarded the instructions of the court. After expressly charging the jury that the negligence of Garner, the driver of the motorcycle, was not to be imputed to the plaintiff, if the jury found Garner was negligent, the court further submitted:

"I charge you also that if you find from a preponderance of all of the evidence in this case that the plaintiff at said time, while so riding on said motorcycle, knew that the motorcycle was being driven on the west side of the highway, while going north, and that it was being driven and operated by the said Garner at an unlawful and dangerous rate of speed, and such acts, or either of them, if so proven, was the direct or proximate cause of the injuries, or contributed to the cause of the injuries received by the plaintiff, and, with such knowledge of such acts and conduct of the deceased Garner, the plaintiff willfully continued to be and remain on said motorcycle, so being driven by the said Garner, then I charge you that the plaintiff would also be guilty of such contributory negligence, and your verdict should be for the defendant, no cause of action."

It is the undisputed testimony that Bryson, in charge of a vehicle and horses, was driving south at the time of the accident on the west traveled track of the highway; that the defendant was traveling with his automobile on the same west traveled track, also going south; that the plaintiff was traveling

in front of the Bryson vehicle and horses going north; and that neither the plaintiff nor defendant was aware that the other was approaching, on account of the Bryson outfit being between them and obscuring their view.

The plaintiff was fully aware of all the conditions and circumstances. He was voluntarily an occupant of the motorcycle with Garner. It was daylight; he was fully aware of Garner driving his motorcycle on the wrong side of the road in front of an approaching vehicle and horses, and it was his duty to understand and know that others were likely approaching from behind the vehicle and horses in charge of Bryson, and that they would obey the law of the road and pass to the east of Bryson, and that he and his companion on the motorcycle in approaching so closely to Bryson would have to make a sudden turn to the east of the highway at the risk of colliding with any vehicle that might be to the rear of Bryson and seek to pass; and yet he made no protest, and quietly acquiesced and assented to all these conditions upon the main and much-used thoroughfare between the heavily populated cities of Salt Lake City and Ogden.

[6] We can reach no other conclusion than that plaintiff and his companion Garner were, under the circumstances, grossly negligent, and that the accident would not have happened had they exercised ordinary care and judgment in driving their motorcycle; and that while Garner was negligent the plaintiff too was negligent in not protesting against the driving of the motorcycle as it was thus driven. We are not to be understood in so holding that we impute the negligence of Garner to the plaintiff, nor that we in any measure qualify the rulings of this court in the cases of *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347; *Atwood v. Utah Light & Ry. Co.*, 44 Utah, 366, 140 Pac. 137; *Martindale v. Oregon Short Line R. R. Co.*, 160 Pac. 255—cited by respondent's counsel. Frick, J., speaking for this court in *Atwood v. Utah Light & Ry. Co.*, *supra*, and commenting, says:

"Of course every one who may be riding in a vehicle, whether as passenger, invitee, or otherwise, must always exercise ordinary care and prudence to avoid injury to himself, and to that end, in case of imminent danger, must leave the vehicle in case such a course is practical and necessary to avoid injury. Again, he may not sit silently by and permit the driver of the vehicle to encounter or enter into open danger without protest or remonstrance and take the chances, and, if injured, seek to recover damages from the driver of the vehicle or from the one whose negligence concurred with that of the driver's, or from both."

When we consider all the circumstances under which this accident occurred, we can arrive at no other conclusion than that the verdict rendered by the jury cannot be sustained under the evidence; that defendant should have been granted a new trial, and

therefore the judgment of the court below should be reversed, with costs to appellant. It is so ordered.

FRICK, C. J. I concur with Mr. Justice CORFMAN in his conclusion reversing the judgment and in granting a new trial. I also concur in his conclusion that the evidence is insufficient to justify a finding that the defendant was guilty of negligence in failing to signal his approach by sounding the horn on his automobile. While, under ordinary circumstances and conditions, the evidence given by the witnesses, that they did not hear a certain signal or did not see a certain thing occur, is a matter for the jury, yet, as pointed out in the opinion, such is not always and under all circumstances the case. Under the peculiar facts and circumstances of the case at bar, all of which it is impossible to correctly reflect in the course of an ordinary opinion, the mere fact that the witnesses testified that they did not hear the horn sounded cannot be dignified with the term evidence such as will raise a conflict. Indeed, under all the circumstances it would have been most remarkable if any one of the witnesses had in fact heard defendant's horn sounded. Again, it is very clear from a consideration of the whole record that the failure to sound the horn, if it be assumed that it was not sounded, in any way could have contributed to the accident. In either view, therefore, the alleged negligence in that regard was without any effect or influence.

I cannot concur, however, in the conclusion reached by my Associate that the plaintiff was guilty of contributory negligence as a matter of law. That question, in my judgment, was properly submitted to the jury, and the instruction in which it was submitted to them not having been excepted to, it, I think, became the law of this case. In any event, however, I do not think that plaintiff's conduct, under all the circumstances, was such that we may say, as a matter of law, he was guilty of contributory negligence which directly contributed to the accident or to his injury. I, however, fully concur in the conclusion that the negligence of Garner, the driver of the motorcycle, is, under the law of this jurisdiction, not imputable to the plaintiff.

MCCARTY, J. (concurring). As I view the record the only conclusion permissible from the evidence is that the injuries received by plaintiff are the result of his own negligence; and I am also clearly of the opinion that the evidence wholly fails to establish negligence on the part of the defendant, and that the court therefore erred in refusing to direct a verdict for the defendant.

I concur in the reasoning of, and in the conclusion reached by, Mr. Justice CORFMAN.

DIMMICK v. UTAH FUEL CO. et al.
(No. 2973.)

(Supreme Court of Utah. April 16, 1917.)

1. APPEAL AND ERROR ⇨520(5)—REVIEW—MOTION FOR NONSUIT.

A motion for nonsuit not shown by the record cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2363, 2366.]

2. APPEAL AND ERROR ⇨1002—TRIAL ⇨143—QUESTION FOR JURY.

Where there is a substantial conflict in the testimony, it is the province of the jury and not the trial court or the appellate court to determine the weight of the testimony and find the facts.¹

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Trial, Cent. Dig. §§ 342, 343.]

3. APPEAL AND ERROR ⇨274(5)—RESERVATION OF GROUNDS FOR REVIEW — EXCEPTIONS.

Where the only exception taken to an instruction was to one portion, the appellate court cannot consider as ground for a reversal complaints of other portions of the instruction urged for the first time in the appellant's brief.

4. TRIAL ⇨296(6)—INSTRUCTIONS.

In a servant's action for injuries, an instruction that "the risks that are assumed by an employé * * * are those that * * * appear to threaten immediate injury to such employé," considered with the whole instruction, which enumerates the circumstances under which an employé is held to have assumed the risk, held to tell the jury that the employé also assumes the risk where the dangers are of such a character as to a man in the exercise of average and ordinary care and precaution, situated as was the employé, appear to threaten immediate danger to such employé, and not that before an employé can be said to have assumed the risk the danger must be such as to threaten immediate danger, and the portion complained of was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

5. TRIAL ⇨241—INSTRUCTIONS—FOLLOWING LANGUAGE OF STATUTE.

Acts of the court in charging the jury in the language of the statute as to what constitutes vice principals and fellow servants was error.²

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563.]

6. APPEAL AND ERROR ⇨1064(4)—REVIEW—PREJUDICIAL ERROR.

As the evidence showed that plaintiff and a person causing the injury were not fellow servants, error in charging in the language of the statute as to what constitutes fellow servants was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224.]

7. NEGLIGENCE ⇨122(1) — CONTRIBUTORY NEGLIGENCE—EVIDENCE—BURDEN OF PROOF.

When the evidence is conflicting or different inferences may be drawn therefrom, the burden of establishing contributory negligence by a

preponderance of the evidence is upon the defendant regardless of whether the evidence in relation thereto comes from the plaintiff's or the defendant's witnesses.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221, 229, 233, 234.]

8. TRIAL ⇨234(7) — INSTRUCTION — BURDEN OF PROOF.

An instruction that, if the jury found that plaintiff was injured by negligence of the defendant, in order to defeat plaintiff's recovery the burden is upon such defendant to prove by a preponderance of the evidence that plaintiff was guilty of negligence, proximately contributing to his own injury, or that plaintiff voluntarily assumed any risk of injury, was not so erroneous as to mislead the jury to believe that in passing on these questions they were confined to the evidence of the witnesses for defendant alone, when the court in one instruction told the jury to weigh all the evidence and consider it together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537.]

9. TRIAL ⇨240—ARGUMENTATIVE INSTRUCTION.

A portion of an instruction that, if the jury find plaintiff was injured, and he had no knowledge or notice that coal was then upon an extension chute, and defendants had knowledge of such fact and full opportunity to warn the plaintiff of such fact and failed to so warn him, then the verdict must be in favor of the plaintiff, was not argumentative as against the defendants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561.]

10. TRIAL ⇨244(4) — INSTRUCTION — UNDUE PROMINENCE.

Such instruction did not give undue prominence to particular facts to defendant's prejudice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 579.]

11. TRIAL ⇨296(3)—INSTRUCTION—CURE.

Such statement, when taken with a portion of same instruction, "should you further find that a reasonably prudent person situated as were the defendants under all the surrounding circumstances would have given such warning, then your verdict must be in favor of plaintiff," reasonably implied that the jury were to find that the defendants had knowledge that the plaintiff did not know that the coal was on the extension chute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

12. APPEAL AND ERROR ⇨1064(4) — HARMLESS ERROR—INSTRUCTION.

It was not prejudicial error to charge in the language of the pleadings as to what constituted the issues in the case where the issues were stated in plain and concise language.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224.]

13. DAMAGES ⇨216(7)—INJURY TO SERVANT — INSTRUCTION.

An instruction that, in determining the damages, if any, that the plaintiff is entitled to, the jury should consider all the evidence, the nature of plaintiff's injuries resulting from the negligent act of the defendants, his suffering in body and mind, and such suffering and loss of health as the jury may believe "plaintiff has sustained, or will sustain," by reason of such injuries, and find such sum as in "the judgment of the jury under all the evidence" will be just, did not leave the right to recover damages for future pain and suffering open to mere conjecture and possibility, but in effect told the jury that such right was limited by the evidence be-

¹ Hill v. So. Pac. Co., 23 Utah, 94, 63 Pac. 814; Clark v. Ducheneau, 26 Utah, 97, 72 Pac. 331; Brostrom v. Lunch-Cannon Eng. Co., 46 Utah, 103, 148 Pac. 423.

² Shepherd v. D. & R. G. R. Co., 41 Utah, 469, 126 Pac. 692; Vota v. Ohio Copper Co., 42 Utah, 129, 129 Pac. 349.

fore them, and hence was not prejudicial error to the defendants.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 552.]

Appeal from District Court, Carbon County; A. H. Christenson, Judge.

Action by Albert Dimmick against the Utah Fuel Company and another. Judgment for plaintiff, and defendants separately appeal. Affirmed.

M. P. Braffet, Ferdinand Ericksen, and Van Cott, Allison & Riter, all of Salt Lake City, for appellants. P. T. Farnsworth, Jr., of Salt Lake City, C. S. Price, of Price, and R. A. Porter, of Payson, for respondent.

CORFMAN, J. The plaintiff brought this action to recover damages against the defendants for injuries alleged to have been sustained by him while employed as a stationary engineer at the coal mine of the defendant Utah Fuel Company at Castle Gate, Carbon county, Utah.

Briefly stated, the complaint alleges the corporate existence of the defendant Utah Fuel Company; that the defendant Edwards was its outside foreman; that on the 22d day of July, 1913, and for a long time prior thereto, the defendant corporation maintained and operated at its mine tippie at Castle Gate three shaker chutes for sizing coal; that the coal was first conveyed from the mine to a feed bin in which there was a hopper, from the hopper on to the shaker chutes, first to chute No. 1, then to No. 2, then to No. 3, the larger lumps of coal finally passing over No. 3 chute; that at all times it was impossible for any coal to pass from the feed bin on to any of the chutes unless the hopper in the bin was caused to move and operate; that no coal could pass to or come upon either chute No. 2 or No. 3 unless No. 1 was operated; that chute No. 3 was operated with a certain stationary engine, known as extension engine No. 3, and chutes 1 and 2, and the hopper, were operated with power from another and larger stationary engine; that plaintiff was employed as engineer for extension engine No. 3; that the defendant Edwards, shortly after plaintiff had come on shift, July 22, 1913, ordered the plaintiff to go to the boiler house, some 300 feet away, and turn steam into the supply pipes for extension engine No. 3 and then return and start up No. 3; that when plaintiff left in obedience to the order no coal was on any of the chutes; that while plaintiff was in the boiler house turning on the steam defendant Edwards caused both stationary engines to be started up, thus operating the hopper and the three shaker chutes, and causing a large amount of coal to be carried on to shaker chute No. 3; that plaintiff found on returning from the boiler house that extension engine No. 3 had already been started, but was working slowly on account of one of its cylinder cocks being open, and,

in order to speed up the engine, proceeded to the side of it, stepped on a pillar which was about 3 feet from the ground in order to reach the cylinder cock and close it, and while in the act of so doing a large lump of coal, owing to the motion, fell from shaker chute No. 3, striking plaintiff on the top of the head, causing him to fall on the railroad track below and sustain the injuries complained of; that plaintiff had had no knowledge or notice of the hopper and chutes having been placed in operation while he was in the power house; that the universal custom in starting the extension engine in chute No. 3 had been not to let any coal pass or come upon it until the cylinder cocks were closed and the engine speeded up to the speed necessary to operate chute No. 3 so it would properly carry the coal that came upon it from chute No. 2; that, when plaintiff went beneath chute No. 3 and assumed the position occupied by him in closing the cylinder cocks of the engine, the engine was not operating at the speed ordinarily employed before any coal would reach chute No. 3, but was operated only in the usual and customary manner employed preparatory to the passing of coal on to chute No. 3; that defendants were grossly negligent in causing coal to come upon chute No. 3 during the absence and without the knowledge of plaintiff, in failing to give plaintiff notice that coal was there, and in ordering and permitting plaintiff to do what he did do under the said circumstances.

The defendant corporation in its answer denies negligence or carelessness on its part and affirmatively pleads that the injuries complained of were the result of plaintiff's own negligence; that he voluntarily assumed all the risk of injury, and that if plaintiff's injury was due to negligence at all it was due to the negligence of a fellow servant. The defendant Edwards in his answer denies negligence on his part and affirmatively pleads negligence on the part of plaintiff.

The trial was to a jury resulting in judgment for plaintiff. Defendants separately appeal.

The physical conditions surrounding the place and scene of the accident and the mode in which the plant was operated, as described in the testimony given at the trial, were substantially as set forth in the complaint, and we shall therefore make no further statement of the facts, nor advert to the testimony of witnesses, except when discussing the controversies arising between the parties on this appeal.

1. Some 30 pages of appellants' brief are devoted to a review of testimony of witnesses and argument in support of their contention that the facts were insufficient to justify the verdict of the jury; that the plaintiff failed to establish his case; and that therefore the trial court erred in denying the defendants' motion for a nonsuit, their mo-

tion for a directed verdict, and their motion for a new trial.

[1, 2] We have carefully reviewed the record and fail to find that a motion for nonsuit was made before the trial court, and therefore the same is not to be considered here. Motions for a directed verdict and also for a new trial were made, which were denied by the court, as the record shows. After such review of the record we find a substantial conflict in the testimony, and, in keeping with the repeated rulings of this court, where there is a substantial conflict in the testimony, it becomes the province of the jury, and not the trial court, nor this court on appeal, to determine the weight of the testimony and find the facts. *Hill v. So. Pac. Co.*, 23 Utah, 94, 63 Pac. 814; *Clark v. Ducheneau*, 26 Utah, 97, 72 Pac. 331; *Brosstrom v. Lynch-Cannon Eng. Co.*, 46 Utah, 103, 148 Pac. 423.

As stated by counsel for appellants in their brief:

"An important fact to be ascertained at the trial was whether or not the engine and chutes had been operated prior to Dimmick's injury on the morning of July 22, 1913; for, if they had been in operation, then the material allegations of the complaint were not proven, the jury's verdict was against the evidence, and the trial court erred in refusing to set aside the verdict and to grant a new trial."

It is an admitted fact, and the record so shows, that the plaintiff, Dimmick, and his son, Vernial, on the morning of the accident were employed by the defendant corporation as stationary engineers, the former as engineer for extension engine No. 3, operating chute No. 3, the latter as engineer for the large stationary engine operating the hopper and chutes Nos. 1 and 2. Both the plaintiff and his son were therefore in a position to know when and how these engines, and machinery attached, on the morning of the accident, were started and operated, and both testified at the trial. The plaintiff testified in his own behalf that in his employment he was under the direction of the defendant Edwards, foreman for the defendant corporation; that, there being no steam on to operate the engine when he went on shift the morning of the accident, Edwards directed him to go to the boiler house and turn steam into the pipes that supplied the engine; that in obedience to the order of Edwards he went to the boiler house, turned on the steam, and then proceeded to return to his engine; that meanwhile, without his knowledge, the large stationary engine had been placed in operation, and the hopper and chutes Nos. 1 and 2 as well, thus causing a large amount of coal to pass on and clog chute No. 3. Plaintiff's son in his testimony corroborated the plaintiff as to when the machinery was placed in operation, and also testified that he was directed to start the larger engine operating the hopper and chutes Nos. 1 and 2 by the defendant Edwards. The defendants produced a large number of witnesses who gave

testimony of a very positive character contradicting the testimony of the plaintiff's witnesses in this regard, and also tending to show that it was a physical impossibility for the plaintiff to have turned the steam into the supply pipes in the manner testified to by him; that the steam had been turned on by another than the plaintiff; and that the machinery had been in operation for an hour or more before the accident complained of occurred.

Were this court the trier of the facts, we might readily agree with appellants' counsel in their contention that the findings of the jury were wrong on this all-important testimony, but, as pointed out in the decisions of this court above cited, and many others, we must abide by the verdict of the jury in all cases where there is such a substantial conflict in the testimony as the record here discloses.

[3, 4] 2. Appellants contend the court erred in charging the jury, the trial court having instructed the jury as to assumption of risk assumed by an employé in the following language:

"You are instructed that the risks that are assumed by an employé under his contract of employment are those that are naturally and ordinarily incident to, or that naturally and ordinarily arise out of such work as is contemplated by the parties and are known to the employé, or such risks as arise from dangerous conditions created during the course of the service, when such dangerous conditions are known to the employé, or are of such a character as to a man, in the exercise of average and ordinary care and precaution, situated as was the employé, appear to threaten immediate injury to such employé, and after such knowledge the employé voluntarily continues in such service. And when such dangerous conditions, so arising during the course of the service are plainly to be seen, and are so obviously dangerous that by the use of ordinary care they would have been seen and their consequence appreciated by a person in the exercise of ordinary and reasonable care, situated as was the employé, then it is presumed from the fact that the employé remains in such service that he has assumed the risks arising from such dangerous conditions. From a careful examination of the evidence in the case you should determine whether or not the injury claimed by the plaintiff was or was not from an assumed risk as herein described. If you conclude that it was the result of such assumed risk, then the plaintiff cannot recover. If you conclude that the injury was not the result of such assumed risk, then defense of assumed risk should be passed by and the rights of the parties to the suit determined under the other issues framed in the case."

The only exception taken at the trial by the appellants to the foregoing instruction was to that portion wherein the court told the jury that "the risks that are assumed by an employé * * * are those that * * * appear to threaten immediate injury to such employé." Appellants' counsel, in their brief, contend that the instruction was erroneous and prejudicial in other particulars, but we find no exceptions were taken in the court below to such other portions of the instruction now complained of, and therefore this court cannot here for the first time consider them

as grounds for reversal. Taking the instruction as a whole, we cannot place the interpretation upon it contended for by appellants' counsel, that the court tells the jury that before an employé can be said to have assumed the risk the danger must be such as to threaten immediate injury. As we view it, the court plainly tells the jury, after enumerating some of the circumstances under which the employé is held to have assumed the risk, that the employé also assumes the risk where the dangers "are of such a character as to a man, in the exercise of average and ordinary care and precaution, situated as was the employé, appear to threaten immediate injury to such employé." In the trial of the case at bar the plaintiff's theory was that the danger plaintiff had been subjected to was of such a character that it threatened immediate injury to him growing out of an extraordinary condition negligently created by the defendants in not operating the plant in the usual manner, permitting a dangerous condition to arise during his absence in obedience to their orders, and subjecting him to an extraordinary and immediate danger without notice or warning. Assuming that the giving of the instruction complained of by appellants was erroneous under the issues tried, it would seem that to thus tell the jury that, if the plaintiff understood and appreciated the immediate danger to which he claimed to have been subjected, he thereby assumed the risk, then it would necessarily follow that the erroneous instruction could not in any manner be prejudicial to the appellants.

[5, 8] 3. It is also contended that the court erred in charging the jury with respect as to whether the plaintiff and the defendant Edwards were fellow servants or not. The court charged the jury in the language of the statute both as to what constitutes vice principals and fellow servants. To thus charge the jury this court has held, in the case of *Shepherd v. D. & R. G. R. Co.*, 41 Utah, 469, 126 Pac. 692, and *Vota v. Ohio Copper Co.*, 42 Utah, 129, 129 Pac. 349 (both cases cited in defendants' brief), was error. It only remains, therefore, for this court to determine whether these errors complained of were prejudicial to the defendants. After carefully reviewing the testimony, we think there is insufficient evidence in the record to support a finding that they were fellow servants. The court might have found as a matter of law, and so charged the jury, that they were not fellow servants, and yet the defendants would have no right to complain when, as here, it clearly appears that the evidence as disclosed by the record is wholly insufficient to establish that relationship.

[7, 8] 4. It is next contended by appellants that the court erred in charging the jury as to burden of proof of contributory negligence and assumption of risk, in this, that the language used by the court was such as to lead

the jury to believe that they were not to consider all the evidence in the case, but were to look to the defendants' testimony alone, in passing on these defenses. The court's instruction No. 11, complained of, was as follows:

"If you find from a preponderance of the evidence that plaintiff was injured by reason of the negligence of the defendant, or either of them, then, in order to defeat plaintiff's right of recovery, the burden is on such defendant or defendants to prove by a preponderance of the evidence that plaintiff was guilty of negligence that proximately contributed to his own injury, or that plaintiff voluntarily assumed the risk of injury from such negligence, if any there was."

The rule in this jurisdiction as to burden of proof with respect to contributory negligence is stated by Mr. Justice Frick, speaking for this court, in the recent case of *Conway v. Salt Lake & O. Ry. Co.*, 155 Pac. 339, L. R. A. 1916D, 1109, to be thus:

"The true rule in this jurisdiction is that when the evidence is conflicting, or when different inferences may be drawn therefrom, the burden of establishing contributory negligence is upon the defendant, regardless of whether the evidence with regard thereto comes from the plaintiff's or the defendant's witnesses, and in either event contributory negligence must be established by a preponderance of the evidence given upon that subject."

Undoubtedly the court's instruction No. 11 could have been made more explicit by adding some qualifying statement to the effect that the jury should, in passing on the questions of contributory negligence and assumption of risk, take into consideration all the evidence in the case, whether adduced by plaintiff's or defendant's witnesses. However, we are not prepared to say that the court's instruction as given was so erroneous as to have misled the jury into believing that in passing on these questions they were to be confined to the evidence of the witnesses for defendants alone. The court, in its instruction No. 12, immediately following, told the jury:

"If you find from a preponderance of the evidence that plaintiff was guilty of negligence that proximately contributed to his own injury, then your verdict should be in favor of the defendants, even though you should find from a preponderance of the evidence that the defendants, or either of them, were also guilty of negligence proximately causing plaintiff's injury."

Then again the court told the jury by its instruction No. 19:

"From a careful examination of the evidence in the case you should determine whether or not the injury claimed by the plaintiff was or was not from an assumed risk as herein described."

Again, in instruction No. 26 the jury are told to weigh all the evidence carefully and consider it together. And so it is found throughout the instructions as a whole that the court nowhere told the jury that they were to be confined to the testimony of the witnesses of either party alone in passing upon the questions submitted to them. While there is some authority to support the contention of defendants that the trial court com-

mitted error in failing to expressly charge the jury that in passing upon the question of plaintiff's contributory negligence and assumption of risk they should consider not only the evidence of defendant's witnesses, but that of the plaintiff's witnesses as well, we think the great weight of authority and the best-reasoned cases hold, if it can be reasonably implied from the court's instructions as a whole that the evidence of both plaintiff's and defendant's witnesses is to be considered, the court's instructions will not be held erroneous. Defendants' contention here must fail. *Terre Haute, etc., Co. v. Young*, 56 Ind. App. 25, 104 N. E. 780; *Prior v. Eggert*, 39 Wash. 481, 81 Pac. 929; *Wistrom v. Redlick*, 6 Cal. App. 671, 92 Pac. 1048.

5. Defendants contend that the court erred in giving instruction No. 14 as follows:

"If you find by a preponderance of the evidence in this case that at the time the plaintiff was injured he had no knowledge or notice, either actual or constructive, that is, by the exercise of ordinary care he could not have known of the fact that coal was then upon the extension chute, and that the defendants had knowledge of such fact, and, with full opportunity to warn plaintiff of such fact, failed and neglected to so warn him, and should you further find that a reasonably prudent person situated as were the defendants in this case under all of the surrounding circumstances disclosed by the evidence would have given such warning, then your verdict must be in favor of the plaintiff, unless you further find that plaintiff assumed the risk, or was himself guilty of contributory negligence, or that he met with the injuries by him complained of as the result of the negligence of a fellow servant or fellow servants of plaintiff."

An exception was taken to the instruction by defendants as follows:

"And defendants separately except to that portion of paragraph 14 wherein the court tells the jury that, if they find 'plaintiff was injured and he had no knowledge or notice, that coal was then upon the extension chute, and that the defendants had knowledge of such fact, and with the full opportunity to warn plaintiff of such fact and failed and neglected to so warn him, then their verdict must be in favor of the plaintiff.'"

[9-11] Defendants here contend that this instruction as given by the court was erroneous in three particulars: (1) That it was argumentative; (2) that it singled out and gave undue prominence to particular facts, and (3) that it did not put before the jury all the facts to be taken into consideration by them. We do not think the instruction is argumentative, certainly not so as to be prejudicial to the defendants, but rather, if at all, as against the plaintiff, by charging that certain facts must be established before the plaintiff can recover. And the same is quite true if it can be successfully contended that undue prominence is given to certain facts. Defendants are very insistent that the jury should have been told by the court that before they could find for the plaintiff it should appear "that defendants knew or ought to have known that the plaintiff was himself ignorant of the fact that coal was upon the

extension chute." True, the court might well have been more explicit, yet it is to be seen that when the court told the jury that, "should you further find that a reasonably prudent person, situated as were the defendants in this case, under all the surrounding circumstances disclosed by the evidence, would have given such warning, then your verdict must be in favor of the plaintiff," the language thus used by the court, we think, reasonably implied that they were to find the defendants had knowledge that the plaintiff did not know the fact that coal was on the extension chute, and had the court not even so impliedly charged it as a matter of law it would not have been error.

6. The court by its instruction No. 1 in substance charged the jury in the language of the complaint and answer, and then, by instruction No. 4, instructed the jury as follows:

"In order to recover in this action the burden is on the plaintiff to prove by a preponderance of the evidence that he was injured by reason of the negligence of one or both of the defendants, and that such negligence consisted of one or more of the acts or omissions alleged in the complaint as negligence."

[12, 13] No exception was taken by defendants to the former. To the latter defendants duly excepted, and now complain and assign error by reason of the court having instructed in the language of the pleadings. Assuming that defendants could be permitted to broaden their exception as taken to No. 4 so as to now rightfully claim that it extended to No. 1, we do not think they were at all prejudiced by the court's having told the jury in the language of the pleadings as to what constituted the issues in this case so long as the issues were, as here, stated in plain and concise language.

7. It is also claimed by defendants that the court erred in instructing the jury as to measure of damages. The court by its instruction No. 23 told the jury:

"In determining the amount of damages, if any, that the plaintiff is entitled to in this case, the jury should take into consideration all of the facts and circumstances before them in evidence, the nature and extent of plaintiff's physical injuries, if any is shown by the evidence to have resulted from the negligent act, or acts, of the defendants, or either of them, his suffering in body and mind, if any, resulting from such injuries, and also such suffering and loss of health, if any, as the jury may believe from all the evidence before them the plaintiff has sustained, or will sustain, by reason of such injuries, his loss of time and service and inability to work and earn money for himself, resulting from such injuries, and should find for him such sum as in the judgment of the jury under all the evidence will be just."

The defendants excepted to that portion of the instruction as given "wherein the court tells the jury that in awarding damages they may allow the plaintiff for 'such suffering and loss of health' as they believe he 'will sustain by reason of such injuries.'" We think the court's instruction properly lim-

ited the jury to the evidence before them in awarding to the plaintiff such damages as he would be entitled to if they found the issues in plaintiff's favor. Many decisions are cited in defendants' brief wherein the language employed by the trial court was such as to erroneously leave the right to recover damages for future pain and suffering open to mere conjecture and possibility, but here the court in effect told the jury by the language used that must be limited by, and not go beyond, what the evidence before them, not reasonably but actually, established. To so instruct the jury was not error prejudicial to the defendants.

We have carefully reviewed the defendants' further assignments of error that the trial court erred in refusing certain requests made by defendants for instructions to the jury, and also the rulings of the court in the admission and exclusion of certain testimony, and none seem vital or such as to change our final conclusion that no prejudicial error was committed in the trial of this case in the court below. Therefore no good purpose is to be subserved in reviewing here in detail those assignments.

The judgment of the district court is affirmed; respondent to recover costs.

FRICK, O. J., and McCARTY, J., concur.

MALLETT v. VELIE MOTOR CAR CO. et al.
(No. 2861.)

(Supreme Court of Utah. Dec. 5, 1916.
Rehearing Denied May 5, 1917.)

APPEAL AND ERROR §414 — **APPEAL FROM JOINT JUDGMENT — SERVICE OF NOTICE ON CODEFENDANT.**

Where a joint judgment was entered against two defendants, and one of them, appealing alone, served plaintiff with notice of appeal, but failed to serve such notice upon its codefendant, the appeal will be dismissed, as the Supreme Court has no jurisdiction, since to serve notice on the codefendant or to obtain a waiver of service of notice was necessary.¹

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138.]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Alma F. Mallett against the Velie Motor Car Company, the Velie Motor Vehicle Company, and others. From a judgment against the named defendants, the Velie

Motor Vehicle Company appeals. Appeal dismissed.

Thurman, Wedgwood & Irvine, of Salt Lake City, for appellant. Hurd & Hurd, of Salt Lake City, for respondent.

FRICK, J. The plaintiff, Alma F. Mallett, brought this action against the Velie Motor Car Company, a corporation, Velie Motor Vehicle Company, a corporation, Max Olsen and Thomas E. Kelly. A trial to a jury resulted in a verdict in favor of the plaintiff and against all of the defendants. The defendant Kelly had, however, not been served with summons, and the district court of Salt Lake county, wherein the action was brought, eliminated him from the verdict and case. A joint judgment was thereupon entered upon the verdict against the other three defendants, but, on motion for a new trial, the action was dismissed as against the defendant Olsen, and thus he was likewise eliminated from the case. The joint judgment against the two corporations was, however, confirmed, on motion for a new trial, and the defendant Velie Motor Vehicle Company alone appeals therefrom. In taking the appeal the appellant served the plaintiff with notice of appeal, but failed to serve such notice upon its codefendant, the Velie Motor Car Company. The judgment being a joint judgment against both corporations, plaintiff's counsel insist that, under the rule laid down in *Griffin v. Southern Pac. Co.*, 31 Utah, 296, 87 Pac. 1091, and cases there cited, *Allen v. Garner et al.*, 45 Utah, 39, 143 Pac. 228, *Williams v. Santa Clara Min. Co.*, 66 Cal. 195, 5 Pac. 85, and *Millikin v. Houghton*, 75 Cal. 539, 17 Pac. 641, we have no jurisdiction of the appeal, and are without authority to dispose of it upon the merits. In view of the authorities just referred to counsel's contention seems to be well founded. Here, as in the cases cited, a joint judgment was entered against both defendants. In view of that fact it was necessary, in order to confer jurisdiction upon this court, for the appellant to serve its notice of appeal upon its codefendant, or to obtain a waiver of service of such notice from it; and the failure to comply with either one of those requirements is fatal to this appeal.

The objection of plaintiff's counsel must therefore be sustained, and the appeal dismissed. Such is the order. Costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

¹ *Griffin v. So. Pac. Co.*, 31 Utah, 296, 87 Pac. 1091; *Allen v. Garner et al.*, 45 Utah, 39, 143 Pac. 228.

CALLAHAN v. PIONEER NURSERIES
CO. et al. (No. 2968.)

(Supreme Court of Utah. March 23, 1917.
Rehearing Denied May 5, 1917.)

**CORPORATIONS — 545(1) — INSOLVENCY —
PREFERENCES TO STOCKHOLDER.**

Where both parties act in good faith, execution of a mortgage by an insolvent corporation to a minority stockholder for money loaned to and applied by corporation to payment of current debts, and a subsequent foreclosure by the stockholder, is not an unlawful preference; the trust fund theory not prevailing.¹

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2170.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by J. M. Callahan against the Pioneer Nurseries Company and another. Judgment for defendants, and plaintiff appeals. Affirmed, with costs.

S. P. Armstrong, of Salt Lake City, for appellant. Aaron Myers, of Salt Lake City, for respondents.

FRICK, C. J. The plaintiff brought this action as a creditor of the defendant Pioneer Nurseries Company, hereinafter styled "company," against said company and against one Sidney Tuttle as a stockholder and mortgagee of said company. The pleadings are very voluminous, and, in view that there is no question raised with respect thereto, we refrain from setting them forth either in form or substance. Moreover, in the findings of the court, to which we shall hereinafter refer, the issues presented by the pleadings are sufficiently reflected to give a clear understanding of the points decided. The plaintiff alleged in her complaint that said company was insolvent. The relief she prayed for was that a certain decree foreclosing certain mortgages which said company had made and delivered to said Sidney Tuttle, and that the sale of said premises made in pursuance of said decree, all be set aside; that a receiver be appointed to take charge of said mortgaged premises; that plaintiff's claim be allowed and that said receiver be ordered to sell said mortgaged premises and apply the proceeds of the sale to the payment of said company's debts, including the plaintiff's claim. As suggested, there were in fact three several mortgages, but it is not necessary to consider them otherwise than as one entire mortgage, and such will be done hereinafter.

The court, on a preliminary hearing, set aside the foreclosure sale and appointed a receiver to take charge of and to sell the mortgaged premises. The receiver was, however,

unable to sell the property, and the court, upon the final hearing of the case, reinstated said sale, discharged the receiver, and denied the plaintiff the relief prayed for. There was also a complaint in intervention, but the same was ultimately dismissed and requires no further attention. The court, on the final hearing, in addition to the findings on some informal matters, in substance, found that, prior to the 5th day of July, 1913, said company was the owner of a certain nursery farm in Salt Lake county of the value of "between \$10,000 and \$12,000," and that said farm, ever since said 5th day of July, 1913, had been, and at the time of the hearing was, the property of said Sidney Tuttle, subject, however, to a certain mortgage for \$4,000 made and delivered by said company to one Hosmer; that said company, at the time of the hearing, was "practically" without assets of any kind; that the plaintiff had recovered a judgment against said company for the sum of \$1,248.17, together with \$200 attorney's fees, and costs, which is in full force, and that there are no other creditors of said company; that the defendant Sidney Tuttle, at all times mentioned in plaintiff's complaint, was a minority stockholder of said company; that at a certain meeting of the stockholders of said company held in January, 1912, certain persons, naming them, were elected directors of said company, and that at another stockholders' meeting held in January, 1913, certain other persons, naming them, were elected directors of said company; that "the aforesaid directors and officers were not dummy officers of the said corporation, nor were they under the control or domination of the defendant Sidney Tuttle or of any other stockholder or combination of stockholders; that, while their financial interest in the said corporation was not large, they exercised their individual and independent judgment in the management of its affairs, and performed their duties with due and reasonable diligence, good faith, and fidelity to the interests of the corporation and its stockholders; that the salary of \$90 per month to William W. Tuttle for his services as treasurer and general manager was moderate and reasonable; that the directors and manager of said corporation endeavored in good faith to conduct it as a going concern during the year 1912, but they were obliged to and did pay about \$4,000 in old debts, and found the salable nursery stock so inferior and depleted, the nursery farm so run down, and the affairs and standing of the corporation so heavily embarrassed, that in the year 1913 their main effort was to close up the business of the corporation, and in the month of August, 1913, the said corporation was practically ended as a going concern; that at various times between January 17, 1912, and February 17, 1913, the defendant Sidney Tuttle loaned to the said Pioneer Nurseries

¹ Weyeth H. & M. Co. v. James-Spencer B. Co., 15 Utah, 110, 47 Pac. 604; Burnham, etc., Co. v. McCormick, 18 Utah, 42, 55 Pac. 77; Wells Fargo & Co. v. Scott & Co., 18 Utah, 127, 55 Pac. 81; National Bank of the Republic v. Scott & Co., 18 Utah, 400, 55 Pac. 374; Kurtz v. Ogden Canyon Sanitarium Co., 37 Utah, 313, 108 Pac. 14; Commercial Nat. Bank v. Page & Brinton, 45 Utah, 27, 142 Pac. 714.

Company, upon his express agreement and understanding with the said company that such loans were to be secured to him by mortgages from time to time upon the aforesaid farm of the said company, the sum of \$7,200, which loans were made in good faith to the said company by the said Sidney Tuttle, and were actually received by the said company and in good faith applied to its use and benefit in the payment of its outstanding and current debts, and said loans were secured to the said Sidney Tuttle by note secured by a mortgage duly executed to him by the said company on March 26, 1912, upon the aforesaid farm of the said company in the sum of \$2,000 payable in six months with interest at 10 per cent., and by a second note secured by a mortgage duly executed to him by the said company on June 27, 1912, upon the said farm of the said company, in the sum of \$2,000 payable in six months with interest at 10 per cent., and by a third note secured by a mortgage duly executed to him by the said company on February 17, 1913, upon the said farm of the said company, in the sum of \$3,200 payable in 30 days with interest at 10 per cent., and at the times when said mortgages were executed the said farm was practically the only asset of the said company by which said loans could have been secured; that the execution of the aforesaid notes and mortgages, or any of them, to the said Sidney Tuttle by the said corporation, Pioneer Nurseries Company, and the subsequent foreclosure of the same, did not constitute an unlawful or fraudulent preference of the said Sidney Tuttle as a creditor of the said corporation, nor were they in fraud of the rights of the plaintiff J. M. Callahan, nor of any other creditor or stockholder; that on June 3, 1913, the said Sidney Tuttle commenced an action in this court to foreclose the aforesaid mortgages, which action was duly and lawfully prosecuted to a conclusion, and thereafter on June 11, 1913, a decree was duly entered therein in his favor against the said Pioneer Nurseries Company in the principal sum of \$7,200, and \$291.53 interest, and \$300 attorney's fees, and \$11.20 costs, and foreclosing his aforesaid mortgages upon the aforesaid farm of the said company, and thereafter on June 13, 1913, an order of sale duly issued out of this court upon said decree, and thereafter on July 5, 1913, sale of said farm under said decree was duly made by the sheriff of Salt Lake county, at which sale said defendant Sidney Tuttle purchased said farm for the sum of \$7,866.13, and the time of redemption of said farm from said sale has long since expired; that the plaintiff J. M. Callahan did not know of said foreclosure suit nor of the sale of said farm thereunder until after said sale was made, but said foreclosure and sale were not surreptitious, nor in any wise out of the due course of law."

The district court made the following conclusions of law:

"The plaintiff J. M. Callahan is not entitled to maintain this action against the defendants, and is not entitled to any of the relief demanded in her complaint as against the defendants.

"The defendant Pioneer Nurseries Company and the defendant Sidney Tuttle are entitled to a judgment in their favor against the said plaintiff upon all the issues joined in this cause, and to a judgment against the said plaintiff for their costs in this action in the sum of \$——."

Judgment was entered accordingly. The plaintiff appeals from the judgment, and her principal assignments are that the district court erred in finding the facts as before stated and that it also erred in its application of the law to the facts.

The evidence is somewhat voluminous, and nothing could be gained by setting it forth here. It must suffice to say that on some of the issues or features of the case the evidence is in conflict, yet a careful reading of the evidence convinces us, and, as we believe, would convince any disinterested person, that the findings are not only amply supported by the evidence, but, in our judgment, they are in accordance with the great weight of the evidence. Indeed, judging from the record alone, we can conceive of no good reason why the court appointed a receiver, except that it attempted to realize all that it was possible to realize out of the property. Time, however, showed that all had been realized upon the foreclosure sale that could be realized, and therefore the court's action in reinstating the sale could not have prejudiced any one.

Now as to the law: Appellant's counsel in his brief vigorously contends that the so-called trust fund doctrine should control in this case, and that the district court erred in refusing to apply that doctrine thereto. Counsel also insists that this court should now recede from its former holdings upon that subject, as hereinafter indicated, and should adopt the trust fund theory. We herewith give counsel's contention in that regard in his own words. He says:

"Appellant contends: First, that this court should adopt the logical and just rule that the property of an insolvent corporation, as soon as it becomes apparent that it cannot continue its business, becomes a trust fund in the hands of the directors or stockholders, where they combine to control (*Ervin v. O. R. & N. Co.* [C. C.] 27 Fed. 625, 631), for payment of all its general creditors, without preference; second, that, if this court deems itself so fettered by former decisions that it cannot meet the needs of modern commercial development and the concomitant growth of high finance, it should then carefully scrutinize the good faith of Sidney Tuttle in taking the mortgages."

This court, in a number of cases, has refused to apply the trust fund doctrine to corporations, but has held that a corporation, with certain exceptions stated in the opinions filed in said cases, may prefer one or more of its creditors over others, if the preferred debt be an honest one and the parties in all things have acted in good faith,

to the same extent that an individual debtor may prefer his creditors. In *Weyeth H. & M. Co. v. James-Spencer-B. Co.*, 15 Utah, 110, at page 124, 47 Pac. 604, at page 608, this court, speaking through Mr. Justice Bartch, after a thorough discussion of the doctrine of preference and the so-called trust fund theory, states the law in the following words:

"The doctrine that an insolvent corporation may make an assignment of all its property for the purpose of paying its just debts, and prefer one creditor or class of creditors over others, the same as it might do if it were a natural, instead of an artificial, person, when none of its officers or agents are preferred, must, in the absence of charter and statutory provision to the contrary, be regarded as the settled law of this country, and, like the rule in the case of an individual debtor, has been so thoroughly incorporated in our system of jurisprudence that it cannot be overthrown, except by legislative enactment."

The foregoing case was followed in the case of *Burnham, etc., Co. v. McCornick*, 18 Utah, 42, 55 Pac. 77, and in the more recent case of *Commercial Nat. Bank v. Page & Brinton*, 45 Utah, 27, 142 Pac. 714.

The defendant Sidney Tuttle does not come within the exceptions stated in the foregoing quotations. Nor, under the evidence, is there any doubt that Mr. Tuttle's claim was an honest one, and that neither in giving the mortgage by the corporation, nor in receiving it by Mr. Tuttle, was there any intention to hinder or delay any creditor of the company, much less to defraud any one. The money for which the mortgage was given to Mr. Tuttle was all applied in payment of bona fide debts of the company and was advanced by him on the promise that he should be secured by the giving of a mortgage on the nursery farm and in the hope of maintaining the business of the company and of saving it from insolvency. Moreover, the debts aforesaid were all contracted by the

husband of the plaintiff as general manager of the company, and nothing was concealed from her. The evidence is also quite persuasive that, when the money was advanced by Mr. Tuttle and the mortgage was made, both he and the directors of the company believed that there were no other debts, except Mr. Tuttle's claim for the money advanced by him. The evidence leaves little, if any, room for doubt, therefore, that the money was advanced by Mr. Tuttle and that the mortgage was delivered to him in the utmost good faith. The facts of the case at bar, therefore, bring it squarely within the rule announced in the case of *Wells Fargo & Co. v. Scott & Co.*, 18 Utah, 127, 55 Pac. 81; *National Bank of the Republic v. Scott & Co.*, 18 Utah, 400, 55 Pac. 374, and in the more recent case of *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah, 313, 108 Pac. 14. In all of those cases preferences of claims were upheld.

In view of the findings of the court, all of which, as we have pointed out, are in accordance with the evidence, and in view of the foregoing decisions of this court, it could subserve no good purpose for us to review the numerous cases cited by appellant's counsel. It is sufficient to say in that regard that counsel's theories and the cases cited by him are all predicated upon actual or constructive fraud. There, however, was neither actual nor constructive fraud in the transactions between the company and Mr. Tuttle, and hence neither counsel's theories nor his cases have any application.

In our opinion both the findings of fact and the judgment are right and should prevail.

The judgment therefore is affirmed, with costs to respondents.

McCARTY and CORFMAN, JJ., concur.

CAMPBELL v. WELLER. (No. 865.)

(Supreme Court of Wyoming. May 7, 1917.)

1. JUSTICES OF THE PEACE §160(4)—APPEAL—NOTICE — JUDGMENT AFTER CHANGE OF VENUE.

Comp. St. 1910, § 5220, provides that a justice granting change of place of trial shall make all necessary docket entries, issue all required processes, and have full jurisdiction of the case up to the time the justice who is to take his place appears, when he shall turn such papers over to him, and after the close of the trial and judgment such papers shall be returned to the justice granting the change, who shall issue all further acts as if no change of place of trial or justice had been granted or had. Sections 5261 and 5262 provide that notice of appeal shall be filed with the justice by whom the judgment was rendered, who shall allow the appeal and make a certified transcript, etc. *Held*, that an appeal from a judgment rendered by a justice after a change of venue to a different court was properly filed with the justice who rendered the judgment, and not the justice who had original jurisdiction of the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 582-584.]

2. JUSTICES OF THE PEACE §73, 74(7) — JURISDICTION—WAIVER.

Where parties in a case in a justice's court after a change of venue was ordered appeared before the justice to whom the case was transferred, who had undoubted jurisdiction of the subject-matter, agreed upon a continuance and time for trial, filed their pleadings, and allowed the trial to proceed to verdict and judgment without objecting to the transfer of the cause or the jurisdiction, both parties waived objection to the change of venue.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 242.]

3. JUSTICES OF THE PEACE §160(3)—APPEAL—NOTICE—SUFFICIENCY.

Under Comp. St. § 5261, providing that a person desiring to appeal from a justice court shall within 15 days after judgment file with the justice of the peace a notice of such desire, without prescribing the substance of the notice or its form, a notice giving the title of the cause, the court wherein it was tried and determined, stating that it was tried by a jury, reciting the date of trial and judgment, and defendant's desire to appeal, was sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 586-588.]

4. JUSTICES OF THE PEACE §160(4) — APPEAL—NOTICE—SUFFICIENCY.

As Comp. St. 1910, § 5263, provides for notice to be issued by the clerk of the district court upon receiving and filing transcript and papers in appeal from a justice of the peace to be served in the same manner as the summons, it is not necessary that the notice prescribed in section 5261 be delivered to the opposite party, and such notice does not seem to be intended by the statute as a notice to such party.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 582-584.]

5. JUDGMENT §190(8) — NOTWITHSTANDING VERDICT—GROUNDS.

In the absence of statute, a judgment non obstante veredicto is authorized only upon the record and when it is clear upon the pleadings that the cause of action or the defense did not in substance constitute a legal cause of action or defense, and such judgment based merely upon the evidence is unauthorized.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 373.]

6. JUDGMENT §199(1) — NOTWITHSTANDING VERDICT—GROUNDS—STATUTE.

Laws 1915, c. 134, provides that, when motion is made for a directed verdict and the motion denied, the trial court upon motion by such party for a new trial or for judgment notwithstanding the verdict, may order judgment in favor of the party who is entitled to have verdict directed in his favor, etc. *Held* that, where a defendant after denial of his motion for directed verdict at the close of plaintiff's case did not renew the motion at the close of all the evidence, as the rule denying his motion, as a ground for new trial was waived by the introduction of further evidence, it was not a ground for a judgment notwithstanding the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367, 374, 375.]

7. APPEAL AND ERROR §304—REVIEW—MOTION FOR NEW TRIAL.

Where defendant's motion for new trial was not acted upon by the trial court, it is not proper for the appellate court to consider the points discussed with reference to the right of plaintiff to recover upon his evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1757, 1758.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action in a justice's court by E. N. Campbell against A. D. Weller. From a judgment for plaintiff, defendant excepted and appealed to the district court. Verdict was for plaintiff in the district court, and from a judgment for defendant notwithstanding the verdict and the overruling of plaintiff's motion to dismiss the appeal, and the overruling of plaintiff's motion for a new trial, plaintiff brings error. Reversed.

H. Glenn Kinsley, of Sheridan, for plaintiff in error. La Fleche & Diefenderfer and J. L. Graverson, all of Sheridan, for defendant in error.

POTTER, C. J. This case, which is here on error, was tried in the district court on appeal from a justice's court. The action was originally brought by the plaintiff in error, E. N. Campbell, in the court of J. F. Hoop, a justice of the peace in Sheridan county, to recover of the defendant in error, A. D. Weller, the sum of \$65, claimed to be due for the hire of a livery team and buggy. The defendant filed a motion and affidavit for change of venue, which was granted, and the cause set for trial before C. P. Story, justice of the peace of the same county, at a stated day and hour, whereupon a certified transcript of the docket entries of the first-named justice and all papers in the cause filed in his court were transferred to the court of the other justice. The parties appeared in that court by attorneys at the time fixed by the justice granting the change, and the case was continued by consent until another date, and the trial set for that date by consent, at which time, the parties and their attorneys being present, a trial was had before a jury resulting in a verdict and judgment thereon for the plaintiff for \$63.50,

and costs, to which the defendant excepted. Within the time provided by law the defendant filed with the justice before whom the trial was had a notice of appeal, and an appeal undertaking, which was accepted, and thereupon said justice made up a certified transcript of his docket entries with bill of costs, which, in proper time, was filed with the clerk of the district court; and, as stated in the bill of exceptions, said appeal was taken directly from the court of said justice. Prior to and on the day of the trial the plaintiff filed a petition in the cause, in its caption describing the cause as in "Justice Court of C. P. Story," and the cause was so entitled in defendant's answer.

In the district court a motion of the plaintiff to dismiss the appeal was overruled, which ruling was excepted to by the plaintiff, and on a trial by jury a verdict was returned in plaintiff's favor for the amount of his claim. At the close of the plaintiff's evidence a motion of defendant that the jury be instructed to return a verdict in his favor was overruled, and he excepted. The defendant, after verdict, filed a motion that judgment be entered in his favor notwithstanding the verdict, and also a motion for a new trial. The latter motion does not appear to have been considered, but the motion for judgment was heard and sustained, and a judgment was thereupon entered in favor of the defendant, the plaintiff excepting thereto, who also thereafter filed a motion for new trial stating as grounds that the court erred in rendering such judgment notwithstanding the verdict, and that the judgment is contrary to law and not sustained by the evidence. The overruling of plaintiff's motion to dismiss the appeal, the entering of judgment notwithstanding the verdict, and the overruling of plaintiff's motion for new trial are assigned as error.

It is contended on two grounds that the motion to dismiss the appeal should have been granted: (1) That the justice from whose court the appeal was taken was without authority to allow the same; (2) that the notice of appeal was insufficient. The contention as to the first ground is that the justice before whom the case was tried and who rendered judgment as aforesaid had no authority to allow the appeal, or to transfer the papers in the cause to the district court, but that, after judgment, he should have returned all the papers to the justice in whose court the case was commenced, who only was authorized to allow an appeal, as provided by section 5220, Compiled Statutes 1910, one of the sections of the Justices' Code found in the chapter entitled "Change of Place of Trial"; the material part of the section reading as follows:

"The justice granting such change shall make all necessary docket entries, issue all required processes and have full jurisdiction of the case up to the time the justice who is to take his place appears, when he shall turn over his docket and all papers in the case to the justice se-

lected to try the same, and such justice shall take charge of and be responsible for the docket, continue the docket entries and issuance of all processes and papers, to the close of trial and judgment, whereupon he shall return said docket, and all the papers in the case to the justice having original jurisdiction thereof, as aforesaid, and such justice shall issue all further processes, writs of execution and orders, and grant appeals, stay of execution, and perform any other act or thing required by law, the same as if no change of place of trial or of justice had been granted or had."

Counsel for defendant contend that the appeal was properly taken from the justice rendering the judgment, first, because that is required by the provisions of the Justices' Code specifically regulating appeals, found in sections 5261 and 5262, Compiled Statutes, which, having been subsequently enacted, impliedly repealed any contrary provision of section 5220; the sections thus relied on providing that the notice of appeal shall be filed with the justice by whom the judgment was rendered, and that within five days after the filing of the notice and payment of the costs, or the filing of the bond to secure the same, the justice shall allow the appeal, make a certified transcript of his docket entries and bill of costs, and transmit the same with all papers filed in the case to the clerk of the district court.

These appellate provisions, it is further contended, are applicable for the reason that, although the transfer of the cause to the justice who tried it was without authority, jurisdiction was acquired by the justice before whom it was tried through the voluntary appearance of the parties in his court, the filing of pleadings and consent to trial therein, and counsel refer to section 5193, Compiled Statutes 1910, authorizing the commencement of a civil action before a justice by the appearance and agreement of the parties without summons, and section 5235, providing for a trial when the parties agree to enter, without process, "any action of which the justice has cognizance."

The controversy respecting the proper method of appeal in this case from the justice court to the district court is in part the result of conflicting provisions of the Justices' Code, as published in the Compiled Statutes of 1910, concerning the procedure upon objection made to a trial before a justice in whose court the case has been commenced, for a cause authorizing a change. These provisions are in the chapter aforesaid entitled "Change of Place of Trial." And to clearly understand the effect of section 5220 upon the proceedings in this case a consideration of the history of such legislation has seemed necessary. As originally enacted, the chapter aforesaid was given the same title as above, and it then provided for changing the place of trial by a transfer of the cause and the papers therein, with a certified transcript of the docket entries, to "some other justice of the same or adjoining precinct"; the statute directing such change whenever either party,

his agent or attorney, shall make affidavit that the justice before whom the same is pending is a material witness for the defendant, or that from prejudice, bias, or other cause he believes such justice will not decide impartially in the matter, or if the justice is near of kin to the plaintiff. Comp. Laws 1876, c. 71, §§ 98-102. It was also then provided by statute that more than one justice might be elected in the same precinct. Comp. Laws 1876, c. 28, Art. 10, § 1; Rev. Stat. 1887, § 1890. And it was usual in some municipal precincts, the municipality constituting a single justice precinct, to elect two justices, until by a statute of 1888 that was required in county seats; that statute providing that each justice and constable precinct in which is located the county seat of any county shall be entitled to two justices of the peace and two constables, and that in each of said precincts two justices of the peace and two constables shall be elected or appointed in the manner provided by law. Laws 1888, c. 74, § 1. By chapter 72 of the Laws of 1895 it was provided that one justice of the peace and one constable shall be elected in such precincts in each county as the board of county commissioners may establish, and the statute of 1888 and section 1890 of the Revised Statutes of 1887, authorizing the election or appointment of two justices and constables in the same precinct, were repealed.

In the meantime the law was changed concerning the procedure, under certain conditions, upon an application for a change of the place of trial, by an act passed in 1884 (Laws 1884, c. 51), entitled "An act to provide that justices of the peace may hold court and try causes in other precincts than their own, upon change of place of trial in justices' courts." The first section of that act provided, in substance, that when a change of place of trial shall be granted by any justice of the peace, for any of the causes set forth in section 98 of the Justices' Code, and there is no other justice in his precinct, or if any other justice therein is disqualified, absent, unable to act, or objected to by either party, the justice granting the change shall immediately notify the next nearest justice of the peace qualified to try the cause to appear at the office of the justice granting the change upon a day and hour agreed upon by the parties, or fixed by the justice if no time be agreed upon, that the notice to said justice to appear and try the case shall be sent by whom and in such manner as may be agreed upon by the parties, or, if no agreement be made, then in such manner as the justice granting the same may deem safe and expedient, and that in case the justice selected to try the case is absent, disqualified, or unable to attend, then the next nearest justice within the county shall be notified to appear and try the case. That section is now section 5219 of the Compiled Statutes of 1910. And section 2 of the act is now section 5220 of the Compiled Stat-

utes, and contains the provisions that after judgment the justice having original jurisdiction of the case shall issue all further processes and orders, grant appeals, stay of execution, and perform any other act required by law, the same as if no change of place of trial or of justice had been granted—the provisions upon which it is contended that the appeal in this case should have been allowed by and taken from the justice before whom the case was commenced. Section 3 prescribed the fee and mileage to be allowed the justice summoned to try the case, and by section 4 all acts and parts of acts inconsistent with any provisions of the act were repealed so far as in conflict therewith. The several sections of the act, except section 4, were incorporated, in their proper order, in the Revised Statutes of 1887 as a part of the chapter of the Justices' Code relating to a change of place of trial, following the other sections thereof. Rev. Stat. 1887, §§ 3446-3448.

As published in the Revised Statutes of 1899, the first section of said chapter, which specifies the causes for objecting to a trial before a justice, and had provided for a transfer of the suit and the papers therein to some other justice of the same or adjoining precinct, the words authorizing a transfer to a justice of the same precinct were omitted, so that the provision was made to read that the suit and papers shall be transferred "to some other justice of an adjoining precinct." Rev. Stat. 1899, § 4352. The evident cause, if not justification, for that change in the section, as so published, was the amendment of the statute relating to the election of justices of the peace by providing for the election of but one justice in any precinct. And, evidently for the same reason, in publishing in that revision section 1 of the act of 1884, which had become section 3446 of the Revised Statutes of 1887, the words thereof stating the conditions authorizing another justice to be called in to try the case in the court where pending were omitted, thereby making the section provide that, when any change of place of trial shall be granted, the nearest qualified justice shall be notified to appear at the office of the justice granting the change. Rev. Stat. 1899, § 4357. And those sections are published in the Compiled Statutes of 1910 in the same form as in the revision of 1899. Comp. Stat. 1910, §§ 5214, 5219.

It thus appears, from a reading of the several provisions as they were enacted, that the authority to send the cause to the court of a justice of an adjoining or any other precinct was taken away by the act of 1884 aforesaid, by providing, instead of such a transfer, for a trial by the next nearest qualified justice at the office of the justice granting the change, if there should be no qualified or available justice of the same precinct or if any such justice was objected to, and repealing all inconsistent provisions, and also

that the authority to send the case to the court of another justice of the same precinct became ineffective through the operation of the later statute providing for only one justice in each established justice and constable precinct and expressly repealing the statutes allowing or requiring the election or appointment of more than one justice in a precinct. Hence that part of the original provisions of the statute found in the present compilation, which directs a transfer of the cause from the court of the justice wherein it has been commenced or is pending to the court of another justice of an adjoining or another precinct, to be there heard and determined, must be considered as having been repealed by the said act of 1884, which expressly repealed all acts and parts of acts inconsistent with any of its provisions so far as in conflict therewith, thus leaving a justice without authority to so transfer a cause upon objection, in the manner provided by law, to a trial before him, and in making it proper or lawful for him in such case only to follow the provisions for calling in another justice to appear in his court and proceed with the case therein up to and including the rendition of judgment.

[1] We think it clear that section 5220, when originally enacted as section 2 of the act of 1884, applied only to cases where another justice was notified to appear and proceed with the case at the office of the justice granting the change. It could not have applied to a cause transferred to another justice to be proceeded with and tried in his court, which remained authorized and possible if there was another qualified and available justice, not objected to, in the same precinct as the justice granting the change; for in such case the statute made no provision for a return of the cause or the papers to the justice who had transferred the same. And for evident reasons it can now be applied only where the cause has remained in the court where commenced, or pending when the change was granted, and the other justice has conducted therein the proceedings had before him.

[2] That was not the procedure in this case. The case was not tried before or in the court of the justice before whom it was commenced, and the judgment was not rendered by him or in his court, nor was there any record in that court of the trial or judgment. It is not perceived, therefore, how an appeal could be taken from that justice to authorize or to obtain a hearing in the district court, or that would affect the judgment rendered in the other court, or that it was necessary or proper to file the notice of appeal with him. Such notice was filed with the justice who rendered the judgment, as required by the statute regulating appeals from justice courts, and we think it was properly so filed. Neither of the parties is in a position to question the validity of the change of venue or

justice and transfer of the cause, or the jurisdiction of the justice rendering the judgment. At the time fixed in the order transferring the cause they appeared before the justice receiving it, who had undoubted jurisdiction of the subject-matter, agreed upon a continuance and time for trial, filed their pleadings, and allowed the trial to proceed to verdict and judgment, without objecting to the transfer of the cause or the justice's jurisdiction, and thereby waived their right to object to such jurisdiction, or to the judgment for want of jurisdiction. 40 Cyc. 181; *Ivy v. Yancey*, 129 Mo. 501, 31 S. W. 937; *Haxton v. Kansas City*, 190 Mo. 53, 88 S. W. 714; *Koerkle v. Pangborn*, 33 Misc. Rep. 476, 67 N. Y. Supp. 898; *Hitt v. Allen*, 13 Ill. 592; *Howe v. Stevenson*, 84 Ky. 576, 2 S. W. 231; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. 465; *In re Whitmore*, 9 Utah, 441, 35 Pac. 524; *Bell v. Farmville, etc., R. Co.*, 91 Va. 99, 20 S. E. 942; *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683; *Raymond v. Harrison*, 27 Colo. App. 484, 150 Pac. 727.

[3] The contention that the notice of appeal was insufficient cannot be sustained. The objections urged against it are that it did not sufficiently describe the judgment, because failing to state the findings of the jury and the amount respectively of the judgment and costs, and did not purport to be a notice to the plaintiff as appellee, but merely notified the justice of the desire to appeal. After stating in the caption the title of the cause the notice states that said cause having been tried before O. P. Story, justice of the peace, in the county of Sheridan, on the 11th day of May, 1915, by a jury, and judgment rendered on said date against the defendant and in favor of the plaintiff "for the amount set forth in the petition filed herein and costs. Notice is hereby given by the said defendant to the said justice of the peace that he desires to take an appeal in the above-mentioned cause of action to the district court within and for the county of Sheridan, Wyo."

We think it sufficiently described the judgment. The statute provides as to the notice merely that within 15 days after the rendition of the judgment the person desiring to appeal shall file with the justice a notice of such desire. Neither the form nor the substance of the notice is prescribed. No doubt, it should be reasonably certain as to the judgment appealed from, but there is no substantial reason for requiring that the amount be stated if it can be and is sufficiently identified without it, and certainly none for stating the findings or verdict of the jury. The title of the cause and the court wherein it was tried and determined are stated in the notice, and also that it was tried by a jury, the date of the trial and judgment, and defendant's desire to appeal. Having thus identified the cause, the party appealing, and the judgment, it must be held sufficient. 24 Cyc. 689; *Allen*

v. Byerly, 32 Or. 117, 48 Pac. 474; State v. Superior Court, 7 Wash. 223, 34 Pac. 922; Friemark v. Rosenkrans, 81 Wis. 359, 51 N. W. 557; Noall v. Halonen, 84 Wis. 402, 54 N. W. 729; Hender v. Ring, 90 Wis. 358, 63 N. W. 282.

[4] It was not necessary that the notice be directed to the opposite party, nor does it seem to be intended by the statute as a notice to such party; a notice to him is provided for to be issued by the clerk of the district court, upon receiving and filing the transcript and papers, and served in the same manner as a summons. Comp. Stat. 1910, § 5263.

[5] The defendant's motion for a directed verdict in his favor, made at the close of plaintiff's evidence, was on the ground that such evidence was insufficient to sustain a verdict for the plaintiff; and the motion for judgment notwithstanding the verdict was made and granted, as we understand, under a statute approved March 2, 1915 (Laws 1915, c. 184) reading as follows:

"When, in the trial of a civil action, a motion is made by either party that a verdict be directed in favor of such party, or an instruction to that effect is requested, and the motion or instruction is denied, the trial court, on motion by such party for a new trial or for judgment notwithstanding the verdict, may order judgment to be entered in favor of the party who was entitled to have a verdict directed in his favor; and the Supreme Court, in reviewing the judgment on exceptions and error, may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his favor, whenever it shall appear from the pleadings and evidence that the party was entitled to have his motion or request for a directed verdict granted."

[6] Without that or a similar statute a judgment notwithstanding the verdict based merely upon the evidence would be unauthorized. Jones v. Chicago, B. & Q. R. Co., 23 Wyo. 148, 147 Pac. 508. The statute was referred to in the case cited, but not considered further than to state that, if it might otherwise have applied, it would not apply in that case for the reason that there was no verdict, the jury having been discharged upon failing to agree; and we said that the statute followed a statute of Minnesota and North Dakota. While not a literal copy of the statute in either of those states, it is in substance the same, following more closely the North Dakota statute, except that in each of the states aforesaid the statute provides that, when the motion for directed verdict has been made and denied, the trial court, on a motion for judgment notwithstanding the verdict or for a new trial, "shall" order judgment to be entered in favor of the party who was entitled to have a verdict directed in his favor, while our statute provides that the court "may" order such judgment to be entered, making the statute in that respect permissive instead of mandatory, as held under a similar statute in Massachusetts. Grebenstein v. Stone & Webster Eng. Corp., 205 Mass. 431, 440, 91 N. E. 411.

And the statute in Minnesota and North Dakota grants the authority for such judgment when "at the close of the testimony," a motion to direct a verdict is made and denied, while our statute, omitting the words "at the close of the testimony," provides for the exercise of the authority conferred "when, in the trial of a civil action" a motion that a verdict be directed is made or an instruction to that effect is requested, and the motion or instruction is denied.

Applying the North Dakota statute, it is held that a motion made by a defendant for a directed verdict in his favor at the close of plaintiff's case must be renewed at the close of all the testimony to authorize a judgment for defendant notwithstanding a verdict for the plaintiff. Landis Machine Co. v. Konantz Saddlery Co., 17 N. D. 310, 116 N. W. 333; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857. And we have seen nothing in the Minnesota decisions indicating a contrary practice in that state, although the point does not seem to have been decided there except by holding that to authorize the judgment there must be a motion or requested instruction for a directed verdict at the close of the testimony. Netzer v. Crookston, 66 Minn. 355, 68 N. W. 1099. It was also held in Landis Mach. Co. v. Konantz Saddlery Co., supra, that where a defendant introduces testimony after a denial of his motion at the end of plaintiff's case without renewing the motion at the close of all the testimony, he waives his right to have the ruling on such motion reviewed. And that is the general rule. 38 Cyc. 1590, 1591; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; U. P. Ry. Co. v. Callaghan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628; Huellmantal v. Vinton, 112 Mich. 47, 70 N. W. 412; Bernheimer v. Becker, 102 Md. 250, 62 Atl. 528, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356; Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 N. E. 267; Cincinnati Traction Co. v. Durack, 78 Ohio St. 243, 85 N. E. 38, 14 Ann. Cas. 218; Wild v. Boston & Maine R. Co., 171 Mass. 245, 50 N. E. 533; Greder v. Stahl, 22 S. D. 139, 115 N. W. 1129.

Whether the last-mentioned rule should be held to apply under our statute aforesaid, or whether a judgment for defendant notwithstanding a verdict for the plaintiff upon all the evidence is authorized by the statute, if otherwise proper, where the defendant, having introduced evidence after the denial of his motion for a directed verdict at the close of plaintiff's case, has neither renewed such motion nor requested an instruction to the same effect at the conclusion of all the evidence, are questions not presented or suggested by the briefs. But they are too important to be passed without consideration in disposing of this case, the first in this court involving the application of the statute. The questions are material, for evidence was introduced by the defendant after his motion at the close of plaintiff's case was de-

nied, and it was not renewed at the conclusion of all the evidence nor was an instruction then requested to the same effect, but the case was submitted to the jury upon all the evidence.

The clear purpose of the statute was to save the necessity in proper cases of ordering a new trial for error in refusing to direct a verdict, and thus, so far as that might do it, expedite the final determination of causes, as stated in the title of the act. The statute was enacted in Minnesota in 1895 (Laws 1895, c. 320), and it was explained and construed as to its effect in *Cruikshank v. St. Paul F. & M. Ins. Co.*, 75 Minn. 266, 77 N. W. 958. After referring to the common-law rule authorizing a judgment non obstante veredicto only upon the record, and then only when it was clear that upon the pleadings the cause of action, or the defense, did not, in point of substance, constitute a legal cause of action or defense, the court in the case cited said:

"By enacting Laws 1895, c. 320, the Legislature was not creating a new remedy, but merely extended, as has been done in many other states, the common-law remedy to cases where, upon the evidence, either party was clearly entitled to judgment. In thus extending the remedy it must be presumed that the Legislature intended it to be governed by the same rules which applied when it was granted upon the record alone; that is, that it should not be granted unless it clearly appeared from the whole evidence that the cause of action, or defense, sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense. This court has acted on this construction of the statute and refused to order judgment even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial."

And that construction is followed in North Dakota, the Supreme Court of that state saying, in *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. E. 436, 1 Ann. Cas. 368:

"Plaintiff moved for a directed verdict in his favor at the close of the testimony, and, after verdict, asked for judgment notwithstanding the verdict or for a new trial. It is now urged that judgment notwithstanding the verdict should be directed by this court, under the provisions of chapter 63, p. 74, Laws 1901. That law was originally enacted in Minnesota in 1895, and the construction placed upon it by the Supreme Court of Minnesota is deemed to have been adopted by its enactment in this state. The practice is well settled in that state that a motion for judgment notwithstanding the verdict will only be granted in those cases where it is clear, as a matter of law, upon consideration of all the evidence, that the cause of action or defense has not been shown in point of substance. If it appears probable from the evidence produced at the trial that proof can be supplied on another trial to cure the defect, such motion will be denied. *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617; *Cruikshank v. Insurance Co.*, 75 Minn. 266, 77 N. W. 958; *Richmire v. Andrews & Gage Elev. Co.*, 11 N. D. 453, 92 N. W. 819. In other words, such motion for judgment will not be granted in case of conflict of evidence, although such conflict is such that the trial court will be justified, in its discretion, in granting a new trial notwithstanding it. The party making such a motion

must base it upon a state of facts that will warrant the court in granting it, without trespassing upon the province of the jury to be the judges of all questions of fact in the case."

And such construction of the statute is held necessary to prevent its infringing upon the constitutional right of a party to have the facts determined by a jury instead of absolutely by the court. *Kernan v. St. Paul C. R. Co.*, 64 Minn. 312, 67 N. W. 71; *Marengo v. Great Northern Ry. Co.*, 84 Minn. 397, 87 N. W. 1117, 87 Am. St. Rep. 369; and see note to *B. & O. R. Co. v. Nobil*, Ann. Cas. 1913A, 1024, stating the result of the Minnesota and North Dakota decisions under the statute aforesaid, and citing cases. In Minnesota also, while the motion for judgment may be combined with a motion for new trial, and that seems to be the usual practice in that state, asking either relief in the alternative, it is held that the statute does not authorize the entering of such judgment merely upon a motion for new trial. *Kernan v. St. Paul C. R. Co.*, supra; *Crane v. Knauf*, 65 Minn. 447, 68 N. W. 79; *Netzer v. Crookston*, supra; and see *St. Anthony Falls Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077.

While we think that the previous construction in the states aforesaid respecting the general effect of the statute must be held to have been adopted with the enactment of the statute in this state, we are not, perhaps, bound by the construction in those states as to the time for making the prerequisite motion for a directed verdict based upon the provision of their statute for making it "at the close of the testimony," since the words specifying that time for the motion are not in our statute. But there does not seem to us to be any substantial distinction between the statutes in that respect. The statute is to be understood as providing for a judgment, not upon part, but upon all, of the evidence submitted to the jury, and upon which the verdict was rendered, when a motion or request that a verdict be directed upon that evidence has been denied. A different interpretation, one that would permit a judgment for defendant notwithstanding the verdict upon a consideration alone of the plaintiff's evidence, where evidence introduced by the defendant was submitted to and considered by the jury, would be unreasonable, and it might lead to unfair, if not absurd, results. The defendant's evidence may have materially aided the plaintiff's case, or the latter, by the court's permission, may have introduced material evidence in his behalf in rebuttal, or on a reopening of the case for that purpose. And we do not think it was intended by the statute that the plaintiff might be deprived of the benefit of such additional evidence, or that the provisions of the statute require it to be so construed.

A further and convincing reason for this construction, when the defendant has intro-

duced evidence after a denial of his motion for a directed verdict at the close of plaintiff's case without renewing the motion or requesting such an instruction at the close of all the evidence, is found in the apparently well-settled rule aforesaid that the defendant, under such circumstances, waives his motion. It is clear that in such case the ruling denying the motion, though erroneous, would not be ground for new trial. That question was discussed at length, with a review of the authorities, in *Cincinnati Traction Co. v. Durack*, supra, where it was held by the Supreme Court of Ohio that the defendant loses the benefit of his motion made at the close of plaintiff's case by introducing evidence without afterwards renewing the motion, or, as said in the opinion:

"In other words, proceeding with the defense waived the motion, unless it was afterwards renewed."

The motion and the error, if any, in denying it, having been waived, it is difficult to see how it can have any standing in the case as one of the prescribed conditions authorizing a judgment notwithstanding the verdict. The manifest object of the statute, as above indicated, is to allow such a judgment upon a proper motion when justified by the evidence under the issues, instead of granting a new trial. That is to say, that the error, if any, in refusing upon motion or request to direct a verdict, which, prior to the enactment of the statute, could have been alleged only as ground for new trial, may also be a ground for judgment notwithstanding the verdict. But it must be an error of which the moving party has the right to complain. It is not conceivable that it was intended by the statute to authorize a judgment against a verdict without reversible error in denying the motion or request for a directed verdict. The theory of the statute, as we see it, is that the evidence being clearly insufficient to establish the alleged cause of action or defense, and error having been committed in refusing to direct a verdict upon such evidence, the court shall not be limited to granting a new trial on that account, but, upon proper motion, may enter a judgment for the party entitled thereto. And it follows that when the motion for a directed verdict has been waived it is no more a ground for entering judgment notwithstanding the verdict than it would be for granting a new trial. The reasons for the waiver rule aforesaid on a motion for new trial apply with equal, if not greater, force, where the motion is for judgment notwithstanding the verdict.

[7] The defendant having waived his motion for a directed verdict in his favor, the judgment was not authorized by the statute. As the defendant's motion for new trial was not acted on by the trial court, it does not

seem proper for us to consider the points discussed by counsel with reference to the right of the plaintiff to recover upon his evidence. The judgment will be reversed, and the cause remanded, with instructions to enter a judgment upon the verdict unless a new trial be granted upon defendant's said motion therefor.

Reversed.

BEARD, J., concurs. SCOTT, J., did not sit.

SAVAGE v. BOYCE. (No. 3753.)

(Supreme Court of Montana. April 28, 1917.)

1. HIGHWAYS §184(2)—AUTOMOBILE ACCIDENT—EVIDENCE—FAILURE TO TURN OUT.

Evidence held sufficient to show that defendant, driving an automobile which collided with plaintiff's vehicle, was at fault in failing to turn to right of center of highway in passing as required by Laws 1913, c. 72, subc. 8, § 1.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 472, 473½.]

2. HIGHWAYS §184(2)—AUTOMOBILE ACCIDENT—PRIMA FACIE NEGLIGENCE—STATUTE.

Where collision between defendant's automobile and plaintiff's vehicle occurred on plaintiff's side of the road, defendant was prima facie negligent in failing to exercise precaution necessary to avoid frightening plaintiff's mule, as required by Laws 1913, c. 72, subc. 9, § 3.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 472, 473½.]

3. HIGHWAYS §184(3)—USE OF ROAD—QUESTION FOR JURY—CONFLICTING EVIDENCE.

Evidence being conflicting as to whether plaintiff was asleep when collision occurred between his vehicle and defendant's automobile, and whether being startled he unconsciously guided his mule to the left, thus causing collision, the question was for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 473, 473½.]

4. APPEAL AND ERROR §1005(3)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Verdict based on conflicting evidence approved by the court in denying motion for new trial will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3949.]

Appeal from District Court, Teton County; J. B. Leslie, Judge.

Action by E. R. Savage against B. F. Boyce. Defendant appeals from judgment for plaintiff, and from order denying motion for new trial. Affirmed.

David J. Ryan, of Great Falls, for appellant. D. W. Doyle, of Great Falls, for respondent.

BRANTLY, J. This action was brought to recover damages for personal injuries suffered by the plaintiff through the negligence of the defendant. The plaintiff resides south of the village of Conrad, in Teton county. On November 28, 1913, he was returning from Conrad to his home, driving a mule harnessed to a light vehicle. As he proceeded, he observed the defendant, in

company with others, about a quarter of a mile away coming from the opposite direction in an automobile. The automobile was owned by defendant and was driven by him. As the two vehicles were about to pass, the automobile came into collision with plaintiff's mule and vehicle, with the result that plaintiff was thrown to the ground and suffered concussion of the brain and contusions about other parts of his body. It is alleged that defendant caused the collision by his negligence in failing to turn the automobile far enough to his right to permit it to pass plaintiff's mule and vehicle in safety. In his answer defendant denied negligence on his part, and, by way of counterclaim, demanded judgment against plaintiff for damage done to his automobile. The jury resolved the issues in favor of the plaintiff and awarded him a verdict. Defendant has appealed from the judgment and an order denying his motion for a new trial.

[1] The only contention made on behalf of defendant is that the evidence was insufficient to justify the verdict. The testimony of the plaintiff showed that the accident occurred under these circumstances: The highway was in a lane 60 feet in width from fence to fence. It was graded up to a crown in the center, the drainage gutter on either side being 3 or 4 feet from the fence, and about 14 inches lower than the crown. The graded portion was about 50 feet in width. The line of principal travel, along which plaintiff was driving, was on the west side, to his right, and as near the fence as one could drive without encountering the bank of the gutter on that side. The part of the way to the east was not so much used, and therefore not so smooth, but was in good condition for travel. The defendant approached plaintiff along the line of principal travel on the west side until he was within 20 or 25 feet. He then turned his automobile to the right, but not beyond the center of the way, apparently intending to pass plaintiff without turning out further than was absolutely necessary to enable him to do so. As he was about to pass, plaintiff's mule became frightened. It first stopped, and then, in an effort to get away, turned to plaintiff's left. As this occurred, defendant's automobile collided with it and also plaintiff's vehicle, throwing plaintiff to the ground and injuring him as alleged. The automobile was turned upside down and came to rest in the middle of the way. Plaintiff had observed the approach of the automobile from the time it was a quarter of a mile away, but did not pay special attention to it, because his mule was accustomed to this kind of vehicle, and he assumed the defendant would take the other side of the way and thus accomplish the passage without trouble. The mule could not turn to the right because of the proximity of the fence on that side.

[2] It is apparent from this evidence that the defendant was at fault in failing to turn reasonably to the right of the center of the highway, as is required by the statute. Laws 1913, c. 72, p. 158, § 1. He was on the wrong side of the way. Inasmuch as the collision occurred as it did on plaintiff's side of the way, defendant was also prima facie at fault in failing to exercise the precaution necessary to avoid frightening plaintiff's mule, and thus to insure plaintiff's safety. *Id.* c. 72, p. 159, § 3.

[3, 4] Defendant endeavored to show that plaintiff was at fault in that he was asleep, and, being startled by the approach of defendant and the stopping of his mule, unconsciously guided the mule to his left, and thus caused it to come in collision with the automobile. The evidence on this point was in conflict, and whether the plaintiff was at fault, and thus brought the catastrophe upon himself, presented a question which it was the exclusive province of the jury to determine. The jury having resolved the issues in favor of the plaintiff, and their conclusion having been approved by the court in denying the motion for a new trial, it must be accepted by this court as final.

The judgment and order are therefore affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

HUFFINE et al. v. LINCOLN. (No. 3751.)

(Supreme Court of Montana. May 4, 1917.)

1. APPEAL AND ERROR \S 629 — MOTION TO DISMISS—TIME FOR MAKING.

Under the direct provisions of Supreme Court rule 4, subd. 3 (44 Mont. xxvii, 123 Pac. x), an appeal will not be dismissed for failure to file the record within the time required, where the record is filed before the motion to dismiss was filed and notice thereof given to appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2765.]

2. EVIDENCE \S 213(1) — ADMISSIBILITY — COMPROMISE OFFER.

Under Rev. Codes, § 8040, providing that an offer of compromise is not an admission that anything is due, a compromise offer is inadmissible in evidence against the party making it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745, 748-750.]

3. NEW TRIAL \S 108 — NEWLY DISCOVERED EVIDENCE—COMPROMISE OFFER.

The discovery of a compromise offer, which would be inadmissible in evidence under the direct provisions of Rev. Codes, § 8040, cannot be the basis for granting a new trial under section 6794, authorizing new trials for newly discovered material evidence, etc.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217.]

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Charles M. Huffine and Leonie Huffine against A. Lincoln. Judgment for

plaintiffs, and defendant appeals from the judgment and an order denying a new trial. The appeal from the judgment was dismissed, and, in the following decision, a motion to dismiss the appeal from the order is denied and the order affirmed.

Belden & De Kalb and E. K. Cheadle, all of Lewistown, for appellant. E. W. Mettler and J. C. Huntoon, both of Lewistown, for respondents.

BRANTLY, C. J. In this action the plaintiffs sought recovery of the defendant on two counts. The first was for a balance of moneys alleged to have been received by the defendant for the use and benefit of the plaintiffs, in the sum of \$2,329.08, this balance having been ascertained and awarded to plaintiffs by arbitrators to whom they and defendant had theretofore submitted their differences for final adjustment. The second was for the sum of \$408.23 alleged to have been due to plaintiffs for goods, wares, and merchandise sold and delivered by them to the defendant, and for the use of teams, wagons, harness, etc., furnished by them to the defendant at his special instance and request. The defendant, answering, denied that he owed any part of the balance demanded in the first count, save and except the sum of \$87.57. He denied all the allegations of the second count. By way of further defenses to both counts, he alleged 12 separate counterclaims. To the fifth, sixth, eighth, ninth, tenth, eleventh, and twelfth of these the plaintiffs replied, averring that the amounts demanded therein had all been included in the submission to the arbitrators referred to in the first count of the complaint, and had been adjusted and determined by their award. As an additional defense to the eighth count, they interposed a plea of the statute of limitations. To all the others they interposed specific denials. A trial resulted in a verdict and judgment for plaintiffs for \$2,336.15 and costs. The cause was brought to this court by appeals from the judgment and from an order denying defendant's motion for a new trial.

[1] When the record on appeal was lodged with the clerk, counsel for plaintiffs moved for a dismissal of the appeal from the judgment on the ground that it had not been taken within a year from the date of entry (Rev. Codes, § 7099), and of the appeal from the order on the ground that the record had not been filed with the clerk within 60 days after the appeal had been perfected, as prescribed by the rules of this court (rule 4, subd. 2, 44 Mont. xxvii, 123 Pac. x). The appeal from the judgment was dismissed on the ground stated in the motion; the court reserving decision as to the appeal from the order until final hearing. The motion in this behalf is denied, for the reason that the record had been filed with the clerk before the motion to dismiss was filed and notice of it given. Rule 4, subd. 8.

[2, 3] The motion for a new trial was based solely on the ground of newly discovered evidence material to establish defendant's eighth counterclaim, which could not with reasonable diligence have been discovered and produced at the trial. The plaintiffs are husband and wife, the wife being defendant's daughter. Early in the year 1908 they and George Lincoln, a son of defendant, leased from him certain ranches, known as the Lincoln ranches, in Fergus county, with the farming implements, machinery, etc., owned by him thereon. The lease was oral. The terms of it are in some respects not clearly disclosed by the evidence; but it is apparent that the plaintiffs and their colessee, among their other obligations, assumed that of caring for defendant's herd of cattle, and in consideration of their services in this behalf were to have a half interest in the increase of it, in steers suitable for beef. This arrangement was, it seems, to continue for five years. At the end of 1908 George Lincoln ceased to be a party to the lease. Thereafter the lease arrangement was continued between the plaintiffs and defendant up to the latter part of the year 1912. Differences had arisen between them as to their respective rights and liabilities under the lease, and, in order to avoid litigation, on November 17, 1912, they entered into a written agreement to submit all these differences to arbitrators named by them, for final adjustment. It was agreed that the final award should be filed with the clerk of the district court and entry thereof made in the judgment book by the clerk, under the provision of section 7370 of the Revised Codes. The arbitrators having heard the evidence and made their award, filed it with the clerk on November 23d. This action was brought on May 19, 1913. The trial took place in March, 1914, ending on the 9th.

The amount of recovery sought by defendant under the eighth counterclaim was \$3,050, the proceeds of a sale of beef cattle by plaintiffs and their colessee during the year 1908 for which defendant alleged they had failed to account to him. There was a conflict in the evidence at the trial, both upon the question whether the sum demanded was due from the plaintiffs under the contract of lease, and upon the question whether they had accounted for it in the adjustment by the arbitrators.

The facts recited in the foregoing narrative are sufficient to make clear the purport of the affidavits presented in support of the motion. The affidavit of defendant, after a brief reference to the origin and character of his claim, and a specific averment to the effect that his right to the sum claimed had not been adjusted by the arbitrators, alleges:

"On or about the 10th day of March, A. D. 1914, I discovered evidence which will establish the fact that the said moneys so received by the plaintiff Leonie Huffine from the affiant did not belong to her under the terms of the said lease. That on said 10th day of March, A. D.

1914, I discovered a memorandum in writing in the handwriting of the said plaintiff Leonie Huffine, which contains among other things, a clause as follows: 'We * * * agree to pay rents and taxes and return to A. Lincoln \$5,300 which George Lincoln and the Huffines received for the beef which was shipped from the AL herd of cattle in the spring of 1908 or about the time the lease began.' That said evidence is new material to the issue, and not cumulative, nor will it be brought to impeach any evidence or testimony of any witnesses who have heretofore been examined in said action. That I did not know of the existence of said evidence and could not by the use of the utmost diligence have discovered and produced the same upon the former trial."

An affidavit by George Lincoln states that he is acquainted with the handwriting of Leonie Huffine, that the memorandum quoted by the defendant was written by her, that he is familiar with the matter stated in defendant's affidavit, and that he believes those statements are true.

The plaintiffs filed counter affidavits. That of Leonie Huffine recites that when the question of settlement arose between the plaintiffs and defendant, in order to avoid litigation, they made in writing mutual offers of terms of settlement, exact copies of which are attached; that no other offer was ever made; that in his counter offer the defendant made no mention of the sum of \$5,300; that the parties could not agree upon a settlement upon the basis of any of the offers, and thereupon agreed to submit their differences to arbitration; that upon the hearing by the arbitrators evidence was given on both sides in relation to all the claims existing between the parties, including the claim for which recovery is sought in defendant's eighth counterclaim; that the arbitrators made their award upon the evidence; and that such award is in full force and effect. It is further alleged that plaintiffs' offer was delivered to the defendant; that at all times after it was made he had full knowledge of its contents; that after it was made, and prior to the submission of their differences to arbitration, this plaintiff and defendant discussed it; and that the affiant never at any time made the offer to the defendant set forth in his affidavit, the only offer made by her being the one a copy of which she tenders with her affidavit. The affidavit of the plaintiff Chas. M. Huffine avers that a second offer was made to defendant, proposing terms of settlement different from those embodied in the one referred to by Leonie Huffine, which contained no reference to the sum of \$5,300 adverted to therein. In all other particulars his affidavit agrees substantially with the affidavit of Leonie Huffine. Both the memoranda referred to are attached as exhibits to his affidavit. The material parts of the memoranda of the two offers are the following:

"No. 1. We turn over 1,075 head of cattle and reserve the right to cut and ship the beef and agree to pay rents and taxes and return to Lincoln one-half of \$5,300, or \$2,650, which Geo. Lincoln and the Huffines received for the beef

which was shipped from the AL herd of cattle in the spring of 1908, or about the time the lease began."

"No. 2. We turn over 1,075 head of cattle, including beef. We pay no rents or taxes; also we are to have all cattle which we may gather in excess of the 1,075 head of cattle, or \$40 per head. We select a man, and Lincoln a man, they to select a third man, to cut and ship the beef. Neither Lincoln nor Huffine to have anything to do with the cutting or shipping of the beef. These men also count the cattle."

The portions of these memoranda quoted are each followed by an enumeration of articles of personal property which were to be delivered to the defendant, including different kinds of grain, colts, and hogs, in case either offer should be accepted as the basis of settlement.

The counter offer by defendant is the following:

"A. Lincoln will settle upon following basis, if settled without litigation, to wit: (1) Huffine to pay all taxes for 1912. (2) Huffine to pay \$3,000 for use of property present time. (3) Huffine to pay his share on state land purchase. (4) Huffine to return 1,200 head of cattle; also all the stock and calves of thoroughbred cattle. (5) Huffine to return horses received and one-half increase. (6) Huffine to return 13 sows and 39 pigs. (7) Huffine to return enough hay to winter cattle and horses to May 1, 1913. (8) Huffine to return seed and feed grain that he had and used of A. Lincoln. (9) Huffine to repair ditch as agreed, or pay equivalent of it in money. If the Robbins desert is deeded back, waive claim on ditch."

At the argument in this court, attention having been called to the denials in plaintiffs' affidavits that they had never made the offer quoted in defendant's affidavit, counsel for defendant admitted that the copy of the memorandum attached to plaintiffs' affidavit, as plaintiffs' first offer, is a true copy of the original. Their argument, however, is that, if the memorandum had been brought to the knowledge of the jury at the trial, the result would necessarily have been a finding in favor of the eighth counterclaim, and hence that judgment would have gone for the defendant. This argument proceeds upon the assumption that the memorandum embodies a distinct admission by plaintiffs that the defendant is entitled to the proceeds of the sale made in 1908, and that upon another trial it will without question establish his right to recover them. If we accept the assumption of counsel as correct, the conclusion must follow, for, though the evidence is cumulative in character, the legal effect of it would be to overcome any denial of their liability by the plaintiffs. But the effect to be given to the writing is to be determined, not by looking alone to the excerpt referred to, but by an analysis of all the memoranda in connection with the circumstances under which they were written. There is an apparent inconsistency in the statements of plaintiffs as to all the circumstances, in that Leonie Huffine states that only one offer was made by plaintiffs and the counter offer by defendant, whereas Chas. M. Huffine states that plaintiffs made a second offer; neverthe-

less it stands admitted by the defendant, because he did not file an affidavit contradicting those of plaintiffs, that the memoranda were offers and a counter offer made in an effort by the parties to adjust their differences and thus avoid a resort to litigation. In legal effect, then, the offer of plaintiffs is not to be construed as an admission that anything was due defendant, but as an offer of a compromise. If, therefore, it had been offered in evidence at the trial it would not have been admissible. Rev. Codes, § 8040; Scott v. Wood, 81 Cal. 405, 22 Pac. 871; 1 Elliott on Evidence, 646; 2 Wigmore on Evidence, 1061. It would have been held wholly incompetent, and the like ruling would necessarily be made with reference to it on another trial. Hence it cannot be regarded as material within the requirement of the statute authorizing the granting of a new trial on the ground of newly discovered evidence. Rev. Codes, § 6794.

Under the well-settled rule, newly discovered evidence, offered as a ground for a new trial, must not only be material, but so substantial in character that it would probably produce a different result on another trial. State v. Matkins, 46 Mont. 59, 121 Pac. 881, and cases cited. It is only when the application makes out a case of this degree of cogency that a trial court should be held guilty of an abuse of discretion in denying it. There must be an end to litigation. The prevailing party is presumptively entitled to the relief awarded him. The presumption thus established in his favor may not be overturned until a cogent reason appears why the discretion vested in the trial court should be exercised in favor of his adversary. Hence, no substantial reason appearing why plaintiffs should be deprived of their advantage, the application was properly denied. The order is affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

ELLING et al. v. FINE. (No. 3752.)

(Supreme Court of Montana. May 4, 1917.)

1. ESTOPPEL § 70(3)—TITLE OF MORTGAGEE—FAILURE OF MORTGAGOR TO ASSERT RIGHTS.

If, on the face of a deed and contract concerning mining properties, the transaction clearly amounted to a mortgage of the properties, the mortgagee got no title by failure of the mortgagor to assert his rights in the property as such, because once a mortgage always a mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 185, 186.]

2. MORTGAGES § 33(5)—NATURE OF TRANSACTION—DEED—CONTRACT TO RECONVEY.

Where the owners of mining property executed a deed conveying separate lodes and mill sites, and the grantee and his wife executed a contract, agreeing to reconvey on payment only ten lodes and mill sites, comprised in a particular group, containing no reference to a loan, no mention of any indebtedness, and no engagement

by the grantors to pay or do anything, the transaction was prima facie a sale to the grantee, with an option to the grantors to repurchase.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 79.]

3. MORTGAGES § 36 — DEED INTENDED AS MORTGAGE—BURDEN OF PROOF.

One claiming that a deed was intended as a mortgage has the burden of proof where resort to extrinsic evidence is necessary.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96.]

4. MORTGAGES § 608½ — LACHES OF MORTGAGOR.

Defendant, who sold mining property, the buyer and his wife executing a contract to reconvey part of the property, so that prima facie the transaction was a sale with option to repurchase, was barred by laches from contending that the transaction was intended as a mortgage, a conclusion to reach which extrinsic evidence was necessary, he having stood idly by for more than 13 years while his grantee treated the property as his own, spent money upon it, paid taxes and died, while his executors operated the property, improved it, and paid taxes, and while it passed through probate proceedings and was formally distributed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815.]

5. MORTGAGES § 608½ — LACHES—EXCUSE.

That a grantor claiming his deed was a mortgage delayed in asserting his rights against his grantee and the latter's executor and heirs on account of lack of funds, because he "didn't want to start anything" until satisfied of his ability "to go through with it," was not an excuse for the mortgagor's laches in delaying to contend that the transaction involved was a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815.]

6. TRIAL § 397(1)—FINDINGS—NECESSITY.

Where defendant was barred by his laches from raising the question whether the transaction in suit was a mortgage or not, the trial court was justified in failing specifically to find on the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 940.]

Appeal from District Court, Madison County; J. B. Poindexter, Judge.

Action by Mary B. Eiling and others against Benjamin J. Fine. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Judgment and order affirmed.

S. V. Stewart and Geo. R. Allen, both of Virginia City, and Walsh, Nolan & Scallon, of Helena, for appellant. Hartman & Hartman, of Bozeman, for respondents.

SANNER, J. In this case it is admitted by the pleadings, established by uncontradicted evidence, or found by the court: That the defendant, B. J. Fine (the appellant here), and one J. H. Pankey were, on January 28, 1895, indebted to Henry ELLING in the sum of \$93,494.62, all incurred in the purchase, maintenance, and operation of certain mining properties situate in Madison county, among them ten unpatented claims and mill sites, referred to as the "Easton group," which are the subject of the present controversy. On

that day Fine and Pankey executed, and a few days later delivered to Elling, an instrument, in form a deed absolute, conveying the properties so owned by them to him. At the same time and as part of the same transaction Elling (his wife joining) entered into a written agreement with Fine and Pankey, which agreement recited the execution of said deed and the desire of Fine and Pankey to have "the privilege of repurchasing" the Easton group, and provided that Elling would "resell and reconvey" the same to Fine and Pankey if they should on or before February 1, 1899, pay or cause to be paid to Elling "the sum of \$93,494.62, together with interest thereon * * * at the rate of 10 per cent. per annum, and the necessary, proper, and legitimate expenses of operating, preserving, and maintaining the title and right to the possession of said property, * * * with interest on such amounts at the same rate." Other stipulations of this agreement are these: That Elling, if he worked the property, must do so "in miner-like fashion and in a manner conducive to the best interests of all the parties to the contract"; that any profits derived from such operations "shall be credited" on the sum fixed as the repurchase price (viz. \$93,494.62); that the costs of improvement and operation "shall be a charge against the property and shall bear interest at the rate of 10 per cent. per annum" that Elling "shall keep a just, true, and accurate account" of his receipts from and expenditures on behalf of the property; that "either party to this contract may negotiate a sale" of the property, "but no sale can be made by either * * * without the consent of the other party in writing"; that if Elling "shall negotiate a sale * * * he shall receive one-third * * * of the proceeds over and above the sum of \$93,494.62, with interest, * * * costs, and expenditures," but if Fine and Pankey should negotiate a sale, Elling "is to receive nothing" over and above said sum, with interest, costs, and expenses; that Elling must maintain and defend the title and possession of said property against all persons and protect it from waste or destruction; and that Fine and Pankey, or either of them, shall have the right "at any time and at all reasonable times to enter upon the premises for the purposes of examination and inspection." Elling went into possession immediately, and from that time remained in the sole and exclusive possession of the property, working and developing it until his death in November, 1900. Thereafter the executors of his will continued to possess, operate, and develop the property, until by decree of the district court of Madison county it was formally distributed to the plaintiffs as heirs at law and devisees of Henry Elling, since which time the plaintiffs have possessed, operated, and developed the same. During the period elapsing since January 28, 1895, said Henry Elling, his executors, and these plaintiffs have paid all taxes levied against said property, have

made large expenditures in mining, developing, and improving the same, such expenditures over and above all receipts derived therefrom amounting in 1899 to \$52,627.93, which, with the purchase price, made a total of \$146,122.55 and all this without accounting to any one. Meanwhile, and on February 21, 1896, there was issued to Henry Elling, and on March 23, 1896, by him recorded, a patent from the United States granting the Easton group in fee simple to him. The value of this property was always speculative and fluctuating in character, never demonstrably greater than \$93,494.62. With full knowledge of all that had been or was being done, Fine and Pankey stood by demanding no accounting, questioning no act, offering no repayment, nor, save some verbal declarations to strangers made by Fine shortly before the plaintiffs brought this suit in February, 1913, had he or Pankey asserted any claim to the property, and Pankey does not now assert any such claim. Fine's contention, as set forth in his counterclaim, is that the transaction whereby Elling became possessed of the property in question was intended as security for the repayment of the indebtedness then due from Fine and Pankey as above mentioned, and that said transaction therefore amounts to a mortgage, from which he ought now to be permitted to redeem by paying such sum as may, after accounting by the plaintiffs, be found to be still due. The trial court, though requested by both sides to find upon this contention, failed to do so specifically, but held that Fine is barred by laches from making this claim or asserting any right to or interest in the property, and also that his "cause of action set up in his counterclaim herein is barred by the provisions of the statute of limitations of this state" As the result plaintiffs were adjudged to be the absolute owners of the property and their title to the same was quieted as against Fine. Hence these appeals.

[1-3] We may premise at the outset that, if upon the face of the instruments the transaction, made up of the deed and contract, clearly amounts to a mortgage, the judgment is wrong; for, "once a mortgage always a mortgage," plaintiffs had no title, and could get none by the failure of Fine to assert what was obvious on an inspection of the record. But such is not, upon its face, the effect of the transaction. The deed is absolute and conveys 27 separate lodes and mill sites. The contract bears date two days later than the deed, and Elling's wife joined in its execution. Of the 27 lodes and mill sites it covers and agrees to reconvey only the 10 comprised in the so-called Easton group. It contains no reference to a loan, no mention of any indebtedness, no engagement by Fine and Pankey to pay or do anything, although some of its provisions, such as those mentioned above, are remarkable; they are not necessarily inconsistent with its expressed purpose to confer upon Fine and Pankey an

option to repurchase property theretofore conveyed by them absolutely to Elling. *Prima facie* the transaction was a sale to Elling with an option to Fine and Pankey to repurchase. *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240. To reach the conclusion that it was intended as a mortgage, resort to extrinsic evidence was necessary. This means that the burden was upon Fine (*Gassert v. Bogk*, *supra*; *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758), and that he could be barred by laches from making the contention (*Riley v. Blacker*, *supra*; *Harrington v. Butte & Superior Co., Ltd.*, 52 Mont. 263, 279, 157 Pac. 181; 27 Cyc. 231).

[4] The trial court held that he was so barred, and we can see no reason for denying this conclusion. The time within which it became the duty of Fine to challenge the apparent effect of the transaction commenced to run on February 1, 1899, when the option contract expired, and he became charged with the knowledge that Elling might thereafter treat the property as unaffected by any claim. From that time until the heirs of Elling commenced this suit more than 13 years elapsed, during which Fine stood idly by while Elling treated the property as his own, spent money upon it, paid the taxes, and died, while the executors of Elling's will operated the property, spent money for its improvement, and paid the taxes upon it, while the property passed through probate proceedings and was by decree formally distributed to Elling's heirs, and while they, as such heirs, have operated the property and paid the taxes on it ever since. *Riley v. Blacker*, *supra*, presented a similar situation, concerning which we said:

"Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant;' and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. Therefore it has often been held by this court that: While a mere delay short of the period of the statute of limitations does not of itself raise the presumption of laches (*Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968; *Parchen v. Chessman*, 49 Mont. 328, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 815), yet 'good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.' *Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36; *Brundy v. Canby*, *supra*. What constitutes a material change of condition has been the subject of much judicial discussion and some judicial dissension; but, whatever doubt there may be as to other

circumstances, it never has been questioned, to our knowledge, that the death of one of the parties to the transaction is such a change."

To the same effect, see 16 Cyc. 163, 164, and cases cited.

[5] The only explanation Fine offers for his delay is lack of funds; he "didn't want to start anything" until satisfied of his ability "to go through with it." However appropriate this stand may be, considered as business strategy, it has no virtue in the field of equity where Fabian tactics are always dangerous. Especially futile must it be to avoid the effect of inaction so prolonged as here, when there were things he could have done, such as to proclaim his position, to demand an accounting, to protest against expenditures he now seems to question, which required no outlay whatever. Under the circumstances here shown, lack of funds is no excuse (16 Cyc. 159, and cases cited; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 Sup. Ct. 902, 37 L. Ed. 737; *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855; *Carter v. Mayor of Chattanooga* [Tenn. Ch. App.] 48 S. W. 117; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299), and the court was clearly right in applying the doctrine of laches (*Riley v. Blacker*, *supra*; *Maher v. Farwell*, 97 Ill. 56; *Schradschi v. Albright*, 93 Mo. 42, 5 S. W. 807; *Turner v. Littlefield*, 46 Ill. App. 109; *Broaddus' Heirs v. Potts*, 140 Ky. 583, 131 S. W. 510; *Elliot v. Bunce*, 10 Cal. App. 741, 103 Pac. 897; *Goree v. Clements*, 94 Ala. 337, 10 South. 906; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Mellish v. Robertson*, 25 Vt. 603; *Harter v. Twohig*, 158 U. S. 448, 15 Sup. Ct. 883, 39 L. Ed. 1049; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Landrum v. Bank et al.*, 63 Mo. 48).

[6] If, then, Fine was barred by his laches from raising the question of mortgage or no mortgage, the court below was justified in falling to specifically find upon the subject; indeed, such a finding would have been a pure gratuity. We may remark, however, that if, as respondents insist with some reason, a fair inference from the language of the findings made is that the transaction was in fact what it appears to be, viz. a deed absolute with an option to repurchase, we should not be inclined to disturb that conclusion, because we cannot say from a careful reading of this record that the evidence clearly preponderates against it.

Appellant assails with much force the finding that Fine's cause of action as set forth in his counterclaim "is barred by the provisions of the statute of limitations of this state." This finding is rather vague, since it does not indicate what provisions of the statute of limitations are held to be a bar, and it may be that appellant's criticisms are sound; but if the appellant is barred by laches, and that conclusion is sufficient, as it clearly is, to sustain the judgment, the

question of limitations becomes of no importance.

The other matters assigned as error could not command a reversal, and therefore will not be further considered.

The judgment and order appealed from are affirmed.

BRANTLY, O. J., and HOLLOWAY, J., concur.

LEE et al. v. COLQUHOUN. (S. F. 7243.)
(Supreme Court of California. April 26, 1917.)

JUDGMENT \S 460(6) — SUIT TO SET ASIDE — COMPLAINT.

The complaint to set aside a judgment as obtained by fraud and without process must show a defense on the merits, and ability to present proof thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 885.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Henry E. Lee and another against W. W. Colquhoun. From an adverse judgment, plaintiffs appeal. Affirmed.

H. L. Clayberg, Clark Clement, and Clayberg & Whitmore, all of San Francisco, for appellants. Walter Slack and Joseph K. Hutchinson, both of San Francisco, for respondent.

SLOSS, J. The plaintiffs appeal from a judgment entered against them pursuant to an order sustaining a demurrer to their first amended complaint.

The action was one in equity to set aside a money judgment obtained by the defendant herein against the plaintiffs and one Pack, individually and as copartners. It will suffice for present purposes to say that by their complaint the plaintiffs sought to set up, as grounds for equitable relief, that there had not been legal service of summons upon them, and that the judgment had been obtained by fraud. Without examining the sufficiency of the averments relied on, we may assume that the plaintiffs stated facts sufficient to support their claims in these respects. But the complaint was totally devoid of any averment to the effect that the plaintiffs herein ever had or now have a meritorious defense to the action which resulted in the judgment of which they complain, or that such judgment was not, in fact, just. Even though a judgment may have been obtained through fraud, or without service of process, a court of equity will not grant relief against it in favor of a party who "claims only the barren right of being permitted to defend against a claim to which he had no defense." (Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639.) In an action to set aside a judgment for these grounds, the plaintiff must show:

"That he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves * * * must be incorporated into his complaint, so that the court may determine that if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action." Whitney v. Kelley, 94 Cal. 153, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106.

This rule is so well established that we content ourselves with referring to Bell v. Thompson, 147 Cal. 689, 82 Pac. 327, and to the very recent case of Matson v. Batto, 161 Pac. 1144, where many of the earlier decisions are cited.

The demurrer was therefore properly sustained upon the ground of want of facts sufficient to constitute a cause of action, without regard to the validity of any of the other grounds specified. Plaintiffs do not complain of the court's failure to grant them leave to amend, nor do they intimate that they could have amended their complaint so as to obviate the defect.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

KINARD v. JORDAN et al. (S. F. 7287.)
(Supreme Court of California. April 23, 1917.)

1. DISMISSAL AND NONSUIT \S 60(3) — FAILURE TO PROSECUTE—EFFECT OF APPEAL.

Code Civ. Proc. \S 583, providing for dismissal where plaintiff fails for more than two years after answer filed to bring the action to trial, is not operative in a case where an appeal has been taken from a judgment, although pending such appeal the trial court attempted to vacate the judgment for plaintiff.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 142.]

2. APPEAL AND ERROR \S 439—EFFECT OF APPEAL—POWER OF TRIAL COURT.

An appeal taken by defendants removed the case from the jurisdiction of the trial court, so that it had no power to set aside the judgment pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2197.]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by C. E. Kinard against William H. Jordan and others. From a judgment dismissing the action, plaintiff appeals. Reversed.

C. E. Kinard, in pro. per. Crittenden Thornton, of San Francisco, for respondents.

SHAW, J. This is an appeal from a final order or judgment dismissing the action. The order dismissing the action was made on September 14, 1914, in pursuance of a motion by the defendants, under section 583 of the Code of Civil Procedure, to dismiss

the action, because the plaintiff had failed for more than two years after answer filed to bring the action to trial. A brief history of the case is necessary to explain the grounds of the appeal.

The action was begun on March 24, 1906. Prior to 1909 a judgment of dismissal was entered, because of the failure of the plaintiff to file an amended complaint in accordance with the orders of the court. The plaintiff appealed and the judgment was reversed on March 11, 1909, the decision holding that the original complaint stated a cause of action for the specific performance of a contract by Huntington, one of the defendants, to transfer to the plaintiff's assignor certain shares of corporate stock, the other defendants being made parties solely because they were trustees for Huntington or assignees with notice. *Kinard v. Jordan*, 10 Cal. App. 219, 101 Pac. 696. Thereafter the defendants, except Huntington, filed an amended answer to the complaint. Huntington failed to answer. On October 24, 1911, the trial of the case was set for December 12, 1911. On December 12th it was continued for trial until December 15, 1911. Notwithstanding these orders, a judgment was rendered on November 8, 1911, purporting to be a judgment in favor of the plaintiff against all of the defendants, including Huntington, his default having been previously entered. From this judgment an appeal was taken by Huntington on December 14, 1911, and a separate appeal was taken by the other defendants on December 16, 1911. No transcript was filed by the defendants on the last-mentioned appeal, and that appeal is still pending. On the separate appeal of Huntington the judgment, as against him, was reversed. This decision was rendered on March 9, 1914. *Kinard v. Jordan*, 167 Cal. 333, 139 Pac. 797. We proceed to consider the judgment of dismissal made on September 14, 1914.

[1] The portion of section 583 relied on provides that the court may in its discretion dismiss an action for want of prosecution, on motion of the defendant, if the plaintiff "has failed for two years after answer filed to bring such action to trial." The answer of the defendants, other than Huntington, was filed before the rendition of the judgment of November 8, 1911. That judgment, however erroneous it may be, purported to determine the case. The aforesaid appeals taken therefrom suspended all power of the court below to proceed, and necessarily took the case out of the operation of section 583 while the appeals remained pending. The motion to dismiss was made within less than six months after the decision on the appeal of Huntington became final. With respect to the other defendants their appeal is still pending, and no proceedings could be had looking toward the trial as to them until that appeal was disposed of. If nothing

more appeared it is clear that the motion to dismiss was not well taken.

The motion purports to be made by all the defendants, including Huntington. So far as he is concerned, it is clearly erroneous. He has never filed an answer, and his default was entered for not answering. The judgment against him was reversed, but the default still stands. The reversal was based on grounds which do not affect the validity of the default. As to him, the ground on which the motion was made did not exist. The other defendants insist that the order was properly made because of proceedings in the court below after they had appealed from the judgment of November 8, 1911, against them. The record shows that a few weeks after the filing of their notice of appeal from the judgment of November 8, 1911, the following order was made:

"In this case upon the court's own motion, plaintiff in person, and counsel for defendants consenting thereto: It is hereby ordered that the judgment heretofore entered in favor of the plaintiff and against the defendants, other than the defendant F. A. Huntington, be and the same is hereby set aside."

[2] The claim is that this order vacated the judgment which was the subject of the appeal previously taken, set the case at large, and made it the duty of the plaintiff to proceed with due diligence to bring the case to trial. The appeal taken by these defendants removed the case from the jurisdiction of the superior court. It was no longer pending therein for the purpose of amending the judgment or of vacating it for errors apparent on the face of the record. The consent of the parties could not reinvest the court with jurisdiction of that subject-matter. The lower court, therefore, had no power to make the order, and it must be deemed a nullity. *Parkside, etc., Co. v. MacDonald*, 167 Cal. 346, 139 Pac. 805; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605. It follows that the judgment was not vacated, the appeal is still pending, the order did not revive the duty of the plaintiff to bring the case to trial, and did not again set in motion the time prescribed by section 583.

The judgment of dismissal is reversed.

We concur: SLOSS, J.; LAWLOR, J.

SANTA BARBARA COUNTY v. MORE et al. (L. A. 3756.)

(Supreme Court of California. April 23, 1917.)

1. HIGHWAYS § 83 — ABUTTING OWNERS — DESTROYING TREES.

The abutting owner is deprived of right to destroy shade and ornamental trees on the side of a highway, though planted by him, and though he owns the fee to the center of the road by Pol. Code, §§ 2633, 2742, 4041, subd. 39, Code Civ. Proc. § 733, and St. 1909, p. 1129, regulatory thereof.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 292, 293.]

2. CONSTITUTIONAL LAW §292 — HIGHWAYS
§83 — TAKING PROPERTY WITHOUT DUE
PROCESS.

Statutes regulatory of when and under what circumstances trees on a highway subserving useful as well as ornamental purposes may be destroyed do not take property of the abutting owner without due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 807; Highways, Cent. Dig. §§ 292, 293.]

3. WOODS AND FORESTS §11 — PENALTIES —
RECOVERY.

The penalty of \$100 per tree for maliciously destroying shade trees on a highway may not be recovered under a complaint merely alleging damages.

Department 1. Appeal from Superior Court, Santa Barbara County; Geo. E. Church, Judge.

Action by the County of Santa Barbara against John F. More and others. From the judgment, both parties appeal. Affirmed.

E. W. Squier and Fred H. Schauer, both of Santa Barbara, for plaintiff, Wm. G. Griffith, of Santa Barbara, for defendants.

PER CURIAM. Hollister avenue is the principal highway leading from the city of Santa Barbara in the county of the same name, to the west and north. Defendant John F. More owns a 400-acre tract of land fronting on the southerly line of this highway. The highway boundaries are and for long have been defined by substantial fences on either side. More than 20 years ago, More planted ornamental trees along this highway between the roadway proper and his fence. He owns the fee of the land to the center line of the highway. These trees are native black walnuts, poplars, silver leaf maples, and catalpas. They have grown to be from 1 foot to 3 feet in diameter, and some of them have reached a height of 70 feet. They afforded with other trees a shaded avenue, declared to be one of the most beautiful in the state. While these trees were thus growing, defendant More planted English walnuts upon his 400 acres. The row or rows nearest to the ornamental trees upon the highway suffered from their proximity to them. Some of the ornamental trees thrust out lateral roots to a distance equal to their height. Suckers sprang up from these roots, the soil was impoverished, the moisture from it withdrawn, and the walnuts on these nearby trees were of inferior size and quality. Defendant More upon more than one occasion sought permission of the supervisors of the county to destroy these ornamental trees, offering to substitute therefor some kind of tree, mentioning palm trees, which thrust down a deep tap root and which would not send out lateral roots to the injury of his nut orchard. The board of supervisors of Santa Barbara county delayed action upon these petitions or requests, and they were withdrawn. Then, on the 11th day of April, 1911, the defendant cut down and destroyed

six of these trees upon the highway in front of his land. He was notified by the district attorney of the county to cease this work of destruction, and he promised to do so, but a few days thereafter on Sunday, in violation of his promise, he employed a force of men in an effort to destroy all of the trees before he could be restrained from so doing by process of law. Twenty more trees were thus destroyed before the work was arrested by the authorities. Thereupon the county of Santa Barbara brought this action, setting forth these matters, averring that the destruction was maliciously done, and that the damage wrought by it was \$2,600. Plaintiff prayed for an injunction and for a monetary judgment in the sum of \$2,600. For answer, the defendant John F. More assumed all responsibility, asserted his ownership in the land, admitted the destruction of the trees, denied that they were willfully or unlawfully or maliciously destroyed, and asserted a right in him so to destroy them by virtue of his ownership of the fee of the highway, setting forth in this connection the injury to his walnut orchard as above outlined. The court's findings of fact were in accord with the foregoing statement. It found that the trees had been planted by defendant More, and in their early growth nurtured by him, but that for many years the county had exercised supervision over them, pruning and caring for them. It found further that the trees were the property of the defendant John F. More, "subject to the right of the county of Santa Barbara to preserve them as part of said highway, for the use and benefit of the public, and control the cutting down, removal, or trimming of the same." It found further that the trees "are large handsome trees, and add greatly to the comfortable use and enjoyment of said highway and the economical and convenient maintenance of the same." In support of this last finding, the evidence was that beside their aesthetic value, the trees afforded a grateful shade to the traveler in warm weather and during the long period of summer drought, when it was necessary to sprinkle the roadway, the better to preserve it; and that by arresting the sweep of the winds, they retarded evaporation, and thus lessened the expense of the upkeep of the highway.

The only evidence which the plaintiff offered under the allegation of damage above quoted was that of the supervisor of the district, who testified that he estimated the damage to the highway by the destruction of the trees at \$100 apiece, "considering the trees of that value." On cross-examination he explained that the basis of his estimate was the law which exacts a forfeiture of \$100 for the malicious destruction of each shade or ornamental tree on any highway. Pol. Code, § 2742. The trial court granted the injunction prayed for. It made no spe-

cific finding upon the allegation of damage, but in its conclusions of law declared that the plaintiff "is not entitled to recover in this form of action the penalty of \$100 per tree imposed by the statute for digging up, cutting down, or other malicious injuring or destroying shade or ornamental trees upon the public highway."

From this judgment, cross-appeals have been taken by the litigants; by plaintiff, whose contention is that the court erred in not fixing and awarding damages herein, insisting that it established the malicious destruction which entitled the county to recover the \$100 penalty; by the defendant, who insists that by virtue of the ownership of the fee of the soil, he had the right absolute to remove the trees. This latter contention first demands consideration. It finds support in two adjudications. The first, *Village of Lancaster v. Richardson*, 4 Lans. (N. Y.) 136, where the Supreme Court of New York held in case of a destruction similar to the present one that:

"Independently of the statute, trees standing in the streets or highway, the soil of which belongs to the adjacent owners, are the exclusive property of such owners, and they may remove them at pleasure."

The second of these cases is *Bigelow v. Whitcomb*, 72 N. H. 473, 57 Atl. 680, 65 L. R. A. 676, where the precise question here under consideration was presented for determination, the court saying that the question before it was:

"Whether, in laying out a highway under statutory authority, the public acquired a right to prohibit the landowner from removing the trees standing in the highway next to his land, for the purpose of * * * shade and ornamentation. If the public cannot deprive the owner of his trees by using them in constructing or repairing the road, can they deprive him * * * from cutting them down and using them in such a manner as he sees fit?"

The court held that the public acquired no such right, saying:

"It is no more a deprivation of his property right to cut down his trees and devote them to the useful and necessary work of road construction, than it is to appropriate them standing, for the purposes of shade and ornamentation. An effective prohibition against one's use and enjoyment of his property in a usual and otherwise appropriate manner deprives him of his property, as much as its actual taking or asportation. * * * Whether the trees are useful for shade and add to the beauty of the way, or whether they are only useful for lumber and wood, cannot determine the question of his ownership. If they are his property, he is entitled to the beneficial use of them, subject to such reasonable regulations as the public use of the highway may require (citing authorities)."

[1, 2] It is the unquestioned rule of decision in this state that the owner of the fee of a highway may exercise all such rights of dominion over his land thus subjected to the easement as are not inconsistent with, nor to the detriment of, the easement itself. *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; *Gurnsey v. Northern California*

Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. But the question before us cannot be answered by mere references to the decisions of other states without a presentation of the statute law of this state bearing upon the matter. When consideration is paid to our statutes, it will be found that the Legislature has spoken decisively on the question. By section 2633 of the Political Code, an owner or occupant of land adjoining the highway is empowered to plant trees in and along the highway, and whoever willfully injures any of these trees is liable to the owner or to the occupant "for the damage which is thereby sustained." Section 2742 of the same Code has been cited above, and it declares that:

"Whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree, * * * forfeits one hundred dollars for each * * * tree."

Section 4041, subdivision 39, of the same Code empowers the boards of supervisors to encourage under such regulations as they may adopt, "the planting and preservation of shade and ornamental trees on the public roads and highways," and authorizes boards of supervisors to "pay to persons planting and cultivating [such trees] for every living tree thus planted, at the age of four years, a sum not exceeding one dollar." Section 733 of the Code of Civil Procedure declares it to be a trespass to destroy any tree on the land of another person or in the street or highway in front of any person's house, village, or city lot or cultivated ground; and, further, that the trespasser is liable for treble the amount of damages which may be assessed. By the statutes of 1909 (St. 1909, p. 1129), the board of supervisors of each county is empowered to appoint a board of forestry "who shall have exclusive charge and control of all shade and ornamental trees, hedges, lawns, shrubs and flowers growing or to be grown upon the public roads, highways, grounds * * * within its respective county."

These Code sections and this statute clearly indicate the policy of the state in regard to this matter, and more than that, form the controlling substantive law. Whatever may be conceived to have been the right of the property owner to destroy such trees in the absence of the legislation upon our books, of that right by that legislation he is absolutely deprived, unless it can be successfully said that in depriving him of that right the state has taken his property without process of law. This argument which seems to have been the basis of the New Hampshire decision is as above quoted. We do not think, however, that this contention can be successfully maintained. Admittedly as a part of its police power, the state has the right directly or through its agencies to control the use of the public highways for all purposes subserving their uses as public highways. These regulations may and do

take many phases, and unless so unreasonable as to work an unlawful confiscation of property, they are not subject to be overthrown. That the regulations of this state as above set forth are not only reasonable but often necessary, the acts of this defendant, which he seeks to justify as the exercise of a legal right, are themselves sufficient to establish. Aside from any consideration of the æsthetic value of such an avenue, though this is my no means negligible, it is shown and found by the evidence, as above indicated, that these trees performed a utilitarian service. They add to the comfort of the traveler, and they lessen the expense of road maintenance. Here then is shown abundant reason for the existence of our regulatory laws. The situation in brief is simply this: That the owner of the fee of the soil has a limited, not an unlimited, right of property in the trees. The public upon the other hand has its limited, and not unlimited, property right in the trees. If their destruction is countenanced or ordered by the authorities, the wood of the felled trees unquestionably belongs to the owner of the fee, so as to the fruit or nuts upon fruit or nut bearing trees. But, upon the other hand, being and growing upon the public highway and subserving useful as well as ornamental purposes, it is for the authorities to say when and under what circumstances they may be destroyed. It would be safe to rest this upon the plain language of our statute, but authority to the same effect is not lacking, and for it reference may be made to 2 Dillon's Municipal Corporations (5th Ed.) § 721; *State v. Merrill*, 37 Me. 329; *Baker v. Town of Normal*, 81 Ill. 108; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549; *Sherman v. Butcher*, 72 N. J. Law, 53, 60 Atl. 336. It follows herefrom that the defendant's appeal must be denied, and the judgment appealed from affirmed.

The nature of plaintiff's appeal has been indicated. Herein appellant complains that the court refused to award it the forfeiture contemplated by section 2742.

[3] It is unquestionably true that equity under proper pleading and proof, will award damages where such are necessary to give adequate and complete relief. Such damages, so far as the pleadings are concerned, were alleged, but the proof to support those damages was merely evidence that the county was seeking to exact in the name of damages, a penalty prescribed, which penalty has no bearing whatsoever upon the actual damage sustained. It would be the same penalty of one hundred dollars whether the tree destroyed was a twig of a year's growth, or a monarch of the centuries. Upon the other hand, if it be said that plaintiff is seeking to recover this penalty imposed by law, then, without regard to the question

as to whether or not under proper pleading the penalty would be recoverable in this action, it is sufficient to say that the complaint contains no proper averments looking to the enforcement of such a penalty. *Chipman et al. v. Emeric*, 5 Cal. 239.

It follows herefrom that the trial court ruled correctly in refusing to allow damages, and upon plaintiff's appeal, the judgment is affirmed.

HEFNER v. SEALEY et al. (Sac. 2319.)
(Supreme Court of California. April 26, 1917.)

1. DEEDS ⇨56(2)—DELIVERY—INTENT.

Delivery of a deed is not effected by mere manual tradition thereof, unless accompanied with intent that the deed shall become operative as such; that is, that it shall presently pass title without reservation of any right of revocation or recall.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118.]

2. DEEDS ⇨66 — DELIVERY — INTENT — QUESTION OF FACT.

Whether the requisite intent for delivery of a deed existed is a question of fact for the trial court or jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633.]

3. DEEDS ⇨208(1)—DELIVERY—SUFFICIENCY OF EVIDENCE.

Evidence held to support a finding of delivery of deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630.]

4. DEEDS ⇨50(2)—DELIVERY—INTENT.

That the grantor stated that her purpose was to avoid the necessity of administration is not necessarily inconsistent with an intent to presently and irrevocably pass title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118.]

5. NEW TRIAL ⇨150(4)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Affidavits presented with motion for new trial are not entitled to weight on appeal from denial of new trial, no showing being made that the evidence embodied in them could not with reasonable diligence have been produced at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 310.]

Department 1. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Fred E. Hefner, administrator of Mary Sealey, against Ada M. Sealey and others. From an adverse judgment and order, plaintiff appeals. Affirmed.

George F. Jones, of Oroville, for appellant. Carlton Gray, of Oroville, for respondents.

SLOSS, J. The administrator of the estate of Mary Sealey, deceased, brought this action to quiet title to two parcels of land in Butte county. The plaintiff and the five defendants are the surviving children and the heirs at law of Mary Sealey. All of the defendants except Ida M. Sealey defaulted, and the plaintiff took judgment against them as prayed. Ida M. Sealey answered, asserting title

under two deeds from Mary Sealey, dated March 10, 1906. The property in controversy consisted of a lot in the city of Oroville and of a tract of country land. The first of the deeds purported to convey the city lot and five acres of the country land to Ida M. Sealey. The second was a conveyance of the remainder of the country land to the plaintiff and the five defendants. Plaintiff's intestate died on July 18, 1910, and the deeds were not filed for record until after her death. The sole point of controversy between plaintiff and Ida M. Sealey, the nondefaulting defendant, was whether these deeds had been delivered. The court found that there had been a delivery, and gave judgment that defendant Ida M. Sealey was the owner in fee of the land described in the first deed, and of an undivided one-sixth interest in the land described in the second. The plaintiff appeals from this judgment and from an order denying his motion for a new trial.

[1, 2] The appellant contends—and this is the only point made—that the evidence does not support the finding of delivery. There is neither dispute, nor room for dispute, regarding the law applicable to the situation. The delivery of a deed is not effected by a mere manual tradition of the instrument, unless the act “be accompanied with the intent that the deed shall become operative as such” (*Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556); i. e., that it shall presently pass title, without the reservation of any right of revocation or recall (*Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544). Whether or not the requisite intent existed is a question of fact for the trial court or jury. *Moore v. Trott*, 162 Cal. 268, 274, 122 Pac. 462, and cases cited.

In the case at bar, several witnesses gave testimony which, if believed by the court, fully supported the conclusion that the deeds had been delivered by Mary Sealey to her daughter Ida with the intention of then and there finally passing title to the land. George E. Gardner, an attorney at law, testified that he had been summoned to Mrs. Sealey's home; that she had told him to make two deeds, saying:

“I want the property so that there will be no administration. I want to divide the whole thing, a sixth apiece, with the exception of this place where we are living. I want to give that to Ida. I want her to have that for herself.”

After the deeds had been drawn pursuant to these instructions, Mrs. Sealey signed and acknowledged them; whereupon Gardner asked what she wanted to do with them, to which she replied: “I guess you had better give them to Ida, I guess you just as well.” Thereupon Gardner handed the deeds to the respondent. Mrs. Sealey stated at the time that she wanted to do what was done.

Ida M. Sealey, the respondent, gave testimony of similar purport. Frank Sealey, one of the sons of the decedent, testified that his mother had told him “that she was going to

give Ida the house and lot here in town and also her interest in the ranch”; that afterwards Ida showed him the deeds that had been delivered to her. Harvey Sealey, another son, testified that his mother had spoken of deeding her property “so there will be no trouble,” and later she had said:

“I deeded what property I have got to you folks. I deeded this house and lot to Ida, and I deeded her a portion of that property down there. * * * There is a deed where you will all have shares alike in that ranch and won't have no administration about it; you will have deeds for your property.”

Mrs. Sealey had also told him that she had delivered the deeds to Ida.

[3, 4] This testimony fully supported the finding of delivery. The fact that Mrs. Sealey stated that her purpose was to avoid the necessity of administration is not necessarily inconsistent with an intent to presently and irrevocably pass title. There are circumstances in the case which might have been taken as indicating that the testatrix had not made the delivery contended for by the respondent, but had merely left the deeds in the custody of a bank for delivery to the respondent after her death, retaining in the meanwhile the right to recall them. But whether the transaction was of this character, or was the one described by the witnesses whose testimony we have quoted, was simply a question of fact for the trial court. The evidence was conflicting, and this court cannot overturn the finding made below. We cannot assent to the appellant's contention that the testimony of Gardner, of the respondent, and of Frank and Harvey Sealey was, either in itself, or in the light of the other evidence in the case, so incredible as to warrant our saying that the trial court could not reasonably accept it.

[5] Certain affidavits were presented by the plaintiff in connection with his motion for a new trial. These cannot, of course, be considered on the appeal from the judgment. Nor is the plaintiff entitled to have any weight attached to them on the appeal from the order denying a new trial, for the reason that he made no showing that the evidence embodied in these affidavits could not, with reasonable diligence, have been produced at the trial.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

FIORI v. AGNEW et al. (Civ. 1911.)

(District Court of Appeal, First District, California. Feb. 13, 1917. On Rehearing, March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. APPEAL AND ERROR §1060(4)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

In action for false imprisonment, reference of counsel during closing argument to defend-

ant's failure to testify, though improper, was not prejudicial, where the arrest was illegal, being without complaint or warrant, and the suit was for \$25,000, and the verdict was for \$500.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135.]

2. FALSE IMPRISONMENT \Leftrightarrow 36 — EXCESSIVE DAMAGES.

In suit for false imprisonment for \$25,000, verdict of \$500 to plaintiff, who was arrested without process or warrant and without a charge, and confined, was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115.]

3. TRIAL \Leftrightarrow 260(1)—INSTRUCTIONS—REPEATING INSTRUCTIONS.

Refusal of defendant's requested instructions covered by the other instructions given is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

4. TRIAL \Leftrightarrow 267(2)—INSTRUCTIONS—REQUESTS—CORRECTION.

It is not error for the court to so state requested instructions as to correctly state the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 663.]

5. NEW TRIAL \Leftrightarrow 104(1)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Whether new trial should be granted or refused on ground of newly discovered evidence which is cumulative is peculiarly within the province of the trial court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218, 228.]

6. APPEAL AND ERROR \Leftrightarrow 981—SCOPE OF REVIEW—ORDER REFUSING NEW TRIAL—EVIDENCE.

To warrant reversal of order denying or granting new trial on the ground of newly discovered evidence, the evidence must clearly show an abuse of discretion by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876.]

Appeal from Superior Court, Alameda County; James G. Estep, Judge.

Action by Mrs. Rosie Fiori against L. F. Agnew and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rehearing denied by Supreme Court. MELVIN, J., dissenting.

James M. Koford, of Oakland, for appellants Agnew & Pullman. G. E. Jackson and John J. Earle, both of Oakland, for appellant Petersen. James P. Montgomery, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for false imprisonment instituted by her against the defendants, who are members of the police department of the city of Oakland, and by whom the plaintiff alleges she was arrested and imprisoned without probable cause and without rightful authority of law. The cause was tried before a jury, which returned a verdict in her favor for the sum of \$500 and costs.

Upon this appeal the first and main contention of the appellants is that the counsel

for plaintiff was guilty of prejudicial misconduct during his closing argument in the case. The particular act of misconduct for which appellants seek a reversal of the judgment arises out of the following facts: While a witness the plaintiff testified that shortly before her arrest two unidentified police officers of said city had called upon her with a proposition that upon payment of hush money she would be permitted to pursue the illicit vocation of a prostitute unmolested by the authorities, and that she had rejected their proposition. This episode not having been connected in any way with the defendants, the plaintiff's testimony regarding it was upon motion stricken out. During the trial two of the defendants did not take the witness stand; and in his closing argument to the jury counsel for plaintiff proceeded to comment upon their failure to do so, when the following occurred:

"Mr. Montgomery: Why were they not brought here, gentlemen of the jury, those other two officers—

"A Juror: Why was that?

"Mr. Montgomery: Because she would have picked out the man that made the demand for the money."

Counsel for defendants promptly objected to this remark of plaintiff's counsel, and assigned the same as error, and requested the court to instruct the jury to disregard the same. Some discussion followed, in which the court seemed inclined to allow the remark to stand, under the impression apparently that the testimony of plaintiff upon which it was predicated had not been stricken out; but, upon being convinced to the contrary, the court admonished counsel for the plaintiff that he would have no right to comment upon it, and also proceeded to credit the jury with having good common sense to distinguish between evidence and argument, and to state that the jury were to understand that the remark of counsel was simply argument.

[1, 2] It may be conceded that the remark of counsel for plaintiff made in response to this question of a juror in the heat of the closing argument of a case in which throughout there had been considerable heat was improper; and it may also be conceded that the remarks of the court in response to the objection, assignment, and request of counsel for the defendants were not as strong in their admonition to the jury as the occasion required. Still the question that this court is to determine is whether from an inspection of the entire record the objectionable remark of counsel for plaintiff was sufficient to create in the minds of the jury such a degree of passion and prejudice as to cause their verdict to amount to a miscarriage of justice. The demand of the plaintiff was for the sum of \$25,000 damages for an arrest made without complaint or process, and which was therefore illegal, and as to its succeeding imprisonment false, unless, as

contended by the appellants, the plaintiff was a vagrant, and thus subject to arrest at any time without warrant. As to this phase of the case the evidence was conflicting; and the jury, as it was its province to do, resolved the conflict in plaintiff's favor, and yet only awarded her damages in the sum of \$500. We cannot say that this modest verdict was the result of either passion or prejudice on the part of the jury amounting to a miscarriage of justice, and hence cannot hold that the objectionable remark of counsel for the plaintiff was sufficiently prejudicial to justify a reversal of the case.

[3] The next contention of the appellants relates to the alleged error of the court in refusing to give certain instructions requested by the defendants as to the preponderance of proof required of the plaintiff in order that she should be entitled to recover for injuries to her credit, reputation, and good name. An examination of the entire body of instructions given by the court shows that these matters were fully covered thereby, and hence that the court committed no error in its refusal to give the said instructions of the defendants in the particular form in which they were requested.

[4] It is also contended by the appellants that the court erred in refusing to give the instructions asked by them upon the subject of vagrancy, and of the right of officers to arrest those guilty of prostitution amounting to vagrancy at any time without a warrant; but the record shows that the court modified the instructions requested by the defendants upon this subject so as to correctly state the law and gave to the jury such modified instructions; and since, as we have seen, the evidence upon the issue as to whether plaintiff was living in a state of prostitution amounting to vagrancy at the time of her arrest, or had reformed from her past conduct of life in these respects, was conflicting, no error can be predicated upon the instructions of the court or finding of the jury upon that issue.

The other errors of law alleged to have been committed by the court in its rulings upon the admission of evidence are not sufficiently meritorious as to require separate comment.

[5, 6] The final contention of the appellants is that the court should have granted a new trial upon the ground of newly discovered evidence. The evidence proffered upon the motion for a new trial was cumulative of evidence offered upon the same general subject during the trial, the determination of the question as to whether a new trial should be granted or refused upon that ground is peculiarly within the province of the trial court, and the case as presented to this court must clearly show an abuse of discretion before the order of the trial court in either granting or refusing a new trial upon

that ground will be reversed upon appeal. *Cahill v. Stone*, 167 Cal. 126, 138 Pac. 712; *People v. Selby S. & L. Co.*, 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267; *Oberlander v. Fixen Co.*, 129 Cal. 602, 62 Pac. 254.

No other grounds of error being urged, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Rehearing.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed February 13, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

PROUTY v. ROGERS et al. (Civ. 2208.)

(District Court of Appeal, Second District, California. March 17, 1917.)

1. DEEDS \S 112(2) — DESCRIPTION — SUFFICIENCY.

A deed describing the land conveyed did not name the district as G. addition No. 1, but located it at G., and also referred to a map made by a named person in April and May, 1886, as a map recorded in Miscellaneous Records, Book 9, at pages 85, 86, and 87. No such map was recorded at those pages, but there was a map of G. addition No. 1, recorded in Book 9, at pages 45 and 46, and such map was the only map of record in the county of the property situated in the territory or district known as G. on which there was shown a block "P" or which bore the inscription or indorsement "survey April and May, 1886," signed by the named maker. There was only one lot 6 in said block P., and there was no other lot 6 in block P. in the territory commonly known as G., and when lots 6 and 7 were sold to plaintiff there was no tract or subdivision at or in G. or vicinity that contained a block P except G. addition No. 1. *Held*, that the description in the deed to plaintiff was sufficient in her suit to quiet title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 324.]

2. TRUSTS \S 357(2) — PURCHASER FROM TRUSTEE — NOTICE — TITLE ACQUIRED.

Where defendant in suit to quiet title when receiving her deed had notice that her grantor if he had any title whatever to the land, had nothing more than bare legal title, necessarily a title held in trust for plaintiff, who then owned the entire beneficial interest, defendant, if the title vested in her at all, received it subject to the trust and unconditional obligation to convey to plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 543-548.]

3. APPEAL AND ERROR \S 1073(1) — HARMLESS ERROR — DECREE.

In suit to quiet title, it being determined that legal title to the land was vested in defendant, subject to an unconditional obligation to convey to plaintiff, there was no prejudicial error in the decree quieting the title in plaintiff as owner and not ordering execution of any deed of conveyance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4240.]

4. CORPORATIONS \S 425(5) — REPRESENTATIONS OF OFFICERS—ESTOPPEL OF CORPORATION.

Where plaintiff purchased land from a corporation, and its president and secretary represented to her that the deed to be delivered to her by the company would convey her good and perfect title, on which representations she relied without making inquiry, she making payments partly in cash and partly by a note secured by mortgage given the company, the company was estopped to deny plaintiff's ownership of the land, though it and its officers acted in good faith, and made no misrepresentations, while plaintiff had constructive record notice of the condition of the title.

5. ESTOPPEL \S 88(2)—PERSONS BOUND.

Where a corporation was estopped to deny the ownership of land which it had conveyed, its officer, who received an assignment of the original owner's contract to convey to the company, and thereafter, from the owner, a conveyance of the land, was charged with notice of all the facts on which the grantee of the land relied as against the company, and the estoppel was binding on him.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 290.]

6. LIMITATION OF ACTIONS \S 103(2)—RECOVERY OF LAND—TRUSTS.

Where plaintiff, in an action to quiet title, was seized of the property at all times down to the time when the action was begun, and defendant was to be treated as holding the title in trust for plaintiff, there having been no repudiation of the trust sufficient to set the statute of limitations in motion, the action was not barred by Code Civ. Proc. \S 318, as to actions for the recovery of real property, or for the recovery of the possession thereof.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. \S 507.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Carol Crouse Prouty against Julia A. N. Rogers and W. B. Judson. From a judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Judgment and order affirmed.

Haas & Dunnigan, of Los Angeles, for appellants. Carter, Kirby & Henderson and Schweitzer & Hutton, all of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the defendants from a judgment quieting plaintiff's title to the lot described in the complaint, and from an order denying the motion of defendants for a new trial. There was a former trial of the action and a decision by this court affirming an order granting a new trial. In that decision there is a statement of facts, and we will repeat here that portion thereof which is identical with the facts proved at the second trial (13 Cal. App. 561, 110 Pac. 142):

"On December 26, 1885, Andrew Glassell, who was the common source of title, entered into a contract with Ralph and W. E. Rogers, whereby he agreed to sell and convey to them a large tract of land, which included the lot in controversy. On March 24, 1886, Ralph and W. E. Rogers transferred this agreement for purchase to a corporation known as the Garvanza Land Company, which, under the terms of the agree-

ment, caused a portion of the land to be subdivided into lots and blocks and designated it as 'Garvanza addition No. 1,' map of which was duly recorded. On June 19, 1886, the corporation, for a valuable consideration, executed a deed, which was duly recorded, to plaintiff, Carol Crouse-Prouty, whereby it conveyed to her the lot in question. After the execution of this deed by the corporation, and on December 15, 1886, the corporation transferred the Glassell contract to W. F. McClure, who, on the day following, assigned it to Ralph Rogers. On July 12, 1888, Glassell executed a grant deed to Ralph Rogers of the lands described in the said contract, excepting therefrom certain tracts, which excepted lands did not, however, include the lot involved in this action. W. E. Rogers joined Glassell in the execution of this conveyance. This deed recited payment of the consideration mentioned in the contract, and that 'this deed is delivered and accepted in satisfaction of the existing obligations of the party of the first part (Glassell) by reason of said contract of December 26, 1885.' On January 2, 1892, Ralph Rogers conveyed the lot in question, together with other lands, to one Conway, from whom, by mesne conveyance, defendants acquired whatever title they have to the lot. It thus appears that plaintiffs' claim of title to the lot is by virtue of the deed from the Garvanza Land Company, whose only interest in the lot was by virtue of the Glassell contract, while defendants claim under a subsequent deed made by Ralph Rogers after he had acquired title to the property by a deed executed pursuant to the Glassell contract. The record contains evidence which tends to prove * * * that defendant Julia Nolan Rogers at the time she claims to have acquired the lot by purchase for a valuable consideration had actual notice of the conveyance of the lot to plaintiff Carol Crouse-Prouty, and of the fact that she claimed ownership under the deed from the corporation. Moreover, under the facts presented, the court might be justified in holding the record of plaintiff's deed sufficient to impart constructive notice. *Rogers v. McCartney*, 3 Cal. App. 34, 84 Pac. 215."

[1] It will be noted that in its former decision this court assumed that the deed of Garvanza Land Company to the plaintiff contained a sufficient description to identify the land described in the complaint, and that the record thereof was sufficient to impart constructive notice. Nevertheless, the defendants continue to insist that the description in that deed was not sufficient for the purpose of passing title. That description, so far as the name of the tract was concerned, did not name the tract as "Garvanza addition No. 1," but located the tract "at Garvanza." Also the deed referred to a map made by W. F. McClure in April and May, 1886, as a map recorded in Miscellaneous Records, Book 9, at pages 85, 86, and 87. There was no such map recorded at those pages. The evidence shows that there was a map of "Garvanza addition No. 1" recorded in said Book 9, at pages 45 and 46. The evidence shows that the map recorded at pages 45 and 46 is the only map of record in Los Angeles county of the property situated in the territory or district known as Garvanza, on which there is shown a block "P," or which bears the inscription or indorsement, "Survey, April and May, 1886, W. F. McClure, C. E."; that there

is only one lot 6 in said block "P," and there is no other lot 6 in block "P" in said territory commonly known as Garvanza; also that Garvanza Land Company never sold or subdivided any lots in any block "P," except block "P" of Garvanza addition No. 1; that there was not at the time of the sale and conveyance of lots 6 and 7 to the plaintiff, or since that time, any tract or subdivision at or in Garvanza, or in the vicinity thereof, that contained a block "P," except Garvanza addition No. 1. On these facts we hold that the description in the deed was sufficient. See, also, *Leonard v. Osburn*, 169 Cal. 157, 146 Pac. 530, 532, which approves the decision in *Rogers v. McCartney*, supra.

[2] Plaintiff's deed when recorded gave constructive notice that Garvanza Land Company had granted the lot in question to her, and there was then on record a contract which gave notice that Garvanza Land Company had acquired the right to obtain the legal title upon payment of the consideration agreed to be paid to Glassell. The deed from Glassell to Ralph Rogers, which also was of record prior to any conveyance of lot 6 by Ralph Rogers, showed that the consideration for all of the described lands, including the lot in question, had been paid to Glassell. Defendant Rogers before receiving her deed, also had actual notice that the plaintiff claimed ownership under her deed from Garvanza Land Company. Defendant Rogers therefore had notice that her grantor, successor by mesne conveyance from Ralph Rogers, if he had any title whatever to this lot, had nothing more than the bare legal title, which necessarily would be a title held in trust for the plaintiff, who then owned the entire beneficial interest. Therefore the defendant Rogers, if the title vested in her at all, received it upon the same trust and subject to the same unconditional obligation to convey to the plaintiff. This conclusion is strengthened, if it needs any further support, by the fact, which the court found upon sufficient evidence, that the grantee to whom Ralph Rogers conveyed this lot, and the succeeding grantees to and including Julia N. Rogers, paid no consideration whatever for their said conveyances.

[3] If under the facts above stated it should be determined that the legal title to the lot is now vested in the defendant subject to an unconditional obligation to convey to the plaintiff, there would be no prejudicial error in the court's decree which quieted title in the plaintiff as owner of the lot and did not order the execution of any deed of conveyance. In any event the result of the decree would be to establish ownership in the plaintiff and put an end to the claims of the defendant. *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143.

[4, 5] But the plaintiff further claims title by estoppel. During the transactions where-

by the plaintiff purchased the lot from Garvanza Land Company and paid for the same and received her deed, it was represented to her by Ralph Rogers, the president of the company, and by its secretary, that the deed to be delivered to her by Garvanza Land Company would convey to her a good and perfect title to the lot. She believed those representations and relied upon them in all of those transactions, without making any other investigations or inquiry as to the title. At the time of receiving her deed plaintiff paid the consideration partly in cash, and gave to the corporation her note for the remainder, secured by mortgage on the two lots conveyed. On June 8, 1887, she paid this note, and the mortgage was satisfied on the record by the company by Ralph Rogers, as president. Upon those facts Garvanza Land Company would have been estopped to deny plaintiff's ownership of the lot. And as Ralph Rogers received an assignment of the company's contract, and thereafter from Glassell a conveyance of the land covered by the contract, he was charged with full notice of all of the facts upon which the plaintiff relied as against that company, and the same estoppel was binding upon him. Upon the facts which we have stated, it seems clear that the plaintiff's rights are unaffected by the subsequent conveyances of the series which ended with the deed to defendant Rogers. Appellants claim that the doctrine of estoppel cannot be applied to the case, because it appears that Ralph Rogers and Garvanza Land Company in their transactions with the plaintiff acted in entire good faith and made no misrepresentations as to the title to the property conveyed to the plaintiff; that when the deed was made to plaintiff she had constructive record notice of the condition of the Garvanza Land Company's title; and that she had the same means of investigating the title that was possessed by her grantor and by Ralph Rogers. This contention should not be sustained. *Karns v. Olney*, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101; *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572.

[6] Defendants pleaded that the action is barred by the provisions of section 318 of the Code of Civil Procedure and by subdivision 2 and by subdivision 4 of section 338 and by section 343 of that Code. The two latter sections are contained in the chapter concerning the time of commencing actions other than for the recovery of real property, and do not apply to this case. In *Murphy v. Crowley*, 140 Cal. 141, 146, 73 Pac. 820, 821, the earlier decisions were reviewed, and the court said:

"It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if the plaintiff alleges facts which show, as matter of law, that he is entitled to

possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318."

Here the plaintiff by her complaint alleged ownership of the lot and seeks to quiet her title, and for all appropriate relief in equity. The controversy exists by reason of the adverse claim of the defendants based upon a chain of title which begins with a mistake made by Ralph Rogers in executing a deed purporting to convey land which he did not have a right to convey to any one other than the plaintiff. Section 318 is the only one of the Code sections constituting the statute of limitations which can be applied to a case of this kind. That section reads as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

If, by reason of defendants' estoppel to set up the claim which they assert in this action, title vested in the plaintiff (as we hold that it did), then the plaintiff was seized of the property within the meaning of section 318, at all times down to the time when this action was begun, and if the defendant Rogers is to be treated as holding the title in trust for the plaintiff, the rights of the plaintiff are not barred by any statute of limitations. There had not been prior to the beginning of the prescribed period, or at all, any repudiation of the trust sufficient to set the statute in motion. Actual possession of the lot had not been taken by the defendants, nor by any person under whom they claim, and the plaintiff had not been notified of any adverse claim against her. *Luco v. De Toro*, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082.

Finally, it should be noted that the transcript begins with an amended complaint filed October 21, 1912, and the record before us does not show when the action was commenced.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

BRAUN v. VALLADE et al. (Civ. 1877.)
(District Court of Appeal, First District, California. Feb. 15, 1917.)

1. NEGLIGENCE §32(2)—DEFECTIVE BUILDING—LICENSEE.

Where plaintiff entered defendants' saloon to use the toilet, and after doing so returned to the barroom and ordered a drink, and after he was served saw a picture upon the opposite wall, and walked across the room, to examine it, and in so doing fell into an open trapdoor, suffering injuries, though he entered for a purpose which would render him a mere licensee, when he fulfilled that purpose and ordered a drink he

became a customer of the defendants, and defendants owed him the duty of ordinary care.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 43.]

2. NEGLIGENCE §134(5)—INJURIES TO CUSTOMER—DEFECTIVE BARROOM—EVIDENCE—SUFFICIENCY.

In action by customer for injuries received in falling through a trapdoor in a barroom, evidence held to show that plaintiff's injuries were caused by defendants' negligent act in leaving open an unguarded trapdoor in a place open and accessible to customers.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 273.]

3. NEGLIGENCE §138(1)—TRIAL §194(16)—INSTRUCTIONS—PROVINCE OF JURY—FACTS.

An instruction that if the defendants negligently opened and left open and not properly guarded a trapdoor in floor of said saloon, and said trapdoor was then a part of said barroom, and open to use of patrons and customers and to the public, and plaintiff was lawfully on the premises, and such negligence and not plaintiff's negligence was the proximate cause of plaintiff's injury, they should find for plaintiff, if understood as referring to the floor space filled by the trapdoor when closed, was not confusing or an invasion of the province of the jury by charging as to matters of fact.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 354, 356-360; *Trial*, Cent. Dig. § 466.]

4. TRIAL §296(3)—DEFECTIVE INSTRUCTION—CURE BY OTHER INSTRUCTIONS.

Any confusion possible being doubt as to whether the instruction referred to the spaces below the trapdoor when open, or to the floor space filled by the trapdoor when closed, was cured by an instruction that if a part of the premises where the trapdoor was located was private, and not open to the public, the public did not have access thereto, the defendants were not required to maintain guards around such trapdoor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 709.]

5. TRIAL §260(1)—INSTRUCTIONS—REQUESTS.

Refusal of requested instructions fully and correctly covered by given instructions is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Franz Braun against Arthur Vallade and another. Judgment for plaintiff, and defendants appeal. Affirmed.

S. O. Wright, of San Francisco, for appellants. J. Dimmer and E. D. Knight, both of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in plaintiff's favor in an action for damages alleged to have been sustained by him by reason of his having fallen through an open and unguarded trapdoor in the floor of certain premises occupied and used by the defendants in the conduct of a saloon.

[1, 2] There is little, if any, disagreement between the parties respecting the main facts of the case. The defendants on the 10th day of July, 1914, were engaged in conducting a saloon known as the Minneapolis Bar on Market street in the city and county of San

Francisco. On said day the plaintiff entered the said place of business of the defendants for the purpose, according to his testimony, of using the toilet attached to and in the rear of the saloon. Having done this and returned to the barroom the plaintiff, not wishing, as he stated, to use the convenience of any place without some return, went to the bar and ordered a drink of beer; and having been served and begun to drink it he observed a picture upon the opposite wall of the saloon, and being interested in painting walked across to examine it, and in so doing fell into an open trapdoor, and was precipitated into the basement, suffering severe injuries. There is some conflict in the evidence as to whether the space in front of where the picture hung, and of which the trapdoor when closed formed a part of the floor, was a portion of the open or public area of the saloon, or was separated therefrom by a piano and other obstructions, indicating that it was private and not intended for public use; but in respect to this matter the plaintiff himself testified that there was no obstruction between the bar and the picture, and that he walked directly across the room toward it and to the open space into which he fell. There is also some evidence that upon the wall above the trapdoor there was a large cardboard sign, reading, "Private. Keep out"; but there was evidently some question as to whether this sign referred to the floor space in front of the picture partly occupied by the trapdoor when closed, or to the basement and entrance into it when the trapdoor was open. The jury resolved these doubts in the plaintiff's favor, and we are not asked to review their discretion in respect to these conflicts in the evidence. The appellants, however, urge as their main contention in the case that the undisputed evidence does show that the plaintiff having entered upon the premises for the purpose indicated by his own testimony, became and was throughout the period of his presence there a mere licensee toward whom, as such, the defendant owed no duty other than that of refraining from causing him an injury by a willful or grossly negligent act. In support of this contention the appellants chiefly rely upon the case of *Kneiser v. The Belasco-Blackwood Co.*, 22 Cal. App. 205, 133 Pac. 989, as indistinguishable from the case at bar. The facts of that case were briefly these: The plaintiff had entered the saloon of the defendant desiring to sit down and rest and to visit the toilet, which he knew to be located in the basement. He had not intended to patronize the bar as a customer, but was induced by the invitation of others already in the place to partake of one or more drinks of liquor, after which he proceeded to go to the basement of the place in pursuit of his original intention to visit the toilet there. While going down the stairs leading thereto his foot caught upon a projecting nail, and he fell

and was injured. The court held upon these facts that the plaintiff was a mere licensee, and as such was not entitled to recover. It seems to us, however, that the distinction between the above case and the present one is clearly outlined by a comparison of the facts of each. In that case, as in the present one, the act and intent of the plaintiff in entering the premises of the defendants for the purpose of making use of the toilet rendered him a mere licensee so long as that intent and purpose was maintained, or was returned to if departed from; the act of the plaintiff in the foregoing case in drinking at the request of others may have changed his relation to the defendants from that of a mere licensee to that of a customer; but, if so, the proofs in that case showed that the plaintiff therein resumed his former relation of licensee when he returned to his primary intent and purpose to use the defendants' toilet and was proceeding to carry out that intent and purpose at the time of his injuries. In the case at bar, however, the plaintiff having entered the defendants' premises with an intent and purpose which under the foregoing case would have constituted him a mere licensee, appears to have fulfilled that purpose and terminated that relation when upon returning from the toilet to the barroom he determined to become, and did in fact become, a customer of the defendants by ordering and partaking of a drink at their bar. From the moment of his changed intent and action his relation to the defendant changed from that of a mere licensee to that of a customer, to whom the defendants would owe the duty of ordinary care—a duty which it is conceded would be violated by negligently leaving an open and unguarded trapdoor in that portion of the floor space of the barroom which was open and accessible to customers. We think that the evidence in this case sufficiently shows that the plaintiff stood in the relation of a customer to the defendants at the time of his injuries, and that these were caused by the appellants' negligent act.

The appellants further contend that the trial court erred in giving to the jury the following instruction:

"The court instructs the jury that if they believe from all the evidence that the defendants in the conduct of their business mentioned in the complaint at the time of the injuries to plaintiff, carelessly and negligently opened and left open and not properly guarded or obstructed a trapdoor in the floor of said saloon, and that said trapdoor was then a part of said barroom and open to the use of patrons and customers and to the public, and that plaintiff was lawfully upon said premises, and that such negligence, and not negligence on the part of plaintiff, was the proximate cause of the injuries to plaintiff, they should find for the plaintiff."

[3, 4] It may be, and in fact is practically conceded on the part of the respondent, that the foregoing instruction is confusing in its reference to the "trapdoor in the floor of said saloon" as being a part of said barroom and "open to the use of patrons and customers

and to the public," the doubt being as to whether these phrases refer to the spaces below the trapdoor when open or to the floor space filled by the trapdoor when closed. If understood in the latter sense the instruction would not be subject to the appellants' criticism; nor would it in our opinion be liable to the objection that it invaded the province of the jury by charging as to matters of fact. Aside from this, however, we think that whatever confusion may have arisen from the doubtful meaning of the foregoing instruction was sufficiently cured by the court in the rest of its instructions, and particularly in the following one, given at the request of the appellants:

"I charge you that if you believe from the evidence that the part of the premises where the trapdoor was located was private and not open to the public, and the public did not have access thereto, then I charge you that the defendants were not required in law to maintain guards or barriers around said trapdoor."

[5] The final contention of the appellants is that the court erred in refusing to give certain instructions requested by them upon the subjects of contributory negligence and proximate cause. The record discloses, however, that the court quite fully and correctly charged the jury upon these subjects, and hence was justified in refusing to give an added instruction thereon in the particular form requested by the defendants.

Judgment affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed February 15, 1917 (164 Pac. 904), which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

KEELEY v. ERBE. (Civ. 1987.)

(District Court of Appeal, First District, California. March 21, 1917.)

1. EVIDENCE — 445(1) — ORAL AGREEMENT SUBSTITUTED FOR WRITTEN CONTRACT.

Oral evidence is admissible to prove that parties entered into a new and distinct oral agreement as a substitute for a written one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2054, 2063.]

2. APPEAL AND ERROR — 1008(1) — REVIEW — QUESTION OF FACT.

Where trial court who heard oral testimony and saw witnesses believed that oral agreement sued on was substituted for a written one, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Lee Roy E. Keeley against Her-

man Erbe. Judgment for plaintiff, and defendant appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant. Albert Picard, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of plaintiff in an action brought by him to recover the reasonable value of legal services.

[1, 2] From the record it appears that the parties entered into a written contract, under the terms of which the plaintiff was to render services as an attorney at law for the defendant upon a contingent fee of 25 per cent. of the value of certain land if title thereto should be obtained for defendant. Subsequently, according to the testimony given by plaintiff, a circumstance was called to his attention for the first time which made the prospect of securing title in the name of the defendant very doubtful, whereupon plaintiff told the defendant "that the situation did not look good to him," and refused to proceed under the contract. They then entered into an oral agreement, whereby the plaintiff should proceed to render the agreed services, he to be paid a fair fee, without, however, there being any agreement as to its amount. The defendant denied that there had been a rescission and abandonment of the written contract.

Oral evidence was admissible to prove that the parties entered into a new and distinct agreement as a substitute for the written one (1 Greenl. on Ev. p. 4, § 303); and, while perhaps such testimony under some circumstances should be viewed with distrust, nevertheless in this case the trial court who heard the testimony and saw the witnesses believed the testimony introduced by the plaintiff as to the oral agreement, and found accordingly. We are constrained, therefore, to hold that the judgment of the trial court cannot be disturbed by this court. Judgment affirmed.

TOCKSTEIN v. PACIFIC KISSEL KAR BRANCH. (Civ. 1868.)

(District Court of Appeal, First District, California. March 19, 1917. Rehearing Denied by Supreme Court May 17, 1917.)

1. SALES — 90 — RESCISSION — ORAL REPRESENTATIONS MERGED IN WRITING.

In the absence of fraud, all preliminary negotiations are presumably merged in a written contract for the purchase of personalty, especially as Civ. Code, § 1625, provides that the execution of a contract in writing supersedes negotiations which preceded or accompanied its execution.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 253.]

2. EVIDENCE — 442(6) — RESCISSION — SUFFICIENCY OF EVIDENCE.

In a buyer's action to rescind an automobile sales contract, evidence held insufficient to justify a rescission on ground that the buyer was

misled by representations of the seller's agent where the buyer thereafter signed a written contract expressly stating that it superseded all oral understandings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887.]

3. PRINCIPAL AND AGENT §=148(4)—AGENT'S AUTHORITY.

Where a party freely contracts with an agent knowing the limit of the agent's authority, he cannot thereafter assert that he was misled into believing the agent had greater authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 537-545.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mrs. E. J. Tockstein against the Pacific Kissel Kar Branch. Judgment for plaintiff, and defendant appeals. Reversed.

J. A. Marsh and A. F. Lemberger, both of San Francisco, for appellant. Daniel O'Connell, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in plaintiff's favor in an action brought by her to recover the sum of \$412.06 as the aggregate of sums of money alleged to have been paid by her on account of the purchase price of a certain automobile from the defendant, and for repairs thereon, which machine is alleged to have proven defective, and in that respect to have violated the terms of certain alleged guaranties given by the defendant to plaintiff at the time of and which constituted the basis of the purchase by her of said automobile; and also to recover the sum of \$420, damages alleged to have been sustained by the plaintiff through her attempted use of such defective machine.

The complaint is in two counts setting forth separately the foregoing items of the plaintiff's alleged loss and damage. Defendant's answer denies the averments of both counts of the complaint in so far as they involve the breach of any agreement or guaranty on the part of the defendant, or of the Ford Motor Company, its principal, in the sale of the machine. The case was tried before a jury, which rendered a verdict in plaintiff's favor for the sum of \$619, and from the judgment entered thereon for said sum and costs the defendant prosecutes this appeal.

There is little if any dispute between the parties as to the material facts upon which the determination of this appeal must depend. The plaintiff, being desirous of purchasing an automobile for use in the jitney bus service, went to the defendant as the local agent of the Ford Motor Company of Detroit to procure said car. According to the plaintiff's testimony—which may be taken as true for the purposes of this appeal—she met there a salesman of the defendant to whom she stated that she wanted to buy a Ford car upon installments, and would like

to see the car. The salesman informed her that they had not a car in stock to show her at that time, but that all of the Ford cars were sold with a guaranty. He also stated, according to her testimony, that the car would be a new and perfect car, and would be delivered in good shape and would be satisfactory in every way. She thereupon paid the sum of \$50 on account of the purchase price of the car, and at that time there was made out and presented to her, and she signed, a writing denominated upon its face "Sales Contract," and being in the customary form of a leasing or conditional sales agreement, containing a general description of the car with a statement of the terms of its proposed purchase and times and amounts of deferred payments. This written agreement contained in black type next above the space of its signature the following words:

"It is understood that the Pacific Kissel Kar Branch will not be bound by any understandings, agreements, or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed."

The plaintiff admits signing this paper, and also admits that a little later and before receiving the car she saw and read and signed another agreement in which the terms of her purchase of the car were more fully set forth, and in which also the express terms of the guaranty of the defendant and of the Ford Motor Company, the manufacturer of the car, were set forth in detail; and in which it was also stated that:

"The above comprises in full the entire agreement covering or pertaining to this sale, and no agreement of any kind, verbal understandings or terms whatsoever will be recognized than as embodied and specified herein."

The plaintiff read and signed said agreement, and also received a duplicate copy of it, and thereupon received delivery of the car. It was a new car, and was selected, arbitrarily, out of a number of similar cars apparently of the same quality. During the 14 weeks which followed, the plaintiff used the car in the jitney service, and in motoring generally, driving it in all about 4,000 miles. From time to time it was in the shop of the defendant for repairs, and at one time was sent to the Ford Motor Company for the remedy of some unspecified defect. The plaintiff paid for a time her installments upon the purchase price of the car, and also paid on account of said repairs the sum of \$173.60, but finally failed, or refused, to keep up her payments, in consequence of which the defendant retook possession of the car, and undertook to cancel the agreement for its purchase for noncompliance with its terms. Thereupon the plaintiff commenced this action?

[1] We are unable to distinguish this case in principle from other cases recently before the Supreme Court and this court in which the doctrine is repeatedly restated that a person buying or agreeing to buy per-

sonal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and that such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms. This is but a restatement of the substance of section 1625 of the Civil Code as interpreted and applied in the following cases: *Kullman, Salz & Co. v. Sugar, etc., Co.*, 153 Cal. 725, 96 Pac. 369; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 96 Pac. 319; *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964; *Dollar v. International Banking Co.*, 13 Cal. App. 331, 109 Pac. 499.

[2] The application of this principle does not of course operate to prevent a person from avoiding a contract for fraudulent misrepresentations which operate as the inducement for entering into it, and upon which the party injured or misled thereby was entitled to rely; and it is upon that theory that the plaintiff has depended to sustain this action and the judgment rendered therein. She asserts that the inducing cause for her agreement to purchase the car in question was the representation of the salesman of the defendant that the car which would be delivered to her would be a new and perfect car, and that it was guaranteed perfect in every way, and that she would have no trouble with it; but the testimony of the plaintiff herself shows that at the very time the aforesaid salesman was engaged in making these representations he informed her there was a written guaranty went with the car, while the first writing which she then and there signed not only expressly referred to such guaranty, but also expressly stated that the defendant would not be bound "by any understandings, agreements, or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed." This the plaintiff admits that she saw and signed, and also admits that she signed and received a copy of the amplified agreement between her and defendant at the time that she received the car, in which the express terms of the manufacturer's and seller's guaranty are set forth, and in which it is again expressly stated that the same contains the full agreement between the parties, and that no agreement of any kind and no verbal understandings or promises whatever will be recognized other than as embodied or specified therein. The plaintiff does not pretend to state that she did not sign these writings knowingly and freely, or that any fraud, deceit, or concealment as to their terms and effect existed as an inducing cause for her execution of them; nor has the plaintiff shown in the proofs in

this case that any of the terms of the express and limited warranty of the manufacturer and seller of the car set forth in detail in the written agreement were violated by the defendant or by its principal, the Ford Motor Company.

This state of facts brings this appeal directly within the principle laid down in the case of *Pease v. Fitzgerald*, 161 Pac. 506, recently decided by this court, wherein it is held that a person, signing a written agreement which contains upon its face the statement that only the written representations, agreements, and guaranties contained within its terms shall be binding upon the other party to it, cannot rely upon any oral statements made by the agent or representative of such party prior to or at the time of the execution of the written agreement.

[3] This case is in line with the well-established rule of law that where a party freely contracts with an agent, knowing the limit of the agent's authority, he may not be heard thereafter to assert that he was misled into believing that the agent had greater authority. *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases cited.

It follows that the judgment herein must be reversed, and it is so ordered.

We concur: KERRIGAN, J.; RICHARDS, J.

WHILDIN et al. v. MARYLAND GOLD
QUARTZ MINING CO. et al.
(Civ. 1630.)

(District Court of Appeal, Third District, California. March 21, 1917. Rehearing Denied April 20, 1917. Denied by Supreme Court May 17, 1917.)

MINES AND MINERALS 43 — CLAIMS — PATENTS—CONSTRUCTION.

A patent to lot No. 41 and 1664, linear feet of the Eureka ledge procured under federal Mining Act July 28, 1866, c. 262, 14 Stat. 251, providing that one having complied with certain conditions shall be entitled to a patent, "granting such mine together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining," gave to grantee the fee to the lot and so much of lode as apexed within its exterior surface boundaries with the right to follow the vein on its dip and nothing more; the patent as to that portion of the lode lying beyond the exterior boundaries of the lot being invalid.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 125-129.]

Appeal from Superior Court, Nevada County; George O. Jones, Judge.

Action by David Whildin and others against the Maryland Gold Quartz Mining Company and another. From a judgment for plaintiff and an order denying a motion for a new trial, the unnamed defendant appeals. Affirmed.

Chas. W. Kitts, of San Francisco, and John Mulroy, of Grass Valley, for appellant, Nillon & Arbogast, of Nevada City, for respondents Whildin and others. Fred Searls, of Nevada City, for respondent Maryland Gold Quartz Mining Co.

BURNETT, J. The action was one to quiet plaintiffs' title to a small parcel of mining ground lying easterly of and adjoining the surface boundaries of defendant Eureka Gold Mining Company's patented land, known as the Eureka quartz mine. The land claimed by plaintiffs is designated as East Eureka quartz mine, and is an irregular shaped parcel surrounded on all sides by patented mining claims. Plaintiffs claim that, on the 5th day of September, 1897, the land embraced within the exterior boundaries of the East Eureka quartz mine was public mineral land of the United States, open to exploration and purchase; that, on said date, one Stephen Maynard, a citizen of the United States and the predecessor of the plaintiffs in interest, having discovered a lode or vein of gold-bearing rock in place within the exterior boundaries of said parcel of land, made a valid mining location of said parcel, to be known as the East Eureka quartz mine; that the labor and improvements necessary in order to hold said mining claim under the federal mining laws were done and performed each year by said Maynard and the plaintiffs as his successors in interest. There is no controversy as to the technical formality of said location, the posting of the notice, the marking of the boundaries, or the performance of the necessary labor to hold the claim.

Appellant, Eureka Gold Mining Company, claims only a portion of the land embraced within said location, and it bases its claim to this upon a certain mineral patent, dated September 13, 1869, issued by the Land Department of the United States to the Eureka Gold Mining Company for lot No. 41 in the northeast quarter of section 28, township 18 north, range 8 east, M. D. M., containing 23.29 acres, together with the lode 1,664 feet in length. This patent was based upon a location of 1,700 feet of the Eureka ledge, made December 9, 1865, as indicated by the following:

"Notice of location. Notice is hereby given that the undersigned have this day located and taken up for mining purposes, seventeen claims of one hundred feet each on the quartz lode or vein known as the Eureka ledge situated upon Eureka hill, about one mile easterly from the town of Grass Valley, Nevada county, California, commencing at a point on said ledge at which this notice is posted, forming the westerly boundary of the claims of the Idaho Mining Company, and extending thence westerly seventeen hundred feet upon and following the said Eureka ledge to a large pine tree forming the eastern boundary of the claims of the Rowanise Company, with all the dips, spurs, angles and variations of said ledge."

About 164 feet of the Eureka ledge or lode attempted to be granted by appellant's min-

eral patent lies outside of and beyond the exterior surface boundaries of plaintiffs' mining location, and the right of ownership of these 164 feet of said ledge presents the important issue in the case.

The determination of this matter involves, of course, the question whether this particular part of the lode was subject to location on September 5, 1897, when the predecessor of plaintiffs gave notice of his claim; in other words, whether it was then a part of the public domain. This must depend upon the consideration whether appellant's patent to lot No. 41 and 1,664 linear feet of the Eureka ledge carried and conveyed that portion of the strike which lies beyond the exterior surface boundaries of said lot. If it was operative to vest title to said portion, manifestly, appellant must prevail; otherwise, the order of the trial court must be affirmed.

Respondents' position is:

"That the Eureka patent granted the fee of lot No. 41 including so much of the Eureka lode as apexed within the exterior surface boundaries of said lot, with the right to follow the vein on its dip and nothing more; and that as to the portion of the lode which lies beyond the exterior boundaries of lot No. 41, the patent is invalid and inoperative."

Furthermore, it is contended that:

"Appellant has the choice of two courses. Either it could rely upon its old location and possessory right of so many linear feet along the ledge, with its attendant burdens of annual labor, etc., without certain and defined surface rights, or it could proceed to patent, have its lode and selected surface ground officially surveyed and platted, and receive from the government a mineral grant for something certain and defined, thus relieving itself from the burdens mentioned and making certain what was theretofore indefinite. Appellant chose the latter course and it must abide its choice."

We think there can be no doubt, under the decisions, of the correctness of respondents' view of the case. If the patent had been issued under the statute of 1872 (Act May 10, 1872, c. 152, § 3, 17 Stat. 91 [U. S. Comp. St. 1916, § 4618]), even appellant would probably not contest the proposition affirmed by respondents, but no different conclusion can be reached from a proper interpretation of the law of 1866 under which appellant claims, although said statute is not so explicit and certain as the later enactment of Congress. The second section of the federal mining act of July 26, 1866, c. 262, 14 Stat. 251, provides:

"Whenever any person * * * claims a vein or lode of quartz, * * * bearing gold, * * * having previously occupied and improved the same according to the local customs or rules of miners in the district, * * * and having expended in * * * labor and improvements thereon an amount of not less than one thousand dollars," etc., "it shall * * * be lawful for said claimant * * * to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although

it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The use of the terms "entry" and "tract" clearly implies a surface location, and it is the "tract" for which the patent is granted. The language is opposed to the contention that the patentee may claim the ledge on its course or "strike" beyond the extreme boundaries, although he may follow the lode on its "dip" beyond the lateral lines. It makes no difference what the actual location may have been or what is permitted by the local mining rules or customs. The statute prescribes the measure for the issuance of the patent, and the muniment of title therein authorized cannot be extended or enlarged by any act of the administrative officers of the government. That the patent must be thus defined and limited in its operation has been decisively stated by the courts. One of the early cases is *Wolfley v. Lebanon Min. Co.*, 4 Colo. 112. There the patent to what was known as the "Ben Harding" lode was issued under the act of 1866, and contained the following language:

"It being the express intent and meaning of these presents to convey to the said J. Warren Brown, his heirs and assigns, only the eight hundred linear feet of the Ben Harding lode, with surface ground hereinbefore described, commencing at the * * * discovery shaft of said lode and extending thence westerly eight hundred feet * * * along the course of the vein, the same being known as claims Nos. 1, etc., * * * with the right to follow said Ben Harding lode or vein, to the distance of eight hundred linear feet, with its dips, angles and variations, to any depth, although it may enter the land adjoining."

In reference to the claim of the right to follow the vein in its course beyond the exterior boundaries of the surface location the court said:

"It is however, insisted that if not by the literal terms of the act of July, 1866, then by virtue of territorial legislation and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode, whether it was comprised within his location or not; that one of the purposes of the act of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs; that whatever may be the true construction of the act as to locations made subsequent to its passage, as to locations made prior thereto, it authorized the issuance of a patent for a lode located in conformity with the rules and customs of the mining district in which it was situated, even though it might depart in its linear course from the lateral boundaries of the described premises."

After a reference to the status of the claimant and possessor before the issuance of the patent, the court declares:

"A title in fee, by patent, is offered him, which he may, at his pleasure, accept or reject. By the statute, his rights are circumscribed and determined. The act of Congress, from which they spring, is paramount to all local laws, rules, and customs. * * * It is in the light of its provisions that every patent issued in pursuance thereof must be construed, and we cannot therefore, admit that any such patent can, by virtue of local laws and customs, transfer to the patentee any greater interest or estate than that which the paramount law warrants."

Quoting from the opinion of Judge Deady in the case of *Chapman v. Toy Long*, 4 Sawy. 34, Fed. Cas. No. 2,610, to the effect that the locator has the choice of remaining in the possession of the mine and developing and appropriating its mineral deposits, or of taking steps to purchase it and secure a patent therefor, it being a matter left to his own option or sense of self-interest, the court proceeds to say:

"The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, has been platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, on its onward course or strike, it departs from the vertical side lines. In the latter case, after its departure, it is the subject of location by whomsoever it may be discovered."

It was therefore held that the plaintiff was not entitled to the portion of the lode in its course beyond the patented side lines. The case was manifestly carefully considered and ably expounded by the Colorado Supreme Court.

Two interesting and noted Utah cases are also brought to our attention, both involving the same question. In *McCormick v. Varnes*, 2 Utah, 355, the notice of location covered some 2,200 feet of the lode, and the patent corresponded with it, but only about 100 feet were covered by the surface boundaries, and it was held that the patentee in his title was limited to this description, the court declaring that:

"It is clear that the government did not intend, by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, whenever the latter might be found to run in its course, without regard to the surface ground."

It was pointed out that under the common law the claimant would be entitled only to whatever might be over and under the surface of a segment of the earth, carved out by the extreme lines of the location extended downwards indefinitely, and that the said statute of 1866 operated to qualify or enlarge this right in one respect only, and that is, to the extent that the claimant—

"may follow the lode from the apex found within the surface ground, on its dip to any depth, although in its course downward it may so far depart from a perpendicular as to enter the land adjoining. * * * But he cannot go beyond or outside of his side lines on the course or strike of the vein."

The other Utah case, *Tarbet v. Flagstaff Mg. Co.*, went to the United States Supreme Court on appeal, and is reported in 98 U. S. 463, 25 L. Ed. 253, and the rulings of the Utah Supreme Court similar to those in the *McCormick* Case, *supra*, were upheld. The rule was also laid down that a location made crosswise of a lode or vein, so that its greatest length crossed the same instead of following the course thereof, will secure only so much of the claim as it actually crosses at the surface, and its side lines will become

its end lines for the purpose of defining the rights of the owner. The same theory that is held by appellant herein was embodied in a proposed instruction that was refused by the lower court, and the Supreme Court of the United States declared that the ruling was correct. The proposed instruction was as follows:

"By the act of Congress of July 26, 1866, under which all of these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

It was declared that the true construction of the act of Congress of 1866 is:

"That the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines."

The foregoing case is followed in *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 75, 18 Sup. 899, 43 L. Ed. 72, wherein the subject is learnedly reviewed by the court through Mr. Justice Brewer and it is declared that:

"The express purpose of the statute [of 1866] was to grant the vein for so many feet along its course. yet such grant could only be made effective by a surface location covering the course to such extent."

In *Walrath v. Champion Mg. Co.*, 63 Fed. 552, the acts of 1866 and 1872 are compared, and it is declared by Judge Hawley:

"A survey of the surface ground must be made before it can be patented, and the surface lines of such survey should be marked upon the ground, whether patented under the law of 1866 or 1872. The intent of both acts, in this respect, is substantially to the effect that the mining locations made thereunder should be along the lode lengthwise, and the surface boundaries should be marked upon the claim. It was not intended by either act that the locator would have any right to follow the lode upon its strike beyond the surface lines of his location. The term 'location' as used in both acts refers to the surface ground, as well as to the vein or lode. The lode claim, whatever its nature, character, or extent, is to be limited to the survey of the surface location, and the title to the lode upon its strike is not given to any portion thereof which departs beyond the surface lines of the location."

Montana Ore Purchasing Co. v. Boston & Montana Co., 20 Mont. 336, 51 Pac. 159, is an instructive case from Montana, very much in point here. The patent called for 2.98 acres of land, more or less, and "and 1,318 linear feet of the said Rarus vein, lode, ledge, or deposit of the length hereinbefore described," etc. The court said:

"While it is often true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of

the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with and containing or overlying them. Neither is the subject of patented grant by itself. * * * What did the Rarus patent convey? * * * The patent conveys an area of 2.98 acres and no more. * * * In so far as the patent attempts to convey the Rarus lode on its strike, independently of the granted surface of 2.98 acres, it is void and of no effect."

Other similar decisions are cited by respondents, but the foregoing would seem to set the matter at rest.

It is true, as pointed out by the Montana court, that certain expressions are used in the statutes that apparently favor appellant's position, but the phraseology results from the fact that the lode is the actual thing in interest and the principal subject that is contemplated. However, as pertinently declared:

"Such expressions and such provisions cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith."

There are certain expressions, also, in some of the decisions of the courts that lend color to the contention that title to the lode independent of the surface boundaries may be acquired, but they are not to be taken as laying down the law in the premises.

Appellant also seems to find some comfort in certain statements contained in sections 58 and 59 (3d Ed.) of *Lindley on Mines*. It is apparent, though, that the learned author is therein dealing largely with the mining rules and regulations as to the location of claims and with the opinions of the Land Department of the government. However, when we look at section 60 we find this declaration:

"The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries."

Then, in section 71, Judge Lindley compares the two acts of 1866 and 1872, and, in reference to the former, makes this comment:

"The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to 200 feet, except in case of the discoverer, and to a maximum of 3,000 feet to an association of persons." "We have seen that under the local rules locations were made of the vein and a given number of linear feet on the course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism."

He then proceeds to state what changes were effected by the statute of 1872, but we need pursue the subject no further.

We may say in conclusion that the principal mistake made by appellant lies in the assumption that the location and the patent are governed by the same rule. As pointed out, the location, prior to 1872, could be made of the lode without regard to the surface boundaries, but under the patent the locator was limited to the lode within the designated lines on the surface of the ground. When appellant applied for its patent, it undoubtedly might have included surface ground for the entire length of the lode claimed by it, but it chose to take 23.29 acres along about 1,500 feet of the vein and no surface ground for the remaining 164 feet, and it filed in the local land office its plat showing such choice.

We feel satisfied that the judgment is just and legal, and the order denying the motion for a new trial is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

KAYE et al. v. SUPERIOR COURT OF
KERN COUNTY et al.
(Civ. 2259.)

(District Court of Appeal, Second District, California. March 21, 1917.)

1. PROHIBITION \S 13 — RESTRAINT OF ACT
ALREADY DONE.

Where the court's act performance of which is sought to be restrained by writ of prohibition has been done, though the court acted in excess of its jurisdiction, the alternative writ will not be made peremptory, since no purpose would be served.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62.]

2. PROHIBITION \S 31—MOOT QUESTION.

Where the record on petition for writ of prohibition presents a moot question, the proceeding will be dismissed without prejudice to petitioners' right to apply for such other and further writ as they may deem advisable.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 80.]

Petition for writ of prohibition by W. W. Kaye and others against the Superior Court of the County of Kern and Milton T. Farmer, Judge thereof. Proceeding dismissed.

W. W. Kaye and T. F. Allen, both of Bakersfield, for petitioners. Emmons & Johnstone, of Bakersfield, for respondents.

PER CURIAM. Prohibition. One Newell obtained a judgment in the justice's court against Katze et al., from which defendants appealed to the superior court, where the case was submitted for decision upon an agreed statement of the facts involved. The court adopted the agreed statement as its findings, and gave judgment thereon for plaintiff. Thereafter defendants, pursuant to notice and upon statutory grounds, moved the court for a new trial, which motion for

new trial so made by defendants the plaintiff moved to dismiss. The court refused to grant the motion so made by plaintiff to dismiss, and continued to a later date the hearing of defendants' motion for a new trial. Plaintiff then applied to this court for an alternative writ of prohibition directed to the respondent, requiring it to desist from further proceedings in the matter. The application was based upon the ground that the court was without jurisdiction to entertain a motion for new trial of a case on appeal from a justice's court, where the trial was had upon a stipulation of the facts involved. The writ was granted on November 25, 1916, and by the clerk issued in form prepared and submitted by petitioners' attorneys, requiring respondent to desist from further proceedings or ruling upon defendants' motion for new trial then pending before it until the 18th of December, 1916, instead of until the further order of the court, as required by section 1104 of the Code of Civil Procedure. It appears from the return that after the expiration of said time, to wit, on December 27, 1916, the court heard the motion for new trial and granted the same. In so doing, since the command of the writ was merely to desist from any ruling until December 18th, there was no violation of the order.

[1] It thus appears that the act the performance of which it was sought to restrain having been done, and conceding the court acted in excess of its jurisdiction, as to which, upon the authority of Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364, Quist v. Sandman, 154 Cal. 748, 99 Pac. 204, and Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804, we entertain no doubt; nevertheless no purpose could be served by making the writ peremptory.

[2] Indeed, as it now appears, the record presents a moot question; and the proceeding, without prejudice to the right of the petitioners to apply for such other and further writ in the premises as they may deem advisable, is dismissed.

CALIFORNIA WESTERN R. & NAV. CO. v.
INDUSTRIAL ACC. COMMISSION
et al. (Civ. 2079.)

(District Court of Appeal, First District, California. Jan. 22, 1917.)

Petition for writ of review by the California Western Railroad & Navigation Company against the Industrial Accident Commission and others. Award affirmed.

Pettis & Pemberton, of Fort Bragg, for petitioner. C. H. McConaughy and Chris M. Bradley, both of San Francisco, for respondents.

PER CURIAM. The petition in the first instance, as it appeared to the court, alleged in effect that the award of the commission was dependent upon the testimony contained in the deposition of the mother of the deceased taken in Finland, and which deposition was given by the witness without having been subjected to an oath. It was also alleged that the deposition was not duly authenticated. The record before us now shows that the witness who gave her deposition was duly sworn, and the deposition also appears to be duly authenticated; and upon an examination of the record we believe that the evidence as shown by that deposition sufficiently supports the award of the commission.

For these reasons the award will be affirmed; and it is so ordered.

GOMEZ v. AMERICAN CAN CO. et al.
(Civ. 2074.)

(District Court of Appeal, First District,
California. Dec. 11, 1916.)

Proceeding by Catarino Gomez against the American Can Company and the Industrial Accident Commission of the State of California under the Workmen's Compensation Act (St. 1913, p. 279). From an order of the Commission denying a rehearing, she applies for writ of review. Petition denied.

Oscar Hudson, of San Francisco, for petitioner. Chickering & Gregory, of San Francisco, for respondent American Can Co. Christopher M. Bradley, of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM. The petition herein is denied. We think that the finding of the Industrial Accident Commission that the applicant has failed to establish any sympathetic affection of his uninjured eye was justified by the evidence before it, and hence that the order of the Commission denying the petition for a rehearing was properly made.

LAKE v. STERLING DEVELOPMENT CO.
et al. (Civ. 1842.)

(District Court of Appeal, First District,
California. Feb. 20, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

Appeal from the Superior Court of the City and County of San Francisco; J. M. Seawell, Judge.

Action by Fred W. Lake against the Sterling Development Company and others. From judgment for plaintiff, and from order denying new trial, defendant named appeals. Reversed.

Jesse Olney, of San Francisco, for appellant. B. M. Aikins, R. P. Henshall, and Luther Elkins, all of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sought and secured a judgment quieting his title to certain lands claimed to be owned by him under a certificate of purchase of state school lands issued to his assignor in the year 1869. The court denied a motion of the defendant Sterling Development Company for a new trial, and this appeal is from the judgment and order.

The primary points presented in support of the appeal are covered and controlled, we think, by the recent decision of our Supreme Court in the mandamus proceeding of *Aikins v. Kingsbury*, 170 Cal. 674, 151 Pac. 145. In that proceeding it appears that the plaintiff in his action had granted a portion of the identical lands here involved to the petitioner therein, who sought by writ of mandate to compel the register of the land office of the state to issue a patent thereon. The essential features of the appeal in that case and in this are the same. The certificate there held to be forfeited is the identical certificate that the plaintiff herein claims under, and the issues raised in this case are identical with those raised in that. It is urged, however, by the appellants that the question of the annulment by foreclosure of the certificate under which respondent claims, and which question is referred to in *Aikins v. Kingsbury*, supra, but not there decided, be disposed of by us. A decision as to the validity or invalidity of that judgment was not deemed necessary in *Aikins v. Kingsbury*, nor do we deem it necessary here.

It will suffice, we think, for us to say that the judgment and order appealed from should be reversed, upon the authority of *Aikins v. Kingsbury*, supra; and it is so ordered.

We concur: **RICHARDS, J.; KERRIGAN, J.**

In re BRENCHELEY'S ESTATE.
BRENCHELEY et al. v. BRENCHELEY.
(No. 18760.)

(Supreme Court of Washington. May 9, 1917.)

DESCENT AND DISTRIBUTION §52(2)—WIFE'S PROPERTY RIGHTS—ACQUISITION OF PROPERTY BY PARTIES ILLEGALLY MARRIED.

Where a woman in good faith married a man within six months of his divorce, knowing he had been divorced, but not knowing that the laws of the state prohibited remarriage within six months after divorce, and thereafter she kept boarders, a lodging house, and was a nurse and midwife, and contributed her earnings to payment of the obligations which purchased the property owned by herself and her husband at his death, she was entitled to half the property, at least, as against the husband's children by his

former marriage, notwithstanding her marriage was void, as contracted within six months of divorce.

Department 2. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Action by William H. Brenchley and Lester Brenchley against Elizabeth Brenchley, administratrix of Richard Brenchley, deceased. From the judgment, plaintiffs appeal. Affirmed.

W. E. Southard, of Wilson Creek, for appellants. F. K. P. Baske and M. E. Jesseph, both of Davenport, for respondent.

MOUNT, J. In this action the appellants seek to recover all the property left by their deceased father. On a trial of the case below, the court awarded one-half of the property to the appellants and one-half to the respondent. The facts are not in dispute.

On November 16, 1888, Richard Brenchley, now deceased, secured, in this state, a divorce from his then wife. He had two sons by that marriage. These two sons are the appellants in this case. On December 3, 1888, Richard Brenchley was married, in regular form, to the respondent. At the time of the marriage, respondent knew that Mr. Brenchley was divorced; but she was not informed of the date of the decree, and never knew there was any question of the legality of the marriage until this action was begun. She lived with Mr. Brenchley, in Lincoln county in this state, from the time of the marriage, in 1888, until his death, which occurred in July, 1914. The property in dispute was acquired jointly by respondent and her husband, Richard Brenchley, between the date of the marriage and the date of his death. At the time of his death, the property consisted of real property of the value of \$5,500, and personal property of the value of about \$900. It all stood in the name of Mr. Brenchley. The appellants contributed in no wise to the acquisition of the property. They did not live with their father, but lived in another state.

Under these facts the trial court was of the opinion that the property being acquired by the joint efforts of Mr. and Mrs. Brenchley, even though the marriage was void by reason of the fact that it was contracted within six months after the decree of divorce from Mr. Brenchley's first wife was rendered, still respondent was entitled to one-half of the property so acquired.

It is argued by the appellants, first, that the marriage was void, because it was contracted within six months after the decree of divorce between Mr. Brenchley and his first wife. This position may be conceded, and we shall notice it no further.

It is next argued by the appellants that, because the marriage was void, the property acquired by Mr. Brenchley was his separate property, in which Mrs. Brenchley had no

interest. This argument is based largely, if not entirely, upon decisions of this and other courts to the effect that, where there is no contract of marriage, or where the contract is a meretricious one, the property acquired during the relation belongs to the one acquiring it. The facts in this case are conclusive that the contract of marriage was not meretricious, but was entered into, and kept, in good faith by both parties. The evidence conclusively shows that the respondent, when she married Mr. Brenchley, knew that he had been divorced. She did not know the time of his divorce, and she did not know that the laws of this state prohibited marriage within six months after a decree of divorce. She came to this state a few months before the marriage. There is no evidence that Mr. Brenchley actually knew of the statute prohibiting marriage within six months after a decree of divorce. But even if he knew, or may be presumed to have known, that fact, the result would be the same, for they lived together in the utmost good faith, each contributing to the accumulation of the property now in dispute. The record shows that the respondent kept boarders, kept a lodging house, was a nurse and midwife, and contributed her earnings to the payment of the obligations which purchased the property. Under these facts, it is clear that she is at least entitled to one-half of the property, which the court awarded her, notwithstanding the fact that the marriage was void. In the case of *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, this court said:

"Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man, which he conceals from the woman, a status is created which will justify a court in rendering a decree of annulment of the attempted and assumed marriage contract, upon complaint of the innocent party; and where in such a case the facts are as they have been found here, where the woman helped to acquire and very materially to save the property, the court has jurisdiction as between the parties, to dispose of their property as it would do under Bal. Code, § 5723 (P. C. § 4637), in a case of granting a divorce—awarding to the innocent, injured woman such proportion of the property as, under all the circumstances, would be just and equitable."

In that same case Judge Rudkin concurred in the result, but did not agree to the ground upon which the decision was placed. He said, at page 224 of 50 Wash., at page 1084 of 96 Pac., 126 Am. St. Rep. 900:

"I approve the rule announced in the authorities cited in the majority opinion, viz. that the court may restore to the woman any property the man may have acquired by or through her, may compensate the woman for any pecuniary benefits derived by the man during the existence of such relation, or may make a just and equitable distribution of their joint accumulations."

So, whether the respondent and Mr. Brenchley were legally married, or not, they themselves supposed they were legally mar-

ried. They lived together, as man and wife, for a period of 26 years. During that time, each laboring to a common interest, they acquired the property in dispute. If Mr. Brencley were now alive, and were seeking to avoid the marriage, because it was illegal at the time it was entered into, no court would say that he might take advantage of his own wrong and have a decree dissolving the marriage, because it was illegal, and, at the same time, take all the property accumulated by the joint efforts of the two. An equitable division, at least, would be made, and respondent would be given one-half the property, which is all the court in this instance awarded to her. The appellants have no better rights than their father would have, were he now alive and seeking the same remedy. See *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844, and cases there cited; also *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S. W. 246. In the case last cited, the plaintiff had lived with her husband in good faith, believing that there was a legal marriage. The property accumulated during that time was treated as partnership property, and was divided as such. In that case, it was said:

"In *Morgan v. Morgan*, 1 Tex. Civ. App. 315 [21 S. W. 154], Justice Head, in his discussion of the principles under which the putative wife, acting in good faith, might have her just rights secured to her, entered into a thorough review of the authorities and held that the tendency of our courts, as evidenced by the decisions involving kindred questions, justified the conclusion that she should be treated as a partner as to all property shown to have been acquired by their joint efforts."

That is the just rule, and is the one applied by the lower court.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and PARKER, FULLERTON, and HOLCOMB, JJ., concur.

EVES et al. v. ROBERTS et al. (No. 13673.)
(Supreme Court of Washington. May 2, 1917.)

1. HUSBAND AND WIFE §47(1) — DEEDS — RECORDING—EFFECT.

Where a husband and wife simultaneously executed deeds to each other to avoid necessity of administration on the estate of the one dying first, and there is no circumstance raising an inference of delivery by the husband that would not equally apply to delivery by the wife, recording the deed from the husband during his unexplained absence conveyed no title.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 232, 234, 237, 239-241.]

2. HUSBAND AND WIFE §47(1)—DEEDS—DELIVERY—PRESUMPTION.

The rule that where a deed formally executed and acknowledged is found in the grantee's possession, a delivery will be presumed, cannot apply where a husband and wife executed deeds to each other simultaneously to avoid necessity

of administration proceedings, in which case there is a presumption against delivery.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 232, 234, 237, 239-241.]

3. EQUITY §87(2)—LACHES—APPLICATION.

Where heirs brought an action to recover real property within three years after becoming of age as required by Rem. Code 1915, § 158, the action is not barred by laches, since that doctrine will not ordinarily defeat an action brought within the statutory period.

Department 1. Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by Sherman W. Eves and Alvin L. Eves against George R. Roberts and Jane Doe Roberts. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sturdevant & Baily, of Asotin, for appellants. E. J. Doyle, of Clarkston, for respondents.

CHADWICK, J. Reuben H. Eves and his wife, Mary J. Eves, were the owners of a certain tract of land in Vineland, Asotin county, Wash. Mary Jane Eves died on or about October 19, 1904, leaving her surviving, her husband and four children. Two of the children, Sherman W. Eves and Alvin L. Eves, were minors. On September 28, 1903, Mrs. Eves and her husband had mutual deeds drawn by a notary public. The form of the deeds was such that each conveyed to the other, as if the grantor was the sole owner. There can be no question that the parties intended, at the time, to defeat the statute of wills and make an administration of the estate of the one dying first unnecessary. They said, according to one witness, that the property was so fixed that their children would not get it, and, according to another, it was so fixed that they would not have to pay out anything for lawyers' fees if one of them should drop off. The record title was not incumbered at the time by the recordation of either deed. Reuben H. Eves testifies that each deed, when prepared, was given to the grantor, that is, he retained the deed executed by himself, and Mrs. Eves retained the deed that she had executed; that they took them home and placed them in a bureau drawer. He further testified that he left home shortly after the time when the deeds were executed, and, his absence continuing over the time appointed for his return, his wife took the deed which he had executed out of its place of deposit and put it of record. Shortly after the death of his wife, Reuben H. Eves took the deed which his wife had executed and filed it for record. This was the state of the record title on the 15th day of September, 1910, when Reuben H. Eves and his later wife, Jane P. Eves, united in a conveyance of the property to George R. Roberts. No administration was ever had of the estate of Mary J. Eves. This action was brought by her children to re-

cover a one-half interest in the property. From a decree, dismissing the action as to two of the heirs who were of age at the time of the death of Mrs. Eves and against whom the statute of limitations had run, and a holding that the respondents Sherman W. Eves and Alvin L. Eves were each entitled to an undivided one-eighth of the property, appellants have prosecuted this appeal.

It seems to us that the only question is whether the deeds were delivered. That there was no present intention to deliver them is best evidenced by the circumstances attending their form and execution. Each purported to convey the whole title. They were executed simultaneously, and, had they been filed for record at the same time, the one would have canceled the other. The title would have been unaffected. The taking of the deed made by Reuben H. Eves from its receptacle by Mrs. Eves, and the filing of it during his absence, rather negatives the presumption of delivery; for, if it had been delivered when executed or before Mr. Eves' departure, Mrs. Eves would probably have recorded it at once, instead of waiting until she had become nervous and worried over the continued absence of her husband.

[1] There is no circumstance from which a delivery by the husband to the wife can be inferred that would not sustain the same inference that the deed by the wife was at the same time delivered to the husband. It follows then that the recording of the deed from the husband to the wife would convey no title as against an outstanding deed simultaneously executed and simultaneously delivered by the wife to the husband.

[2] We understand the rule to be that when a deed, formally executed and acknowledged, is found in the possession of the named grantee, a delivery will be presumed, and if one would overcome such presumption he must do so by testimony that is strong and convincing. *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513. See, also, 8 R. C. L. p. 999; 13 Cyc. 733; *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946; *In re Slocum's Estate*, 83 Wash. 158, 145 Pac. 204; *Brown Brothers' Lum. Co. v. Preston Mill Co.*, 83 Wash. 648, 145 Pac. 964. But that presumption cannot be applied with all its force, or even in a measurable degree, where a husband and wife make mutual deeds to the same property with intent to pass title in the event of the death of one or the other, and in which event the deed to the one deceased is not to be used as a conveyance. Whether such conveyances could be sustained as deeds if placed in some escrow, independent of the parties, we are not called upon to decide. We are quite satisfied to hold,

however, where, as in this case, we have two deeds made simultaneously, and for the avowed purpose of defeating the jurisdiction of the courts and expense of administration upon the estate, that the presumption is against delivery, and that the one depending upon it must show the fact by testimony rising to the same dignity as that required to overcome the presumption attending the possession of a deed, formally executed, by a stranger to the title.

The circumstances of this case invite the application of the same rules that apply in cases where one comes into possession, or discloses the possession of a deed after the death of a grantor, and his possession is challenged by one who would take under a will or the statutes of descent. We but recently had occasion to review these principles. In *Showalter v. Spangle*, 160 Pac. 1042, we said:

"In every case there must be something from which it clearly appears that there was an intention to make the deed a presently operative conveyance, vesting title in the grantee within the grantor's lifetime. *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240."

When Mrs. Eves recorded the deed in which she was named as grantee, she either became the sole owner, for one spouse can convey to another (Rem. Code, § 8766), or the deed accomplished no more than to cloud the record, depending entirely upon whether the deed had been delivered. That it lacked the element of delivery is best evidenced by the act of Eves, who, in seeming obedience to his first intention and understanding that the deeds were to be operative only as testamentary writings, placed his deed of record after the death of his wife.

We have not overlooked the fact that the reputation of Eves for truth and veracity was successfully attacked, but the decree of the court may be sustained by reference to the exhibits and collateral circumstances which do not depend upon Eves' testimony.

[3] Counsel charge respondents with laches. They brought their action within three years after coming of age, and are within the statute. Rem. Code, § 158. Laches is an equitable doctrine and will not ordinarily be resorted to to defeat an action brought within the limit of an express statute. *Cordiner v. Finch Investment Co.*, 54 Wash. 574, 103 Pac. 829; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272; *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350.

We find no error, and the decree is affirmed.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

SUNDE et al. v. HANSON. (No. 13727.)
(Supreme Court of Washington. May 9, 1917.)
ADVERSE POSSESSION §60(4) — **TITLE TO LAND—REASSERTION OF OWNERSHIP.**

Where, after foreclosure of a mortgage covering a tract of land in defendant's possession, he reasserted ownership adverse to the record owners, who were fully advised of the fact, he acquired title to the land by adverse possession; the requisite period having elapsed.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 288-293.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Ole Sunde and others against Chris Hanson. From a judgment for defendant, plaintiffs appeal. Affirmed.

Somers H. Smith and Paul Shaffrath, both of Seattle, for appellants. Solon T. Williams, of Seattle, for respondent.

PARKER, J. This is an action of ejectment tried in the superior court for King county, resulting in findings and judgment in favor of the defendant, Hanson, from which the plaintiffs have appealed to this court.

The land in question is 2½ acres, known as tract 38 of Panther Lake garden tracts. Respondent Hanson has been in the actual possession of the land ever since the year 1893, when he acquired title thereto by warranty deed from its then owner. At that time there was a blanket mortgage upon all the tracts in the plat of Panther Lake garden tracts, the existence of which mortgage was unknown to respondent until its foreclosure in the year 1895, which foreclosure resulted in divesting him of the record title to tract 38, the owner of the mortgage becoming the purchaser of this and the other tracts under the foreclosure. Respondent had paid the taxes on tract 38 up until the foreclosure sale. He then ceased for a time to pay taxes and recognized that the title to the tract had passed to the owner of the mortgage, though he continued in possession. About the year 1898 respondent reasserted his ownership to the tract, and continued his possession thereto under such circumstances as to evidence to the then owner that he was holding such possession adverse to it. Indeed the evidence convinces us, as it evidently did the trial court, that the then owner never intended to assert ownership to this tract as against respondent, and that its inclusion in the foreclosure proceeding was inadvertent. Neither it nor any one else other than respondent ever paid any taxes upon the tract since the foreclosure. In January, 1902, respondent paid all the delinquent taxes charged against the tract after the foreclosure, and has since then paid all the taxes upon the tract as they became due from year to year. The trial court rendered judgment in respondent's favor upon the theory that he had acquired title to the

tract by adverse possession since the foreclosure, finding:

"That ever since the said year 1898, the said defendant, Hanson, has been in the open, notorious, peaceful, adverse, hostile, and continuous actual possession of the premises * * * under claim of ownership and right made in good faith, which said possession, under said claim, has been continuous for more than ten years prior to the commencement of this action."

The contention of counsel for appellants seems to be that the evidence did not warrant this finding, arguing, in substance, that respondent's possession after the foreclosure was but the continuance of his possession prior thereto, and never in fact became adverse to the owner of the mortgage acquiring the record title by foreclosure and its successors in interest. It seems true that respondent's possession was of the same nature in outward appearance after 1898 following the foreclosure as before then, but we are quite convinced, as the trial court evidently was, that his possession was after 1898 adverse to the record owners, and that they were fully advised of that fact. Both the law and the equities of the case support respondent's title acquired by adverse possession.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

STATE ex rel. PROGRESSIVE MOTION PICTURE CO. v. HOWELL, Secretary of State. (No. 13990.)

(Supreme Court of Washington. May 5, 1917.)

MANDAMUS §88 — **SECRETARY OF STATE — FOREIGN CORPORATIONS.**

Under Rem. Code 1915, § 3680, prohibiting the secretary of state from filing incorporation articles of a company whose name is similar to that of a concern already doing business, and section 1014 authorizing mandamus to compel performance of an act which the law especially enjoins, a domestic corporation may maintain mandamus to compel the secretary of state to strike from his records the name of a foreign corporation having the same name, and authorized to do business after the relator filed its articles, although such foreign corporation is not a party to the proceeding and had presented affidavits to the secretary of state alleging that relator had wrongfully appropriated its trade-name, since the secretary has no jurisdiction over such a controversy.

Department 2. Original mandamus proceedings by the State of Washington, on the relation of Progressive Motion Picture Company, against I. M. Howell, Secretary of State. Writ issued.

Gerard Ryzek, of Pasco, for relator. W. V. Tanner, Atty. Gen., and Hance H. Cleland, Asst. Atty. Gen., for defendant. Cassius E. Gates, of Seattle, amicus curiae.

PARKER, J. The relator, Progressive Motion Picture Company, a domestic corpo-

ration, seeks in this court a writ of mandamus to compel the secretary of state to strike from the records of his office the name of the "Progressive Motion Picture Company," a California corporation, and cancel the license of that corporation authorizing it to do business in this state.

On September 23, 1916, Gerard Ryzek and J. E. Doughty, residents of Pasco in this state, duly executed articles of incorporation looking to the organization of relator under the laws of this state. On September 25, 1916, they filed in the office of the secretary of state the articles so executed, paid the filing fee therefor, and also paid the annual license fee required by law, received from him a certificate of incorporation, evidencing its existence under the name of "Progressive Motion Picture Company," and also received from him a license authorizing it to do business. At that time the records in the office of the secretary of state did not show that any other corporation of the same or a similar name was organized under the laws of this state, or that any foreign corporation of the same or similar name had complied with the laws of this state, authorizing it to do business therein. On November 24, 1916, the "Progressive Motion Picture Company," a California corporation, tendered to the secretary of state a duly certified copy of its articles of incorporation, evidencing its existence under the laws of the state of California, together with a written appointment of a resident agent in this state, looking to its acquisition of the right to do business in this state under the provisions of sections 3720, 3721, and 3722, Rem. Code. It also tendered the filing and license fees required by law in such cases, and thereupon the secretary of state received and filed in his office the papers so tendered, and issued to it a license to do business in this state, notwithstanding relator was then a corporation of exactly the same name, existing and licensed under the laws of this state, as appeared from the records in his office. On January 15, 1917, relator demanded of the secretary of state that he strike from the records of his office the name of the California corporation and cancel its license, claiming that the receiving and filing of its articles of incorporation and the issuance of a license to it by the secretary of state was a wholly unauthorized and illegal act on his part and in violation of the rights of relator, because it was at that time an existing corporation under the laws of this state, having the same name as the California corporation. The facts thus far summarized by us are not controverted.

For the purpose of inducing the secretary of state to file its certified copy of articles of incorporation and its appointment of a resident agent, and to issue a license to it as a foreign corporation, notwithstanding the relator was then shown by the records of his office to be an existing domestic corporation of the same name, the California corporation

caused to be presented to the secretary of state certain affidavits, wherein it was stated, in substance, that a controversy between the incorporators of relator and the California corporation arose and was existing at the time of the incorporation of relator, in connection with the film or motion picture business at Pasco, and that the incorporation of relator was a move on the part of its incorporators in connection with that controversy, and for the purpose of appropriating the name of the California corporation, and not in good faith for the purpose of organizing relator as a corporation under the laws of this state. The fact of the presentation of these affidavits to the secretary of state, the fact that the California corporation knew at the time it tendered the filing of its papers to the secretary of state that relator was, as the records of that office showed, a duly organized and licensed corporation under the laws of this state, and the fact that the statements in the affidavits induced the secretary of state to receive and file the papers tendered by that corporation and issue to it a license to do business in this state as a foreign corporation, are not in dispute. Other facts stated in the affidavits, however, are, for the most part, controverted. However, as we proceed we think it will become plain that the only fact so disclosed which can have any possible relevancy to the question we are here called upon to decide is the fact that the California corporation had knowledge of the prior and existing incorporation of relator, as evidenced by the records in the office of the secretary of state, and it might well be argued that even that fact is immaterial.

Counsel for relator rests its claimed right to have the name of the California corporation stricken from the records of the office of the secretary of state and its license canceled, upon the provisions of section 3680, Rem. Code, reading as follows:

"No corporation shall take the name of a corporation theretofore organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading. The secretary of state shall refuse to file said articles of incorporation of any association or corporation violating the provisions of this section."

It is provided by our mandamus statute that a writ of mandamus "may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. * * *" Section 1014, Rem. Code. It is plain that section 3680, above quoted, "especially enjoins" upon the secretary of state that he refrain from filing in his office articles of incorporation looking to the incorporation of a domestic corporation, or the authorization of a foreign corporation to do

business in this state, of the same name as that of a domestic corporation existing under the laws of this state or a foreign corporation authorized and licensed under our statutes to do business in the state. Whatever doubt there may have been as to the application of section 3680 to the authorization of foreign corporations to do business in this state, so far as the duplication of names is concerned, was removed by the decision of this court in *State ex rel. Baker River, etc., Co. v. Nichols*, 51 Wash. 619, 99 Pac. 876.

Much discussion is indulged in and many authorities cited by counsel for the secretary of state having to do with the respective rights of these corporations to the use of the name "Progressive Motion Picture Company" as a trade-name. Whatever the rights of either of these companies may be to the use of that name as a trade-name we think is foreign to any proper subject of inquiry here. There are numerous authorities holding that the mere acquiring of a corporate name by the organization of a corporation in accordance with statute, or the mere acquiring of the right of a foreign corporation to do business in a state in accordance with statute, does not give to either of such corporations the right to do business in its corporate name, in violation of the trade-name rights of others. *Grand Lodge, etc., v. Graham*, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133; *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014; *General Film Co. v. General Film Co. (C. C. A.)* 237 Fed. 64; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123. But this is not the question here for decision, nor will our disposition of this case impair in the least whatever rights either of these corporations may have as against the other, rested upon its claimed trade-name rights. This is simply a question of the secretary of state having failed to perform a plain duty enjoined upon him by the express language of section 3680, above quoted, which duty we are of the opinion the relator had an equally plain right to have performed, and, having promptly asked for relief in that behalf is now entitled to have that duty in effect performed by striking the name of the California corporation from the records of the office of the secretary of state and the license of that corporation canceled. It may be that had not the Washington corporation moved promptly in seeking relief by mandamus, it would have lost its right to invoke that remedy against the secretary of state because of rights the California corporation might possibly have acquired which could be rested upon estoppel or laches as against relator. It may also be true that had the names of these corporations, instead of being exactly alike, only resembled each other with a difference such as to furnish room for honest difference of opinion as to whether they

so resembled each other "as to be misleading," thus presenting a question for the exercise of judgment on the part of the secretary of state for decision, we would not award relator relief by mandamus. But the resemblance of these names to each other is so complete, they being exactly the same, that there is no room for exercise of judgment upon the question of their similarity; hence there was no question for the secretary of state to decide in that respect as to which there was any room for difference of opinion. The secretary of state in our opinion had no authority whatever to entertain the question of what right either of these companies had against the other to the use of the name "Progressive Motion Picture Company," except as he was required to determine that question from his own records; and, when by reference thereto it appeared that the Washington corporation was duly organized as such and had issued to it a license, the scope of his inquiry was at an end, and he had no authority whatever to file articles of any other corporation, domestic or foreign, or to issue a license to any other corporation, domestic or foreign, of the same name. Such is the plain mandatory provision of section 3680.

We have not lost sight of the general rule invoked by counsel for the secretary of state, citing 26 Cyc. 149, and other authorities, that mandamus will ordinarily not be awarded as a remedy where the rights of third parties may be injuriously affected; they not being heard. But we are of the opinion, in view of the plain duty of the secretary of state to have refrained from filing the California corporation's articles and the issuing to it of a license, and the prompt application of the relator for mandamus in this proceeding, that such remedy should not be denied relator because the California corporation is not being heard here. We think the undisputed facts before us render it plain that the California corporation has no such possible rights as entitle it to be heard here. It is true it will, by the issuance of a writ in this proceeding, be in effect denied the right to do business in this state as a foreign corporation, except such business as a foreign corporation may do without filing copies of its articles and procuring a license, but this is a right that it manifestly never possessed. It was bound to know the law, and, having actual knowledge of the existence of a domestic corporation of exactly the same name, it never acquired any right under our statutes relating to the doing of business in this state by a foreign corporation. Whether or not it has the right to do business in this state such as a foreign corporation may do without complying with the provisions of our statute relative to the domestication of foreign corporations, and has acquired any trade-name rights in that behalf as against the rights of the Washington corporation, is a question it is free to litigate in our courts.

Whether or not the Washington corporation may be adjudged to have no lawful existence because of fraud in its organization, by proceedings in the nature of quo warranto to the end that its name be stricken from the records of the office of the secretary of state, leaving the name open to the California corporation, is also a question which may be presented to our courts. But these are not questions for the secretary of state to decide. In conclusion we feel impelled to say that the record before us indicates that the secretary of state acted with the best of motives in his action here in question. He simply mistook his legal duty.

We conclude that a writ of mandamus must issue as prayed for, requiring the secretary of state to strike the name of the California corporation from the records of his office and cancel its license to do business in this state. It is so ordered.

ELLIS, C. J., and FULLERTON and HOLCOMB, JJ., concur.

STOLZ v. STOLZ. (No. 13855.)

(Supreme Court of Washington. May 9, 1917.)

1. DIVORCE \Leftrightarrow 54—GROUNDS—CRUEL AND INHUMAN TREATMENT—SUBSEQUENT ABANDONMENT BY WIFE.

Where a husband inflicted severe physical punishment on different occasions upon his wife, she abandoned him of right when his employer forced him to leave the place at which they both lived, the wife refusing to do so and continuing in the employment, and the fact that the wife remained with the employer when her husband had obtained employment for her elsewhere was not sufficient to deprive her of her right to a divorce for the husband's cruelty; she not having been guilty of criminal intimacy with her employer or other men.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 190-196.]

2. DIVORCE \Leftrightarrow 252—DIVISION OF PROPERTY.

A wife, entitled to divorce from her husband on the ground of cruel and inhuman treatment consisting of physical violence, is entitled to all their property, which does not exceed \$450 in value.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715.]

Department 2. Appeal from Superior Court, Grant County.

Action for divorce by Anna H. Stolz against Phillip Stolz. From a judgment dismissing the action, plaintiff appeals. Judgment reversed, and cause remanded for a decree of divorce to plaintiff.

W. E. Southard and T. B. Southard, both of Wilson Creek, for appellant. John Truax, of Ritzville, and Martin & Jesseph, of Davenport, for respondent.

MOUNT, J. This is an action for divorce. The plaintiff based her cause of action upon cruel and inhuman treatment and nonsupport. Upon a trial of the case, the court concluded that the plaintiff was not entitled to a decree,

because each of the parties was guilty of improper conduct toward the other, and, for that reason, denied the decree. The court, in its opinion, which is made a part of the record, found that the defendant had treated the plaintiff in a cruel and inhuman manner, had struck her, and otherwise maltreated her, but that the plaintiff had abandoned the defendant, and had lived at the house of their employer for a period of a year, and because thereof some scandal had been circulated in the neighborhood. The court, therefore, concluded that each of the parties was without remedy against the other, and dismissed the action. The plaintiff has appealed.

If the evidence offered on behalf of the appellant is to be believed, we have no doubt of her right to a decree of divorce. The respondent did not seek a decree. He sought a reconciliation.

[1] It appears that the parties were married in the year 1910, and lived together for a period of five years. Two children were born to them. These children, at the time of the trial, were both infants. Appellant and respondent had accumulated some real estate of about the value of \$450. In the early part of 1915, the respondent and his wife were employed to work on the farm of a neighbor, who was an unmarried man. The appellant was employed to do the general housework, and the respondent was employed to work upon the farm. After they had been in this employment for a time, the husband became jealous of his wife, and accused her of infidelity, both with their employer and with other men. He attacked her upon different occasions, and punished her physically. Upon one occasion, their employer resented these attacks, struck the respondent, and required him to leave the place. He left, and his wife refused to go with him. She had, prior to that time, refused to cohabit with him. After he left the place, she continued in the employment, and remained there during the trial of this action. Upon the trial, the court exonerated her from any criminal intimacy with her employer, or other persons, but was of the opinion that she should have gone with her husband after he had mistreated her. In sort, the trial court concluded that, but for the fault of the other, each would be entitled to a decree of divorce; that, because the appellant had abandoned her husband, after the cruelty, she was not entitled to a decree. We think the trial court was in error in this respect. If she had been treated cruelly by her husband to the extent described in the testimony, she abandoned him of right. The fact that she remained with her employer, where her husband had obtained employment for her, is not sufficient to deprive her of her rights. Her reason for remaining there with her children was explained by the fact that she

had no other place to go. In the case of *Denison v. Denison*, 4 Wash. 705, at page 709, 30 Pac. 1100, at page 1101, this court said:

"If the plaintiff's testimony is true as to the matters upon which she seeks a divorce, she had abundant grounds therefor unless her own conduct had been such as to warrant the court in granting any relief, and while we are not entirely satisfied that she did at all times conduct herself as a wife should, it is not apparent that she was guilty of any criminal offense, nor is the testimony strong in that direction. She may have done improper things, and her conduct may have been ill-advised and wrong in some matters, but anything like perfect conduct upon her part under the circumstances could not be looked for. Continued ill treatment of the kind that she received at the hands of the defendant was bound to show itself upon her to some extent, and may have provoked her to acts and sayings which otherwise would not have been excusable. This is human nature. From her own proof, and that of her witnesses, we do not think her conduct was so reprehensible as to bar her right to ask for a divorce on the ground of the cruel treatment by her husband."

The same is true in this case. The court, in its opinion, after hearing all the evidence, exonerated the appellant of any criminal conduct. The court was of the opinion that she had been indiscreet, but not guilty of any criminal offense. If, as the trial court concluded, the respondent had been guilty of cruel and inhuman conduct, which we find to be amply sustained upon the record, she clearly had a right to abandon her husband, and not go with him when he left his employer's premises. The trial court found that she was not discreet in remaining with an unmarried man alone on the premises, and she may have been so indiscreet, but, when the trial court exonerated her of any criminal intimacy, either with her employer, or with other men, as charged by the husband, we think a divorce should have followed. It appears here plainly from the evidence that these parties can no longer live together, and it plainly appears that the respondent was guilty of cruel and inhuman conduct, making appellant's life burdensome. The mere fact that appellant abandoned him, we think, was not sufficient to deny her a divorce, because, under the circumstances, she was justified in the abandonment. We are satisfied, therefore, that the trial court should have granted her a decree of divorce.

[2] We are also satisfied that she is the proper person to have the care and custody of the minor children, and we are further satisfied, from the record here, that she should have a decree awarding her all the property, which the evidence shows does not exceed, in value, \$450.

The judgment of the trial court is therefore reversed, and the cause remanded for a decree of divorce to the appellant, awarding her the custody of the minor children and all the property belonging to the parties.

ELLIS, C. J., and PARKER and HOLCOMB, JJ., concur.

BORMANN v. HATFIELD. (No. 13929.)

(Supreme Court of Washington. May 11, 1917.)

MORTGAGES §—181 — REINSTATEMENT AFTER RELEASE INDUCED BY FRAUD—PRIORITY.

When a first mortgagee takes a new mortgage as substitute and releases original mortgage upon mortgagor's misrepresentation that no intervening lien exists, and in ignorance of such lien equity will reinstate the first mortgage lien in its original priority, in the absence of laches or other disqualifying facts, but the holder of the junior incumbrance must not be placed in a worse position than he would have occupied had the senior incumbrance not been released.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 435, 436.]

Department 1. Appeal from Superior Court, Spokane County; R. B. Albertson, Judge.

Action by Henry Bormann against Alfred J. Vyverberg and others. Decree for defendant C. B. Hatfield, and plaintiff appeals. Reversed and remanded, with directions.

Adolph Munter and Richard S. Munter, both of Spokane, for appellant. Goodsell & Farrington, of Spokane, for respondent.

WEBSTER, J. This is an action to foreclose a real estate mortgage. On January 22, 1910, the defendants Vyverberg executed and delivered to plaintiff their mortgage on two lots situated in Spokane county, to secure the payment of a note for the sum of \$500, with interest. On March 12, 1910, the mortgage was duly lodged for record. On July 18, 1911, they executed and delivered to defendant Hatfield a mortgage on the same property, to secure the payment of a note for \$3,700. This mortgage was filed for record on July 22, 1911. Subsequently to January 22, 1910, the plaintiff loaned the Vyverbergs additional sums of money for which he held no security. In January, 1915, a settlement was made between them by which it was ascertained that the Vyverbergs were indebted to plaintiff in the sum of \$1,724.47. On February 3, 1915, the Vyverbergs executed a new note for this amount and simultaneously executed to plaintiff a new mortgage on the same property to secure the payment of the note. On the same day plaintiff executed a release of the mortgage for \$500, bearing date January 22, 1910. On March 29, 1916, plaintiff commenced this action to foreclose the mortgage for \$1,724.47, and, having made Hatfield a party defendant, prayed that the lien of the mortgage be decreed to be superior to the lien of Hatfield's mortgage. Hatfield filed an answer and cross-complaint alleging the priority of his mortgage over that of the plaintiff, and prayed for its foreclosure. For answer to the cross-complaint plaintiff alleged that, at the time he executed the release of the mortgage for the sum of \$500, the defendants Vyverberg represented to him that there were no other mortgages or liens

upon the property; that in reliance upon this representation and believing the same to be true, he executed the release; that the note secured by the first mortgage had never been paid; that at the time of executing the release he did not know of the existence of the mortgage held by Hatfield, and did not learn of its existence until February, 1916. He prayed that the release of the first mortgage be canceled; that the lien of the original mortgage be reinstated; and that to the extent of the amount due thereon he be adjudged to have a prior and superior lien on the property. On the trial of the cause a decree was entered in favor of the defendant Hatfield, and denying the plaintiff the relief prayed. The plaintiff appeals.

There is very little conflict in the evidence concerning the controlling facts. The sole question for determination is this: Is the plaintiff entitled in equity to have the release of the first mortgage canceled and set aside, and to have the lien of the mortgage reinstated and restored as a prior lien to that of Hatfield's mortgage, the release having been executed in reliance upon the representation of the Vyverbergs that there were no other mortgages or liens upon the premises, and without actual knowledge on the part of the plaintiff of the existence of the Hatfield's mortgage, it appearing that the discharged mortgage was a valid and subsisting obligation duly recorded and unreleased at the time of the execution of the mortgage to Hatfield?

Counsel for the defendant Hatfield insist that, according to plaintiff's testimony, he released his first mortgage of record without examining the public records for the purpose of ascertaining whether there were any intervening liens upon the property, and that equity will not relieve him on the ground of ignorance of facts which he could have ascertained by the exercise of reasonable diligence. This contention ignores the fact that it is established by the clear preponderance of the evidence that the defendant Alfred J. Vyverberg represented to both plaintiff and his counsel, at the time the release was executed and the new mortgage was accepted, that there were no other liens or incumbrances upon the property. This assurance was reasonably calculated to disarm vigilance on the part of the plaintiff and to induce him not to examine the records. We are also unable to see how Hatfield's rights or interests were in any way affected by failure of the plaintiff to examine the records.

The precise question presented by this appeal was before this court in the case of *Nommenson v. Angle*, 17 Wash. 394, 49 Pac. 484, and the identical contention made by counsel for defendant Hatfield was urged upon the court. It was there held that, where a first mortgage has been released by the mortgagee, the note secured by the mortgage has been surrendered to the mortgagor, and a deed to the mortgaged premises has been

accepted by the mortgagee under the mistaken belief that there were no other incumbrances on the property, when in fact there was a second mortgage thereon, the first mortgagee is entitled, as against the debtor and the second mortgagee or the assignee of the latter with notice, to be restored to his original rights and lien under the released mortgage. It was said in the course of the opinion that it was the duty of the agent of the mortgagor having charge of the transaction to have disclosed to the mortgagee the true situation of which the agent had knowledge, or at least that he should not have said anything to induce the mortgagee to forego making a full examination of the records. See, also, *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

On the other hand, if mere constructive knowledge springing from the fact that the second mortgage is of record at the time the first mortgage is released and the new mortgage is recorded is sufficient to preclude the holder of the first mortgage from relief in equity against the releases of his mortgage, a mortgage so released could never be restored as against the second mortgage if the latter had in fact been lodged for record. The doctrine would then be restricted in its application to cases where the second mortgage was not of record at the time of the release, and, under such circumstances, there would be no need for a restoration of the released mortgage. In *Jones on Mortgages*, § 971, it is said:

"When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien. This was done in a case where the holder of a first mortgage, in ignorance of the existence of a subsequent one on the premises, released his mortgage and took a new one. There was no evidence of mistake except such as might be inferred from the mortgagee's ignorance of the existence of the intermediate mortgage, and there was no evidence that he would not have made this arrangement had he known this fact; but it was considered that although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which logically and naturally follow from the facts proved; that it is not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive, to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage. A court of equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction."

We are of the opinion that the rule supported both by reason and by authority is to the effect that, when the holder of a first mortgage takes a new mortgage as a substitute therefor and releases the original mortgage in ignorance of an intervening lien upon the mortgaged premises, and especially if the release is induced by fraud or misrep-

resentation on the part of the mortgagor, equity will, in the absence of laches or other disqualifying fact, restore and reinstate the lien of the first mortgage and give it its original priority. The rule is, of course, subject to the limitation or qualification that, by restoring the discharged lien, the holder of the junior incumbrance must not be placed in a worse position than he would have occupied had the senior incumbrance not been released. To deny this relief and to refuse to restore for the protection of the first mortgagee the lien of the prior mortgage would be to permit the second mortgagee to unjustly profit by the mistake of the former, or to unconscionably avail himself of the fruits of a palpable fraud perpetrated by another to the injury of the victim of the fraud. Therefore a subsequent mortgagee who becomes such anterior to the discharge of a prior mortgage cannot, with any show of reason or justice, claim to be injured by the setting aside of the subsequent release and restoring the lien of the prior mortgage. He is in no way prejudiced, but is left to enjoy exactly what he expected to get when he accepted the second mortgage. *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Bruse v. Nelson*, 35 Iowa, 158; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Robinson v. Sampson*, 23 Me. 388; *Cobb v. Dyer*, 69 Me. 494; *London, etc., Co. v. Tracy*, 58 Minn. 201, 59 N. W. 1001; *Am. Bonding Co. v. Nat. Mech. Bank*, 99 Am. St. Rep. 466, note.

The judgment will be reversed, and the cause remanded, with direction to cancel the release and to reinstate the mortgage of date January 22, 1910; and, to the extent of the principal and interest due thereon according to its terms, to decree to plaintiff a prior lien on the premises as against the defendant Hatfield.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

ROWE v. SILBAUGH et ux. (No. 13816.)
(Supreme Court of Washington. May 5, 1917.)

1. JUDGMENT \Leftrightarrow 470—COLLATERAL ATTACK—MATTER OUTSIDE THE RECORD.

A judgment valid on its face cannot be collaterally attacked for matter dehors the record, but must be avoided in an appropriate remedy for that purpose, since such judgment is not absolutely void, but merely voidable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907.]

2. JUDGMENT \Leftrightarrow 518—COLLATERAL ATTACK—MATTER OUTSIDE THE RECORD — BILL TO QUIET TITLE.

A bill to quiet title, asking vacation of a judgment valid on its face, is a collateral attack on such judgment, and hence demurrable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962.]

3. JUDGMENT \Leftrightarrow 407(1) — DEFAULT — VACATION.

Where default judgment was taken in another county on false affidavit regarding defendant's

address, and without defendant's knowledge until too late to avail herself of statutory method of vacation, her remedy was to institute suit in equity to set it aside in court rendering judgment, and her bill to quiet title, seeking vacation of such judgment and brought in her own county, was improper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 768.]

Department 1. Appeal from Superior Court, Pacific County; Edward H. Wright, Judge.

Action by Nettie O. Rowe against Jackson Silbaugh and wife. From an order and judgment sustaining demurrer to amended complaint and dismissing action, plaintiff appeals. Affirmed.

Robert G. Chambers, of Raymond, for appellant. Fred M. Bond, of South Bend, for respondents.

WEBSTER, J. This is an appeal from an order and judgment sustaining a demurrer to the amended complaint and dismissing an action to quiet title to certain lands in Pacific county, by vacating and setting aside a judgment of the superior court of King county and canceling a sheriff's deed made pursuant thereto. Plaintiff alleged that, on or about February 7, 1914, she and the defendant Jackson Silbaugh entered into a written contract for the exchange of certain real properties; that at the time plaintiff signed the contract Silbaugh pretended to read its contents to her, but fraudulently failed to read a clause providing for the forfeiture of \$500 as liquidated damages by the party in default in the event the contract should not be carried out; that, upon discovering the fraudulent manner in which her signature to the writing had been procured, plaintiff accused Silbaugh of the fraud, and he thereupon wrote on her copy of the contract an addendum to the effect that, if she should be unable to obtain the sum of \$1,000 from one Devenish, or should be unable to realize that amount upon the obligation due her by him, the forfeiture clause would be waived; that she thereafter informed Silbaugh that she was unable to secure money on the Devenish note, and that nothing further was done toward consummating the exchange; that on June 23, 1914, Silbaugh commenced an action against her in the superior court of King county, based upon the forfeiture clause in the original contract, and such proceedings were had that on October 22, 1914, he obtained a default judgment against her in the sum of \$500 and costs; that on July 25, 1914, Silbaugh sued out a writ of attachment, which on August 7, 1914, was levied upon her property in Pacific county, the title to which she is now seeking to have quieted; that the summons in the action was published in the Seattle Municipal News, commencing August 15, 1914, and ending on September 26, 1914;

that on December 5, 1915, pursuant to an execution issued out of the superior court of King county, the sheriff of Pacific county sold the property in question for the purpose of satisfying the judgment; that at said sale Rosetta Silbaugh, the wife of Jackson Silbaugh, became the purchaser of the property, and on December 16, 1915, the sheriff of Pacific county executed a deed conveying the property to her; that on January 22, 1916, the deed was lodged for record in the office of auditor of Pacific county; that at no time during the pendency of the action did plaintiff have any knowledge thereof, and that her first information concerning it was obtained after the deed to Rosetta Silbaugh had been filed for record; that during the month of August, 1914, the home and residence of plaintiff was upon the land sold under the execution; that the affidavit for publication of summons, sworn to by Silbaugh and filed in the court on August 6, 1914, stated, "The defendant is a nonresident of the state of Washington and cannot be found therein, although diligent search has been made;" that this statement was false and untrue, and known to be such by Silbaugh at the time the affidavit was made; that he in fact knew the residence and post office address of plaintiff, but did not mail a copy of the summons and complaint to her known residence and post office address; that the obtaining of the judgment was a fraud upon the superior court of King county and upon the plaintiff; and that the judgment and the deed pursuant to it constitute a cloud upon the title of the plaintiff to the property described in the amended complaint.

Only plaintiff prayed that the judgment be vacated, the deed be canceled, and that title to the property be quieted in her. The defendant interposed a general demurrer upon the grounds, among others, that the amended complaint did not state facts sufficient to constitute a cause of action, and that the court was without jurisdiction to hear and determine the cause. The demurrer was sustained. Plaintiff declined to plead further, and the action was dismissed. From this judgment plaintiff appeals.

As we read the amended complaint, it is susceptible of two constructions: First, as an action to quiet title and incidental thereto to vacate the judgment and cancel the deed; and, second, as an action in equity to vacate and set aside a judgment procured by fraud, brought after the expiration of one year from the entry of judgment, but within three years after the discovery of the fraud by which it was obtained. We shall therefore consider it in each of its aspects.

[1] If it be considered an action to quiet title, the demurrer was properly sustained upon the ground that the amended complaint did not state sufficient facts. An examination of the pleading discloses that the record presented for the consideration of the King

county superior court clothed it with jurisdiction to enter in the and the judgment entered in the cause and valid on its face. Its invalidity be exposed by evidence debors the the defect complained of being that, davit of nonresidence upon which the cation of summons was based was fraudulent. The judgment is not ab void, but is subj ct only to be avoide appropriate action for that purpose.

"Where it appears on the face of the that no service has been made on the de- and the court must know, from a bare tion thereof, that the judgment is void of jurisdiction over the person of the de- it will set aside the judgment, on the not the defendant or of any one injuriously at by it; but, when the judgment is valid face, it is not thus subject to attack. T aside a judgment for matters debors the it must be attacked by some one of the tory methods for the vacation of judgments, within the time limited by statute, or by a setting up some equitable ground for its u- tion." *Scott v. Hanford*, 37 Wash. 5, 79 481.

See, also, *State ex rel. Pacific Loan, & Co. v. Superior Court*, 84 Wash. 302, 1 Pac. 834; *Doble v. State of Washington*, 2 Pac. 37; *Benjamin v. Ernst*, 83 Wash. 145 Pac. 79; *Peyton v. Peyton*, 28 Wash. 68 Pac. 757; 1 *Freeman on Judgments*, 132, 334.

[2] In *Magee v. Big Bend Land Co.*, 2 Wash. 406, 99 Pac. 16, this court held that an action to quiet title and recover possession of lands sold at an administrator's sale alleged to have been made without jurisdiction is a collateral attack upon the proceeding. In *Peyton v. Peyton*, supra, it was held that, if an action or proceeding is for an independent purpose and contemplated some other relief or result than that of vacating and setting aside the judgment, although the overturning of the judgment may be important and even necessary to its success, the attack upon the judgment is collateral. See, also, *Kalb v. German Savings & Loan Society*, 25 Wash. 349, 65 Pac. 57, 87 Am. St. Rep. 757; 1 *Black on Judgments*, § 252.

Inasmuch as the judgment was not void, and therefore not open to collateral attack, and an action to quiet title must be treated as such an attack, the amended complaint fails to state a cause of action. If, on the other hand, the action is to be treated as one in equity to vacate a judgment on the ground of fraud, the superior court of Pacific county was without jurisdiction to entertain it. In *Case Threshing Machine Co. v. Sires*, 21 Wash. 322, 58 Pac. 209, it was held that a decree of a court of competent jurisdiction may not be set aside by a court of coordinate jurisdiction. In *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433, we reaffirmed that doctrine, enunciating the rule that the power to vacate judgments is inherent in and to be exercised by the court which re-

the judgment, and to that court and her the application to set aside the judgment must be made, quoting with approval 1 Black on Judgments (2d Ed.) § 297, as follows:

The power to vacate judgments is an entirely distinct matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment and to that court and no other the application to set aside the judgment should be made. Between courts of co-ordinate jurisdiction, as two county courts or circuit courts of the same state, the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face; but must be sought in the court where the judgment was entered."

Doble v. State of Washington, supra, appellants were seeking to declare null and void, in the superior court of Thurston county, a decree of the superior court of Whitman county in the matter of the estate of Samuel Doble, deceased, Judge Mount, speaking for the court, said:

We are also of the opinion that the trial court was right in sustaining the demurrer upon the ground that the superior court of Thurston county being a court of co-ordinate jurisdiction with the superior court of Whitman county, did not have jurisdiction to set aside a decree of the superior court of Whitman county. This court held that a decree of a probate court, disposing of an estate, is binding upon the world and cannot be set aside in a direct proceeding, and cannot be attacked in a collateral proceeding, except for fraud in its procuring, or want of jurisdiction appearing upon the face of the record."

See, also, Missouri Pacific Ry. Co. v. Lasker, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338, 17 Ann. Cas. 605; 17 Am. & Eng. Ency. Law (2d Ed.) 842.

Counsel for appellant cites and relies upon the cases of Krutz v. Isaacs, 25 Wash. 166, 66 Pac. 141, and Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907, as supporting his contention that the superior court for Pacific county has jurisdiction of the action. In the Krutz Case the action was brought in the superior court of Walla Walla county to recover possession of certain real estate situated in that county, and to quiet plaintiff's title against a sheriff's deed executed in pursuance of a judgment rendered in the superior court for Walla Walla county. The attack was direct, and the action was instituted in the court which had rendered the judgment of which complaint was made. The court, having jurisdiction of the action for the purpose of vacating and setting aside its own judgment, could in the same action afford complete relief to the parties by quieting plaintiff's title. In the Draham Case the judgment complained of was absolutely void upon its face, and was therefore open to direct or collateral attack, either in the court in which it was rendered or elsewhere.

[3] It is insisted in behalf of plaintiff that the cloud on her title is caused directly by the deed of the sheriff of Pacific county to Rosetta Silbaugh, that this deed is based up-

on the judgment of the superior court for King county, that it is impossible to remove the cloud without attacking the cause of it, and that an action to quiet title must be brought in the superior court of the county in which the property is situated. He then propounds this query:

"Is there any legal reason why the plaintiff should first bring an action in King county to set aside the judgment, and then another action in Pacific county to set aside the sheriff's deed and quiet her title?"

The conclusion implied in the question does not follow the premise. The answer to the question is this: From the allegations of the amended complaint it appears that the plaintiff without fault or neglect on her part did not discover the existence of the alleged fraudulent judgment until long after the expiration of the one year in which she might have availed herself of the statutory methods for its vacation, and under the decisions in Peyton v. Peyton, supra, and kindred cases, she has the clear right to institute an action in equity to set aside the judgment upon the ground of fraud practised both upon herself and the court rendering the judgment. Under the authorities already cited this action must be instituted in the superior court for King county, the jurisdiction in which the judgment was rendered, and if plaintiff should be able to sustain the necessary allegations of her complaint in such an action, the court would grant to her full and complete relief either by way of canceling the judgment and the deed pursuant to it, or by setting aside the judgment and compelling a reconveyance of the property to her, in which event no action in Pacific county to quiet title would be necessary.

In the memorandum decision of the learned trial court it is suggested that a doubt is entertained as to the scope and effect of the opinion of this court in Seattle & Northern Ry. Co. v. Bowman, 53 Wash. 416, 102 Pac. 27. It is said that it seems to be held in that case that the only methods of vacating a judgment in this state are those provided by sections 5153 and 5156, Bal. Code, being sections 464 and 467, respectively, of Rem. & Bal. Code. An examination of that case discloses that the parties seeking to set aside the judgment had knowledge of its existence within the year during which they could have moved or petitioned for its vacation under the statutes. It was not held that a party could not, after the expiration of one year from the entry of a judgment, maintain an action in equity to set it aside upon the ground of fraud in its procuring, if, without fault on his part, the existence of the fraudulent judgment was unknown to him during the statutory time. The rule announced in Peyton v. Peyton, supra, and the other cases from this court to the same effect was in no way modified or affected. See Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1038.

The judgment will be affirmed, but without prejudice to the right of the plaintiff to institute an action in the superior court of King county to vacate and set aside the judgment and deed, upon the ground of fraud discovered more than one year after the rendition of the judgment and within three years after its discovery.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

STATE v. MEYER. (No. 13786.)

(Supreme Court of Washington. May 11, 1917.)

1. HOMICIDE \S 300(7)—INSTRUCTIONS—SELF-DEFENSE—MISLEADING INSTRUCTIONS.

To instruct that, before one is justified in taking the life of an assailant, he must retreat to the wall if he can do so without increasing danger to himself, was erroneous, misleading, and confusing, where accused had no opportunity to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622.]

2. HOMICIDE \S 118(2)—JUSTIFIABLE HOMICIDE—RETREAT.

Where an assault is so fierce and imminent that the person assaulted is justified in honestly believing that he cannot retreat without increasing danger, he may stand his ground, and if in so doing he kills his assailant, he is justified.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 169.]

3. HOMICIDE \S 122—DEFENSE OF ANOTHER.

Defendant had the right to go to the defense of his housekeeper if she was being feloniously assaulted and to do such things for her protection as she might have done had she been able in view of Rem. & Bal. Code, \S 2406, providing that homicide is justifiable when committed in the lawful defense of any person in one's presence or company when there is reasonable ground to apprehend a design to commit a felony or do some great personal injury to such person, and there is imminent danger of such design being accomplished.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 177-181.]

4. HOMICIDE \S 122—DEFENSE OF ANOTHER—KILLING ONE INTERFERING WITH DEFENSE.

Where accused at the time he wounded E. was acting in the necessary defense of A., J. had no right to go to the defense of E., and accused could stand his ground to the extent of taking J.'s life if necessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 177-181.]

5. HOMICIDE \S 122—DEFENSE OF AGGRESSOR—RIGHTS.

If the son was the aggressor, the right of the father to act in his defense remained in abeyance until the son had in good faith attempted to withdraw from the conflict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 177-181.]

6. HOMICIDE \S 190(1)—THREATS BY THIRD PERSON—ADMISSIBILITY.

Exclusion of testimony that son said he would go home and get the father and "clean out the whole God damn bunch," was improper where within a few minutes after threat he and father returned armed; the evidence being competent to show the condition of the mind of ac-

cused and that father was the aggressor when killed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 399.]

7. HOMICIDE \S 157(5)—HOSTILE FEELING OF THIRD PARTY—EVIDENCE—ADMISSIBILITY.

Where accused was charged with killing the father, evidence that a difficulty had occurred between father's son and accused four years prior was properly excluded, where injury to son, a joint aggressor, was by accused in defense of another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 292.]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Charles A. Meyer was convicted of second degree murder, and he appeals. Reversed, and remanded for a new trial.

J. L. Sutherland, of Vancouver, for appellant. Jas. O. Blair, of Vancouver, for the State.

WEBSTER, J. The defendant, Charles A. Meyer, was charged with the murder of John Kramer. He was convicted of murder in the second degree and sentenced to imprisonment in the state penitentiary for a period of not less than 10 years nor more than 20 years. From this judgment he appeals.

There is little, if any, conflict in the testimony as to the following facts: On the evening of December 25, 1915, the defendant, in company with Lillian Abbott, his housekeeper, attended a Christmas party which was given at the residence of Peter Kramer at Hazel Dell Corners, a village about four miles north of the city of Vancouver. Peter Kramer and his wife were away from home, and the party was arranged and given by their son, Mat Kramer. The invited guests were Pauline Ecklund, Grace Goff, Lillian Abbott, Ray Holtgrieve, Ed. Kramer, Jr., John Meyer, Peter Zens, and the defendant. A keg of beer and several bottles of whisky had been provided by Mat Kramer, and all of the members of the party drank more or less of these liquors. The defendant and Lillian Abbott arrived at the Peter Kramer residence about 7:30 in the evening. Edward Kramer, Sr., a son of the deceased, John Kramer, and a cousin of Mat Kramer, attended the party uninvited. He was about 45 years of age, and lived at the home of his father, which was about 250 feet south of the Peter Kramer house and on the opposite side of the road or street. Very soon after the arrival of the defendant and Lillian Abbott, Edward Kramer, Sr., undertook to take indecent liberties with the person of Lillian Abbott. He also had some trouble with his son, Edward Kramer, Jr. During the evening he made himself generally disagreeable and offensive. In order to prevent further trouble, Mat Kramer requested him to either conduct himself properly or leave the house. After some words between them he left cursing and vilifying the members of the party,

both male and female, and made the threat, "I will get all of you sons of bitches before morning." Immediately upon his leaving the house the members of the party decided that it would be advisable for them to go home, and thus avoid Kramer in the event he should return to carry out his threat. They immediately commenced to put on their wraps, and were in the act of leaving the house when Edward Kramer, Sr., and his father John Kramer appeared at the front gate leading to the Peter Kramer residence. Both Edward and John Kramer indulged in vile and profane language, called the members of the party vulgar and offensive names, and threatened that if the party did not come out of the house they would go in and get them. Whereupon several members of the party went to the gate apparently for the purpose of quieting the Kramers. Some of them remained inside the yard, while others, including Mat Kramer, Edward Kramer, Jr., Lillian Abbott, Peter Zens, and the defendant, went out into the road. A number of the witnesses testified that Edward Kramer, Sr., was armed with a knife and a club, and John Kramer was armed with a pistol and a club. John Kramer immediately took Mat Kramer to task for the character of the party he was giving in the absence of his parents, referring to it in an obscene and filthy manner. He also threatened to knock Mat Kramer's head off, but Mat backed through the gate into the yard. Edward Kramer, Sr., then attempted to assault his son, Edward Kramer Jr., who, in order to get away from his father, ran down the road and jumped over the fence into the Peter Kramer yard. Edward Kramer, Sr., then attacked the defendant, who backed away from him until he reached the fence. There Kramer assaulted him with a knife and inflicted upon him three wounds, one of which was in the left breast over the heart and was about five or six inches in length and from one-fourth to one-half an inch deep. The defendant finally succeeded in getting away from Kramer and went back into the yard. Kramer then assaulted Lillian Abbott, called her vile and insulting names, threatened to cut her heart out, and was roughly pushing her in front of him down the road in the direction of the John Kramer residence. She was screaming and calling for help. At this point the defendant requested Edward Kramer, Jr., and other members of the party to go with him to the assistance of Lillian Abbott. This they declined to do, one of them saying that Edward Kramer, Sr., and John Kramer were armed. The defendant then asked Mat Kramer whether there was a weapon in the house. He was told that there was a shotgun in the washroom. He went in, procured the gun, but, finding no shells, went back and asked Mat Kramer where the shells were kept. He was told that they were on the kitchen cabinet. The defendant returned to the house, found the shells, and

loaded the shotgun. During this time Edward Kramer, Sr., was continuing his assault upon Lillian Abbott, and she was calling to the defendant to come to her rescue. After loading the gun, the defendant hurried out of the house and went down the road to the place where Edward Kramer and Lillian Abbott were. When he got near Edward Kramer he said: "Ed, you cut that out," and Kramer turned as if to assault him, but, seeing the shotgun in defendant's hands, immediately turned toward Lillian Abbott, called her a vile name, and said, "I will cut the heart out of you." He was in the act of striking her, as the defendant believed, with a knife which he held in his hand. She screamed, and the defendant shot Kramer in the legs, most of the charge taking effect on the inside of the left leg a few inches above the ankle and a few of the shot lodging in the outside of the right leg at about the same distance from the ankle. At this instant, according to the testimony of the defendant and Peter Zens, an eyewitness to the shooting, and which was strongly corroborated by other evidence, John Kramer advanced upon the defendant with a pistol pointed at him, and said either, "I will shoot you, Charlie Meyer," or "I will get you, Charlie Meyer." At this time the defendant was holding the shotgun at his right hip. Without taking time to raise the gun to his shoulder, he fired the second shot, killing John Kramer instantly. According to all of the testimony, the time elapsing between the shots was but a few seconds. After the shooting it was found that Lillian Abbott had been roughly treated by Kramer, her hair was disheveled, and her clothes were badly torn. A few minutes after the shooting the defendant, in company with members of the party, went to a nearby house, and the sheriff was notified by telephone of the killing. The defendant remained at the house until officers arrived, and surrendered himself to their custody.

The theory of the defense was that Edward Kramer, Sr., left the Peter Kramer residence, went to his home and got his father, and that the two were acting in concert when they appeared at the gate leading to the Peter Kramer house; that they went there for the purpose of attacking members of the party and causing serious trouble; that Edward Kramer, Sr., after attacking other members of the party, including the defendant, was making a felonious assault upon Lillian Abbott without fault on her part; that the defendant went to her defense, and, while Kramer was apparently in the act of inflicting upon her great bodily harm or attempting to take her life, the defendant, using no more force than reasonably appeared to be necessary to protect her from the then impending danger, shot Edward Kramer in the legs with the shotgun; that this occurred upon the public highway, where the defendant had a lawful right to be; that immediately upon his firing the shot which

wounded Edward Kramer, John Kramer advanced upon him with a pistol in his hand threatening to take his life, and that the defendant then, acting in his own necessary self-defense, fired the second shot which resulted in the death of John Kramer.

In instructing the jury upon the law of the case the court charged in part as follows:

"Before a person can take the life of an assailant, he must be in a position where he cannot retreat without increasing danger to his life or subjecting himself to great bodily harm, and if he can retreat without so increasing his danger to life or great bodily harm, he cannot successfully invoke the doctrine of self-defense."

[1] The giving of this instruction is assigned as error. Counsel for defendant insists that under the evidence in the case there was no room for an instruction upon the doctrine of retreat for two reasons: First, because the deceased at the time of the shooting was advancing upon the defendant with a pistol in his hand threatening to take the defendant's life, and that in these circumstances the defendant was compelled to act instantly and had no opportunity to retreat; and, second, that if the jury should find that, without fault on the part of Lillian Abbott, Edward Kramer, Sr., was making a felonious assault upon her in the public highway, the defendant had the lawful right to go to her assistance, and, if in her necessary defense he shot and wounded Edward Kramer, he was within his rights and was guilty of no violation or infraction of the law; that, being in a place where he had the right to be and doing that which under the law he had the right to do if he was then and there feloniously attacked by John Kramer, he was not required to retreat, but was entitled to stand his ground and repel force with force even to taking the life of his assailant if in good reason it was apparently necessary to do so for the preservation of his own life or to protect himself from great bodily harm at the hands of the deceased.

[2] We consider both contentions to be meritorious. The instruction complained of was abstract and wholly inapplicable to the facts established by the evidence. Obviously, under the testimony, the defendant had no opportunity to retreat. It is too well settled to justify lengthy discussion that, where retreat from an assault is impossible without increasing the peril of the one assaulted, he may stand his ground; that is to say, where an assault is so fierce and imminent that the person assaulted honestly believes and has good reason to believe that he cannot retreat without manifestly increasing the danger to himself, he is not required to retreat, and, if in standing his ground and defending himself he kills his assailant, he is justified. The instruction therefore that the defendant was required to retreat if he could do so without increasing the hazard to himself was erroneous, misleading, and confusing.

In *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047, Judge Rudkin said:

"The party first assaulted, whether the appellant or the deceased, was clearly acting in self-defense. There was neither time nor room for retreat or warning, and an instruction upon that question could only tend to mislead or confuse the jury. It is said that this instruction was copied almost literally from an instruction approved by this court in *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810. This is true, but an instruction which is correct in the abstract, or correct as applied to one state of facts, may be very misleading when applied to another and different state of facts. When the court instructed the jury that a person against whom a murderous, felonious assault is committed with a deadly weapon must retreat or give warning before taking the life of his assailant in self-defense, it imposed upon him a burden which the law does not sanction, and the fact that the instruction was qualified by the proviso if he has time to retreat or give such warning does not necessarily render the instruction harmless. In other words, instructions covering every possible phase of the law of self-defense should not be given in any case unless called for by the testimony, as abstract rules of law not applicable to the facts of a given case are sometimes as misleading as incorrect rules. So much of the law of self-defense as is applicable to the facts before the court should be given in plain and concise language, but rules of law applicable to other and different facts should be withheld from the jury."

To instruct a jury that, where the assailant is approaching the accused with a pistol pointed directly at him and threatening to take his life, and the parties at the time are only 15 or 20 feet apart, the accused must retreat to the wall if he can do so without increasing the danger to himself, is submitting to the jury an impossible issue and imposing upon the accused a burden which the law never intended that he should bear. Upon the other hand, the ancient doctrine of the common law that the right of self-defense did not arise until every effort to escape had been resorted to, even to the point of retreating until an impassable barrier was reached, has been supplanted in many of the American states, including the state of Washington, by the more reasonable doctrine and the one more in keeping with the dictates of human nature to the effect that, when one is feloniously assaulted in a place where he has the right to be and is placed in danger, either real or apparent, of losing his life or of suffering great bodily harm at the hands of his assailant, he is not required to retreat or to endeavor to escape, but may stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm. *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; *State v. Carter*, 15 Wash. 121, 45 Pac. 745; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *State v. Phillips*, supra; *State v. Bowinkelman*, 66 Wash. 396, 119 Pac. 824; *State v. Gardner*, 96 Minn. 318, 104 N. W. 971, 2 L. R. A. (N. S.) 49.

[3] That the defendant had the right under the law to go to the defense of Lillian Abbott, if she was being feloniously assaulted,

and to do such things for her protection as she might have done for herself had she been able, there can be no serious question. Section 2406, Rem. & Bal. Code, provides:

"Homicide is also justifiable when committed * * * in the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished."

This is but the statutory declaration of the common law. In *Michle on Homicide*, vol. 1, § 122, the rule is stated in this language:

"One may kill to protect another from death or serious bodily injury, real or apparent, and may be justified. The same circumstance that will justify or excuse the homicide where the assault is upon one's self will also excuse or justify the slayer if the killing is done in defense of such person's husband, wife, parent, child, brother, sister, nephew, master, servant, guardian, or ward, or of a stranger where an unlawful and violent attack is made upon him."

See, also, *State v. Tribett*, 74 Wash. 125, 132 Pac. 875; *State v. Hennessy*, 29 Nev. 320, 90 Pac. 221, 13 Ann. Cas. 1122; 21 Cyc. 828.

[4, 5] If the defendant at the time he shot and wounded Edward Kramer, Sr., was acting in the reasonable and necessary defense of Lillian Abbott, the deceased, John Kramer, had no right to go to the defense of his son. In *State v. Tribett*, supra, the trial court instructed the jury as follows:

"The same condition which will authorize a man to act in defense of himself will authorize him to act in defense of his son. If the father, seeing his son assaulted or menaced with great danger to life, under circumstances such as are calculated to create in the mind of the father a well-grounded belief that the son is in danger of some great personal injury, then such father, if he actually and in good faith believes the life of such son to be in danger, has the right to use such force as may at the time under all the circumstances reasonably seem necessary to prevent the threatened danger to his son."

In commenting upon this instruction Judge Gose said:

"This instruction should have been qualified by an instruction that, if the son was himself the aggressor, then the right of the father to act in his defense remained in abeyance until the son had in good faith attempted to withdraw from the conflict which he had brought on. This qualification springs from the principle that one who is himself the aggressor may not invoke the law of self-defense until he has in good faith attempted to withdraw from the combat, and one who goes to the defense of another stands in the shoes of him he seeks to defend."

Consequently, if Edward Kramer, Sr., was making a felonious assault on Lillian Abbott, and the defendant was acting in her defense, the deceased did not have the right to advance upon him with a pistol pointed at him. But the defendant had the right under those conditions to act in his own defense, and in doing so he was not required to retreat, but had the right to stand his ground and repel force with force even to the taking of life, if, in the light of the attending circumstances, this was apparently necessary to save his

own life or to protect himself from great bodily harm at the hands of the deceased. The court should have so instructed the jury.

It is also assigned that the court erred in giving the following instruction:

"The defendant contends that the killing of John Kramer was excusable and justifiable because done in self-defense. The essential elements of self-defense are these: First, the defendant must be free from fault, that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he be disregarding of the consequences in this respect of any wrongful word or act; second, there must be a present impending peril to life or of great bodily harm either real or apparent as to create the bona fide belief of an existing necessity; third, there must be no convenient or reasonable mode of escape by retreat or declining the combat."

The third element in this instruction should not have been included in the charge to the jury for the reasons already pointed out.

[6] At the trial the defendant called as a witness in his behalf Edward Kramer, Jr., and he was asked the following questions and made the following answers:

"Q. Do you know when your father left the house? A. Yes, sir. Q. Do you know what he said when he left? A. He said he would go home and get the old man and clean out the whole God damn bunch."

Counsel for the state moved that this testimony be stricken. The motion was granted, and the jury was instructed to disregard the evidence, and not to consider it for any purpose. This ruling is assigned as error. The question, "Do you know when your father left the house?" referred to Edward Kramer, Sr.'s, leaving after he had been told by Mat Kramer that he must conduct himself properly or leave. As we have already said, the record discloses that within a very few minutes after Edward Kramer, Sr., left the Peter Kramer home, he and his father appeared at the yard gate leading to the house. At this time they were both armed, were calling members of the party vile names, and were making violent threats against them. The threat of Edward Kramer to go get the old man and clean out the whole bunch was to this extent executed. The previous threat, accompanied by the subsequent conduct of the parties in carrying it out, reasonably warranted the inference that Edward Kramer, Sr., and John Kramer were acting in concert in the execution of an unlawful purpose, in which event the act or declaration of either in furtherance of the unlawful enterprise was the act or declaration of the other, and this is so whether the act or declaration was done or made prior to the time that John Kramer became a party to the unlawful undertaking or not. The evidence was competent as tending to show that John Kramer was the aggressor in the immediate difficulty in which he lost his life. It would tend strongly to corroborate the defendant's version of the transaction that John Kramer was the attacking party, and was advancing upon the defendant with

his pistol pointed at him at the time the second shot was fired. If the threat was made in the hearing of the defendant or was communicated to him prior to the shooting, it was competent as tending to shed light upon the question of whether the defendant believed and had reasonable ground to believe that he was in imminent danger of losing his life or suffering great bodily harm at the hands of John Kramer at the time the defendant shot and killed him. And it was also competent as casting light upon the question of whether the defendant had reasonable ground to believe and in good faith did believe that Lillian Abbott was in danger of losing her life or of suffering great bodily harm at the hands of Edward Kramer, Sr., when he went to her defense, she being one of the members of the party against which the threat was made. The threat, having been made by Edward Kramer, and executed as it was by him and John Kramer, was an important circumstance, and should have been permitted to go to the jury, in connection with all the other facts and circumstances shown by the evidence, for the purpose of enabling the jury to place itself in the position of the defendant at the time of the shooting, and from his viewpoint determine the reasonableness of his conduct.

[7] It is next assigned that the court erred in holding that counsel for defendant was not entitled to state to the jury that a difficulty had occurred between Edward Kramer, Sr., and the defendant about four years prior to the shooting, and that on account of this trouble Edward Kramer, Sr., had a hostile feeling toward the defendant, and also that the court erred in refusing to admit evidence to this effect. This contention is without merit. The defendant was not charged with having killed or injured Edward Kramer, Sr. Nor did he claim that he shot Edward Kramer, Sr., in defense of himself. As we have already stated, the defendant's theory was that at the time he shot Edward Kramer, Sr., he was acting in the defense of Lillian Abbott. Consequently the hostile feeling of Edward Kramer, Sr., toward the defendant personally was wholly immaterial.

Upon the retrial of the cause the court by appropriate instruction should submit to the jury the defendant's theory of the case, viz. that at the time he shot Edward Kramer, Sr., he was acting in the reasonable and necessary defense of Lillian Abbott, and that the deceased, John Kramer, did not have the right to go to the defense of his son Edward Kramer, Sr., but that his rights in this respect were measured by the rights of the son; that the deceased at the time the defendant shot and killed him was making a felonious assault upon the defendant, and consequently the defendant was not required to retreat, but had the right to stand his ground and repel force with force even to taking the life of his assailant, if in the

light of the attending circumstances and surroundings he had reasonable ground to believe, and in good faith did believe, that he was then and there in danger of losing his life or of suffering great bodily harm at the hands of the deceased. There is evidence in the record more or less circumstantial and negative in character which militates against the defendant's version of the unfortunate occurrence, but nevertheless he is entitled to have his theory of the case submitted to the jury, there being abundant evidence in support of it.

The judgment is reversed, and the cause remanded for a new trial.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

McMULLEN & CO. v. CROFT.
GANDLER et ux. v. GOULD LUMBER CO.
et al.

(No. 13320.)

(Supreme Court of Washington. May 12, 1917.)

1. RECORDS \S 9(1)—TORRENS SYSTEM—FILING LIENS.

The effect of the Torrens Act (Rem. Code 1915, §§ 8807, 8841, 8853, 8874, 8875) is to require all liens affecting real estate registered under the act to be recorded or filed and entered with the registrar of titles, within time required under existing laws, and the act neither amends nor repeals the statute relating to liens.

2. MECHANICS' LIENS \S 131—FILING OF NOTICE—EFFECT OF TORRENS ACT.

Rem. Code 1915, § 1134, providing that mechanics' liens are unenforceable, unless claim be filed with county auditor within 90 days from the date of the cessation of performance of labor or of furnishing materials, when construed with the Torrens Act, requires such claim to be filed with the registrar within the 90-day period.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 184.]

3. MECHANICS' LIENS \S 158—AMENDMENT OF NOTICE AFTER EXPIRATION OF FILING PERIOD.

A mechanic's lien notice may be amended after expiration of the filing period, in view of Rem. Code 1915, § 1147, providing that the lien statute shall be liberally construed, and section 1134, allowing amendment by order of court in the same manner as pleadings are amended; but where notice is filed after expiration of time amendment cannot make it valid, the right to such amendment applying only to defects which do not go to the substance of the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 275-278.]

4. MECHANICS' LIENS \S 158—STATUTE OF LIMITATION.

Rem. Code 1915, § 1134, providing that mechanics' liens shall be unenforceable, unless notice is filed within 90 days, is a statute of limitation, and where it shows a want of such filing, the lien being absolutely void, the petition cannot be amended.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 275-278.]

5. MECHANICS' LIENS \S 131—FILING OF NOTICE—TORRENS SYSTEM.

The fact that a mechanic's lien was filed in the office of auditor under the old system of reg-

istration of land titles, who is also registrar under Torrens system, did not relieve lien claimant from filing it in the registrar's office as required by the Torrens system (Rem. Code 1915, § 8874), since the two systems are independent, and since it was the duty of the lien claimant to know under which system the real estate upon which he sought a lien was registered or recorded.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 184.]

Holcomb, Parker, and Morris, JJ., dissenting.

En Banc. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action to foreclose mechanic's lien by McMullen & Co. against W. A. Croft, Gould Lumber Company, and others. Decree for plaintiff, and defendants' Gandler appeal. Affirmed in department (see 159 Pac. 375), and upon rehearing before whole court, judgment reversed.

C. H. Winders, William E. Froude, Higgins & Hughes, and Hyman Zettler, all of Seattle, for appellants. J. P. Wall, Jay C. Allen, Edward Von Tobel, and Philip Tindall, all of Seattle, for respondent.

MOUNT, J. This case was originally heard and decided in department 2. After the departmental opinion was filed, which may be found in 92 Wash. 411, 159 Pac. 375, a petition for a rehearing was granted, and the case was heard by the whole court. The facts are stated in the departmental opinion, and need not be restated here.

The principal question, as stated in that opinion, is this: Where the title to real estate is registered under the Torrens Act, must a lien claimant register his lien under that system within 90 days? It is conceded that the respondents, who are lien claimants, failed to register their notices of lien within the 90-day period. Instead they filed their lien claims with the county auditor under the old recording statute.

[1] Since the passage of the act, known as the Torrens Act (Laws 1907, p. 693), there have been, in this state, two independent systems of recording land titles; one under the old recording act, and the other under the Torrens Act, which provides:

"All dealings with the land or any estate or interest therein after the same has been brought under this chapter, and all liens, incumbrances, and charges upon the same shall be made only subject to the terms of this chapter." Rem. Code, § 8841.

That act further provides, in so far as it relates to this case, as follows:

"Every * * * lien * * * which would, under existing law, if recorded, filed or entered in the office of the county clerk, and county auditor, of the county in which the real estate is situate, affect the said real estate to which it relates, if the title thereto were not registered, shall, if recorded, filed or entered in the office of the registrar of titles in the county where the real estate to which such instrument relates is situate, affect in like manner the title thereto if registered. * * * Id. § 8853.

"In every case where writing of any description * * * is required by law to be filed or

recorded in order to create or preserve any lien, right, or attachment upon unregistered land, such writing or copy, when intended to affect registered land, in lieu of recording, shall be filed and registered in the office of the registrar of titles, in the county in which the land lies, and, in addition to any particulars required in such papers, for the filing or recording, shall also contain a reference to the number of the certificate of title of the land to be affected. * * * Id. § 8874.

"All certificates, writing or other instruments, permitted or required by law, to be filed or recorded, to give effect to the enforcement, continuance, reduction, discharge or dissolution of attachments, liens or other rights upon registered land, or to give notice of such enforcement, continuance, reduction, discharge or dissolution, shall in the case of like attachments, liens or other rights upon registered land, be filed with the registrar of titles, and registered in the register of titles, in lieu of filing or recording." Id. § 8875.

"The title or interest certified shall be subject only to such estates, mortgages, liens and charges as are so noted, except as herein provided." Id. § 8807.

The effect of these provisions of the Torrens Act is to require liens affecting real estate, registered under it, to be recorded, or to be filed and entered with the registrar of titles, within the time required under existing laws. The statute relating to liens is neither amended nor repealed by the Torrens Act. It simply recognizes the lien laws, and provides that, where liens are sought to be enforced against titles registered under the Torrens Act, such liens must be filed for registration with the registrar.

[2] Section 1134, Rem. Code, relating to liens, provides:

"No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor. * * *"

When these statutes are construed with reference to each other, it seems plain that a lien, to become effective and enforceable against lands registered under the Torrens system, must be filed in the office of the registrar within the 90-day period. We have held that, where a lien notice was not filed within the 90-day period from the date of the cessation of labor, or the furnishing of materials, such lien was not enforceable as a lien. *Brown v. Trimble*, 48 Wash. 270, 93 Pac. 317; *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001. And the general rule is that the failure to file the notice, claim, or statement, within the time limited by statute, defeats the lien. 27 Cyc. 150.

[3] We have, in a number of cases, held that a lien notice may be amended after the time has expired when it may be filed. Such holdings have been based upon section 1147, Rem. Code, to the effect that the provisions of the lien statute shall be liberally construed with a view to effect their objects;

and upon section 1134, to the effect that a claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment. In *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248, where a lien notice failed to refer to a leasehold estate, it was held that the lienor might be permitted to cure this omission by amendment, and, in the case of *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012, we held that a lien notice filed in time against lot 22, of block 8, might be amended so as to include lot 21, of the same block, but we have never held that a lien notice filed after the expiration of the 90 days could be so amended as to make it a valid lien notice.

[4] The statute is a statute of limitation, and when it says "no lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within 90 days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record," this, of course, means that, if a claim is not filed within the time, there is no lien. The statutes operate as a limitation upon the right of lien. While the statutes provide that lien notices may be amended, as pleadings may be amended, they do not mean that a lien notice which is void because filed too late may be so amended as to make it valid. A pleading which shows upon its face that an action is barred by the statute of limitations may not be amended. The statutes simply mean that defects which do not go to the substance of the lien may be amended, as pleadings may be amended, but this does not mean that a void notice of lien may be filed out of time, and thus be amended so as to make a valid lien.

[5] It is argued by the respondents that the notice of lien having been filed in the office of the auditor, who is also the registrar, under the Torrens system, would relieve the respondent from filing the claim under the Torrens system. As we have seen above, the Torrens system is an independent system of registration of real estate titles. Section 8874, Rem. Code, supra, provides that a lien which affects the real estate to which it relates shall be filed and entered in the office of the registrar. It was plainly the duty of the lien claimant to know under which system the real estate, upon which he sought a lien, was registered or recorded. It was his duty to file his claim of lien in the proper office, and with the proper officer. If he had filed his claim of lien notice with some other officer, under a mistake, it could not be maintained that this would be an amendable defect, after the time had gone by within which a proper lien notice may be filed in the proper office. The object of the Torrens system was to create an independent system

of registration of land titles, and that all liens relating to land so registered should be filed and registered in that department, and no other. As was said in *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910, in construing section 8852 of the Torrens Act:

"The manifest meaning of this section is that the execution of the instrument, notwithstanding it has the form of a conveyance, does no more than create a charge enforceable against the person of the owner, in no manner, and for no purpose, affecting or binding the land, unless, and until, the operative act of conveyance by registration has been performed. * * * Our construction of this section is in keeping with the obvious purpose of the Torrens Act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. This is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. The Torrens system makes this simultaneous quality inevitable by making both conveyance and notice of record performable, and performable only, by the one act of registration. This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land titles, but a mere change in the form of the record, a mere modification of the recording act."

The respondents rely largely upon the case of *Malfa v. Crisp*, supra. In that case, the lien notice was filed within time. It omitted the description of a lot, or described the wrong lot, in a block. We think that case is distinguishable from this in the fact that there the lien notice was filed in time, and was therefore valid as a notice, while in this case the lien notice was not filed until long after the expiration of the 90-day period, and was therefore void as a notice. We are of the opinion that the *Malfa* Case went to the limit of amendment, and that we should not hold that a lien notice filed out of time may be amended in the face of the statute. We are of the opinion, for these reasons, that, where the title to real estate is registered under the Torrens Act, a lien claimant must file his notice of claim with the registrar, which notice shall contain a reference to the number of the certificate of the land affected, as required by section 8874, Rem. Code, supra, and a failure to file the same, within the 90-day period, renders the lien notice void.

The judgment appealed from is therefore reversed.

ELLIS, C. J., and MAIN, FULLERTON, WEBSTER, and CHADWICK, JJ., concur.

HOLCOMB, PARKER, and MORRIS, JJ. We dissent, and adhere to views expressed in 92 Wash. 411, 159 Pac. 375. The lien notices were filed within the 90-day period provided by law for filing notices of liens, but were not registered with the registrar of titles, who was also county auditor, and noted on

certificate. The law requiring the provisions relating to such liens to be liberally construed so as to effectuate their objects is certainly not repealed by the "Torrens v." This decision assuredly does so, and will result in great injustice not only in this case but in others to laborers and materialmen.

NATIONAL CITY BANK v. SHELTON ELECTRIC CO. (No. 13908.)

(Supreme Court of Washington. April 30, 1917.)

BILLS AND NOTES §517—DEFENSES—FORGERY—DATE OF INSTRUMENT—EVIDENCE.

In action on note of corporation, where plaintiff produced evidence that at the date of execution the parties signing were officers of the corporation, and that they did sign on that date in view of Rem. Code 1915, § 3402, providing that where the instrument or the acceptance or any indorsement is dated, such date shall be deemed prima facie to be the true date, it devolves on the defendant to establish the defense of forgery by alteration of date by evidence clear, cogent, and convincing, since no one is presumed to have perpetrated a fraud or committed a crime.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807-1815.]

EVIDENCE §272—ADMISSIBILITY—ADMISSIONS—DECLARATIONS AGAINST INTEREST.

The rule as to admissions or declarations against interest does not apply as to testimony of one not a party to a suit, but who as a former officer of one of the parties signed the note in suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105-1107.]

WITNESSES §397—IMPEACHING TESTIMONY—EFFECT AS SUBSTANTIVE EVIDENCE.

Testimony of a witness in a former suit introduced for the purpose of contradicting or impeaching him as a witness in a subsequent action is not substantive evidence in the case in which he is testifying.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1266.]

WITNESSES §397—IMPEACHING TESTIMONY—EFFECT.

In action on note, where plaintiff made prima facie case of due execution on the date specified in the note, testimony impeaching the witness who attested the correctness of the date merely destroyed such witness' testimony, but did not affect the prima facie case made by the specification of the date in the note.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1266.]

BILLS AND NOTES §497(2)—HOLDERS IN DUE COURSE—CONSIDERATION—BURDEN OF PROOF.

Assuming that defendant in action on note proved lack of consideration, plaintiff then merely had burden of showing that it was a holder in due course as against whom the defense of lack of consideration cannot be urged, in view of Rem. Code 1915, § 3419, and section 3450 as to holders in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1676, 1677, 1686, 1687.]

BILLS AND NOTES §332—TITLE—HOLDER IN DUE COURSE.

A noteholder's right cannot be defeated without proof of actual notice of defect in title or had faith on his part, and though he may have been negligent in taking the paper and

omitted precautions which a prudent man would have taken, his title will prevail, unless he acted mala fide.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 805, 815, 816.]

BILLS AND NOTES §340—TITLE—HOLDER IN DUE COURSE.

Where an officer of a corporation makes its commercial paper payable to his own order, signs it as such officer, and transfers it in payment of an individual debt, the transferee is not a bona fide purchaser thereof without notice, since the facts appearing on the face of the paper are sufficient to put him on inquiry as to its ownership.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 825-828, 842-848.]

BILLS AND NOTES §340—TITLE—HOLDER IN DUE COURSE.

Where the president of one corporation signed a note in its behalf for money borrowed from another corporation which used his name as president, but of which he was not in fact a member, and the note was thereafter indorsed by him as president of the payee corporation, of which he became a member after severing connections with the maker, the defense of want of consideration and mala fide does not avail.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 825-828, 842-848.]

BILLS AND NOTES §340—TITLE—HOLDER IN DUE COURSE.

One who takes the negotiable note of a corporation from its president, as collateral security for a loan to him or to a firm to which he belongs, is not precluded from claiming as a holder in due course by reason of the fact that the note was signed by the president, where it was payable to a third person and indorsed by him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 825-828, 842-848.]

BILLS AND NOTES §444—ACTION—PRESENTATION TO RECEIVER OF MAKER.

It is no defense to action on note that it was not presented to the receiver of maker, where the maker did not make a voluntary assignment of all its property for the benefit of creditors, so that Rem. Code 1915, § 1100, stating when the assignor shall be discharged, does not apply.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1287-1293.]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by the National City Bank against the Shelton Electric Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Halverstadt & Clarke, of Seattle, for appellant. Frank C. Owings and Thomas L. O'Leary, both of Olympia, for respondent.

WEBSTER, J. The complaint in this case states two causes of action, the basis of each being a promissory note. The two notes are dated February 28, 1912, and March 7, 1912, and are in the amounts of \$400 and \$150, respectively. Each is signed: "The Shelton Electric Company, by Jos. E. Wickstrom, Prest. Attest: Chas. L. Shotts, Secy."—and is payable "to the order of Joseph E. Wickstrom Company at any bank or trust company, on demand, two years after date."

The notes were indorsed: "Joseph E. Wickstrom Co., by W. J. Wickstrom, Pres. and Treas. Jas. E. Wickstrom, Secy." The notes are identical excepting as to their dates and amounts. Plaintiff alleged that on or about February 16, 1914, it loaned the sum of \$500 to the Joseph E. Wickstrom Company, for which that company executed its promissory note in that amount payable to the order of the plaintiff upon demand, and to secure the payment thereof pledged as collateral the two notes which are the basis of this action. Upon the maturity of the notes they were protested for nonpayment, and this action was instituted against the defendant company as the maker thereof. Defendant interposed a general denial, and affirmatively pleaded three defenses, to the effect: (1) That the notes were forgeries, in that they do not bear the true dates of their execution, and at the time they were actually executed the persons purporting to sign them as such were not officers of the defendant company; (2) that the notes were without consideration; (3) that the defendant company went through a receivership proceeding subsequent to the dates borne by the notes; and that no claim based upon the notes was made to the receiver by any one claiming to own the same. For reply plaintiff denied the affirmative allegations of the answer and alleged that it was a holder of the notes in due course, having acquired the same prior to their maturity for value and in good faith. Upon the issues thus framed the cause was tried to the court without a jury, resulting in a judgment in favor of defendant, from which plaintiff appeals.

[1] We will first notice the affirmative defense of forgery. At the trial plaintiff offered evidence to the effect that at the time the notes bear date Joseph E. Wickstrom was president and Charles L. Shotts was secretary of the defendant company, and that these officers were authorized to conduct all of the business and affairs of that company. It also proved the genuineness of the signatures of Wickstrom and Shotts as president and secretary, respectively, of the company, and, in anticipation of the defense that the notes were not executed upon the dates they bear, undertook to prove by Joseph E. Wickstrom that the notes were in fact executed upon those dates. On cross-examination defendant laid the proper foundation for impeaching the witness, and subsequently introduced evidence showing that, during the receivership proceeding through which defendant company passed, he gave certain evidence which tended to contradict his testimony as to the true date of the execution of the notes. It is largely, if not entirely, upon this impeaching evidence that defendant bases its contention that the notes were forged. When plaintiff introduced evidence to the effect that Joseph E. Wickstrom and Charles L. Shotts were president and secretary, respectively, of the defendant company

at the time the notes bear date, that they were authorized to execute notes in behalf of the company, and that their signatures upon the notes were genuine, it established a prima facie case, overcoming the general denial of the execution of the notes. Section 3402, Rem. Code, provides:

"Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement as the case may be."

It then devolved upon defendant to establish its defense of forgery by evidence that was clear, cogent, and convincing; that is, that the dates borne by the notes were not the true dates upon which they were executed, and that at the time the notes were actually executed the persons purporting to have signed the same as officers of the corporation were not in fact such officers. It is settled law that no one is presumed to have perpetrated a fraud or committed a crime. Every one is presumed to act honestly until the contrary is established. Jones, in his *Commentaries on Evidence*, vol. 1, § 13, p. 99, states the rule in the following language:

"But the legal presumption is that men are not guilty of fraud and dishonesty, and, more strongly, that they do not commit criminal offenses. This presumption exists no more when a man is on trial for a criminal offense than at any other time, or on the trial of a civil case, when an attempt is made to show that a person has committed a crime. It exists at all times, and everywhere, and is a presumption the law ever makes. Hence every man, however charged with dishonesty or fraud, or a criminal act, is always entitled to have this presumption of law weighed in his favor, and whoever asserts the contrary must always encounter it, and be required to overcome it by evidence."

[2] It must also be borne in mind that Joseph E. Wickstrom was not a party to this action, and his only connection with it was in the capacity of a witness, so that the rule of admissions or declarations against interest does not apply.

[3] It is elementary that the testimony of a witness in a former suit, introduced for the purpose of contradicting or impeaching him as a witness in a subsequent action, is not substantive evidence in the case in which he is testifying. In other words, the impeaching testimony does not establish, or in any way tend to establish, the truth of the matters contained in the contradictory statements. Such testimony must be strictly confined to the object of impeaching the witness. 5 Jones on Evidence, p. 254.

[4] Consequently, giving the impeaching matter full weight and force for the only purpose for which it could properly be considered, its effect would be to destroy the testimony of Wickstrom as to the true date of the execution of the notes, and the presumption that the dates borne by the notes were correct would still remain unshaken and unaffected. Unless the impeaching evidence is to be treated and considered as proof of substantive facts, there is not sufficient evidence in the record to sustain the

defense of forgery, and we have grave doubt whether there is sufficient evidence to sustain that defense, even though the impeaching testimony should be considered for that purpose.

[5] This brings us to the defense of want of consideration, and while what we have said upon the subject of impeaching evidence being used to establish substantive facts upon which to rest the defense of forgery applies to much of the evidence relied upon as tending to establish lack of consideration, as we view the case it will not be necessary to enter upon a consideration of whether that defense was in fact proven. Assuming that it was adequately established, its primary effect was to cast upon plaintiff the burden of establishing that it was a holder in due course of the notes in question, and if plaintiff discharged the burden by proving that it was such holder, the defense of want of consideration could not be urged against it. Rem. Code, §§ 3419, 3450. Therefore we come directly to the question of whether the plaintiff is a holder in due course of the notes upon which this action is based.

It was established by the evidence that Joseph E. Wickstrom Company was a customer of the plaintiff, and that the notes were taken by it in the usual course of business, before maturity, for value, and without actual knowledge of any defect or infirmity in the instruments. If plaintiff is to be denied the rights of a holder in due course, it must be upon the theory that the notes "bear their death wound upon their face," that the bank was thereby put upon inquiry to ascertain their true validity, and the failure to make such inquiry amounted to bad faith. This contention is predicated upon the facts that the notes were executed to plaintiff by Joseph E. Wickstrom as agent for the Joseph E. Wickstrom Company; that they were payable to the order of the Joseph E. Wickstrom Company, and were signed in the name of the defendant company by Joseph E. Wickstrom as its president. The evidence established and the lower court found that plaintiff had no actual knowledge of any infirmities in the instruments, and, unless the face of the notes was such as to put plaintiff upon inquiry, and that its failure to make inquiry in the circumstances amounted to male fides, it must be treated as a bona fide holder for value. Rem. Code, § 3447, provides that, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. This court, in the case of *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042, in commenting upon this section, uses this language:

"The rule by which the good faith of a holder of negotiable paper is to be determined is

thus stated in Crawford's Annotated Negotiable Instruments Law (3d Ed.) p. 68: "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrines, will prevail."

[6, 7] This rule is fully sustained by the authorities, and is the one by which plaintiff's good or bad faith must be measured. Defendant invokes the rule that no person can be a holder in due course of a promissory note, executed by an officer in the name of a corporation and payable to the officer executing it individually, when it is pledged or given in payment of the officer's personal obligation. This rule is elementary, and is clearly stated in 3 R. C. L. p. 1085, § 291, in this language:

"Where an officer of a corporation makes its commercial paper payable to his own order, signs it as such officer, and transfers it in payment of an individual debt, it is held that the transferee is not a bona fide purchaser thereof without notice, since the facts appearing on the face of the paper are sufficient to put him on inquiry as to its ownership."

The question, therefore, is whether this principle is applicable to the situation presented by the evidence in this case. The notes sued on were executed to Joseph E. Wickstrom Company, and the evidence disclosed that, at the time of their execution, there was an independent corporation de facto, or at least a partnership by that name, which subsequently became a corporation de jure and was such at the time the notes were negotiated to plaintiff. It was also shown that Joseph E. Wickstrom was not a member of, or in any way connected with, the Joseph E. Wickstrom Company at the time the notes were executed. The evidence tended to prove that, in order to enable the Joseph E. Wickstrom Company to hold certain agencies, Joseph E. Wickstrom permitted the company to use his name as a part of its corporate name. The notes were not executed by an officer of the corporation in the name of the corporation payable to the officer executing it as an individual, but were obligations executed in the name of the corporation by its president, to a distinct and independent concern, which used as a portion of its corporate or firm name the name of the officer of the maker corporation signing the notes. At the time the notes were negotiated to plaintiff, Joseph E. Wickstrom had acquired some interest in the Joseph E. Wickstrom Company, but had long since ceased to be the president of the defendant company or to have any connection whatso-

ever with its affairs, so that, at the time the plaintiff acquired the notes, Joseph E. Wickstrom was not an officer of the maker corporation. The notes were indorsed in the name of Joseph E. Wickstrom Company, by W. J. Wickstrom, president and treasurer, and Joseph E. Wickstrom, secretary, and were pledged as collateral security for the payment of a loan, not to Joseph E. Wickstrom individually, but to the Joseph E. Wickstrom Company.

[8] The basic thought upon which the rule under consideration seems to rest is that officers of a corporation cannot lawfully contract with themselves or use the credit of the corporation for their individual benefit, because of the fundamental principle that no person can act as agent of another in making a contract with himself or obtain private advantage at the expense of his principal. In such a situation there can be no meeting of minds, for the reason that there is but one consenting mind to the transaction. Therefore, when it appears upon the face of a paper that it was payable to the individual who had executed it in an official capacity, the obligation is nugatory, and, in the language of Lord Denman, "bears its death wound upon its face." This principle like all legal principles must be applied by reference to the reason upon which the principle is founded, and it would seem to us that the reason for this rule does not extend to an obligation executed by an officer of the corporation to a wholly distinct and independent corporation or firm, merely because of the fact that the name of the officer executing it is included in the name of the payee corporation or firm. Upon the face of such an instrument it appears that there were two consenting minds, one representing the maker and the other the payee, and the officer is not conducting a business transaction with himself, nor is he using the credit of the corporation for private gain. While it is out of the usual course of business, and therefore suspicious, for a corporation in the name of its president to execute a promissory note payable to the president in his individual capacity, it is not at all out of the ordinary for it to execute obligations to third persons, and we fail to see how this situation is altered solely because of the fact that the name of the payee concern includes the name of the president of the maker corporation.

This case does not fall within the rule contended for by defendant: (1) Because the notes were not payable to the officer individually who executed the notes in the name of the maker; (2) the notes were not pledged as security for the officer's individual obligation; and (3) Joseph E. Wickstrom had long since ceased to be the president of or in any manner connected with the maker corporation at the time the notes were indorsed to plaintiff.

In *Jones v. Stoddart*, 8 Idaho, 210, 67 Pac.

650, it was held that the fact that a note bore the indorsement of a former president of a corporation who was transferring the same is not notice to the purchaser of any infirmities which may exist, where the party at the time of the transfer had ceased to be president, although the transfer was for the individual interest of the former president. We prefer not to rest our decision upon this circumstance alone, but we call attention to the case as shedding light upon the importance to be given to that fact in connection with other circumstances.

[9] There is a rule which we conceive to be applicable to the facts in this case, and it is as well settled as the one upon which defendant relies, viz., that one who takes the negotiable note of a corporation from its president, as collateral security for a loan to him or to a firm to which he belongs, is not precluded from claiming as a holder in due course by reason of the fact that the note was signed by the president, where it was payable to a third person and indorsed by him. This rule has been recognized by this court in *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058. See, also, *Cheever v. Pittsburgh, etc., Ry. Co.*, 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646; *In re Troy & Cohoes Shirt Co. (D. C.)* 136 Fed. 420, affirmed 142 Fed. 1038, 73 C. C. A. 523; *Kaiser v. First National Bank*, 78 Fed. 281, 24 C. C. A. 88; *Capital City Brick Co. v. Jackson*, 2 Ga. App. 771, 59 S. E. 92; 8 C. J. § 732, p. 521; 7 R. C. L. § 642.

In the *Cheever Case*, supra, it appeared that a negotiable note of a corporation was signed by the president and made payable to a third person, the private secretary of the president, who indorsed it to a firm of which the president of the corporation was a member, that it might stand as part collateral security for a loan to that firm. It was held that the person taking the paper was not precluded from claiming as a bona fide holder by reason of the fact that the note was signed by the president. The court said:

"The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting except the signature of the president and the indorsement of the payee. So far as Brooks [the lender] was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and through his indorsement had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was abso-

lutely nothing on the face of the paper, except the signature, as president, of the party who was dealing with it and that, we think, was not sufficient, in view of the fact that the appearances were that he was a purchaser from a third party. The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it."

So in this case it is difficult to find the circumstance which can be said to be sufficient to put plaintiff upon inquiry. The notes were regular in form, payable to a distinct and independent concern, executed in the name of the maker by the proper officers thereof, bore the seal of the corporation, and were duly and regularly indorsed in the name of the payee by its president, W. J. Wickstrom, and its secretary, Joseph E. Wickstrom. If there was any circumstance sufficient to arouse plaintiff's suspicion, it was the fact that the notes were in the possession of Joseph E. Wickstrom, who had signed the same as president of the defendant company, and this the cases hold is not sufficient. *Spencer v. Alki Point Transp. Co.*, supra. If these notes had been made payable to the John Doe Company and had been indorsed by it to the Joseph E. Wickstrom Company, and had been pledged by Joseph E. Wickstrom in the name of that company as security for its obligation, there could be no question under the authorities of the right of the holder, who took the notes before maturity for value and without actual knowledge of infirmities, to recover thereon. The only distinction between the case we have supposed under the decided cases, and the actual facts in this case is that the notes were payable to a company carrying as a part of its name the name of the president of the maker. We are convinced that, under the facts in this case, in the light of the rules herein referred to, the plaintiff was not guilty of bad faith by failing to make inquiry to ascertain the true situation, and is therefore not to be affected by the existence of facts which inquiry probably would have disclosed.

[10] We come finally to the defense that the notes were not presented to the receiver while the defendant company was passing through receivership proceedings. The defendant did not make a voluntary assignment of all of its property for the benefit of its creditors, and consequently *Rem. Code*, § 1100, can have no application. The company was placed in the hands of a receiver at the suit of the Kneeland Investment Company, and these proceedings were had long prior to the negotiation of the notes to plaintiff, and at a time when they were presumably in the hands of the Joseph E. Wickstrom Company. That company was not a party

to the proceeding. No notice to creditors was published by the receiver, and the defendant did not purchase the property of the corporation at receiver's sale. Joseph E. Wickstrom individually was a party to the proceeding, but at that time was not connected with the Joseph E. Wickstrom Company. Counsel for defendant cite no authorities, and we know of none, in support of the contention that the failure in these circumstances to present the notes bars recovery thereon.

The judgment of the lower court will be reversed, with direction to enter judgment in favor of plaintiff.

ELLIS, C. J., and MORRIS and MAIN, JJ., concur.

PETERSON v. JAHN CONTRACTING CO. et al. (No. 13627.)

(Supreme Court of Washington. May 9, 1917.)

1. BAILMENT — HIRING ROAD MACHINE—BY—CONTRACT—CONSTRUCTION.

Under a lease providing that lessee is to take entire equipment as it was seen and inspected on a certain day, including "approximately" one mile of rails and two miles of pipe, lessee cannot recover for a shortage of 1,092 feet of rails and 3,952 feet of pipe; there being no warranty of any particular length.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 21, 22.]

2. ACCORD AND SATISFACTION — PART PAYMENT — CONDITIONAL ACCEPTANCE — FAILURE TO RETURN MONEY.

That defendant tendered payment in full settlement to plaintiff's agent, who accepted subject to plaintiff's ratification, did not estop plaintiff from recovering balance, although he did not tender a return of money, where he notified defendant that he would not accept money as payment in full.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 78.]

3. BAILMENT — FRAUD OF LESSOR—INSPECTION BY LESSEE.

Lessee of equipment, who had full opportunity to inspect and agreed to take property as it stood, cannot show fraudulent representations made by plaintiff concerning condition of equipment.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 18-20.]

4. COSTS — ATTORNEY'S FEE — SUBSEQUENT STATUTE.

Where at the time defendant executed a bond no attorney fee was provided for by statute, plaintiff cannot recover under a later enactment, providing for attorney's fee in addition to all other costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 2, 3, 109.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Andrew Peterson against the Jahn Contracting Company and another. From a judgment for plaintiff, all parties appeal. Affirmed.

John W. Roberts and Geo. L. Spirk, both of Seattle, for plaintiff. Raymond G. Wright, of Seattle, for defendants.

FULLERTON, J. The defendant Jahn Contracting Company entered into a contract with King county for the construction of a public road known as "Highway 3 C." Needing certain equipment to prosecute this work, the company, on July 6, 1914, leased the same from the plaintiff Peterson, agreeing to pay as rental therefor the sum of \$3,200, at the following times: \$750 on or before August 20, 1914; \$750 on or before September 20, 1914; \$750 on or before October 20, 1914; \$750 on or before November 20, 1914; and \$200 on completion of the highway. It was provided in the contract that the Jahn Contracting Company during the time it used the equipment should keep it in the same good repair it was in when it received it, ordinary wear and tear excepted, and also that it was "understood and agreed that party of the second part [the Jahn Contracting Company] is to take the entire equipment that was used by the party of the first part in building and constructing the North Trunk road, which is now left upon the ground, as it was seen and inspected by the parties hereto on the 5th day of July, 1914." The defendant New England Casualty Company was the surety on the bond required by statute for the contract between the Jahn Company and King county. The contracting company made the first four payments at the times mentioned in the contract to the Scandinavian-American Bank, which bank the plaintiff had authorized to receive the payments, less certain deductions from the full contract price on account of certain expenses it incurred in putting the equipment in working order. The plaintiff, Peterson, instituted this action against the contracting company and its surety, to recover the difference between the amount paid by it to the bank and the amount of rental called for in the contract, together with certain damages he alleged he sustained by reason of the defective condition the equipment was in when returned to him. In their answer the defendants claimed that the payments made by the contracting company to the bank were made in full settlement of their indebtedness to plaintiff, and also claimed damages for indebtedness incurred by reason of alleged defects and deficiencies in the equipment when received by the contracting company. A judgment in the sum of \$1,306.71 was entered in favor of the plaintiff, from which both parties appeal.

[1] The contract, after enumerating somewhat definitely certain parts of the equipment leased, mentioned "rails, joints, fishplates and bolts for approximately one mile of 24-inch gauge railroad," and for "two miles approximately of pipe." The rails were afterwards found to lack 1,092 feet of one mile, and the pipe 3,952 feet of two miles. The defendants on their appeal first contend that the court erred in not allowing them for the shortage in rails and pipe. But we cannot think the contract properly construed, calls for any precise number of feet of rails or pipe.

It recites that the property was seen and inspected by the lessee, and uses the word "approximately" in describing the distance they would reach. It is not disputed that the lessee got all of the rails and pipe that were upon the ground. We think it clear that this is all it was to receive, and that there was no warranty of any particular length.

[2] The defendants next contend that the payments made to the bank were tendered and accepted in full settlement of the rentals due on the contract at the time they were made, and that the trial court erred in holding them to be but partial payments. It appeared that Peterson was indebted to the bank at the time the contract was entered into, and left the contract with it so that payments made thereon might be applied by the bank toward the satisfaction of his obligation. The bank accepted these payments and gave Peterson credit for the same, but it distinctly refused to accept them as payments in full of the amount due, telling the defendant that it had no authority so to do, and that it would accept them only subject to the plaintiff's ratification and approval. When the matter was brought to the plaintiff's attention, he notified the defendant through the bank that he would not recognize the payments as payments in full. He did not, however, tender a return of the money, and it is on this fact that the defendant largely bases its claim that the payments were accepted as tendered. But the conclusion does not follow. The defendant was dealing with the plaintiff's agent. When the agent refused to accept the payments on the conditions tendered, it was the defendant's duty to act. It could refuse to make the payments at all, or it could pay on the conditions the agent was willing to accept them. Having taken the latter course, it cannot now be heard to say the payments were made on any other condition. The plaintiff is not therefore estopped from recovering such balance as is found to be due and unpaid.

[3] During the progress of the trial the defendant offered evidence tending to show fraudulent representations made by the plaintiff concerning the condition of the equipment, and the amount of the expense it was put to in repairing it, as an offset to the plaintiff's claim. The trial court excluded the evidence, and the defendant complains of its action in so doing, contending that evidence of fraud is always admissible, even though it may vary the terms of a written contract. While this, no doubt, is the general rule, a different rule obtains where there is an inspection of the property or an opportunity to inspect, and the party charging the misrepresentation has every opportunity to judge for himself. The rule is well expressed in *Meyer v. Maxey*, 92 Wash. 73, 158 Pac. 995, where the court said:

"Even assuming that every representation charged by respondents had been made by appellant, it is manifest that the case falls within

the rule announced by Pomeroy and reiterated in many of our decisions, to the effect that, where the party charging misrepresentation institutes inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, or could have done so by availing himself of the means of information at hand, he cannot claim that he did not learn the truth and was misled by the representations. 2 Pomeroy, Equity Jurisprudence (2d Ed.) § 893; Wilson v. Mills [91 Wash. 71] 157 Pac. 467; Stewart v. Larkin, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B, 1069; Conta v. Coriat, 74 Wash. 28, 132 Pac. 746; Shores v. Hutchinson, 69 Wash. 329, 125 Pac. 142; Van Horn v. O'Connor, 42 Wash. 513, 85 Pac. 260. While we have gone as far as any court in relieving against inducing fraud and artifice, we have never gone so far as to relieve a purchaser of all responsibility for a failure to observe facts and conditions as much within his reach as that of the seller."

More than this, we think the contract itself plainly indicates that the lessee was to take the property as it stood, regardless of its condition. No error was committed, therefore, by the rejection of the proffered evidence.

The rental contract provided for 30 dump cars and the "optional use of six additional 24-inch gauge cars if needed." It appears that the defendant procured only 29 cars. The court accordingly allowed the offset for the additional car. The defendant claims that it should have been allowed an offset for 6 additional cars, and that it made a demand in due time for their delivery. But we think the trial court rightly found with the plaintiff on this issue. The evidence on the point was conflicting, and we cannot say that it preponderates against the court's conclusion.

In his cross-appeal Peterson maintains that his claim for damages to the mixer caused by the use of dynamite therein by defendants should have been allowed. While the trial court seemed to think that such damage actually occurred, it was also of the opinion that the damage was offset by counterclaim of the defendants relating to the same article. It would serve no purpose to set forth the evidence on the point. We find no error in the court's conclusion.

[4] The plaintiff claims that he should be allowed an attorney fee as against the casualty company. At the time the bond was executed no such attorney fee was provided for by statute, but subsequent thereto, and before the trial of the cause, a statute was enacted by the Legislature, allowing an attorney's fee in such cases. The act provides for an allowance of an attorney's fee "in addition to all other costs." Plaintiff's conclusion is that such an attorney fee is a part of the costs, that the act only affects the remedy, and that the general rule is that the rights and liabilities of parties in regard to costs depend upon the law in force at the time of the determination of the controversy, in the time when the contract is entered into. But whatever this attorney

fee be termed, costs or something else, it is an attempt to place a substantial liability on the bonding company which it did not contract to assume. It may be questioned whether the Legislature intended the act to operate upon existing contracts, but whether it did so or not it is such an additional burden as to existing contracts as to be beyond the power of the Legislature to impose.

The judgment is affirmed.

MORRIS, MOUNT, PARKER, and HOLCOMB, JJ., concur.

SKARLATOS v. BRICE. (No. 13533.)

(Supreme Court of Washington. May 9, 1917.)

1. JURY \S 25(8)—GRANTING JURY TRIAL—FAILURE TO DEMAND.

Where, though the jury fee had been paid in time, no formal demand for a jury was served and filed by plaintiff prior to the calling of the cause for trial, but, when the question was raised at the opening of the trial, the court offered to grant continuance if defendant so desired, which offer was declined, the failure to make formal demand for a jury worked no prejudice, and the court's action in granting plaintiff a jury trial was not erroneous.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 166-168.]

2. APPEAL AND ERROR \S 1040(16)—PRESERVATION OF GROUNDS OF REVIEW—DEFECTS IN COMPLAINT.

Where amendment to the complaint, made during trial, supplied the defects complained of by demurrer, defendant, who declined the court's offer to grant continuance, made when the defendant objected to the trial amendment, could not complain of the defects in the complaint on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4104.]

3. APPEAL AND ERROR \S 1001(1)—REVIEW—EVIDENCE IN JURY CASE.

Where a case was tried by a jury, the power of the Supreme Court is exhausted when it has found evidence or justifiable inferences from evidence upon which reasonable minds might reach different conclusions; the weight of the evidence and the credibility of the witnesses being questions for the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3933.]

4. APPEAL AND ERROR \S 977(1)—NEW TRIAL \S 6—MOTION—DISCRETION OF COURT.

A motion for new trial is addressed to the sound discretion of the trial court, and the Supreme Court cannot interfere with the trial court's exercise of its discretion unless there has been a clear abuse thereof, or unless the action of the trial court is based on a misconception of the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3360; New Trial, Cent. Dig. §§ 9, 10.]

5. NEW TRIAL \S 99 — NEWLY DISCOVERED EVIDENCE—CUMULATIVE CHARACTER—MATTERS OF COMMON KNOWLEDGE.

The trial court did not abuse its discretion in refusing new trial because of so-called newly discovered evidence, nearly all of which was purely cumulative and the rest of which related to matters of common knowledge at the time of the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Perikles Skarlatos against Henry Brice. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Whitham, of Seattle, for appellant. C. Liliopoulos and Walter B. Allen, both of Seattle, for respondent.

ELLIS, C. J. Plaintiff brought this action as assignee of some 30 Greek laborers. Defendant had a contract with King county to build a certain road. The second amended complaint, upon which the cause was tried, contained two causes of action. In the first count it is alleged that: On April 9, 1915, defendant entered into a written contract with plaintiff's assignors, in which they agreed to grub and grade parts of the roadway between stations 375 and 437, according to profiles, maps, plans, and specifications on file in the office of the county engineer, at the following rates per cubic yard: For common dirt, 18 cents; for loose rock, 28 cents; for solid rock, 60 cents; for overhaul, three-quarter cents. That defendant then assured the other parties to the contract that the place of work was properly marked and cleared ready for grubbing and grading, by reason whereof the laborers went forthwith to the designated place to commence work; that the place was neither marked nor cleared, and that the laborers were obliged to remain idle for a period of 14 days because thereof, to the damage of each in the sum of \$2.50 per day for loss of time, making a total of \$1,050. In the second count it is alleged that about April 22, 1915, the same parties entered into a second written agreement, whereby it was agreed that in consideration of \$2 each per day the laborers would undertake to clear that part of the roadway between stations 410 and 437, that in accordance with that agreement they worked 347 days, and that defendant has refused to pay them the agreed compensation of \$748 for such time. During the course of the trial the following amendment was allowed by the court:

"That without any fault on the part of any of the parties named in paragraph 2 on page 1 of this second amended complaint, but solely by reason and on account of an injunction issued out of the superior court of King county, in cause No. 108433, records of said court wherein the Puget Sound Traction Light & Power Company is plaintiff and Henry Brice, et al. are defendants, these parties were enjoined, restrained, and prevented from continuing said work."

Defendant demurred generally to both causes of action. The demurrer was overruled. Defendant then answered, admitting the making of the written contracts, but traversing practically all of the other allegations of the complaint, and as matter of affirmative defense alleged that the laborers did not attempt to execute their contract in a workmanlike manner; that defendant furnished groceries and provisions to the men, which they agreed to pay for, but refused to do so; that

in the contract set forth in the second cause of action the men waived all earnings thereunder unless they worked at least 20 days on the contract set forth in the first cause of action, in consideration that defendant waive a bond on their part; that they did not work that length of time on that contract, but abandoned the work without cause; and that the provisions furnished were of greater value than the work performed by the men. Defendant claimed damages in the sum of \$2,000. These affirmative matters were traversed by the reply. The cause was tried to a jury. At the close of plaintiff's evidence defendant moved for a nonsuit, which was denied. When the evidence was all in, the cause was submitted to the jury upon very full instructions, to which no exceptions were taken. The jury returned a verdict in plaintiff's favor for \$923. Defendant's motion for a new trial was overruled. From a judgment entered on the verdict defendant appeals.

Appellant contends that the court erred: (1) In granting a jury trial; (2) in overruling the demurrer to the complaint; (3) in overruling the motion for nonsuit; (4) in refusing a new trial; and (5) in entering the judgment for plaintiff.

[1] 1. The first of these assignments of error is based upon the fact that, though the jury fee had been paid in time, no formal demand for a jury was served and filed prior to the calling of the cause for trial. When this question was raised at the opening of the trial, the court offered to grant a continuance if appellant so desired. The offer was declined, counsel for appellant then stating that he did not desire a continuance because his witnesses were all in attendance. Obviously the failure to make formal demand for a jury had worked no prejudice. Moreover, this assignment is substantially waived in the first sentence of the argument in appellant's opening brief as follows:

"We will not insist that the first error assigned constitutes reversible error."

[2] 2. The demurrer was based on the ground that the complaint at that time did not contain any allegation that the men quit work because of the restraining order nor give any other reason. This is true, but the amendment made during the trial supplied this defect. True, also, the amendment was made over appellant's objection, but again the court offered to grant a continuance, and the offer was declined. On direct invitation by the court, counsel for appellant expressly declined to claim prejudicial surprise, or to ask for a continuance. The making of this amendment also answers the further claim in this connection that the demurrer should have been sustained as to the second cause of action because there was no allegation that 20 days' work had been done under the first contract, which was a condition precedent to a recovery for work performed under the second contract. Had the demurrer been sustained, undoubtedly the amendment would

have been made at that time. The trial amendment effectually cured the error.

[3] 3. We must decline to enter into a detailed discussion of the evidence as invited by appellant's argument on the motion for a nonsuit. It must suffice to say that we have read the abstract and supplemental abstract with frequent recourse to the statement of facts, and have found ample evidence to take the case to the jury on every controverted question of fact. Counsel argues this phase of the case as if the action had been tried to the court without a jury, and as if it were here for a trial *de novo*. But it was tried to a jury, and it is elementary that our power is exhausted in such a case when we have found either evidence or justifiable inferences from evidence upon which reasonable minds might reach different conclusions. The weight of the evidence and the credibility of the witnesses were questions for the jury.

[4] 4. Appellant's argument on the motion for a new trial is twofold. It is first asserted that the evidence shows that the men did not quit work because of the injunction, but had quit before the injunction was served. It is true that there was some evidence capable of that construction, but there was also much positive testimony the other way. Appellant's own superintendent on the work testified that the injunction papers were served "on the boys on the work." Several of the men also testified that they quit work because of the injunction. Appellant apparently confuses the work on the two contracts. The men did stop work on the clearing contract of April 22d, before the injunction was served, but the evidence tends to show that they immediately began the work of grubbing and grading contemplated by the original contract of April 9th. The evidence was conflicting. The motion for a new trial is addressed to the sound discretion of the trial court. As we have often said, this is not a court of first instance. We can only interfere with the exercise of the discretion of the trial court in such a case where there has been a clear abuse of discretion, or where the discretion has not been exercised by the trial court at all, or where the action of the trial court is based upon a misconception of the law. See *Brown v. Walla Walla*, 76 Wash. 670, 675, 136 Pac. 1166, and the numerous decisions of this court there cited.

[5] It is next argued that a new trial should have been granted because of newly discovered evidence. Nearly all of the so-called newly discovered evidence set out in the affidavits offered in support of the motion was purely cumulative. The rest related to disturbances, created in another camp, through the activities of certain labor agitators. This was offered in connection with some slight evidence that the laborers here involved became frightened and quit work because of these disturbances. These dis-

turbances were matters of common knowledge. They were exploited in the newspapers at the time. Clippings detailing them accompanied the motion for a new trial. They were palpably as well known to appellant at the time of the trial as they are now. The evidence was not only cumulative in character, but there was no sufficient showing that it might not have been produced at the trial by the exercise of reasonable diligence. The record before us does not justify the view that the court abused its discretion in refusing a new trial.

5. What we have said of the other assignments of error disposes of the last assignment. The judgment was based upon the verdict of the jury found upon conflicting evidence, which was submitted to the jury under instructions to which no exceptions were taken. So far as the record shows, no other or different instructions were requested.

We find nothing in the record to justify a reversal. The judgment is affirmed.

HOLCOMB, MORRIS, MAIN, and OHADWICK, JJ., concur.

CROSE v. JOHN et al. (No. 13706.)

(Supreme Court of Washington. May 9, 1917.)

1. SHERIFFS AND CONSTABLES §18 — APPOINTMENT OF DEPUTIES—VALIDITY.

Under Rem. Code 1915, § 3990, authorizing sheriffs to appoint deputies, and to deputize in writing persons to do particular acts, only appointments to do particular acts must be written.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 32, 33.]

2. SHERIFFS AND CONSTABLES §18 — APPOINTMENT OF DEPUTIES — GENERAL APPOINTMENT.

Where a sheriff gave a deputy's badge to a person, and told him to arrest a certain criminal, the appointment as deputy was general, and not special, within Rem. Code 1915, § 3990, requiring appointments to do particular acts to be in writing.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 32, 33.]

3. SHERIFFS AND CONSTABLES §22—WRITTEN APPOINTMENT—DEPUTY—WHAT CONSTITUTES.

Rem. Code 1915, § 3990, providing that persons may be deputized by a sheriff in writing to do particular acts, is sufficiently complied with where the sheriff gives a deputy a badge with the words "Deputy Sheriff" written upon it.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 40.]

4. SHERIFFS AND CONSTABLES §100, 157(3)—LIABILITY FOR DEPUTY'S ACTS—SHOOTING INNOCENT PARTY BY MISTAKE.

Where a deputy sheriff, who was ordered to arrest a certain criminal and to kill him if necessary, negligently shot plaintiff under belief that she was the criminal, the sheriff and his bondsmen are liable.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 158-173, 358.]

5. DAMAGES \Leftrightarrow 131(1)—EXCESSIVE.

One thousand three hundred and twelve dollars and eighty-one cents damages are not excessive where a bullet was removed from plaintiff's leg, numerous nerves were injured, she was in the hospital for 18 days, and unable for over 9 weeks to follow her occupation of waitress.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357, 363, 364, 370.]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by Sylvia V. Crose against Tony John and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Burt J. Williams and Williams & Corbin, all of Wenatchee, for appellants. Arthur G. Morey and Ludington & Shiner, all of Wenatchee, for respondent.

MOUNT, J. This action was brought to recover damages for an injury received by the plaintiff from a gunshot wound inflicted upon her by the defendant Tony John. Upon a trial of the case, judgment was entered in favor of the plaintiff for \$1,312.81. The defendants have appealed.

The facts are as follows: The defendant Charles Kenyon is the sheriff of Chelan county. The defendant Fidelity & Deposit Company is the surety upon his official bond. Some time prior to the 25th day of May, 1915, one Fred Trotto, an Italian, had been convicted of a felony and sentenced for a term of years in the penitentiary of the state. He escaped from the penitentiary, and was supposed to be in hiding near Wenatchee, in Chelan county. The defendant Tony John, also an Italian, informed the sheriff of the fact that Trotto was in that vicinity. The sheriff thereupon gave to Tony John a deputy sheriff's star, with the words "Deputy Sheriff" imprinted upon it, and also gave him a loaded revolver, and instructed Tony John to wear the star under the lapel of his vest, and show it when necessary. He told Tony John to "go out and get him [Trotto]; * * * shoot him; bring him in dead." Tony John took the star and the revolver, and went upon his mission to arrest the escaped prisoner, displaying the star upon the lapel of his coat. On the evening of May 25, 1915, Tony John engaged an inside room at the Del Mundo Hotel in the city of Wenatchee. At about 11:30 o'clock of that evening, the plaintiff, who occupied an adjoining room, and who had visited a lodge that evening, went to her room. While disrobing, and hanging up her clothing on the door between the two rooms, Tony John, without warning, fired two shots through the door connecting the two rooms. The first shot struck the plaintiff in the hip. She ran screaming into the hall, where she came upon Tony John, wearing the star. He held a gun directly in her face. When he saw her, he dropped the gun from his hands. The landlord of the

hotel came upon the scene about this time, when Tony John exclaimed: "Me after Trotto. Trotto after me. I think Trotto in woman's clothes." The plaintiff afterwards recovered from the shot, and brought this suit against Tony John, the sheriff, and the sheriff's bondsman. The trial resulted in a verdict and judgment as hereinbefore stated. The defendants have appealed from that judgment.

The appellants contend first that the court erred in overruling a general demurrer to the complaint, for two reasons: First, that the complaint does not show that Tony John was legally appointed a deputy sheriff; and, second, that it does not appear that he was acting within the scope of his authority at the time he did the shooting.

Paragraph VI of the complaint alleges that the sheriff—

"acting within the scope of his authority as sheriff, employed and deputized the defendant (commonly known as Tony John, but whose true name is to plaintiff unknown) and gave him a loaded revolver belonging to said county, and instructed him to carry the same upon his person, and gave to said John a deputy sheriff's star belonging to said sheriff's office, and directed him to display the same upon his person, and authorized, directed and instructed said John to arrest and secure the person of the said Trotto, and for that purpose to shoot him if necessary."

[1-3] It is argued by the appellants that the statute requires the appointment of a deputy to be in writing. The statute, at section 3990 (Rem. Code), is as follows:

"Each sheriff may appoint as many deputies as he may think proper, for whose official acts he shall be responsible to the amount of their (his) bond, and may revoke such appointments at his pleasure; and persons may also be deputed by any sheriff in writing to do particular acts; and the sheriff shall be responsible on his official bond for the default or misconduct in office of his deputies."

It is plain from this statute that the sheriff is authorized to make general and special appointments. If the appointment is to do particular acts, then it must be in writing, but not otherwise. The appointment in this case, as alleged in the complaint, and proved upon the trial, was made by the sheriff giving the deputy a star with the words "Deputy Sheriff" imprinted thereon, handing him a revolver, and telling him to go and arrest the escaped criminal. The appointment here made was a general appointment as deputy. It was not a special deputation. The deputy was given an official deputy sheriff's star to wear upon his coat. If it was necessary for the appointment to be in writing, we think the placing of this star in the possession of the deputy by the sheriff was a sufficient writing. The fact that the writing was upon metal was as effective to show his authority as if it had been written on paper and retained in the sheriff's office. 30 A. & E. Encycl. of Law (2d Ed.) p. 1303. So, whether the appointment was general or special, it

was sufficient under the statute in either case. We are of the opinion, therefore, that the complaint was sufficient upon this point.

[4] It is next argued that it does not appear from the complaint that Tony John was acting within his authority as a deputy sheriff when he shot the respondent. The complaint alleges, at paragraph VIII, as follows:

"That, on the 25th day of May, 1915, while acting within the scope of his authority as said deputy, and armed as aforesaid, and while attempting to apprehend, arrest and secure said Trotto, and believing the plaintiff herein to be said Trotto, but without taking any means or precautions whatever to satisfy himself of such fact, the defendant Tony John did, without provocation, * * * wrongfully, heedlessly and feloniously shoot at said plaintiff through the closed door of her room with said revolver, believing said shot was necessary to secure the body of the said Trotto. * * *"

It is plainly alleged here that the act was done by Tony John while acting within the scope of his authority as such deputy sheriff. In the case of *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416, a Kentucky case, where two deputies were sent out by a sheriff to arrest the person charged with felony, and where they discovered two men in a buggy, one of whom they believed to be the guilty person, and their command to stop was not obeyed, one of the deputies shot, killing one Williams, who was in the buggy. The sheriff in that case was held liable, because the deputy acted under color of his office.

So in this case the complaint alleges, and the evidence clearly shows, that at the time Tony John fired the shot through the door he believed the occupant of the room was the person he was looking for. He fired the shot in an attempt to perform his duty as an officer. He was acting as such officer, and fired the shot because he was instructed by the sheriff to bring the prisoner in dead. There can be no doubt that he acted under color of his office, and the complaint and the facts in the case are sufficient to show that he was acting within the scope of his authority as a deputy sheriff. *Greenius v. American Surety Co.*, 92 Wash. 401, 159 Pac. 384.

Several instructions were excepted to, and are briefly argued by the appellants, but they raise the same questions which are disposed of in what is said above. There was no error in the instructions.

[5] It is lastly argued that the verdict is excessive. The record shows that the bullet which struck the respondent passed through the fleshy part of the hip near the pelvic bone. In order to remove the bullet, which necessitated an operation, a cut, $3\frac{1}{2}$ or 4 inches long, and $2\frac{1}{2}$ inches deep, was made upon her hip. Numerous small nerves were injured. She was in the hospital for 18 days, on crutches thereafter for a week, and was unable for more than 9 weeks to follow her occupation, which was that of a waitress. Her condition thereafter was very nervous.

Her expenses, physicians' and hospital bills totaled \$312.81. The jury evidently fixed the sum of \$1,000 for pain and suffering. We are satisfied from the facts in the case that this sum was a reasonable compensation for her injury. At any rate, it was not excessive.

We find no error in the record. The judgment appealed from is affirmed.

ELLIS, O. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

DISHMAN v. NORTHERN PAC. BENEFICIAL ASS'N et al. (No. 13813.)

(Supreme Court of Washington. May 8, 1917.)

PHYSICIANS AND SURGEONS \S 18(8)—DEGREE OF SKILL—NEGLIGENCE—LIABILITY.

In a malpractice suit for alleged negligence in treating an injury to plaintiff's wrist, where doctors of equal skill and learning, being in no way impeached or discredited, disagreed as to the proper manner of treatment for the injury as alleged by plaintiff and advisability of an operation not performed by defendant, plaintiff cannot recover, because of failure of proof of negligence, since an award of damages would rest upon mere speculation and conjecture.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. \S 43.]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Ora P. Dishman against the Northern Pacific Beneficial Association, the Northern Pacific Railway Company, and A. W. Z. Thompson. Judgment of dismissal was entered as to the corporate defendants. From a judgment for plaintiff against the defendant Thompson, he appeals, and plaintiff cross-appeals from the judgment dismissing the defendant Northern Pacific Beneficial Association. Judgment against Thompson reversed, with direction to the superior court to dismiss the case, and judgment of dismissal as to the Beneficial Association, from which plaintiff has cross-appealed, affirmed.

Griffin & Griffin, of Seattle, for appellant. C. H. Winders, of Seattle, for respondents.

PARKER, J. The plaintiff, Ora P. Dishman, commenced this action in the superior court for King county seeking recovery of damages from the Northern Pacific Railway Company, the Northern Pacific Beneficial Association and Dr. A. W. Z. Thompson, one of the surgeons of the Beneficial Association. The damages sought to be recovered are for alleged personal injuries suffered by Dishman as the result of malpractice and negligence on the part of Dr. Thompson in failing to properly treat the injured extensor tendons of Dishman's left hand and wrist. The Railway Company and the Beneficial Association were made defendants, and sought to be held liable to Dishman upon the theory

that Dr. Thompson was acting as their agent in the treatment of Dishman in pursuance of the duty which it is claimed they each owed to him, resulting from monthly payments to the Beneficial Association from his wages as an employé of the Railway Company, entitling him to medical and surgical treatment as occasion might require. The case proceeded to trial before the court sitting with a jury, when at the close of the evidence introduced in Dishman's behalf a motion was made in behalf of each of the three defendants challenging the sufficiency of the evidence to support any recovery as against either of them. This motion was granted by the trial court as to the Railway Company and the Beneficial Association, and judgment of dismissal entered accordingly, and denied as to the defendant Dr. Thompson. The trial thereupon proceeded as against Dr. Thompson, and at the close of the evidence introduced in Dishman's behalf counsel for Dr. Thompson again challenged the sufficiency of the evidence to support any judgment as against him, and moved that the court so decide as a matter of law and enter judgment accordingly. This motion was by the court denied, the case was submitted to the jury, and a verdict rendered awarding damages in Dishman's favor and against Dr. Thompson. The sufficiency of the evidence was again challenged by counsel for Dr. Thompson by motion timely made for judgment notwithstanding the verdict, which motion was by the court denied, and judgment thereafter rendered in accordance with the verdict. Dr. Thompson has appealed from this judgment, claiming he is entitled to judgment absolving him from liability as a matter of law, or in any event that he is entitled to a new trial. Dishman has cross-appealed from the judgment of dismissal as to the Beneficial Association, claiming that the court erred in its judgment of dismissal as to the Beneficial Association, and that he is entitled to a new trial as against it. No appeal is taken from the judgment of dismissal as to the railway company.

On December 25, 1914, while in the employ of the Railway Company as a brakeman, Dishman was severely injured. He was standing on the stirrup of a freight car, holding to one of the grabirons above, his wrist resting on the iron, and his left hand down between it and the side of the car, when his foot slipped off the stirrup, resulting in the weight of his body forcing his wrist down upon the iron, injuring the carpal bones of his wrist and the tendons on the back of his wrist and hand. The severity of the injury evidently resulted from the fact that his hand was held between the grabiron and the side of the car, so that his wrist was forced down upon the iron as a lever upon a fulcrum. The injury was first treated by Dr. Hoyer, the local surgeon of the associa-

tion at Auburn, soon after the accident occurred. Dr. Hoyer immobilized the wrist and hand with splints and bandages, and upon examination of it a day or two later sent Dishman to the hospital of the association at Tacoma for treatment. Upon arriving at the hospital on December 28th Dishman was placed in charge of Dr. Thompson, who was one of the hospital surgeons, for treatment. Dr. Thompson then removed the bandages, and took an X-ray photograph of the wrist and hand, and again immobilized the injured parts. Dishman did not stay at the hospital for treatment, but went to his home at Auburn of his own accord, being enabled to remain at the hospital for treatment if so desired, but choosing to go to his home and be treated as an outside patient, returning to the hospital from time to time for treatment. He went to the hospital seven times for treatment up until February 20, two months following the accident. During these visits Dr. Thompson re-dressed the injury several times and took additional X-ray photographs of the wrist and hand, giving Dishman liniment, with directions for its use. Dr. Hoyer redressed the injury at Auburn two or three times during these two months, though he was not the physician having charge of the case.

Dishman, becoming dissatisfied with the treatment received, did not go back to the hospital after February 25th, but went to Dr. Silliman, at Seattle, who thereafter had charge of the case. On January 25th, evidently for the first time, it was discovered that one or two of the carpal bones were broken. This was dimly shown by the X-ray photographs, but was apparently overlooked up to that time. No portion of the outer flesh or skin of the wrist or hand was broken, or became broken, at any time during the two months' treatment by Dr. Thompson. The result of the injury was such that Dishman, while under Dr. Thompson's care, could not raise his hand or extend it backward beyond the projected line of the forearm, and it was with some difficulty that he could extend it even in a straight line with his forearm. This weakened condition of the hand and wrist, it is contended in Dishman's behalf, was caused by the rupture and severance of the extensor tendons, being those tendons on the back of the hand and wrist which enable one to open and extend the hand backward, even beyond the projected line of the forearm, when the wrist and hand are in a normal healthy condition. As we proceed, it will appear that the several surgeons who testified upon the trial do not agree in their opinions as to the extensor tendons being severed.

The alleged negligence in the treating of Dishman's hand and wrist during the two months following the accident, upon which Dishman rests his right to recover damages, is stated in his complaint as follows:

when the plaintiff arrived at said hospital, surgical treatment the defendants negligently, carelessly, and negligently failed, and refused to perform any surgical operation upon plaintiff's left wrist to bring the broken tendons together, and wrongfully, carelessly, and negligently failed, and refused to perform any surgical operation upon plaintiff's left wrist, to suture in proper manner to fasten the ends of the broken tendons together, and wrongfully, carelessly, negligently failed to do anything whatsoever to afford the plaintiff any relief whatsoever from the condition he was then in, but negligently, carelessly, and negligently allowed plaintiff's left wrist and extensor tendons to remain without any treatment of any kind whatsoever, and that thereafter for two months, during all of which said time the defendants had complete control of the plaintiff's complete control of the care and treatment of plaintiff's left wrist, the defendants did not do either or any of them ever, do anything whatsoever to benefit the plaintiff's left wrist or tendons thereof, excepting the application of bandages and liniment to the surface, which was wholly ineffective, and afforded no benefit whatsoever to the plaintiff, or to his injured left wrist. That immediately after the time the plaintiff was injured, and at all times during the time the plaintiff remained in the hospital of the defendant Northern Pacific Hospital Association, the defendants and each of them knew, or by the exercise of reasonable care, that the said defendants would have known, of the rupturing and severing of the said extensor tendons of plaintiff's left wrist, and that during said time the defendants and each of them knew that the only proper treatment for the broken wrist of the plaintiff was by bringing together the broken ends of the said tendons and suturing and securely fastening the same."

It is followed by allegations in substance that the wrist and hand had been operated upon within a few days following the injury, that the severed tendons brought together and sutured, the wrist and hand would have been in a short time rendered strong and useful, that Dr. Thompson's failure to so operate upon the wrist and hand has rendered them useless, that they will always remain so, and because of the lapse of time the extensor tendons have so shrunk and lost their vitality that it has become impossible to unite and suture them. That the issue is narrowed to the question of Dr. Thompson's negligence in failing to operate upon the hand and wrist, and suturing the alleged broken tendons, is also rendered plain by remarks of counsel for Dishman made on several occasions during the progress of the trial, such

"We are not complaining of any failure to suture the broken carpal bones." "We are not complaining of his [Dr. Thompson's] failure to operate upon the bones of the wrist."

"We do not find in the record before us any admission of improper treatment by Dr. Thompson other than his failure to operate upon and suture the alleged severed extensor tendons. We have thus noticed the nature of Dishman's injury and the negligence of Dr. Thompson, as claimed in behalf of Dishman, some length, to the end that we have cleared before us the exact issue touching Dr. Thompson's negligence as claimed in Dishman's behalf."

This court has recognized the law to be that a physician is not an insurer of a cure in cases of affliction under his care for treatment, and that he is not to be held liable as for negligence or malpractice for mere failure to cure, or for bad results because of his choosing one of two or more methods of treatment, when such choosing is an exercise of honest judgment on his part, and the method so chosen is one recognized by the medical profession as a proper method in the particular case, though it might not meet the unanimous approval of the medical profession. We shall presently review some of the authorities supporting and illustrating this doctrine, which we here notice in general terms only, as preliminary to a review of the testimony of the physicians given upon the trial touching the question of the negligence of Dr. Thompson in treating Dishman's hand and wrist, to wit, the question of his negligence in failing to operate upon the hand and wrist for the purpose of suturing the alleged broken extensor tendons thereof during the two months the case was in his charge.

The following quotations from the testimony of the physicians are taken from the abstract of the evidence, which is for the most part in the usual narrative form, and therefore may not in all cases be the exact words used by the witnesses. However, the correctness of the abstract as a statement of the substance of the testimony, as prescribed by the law and court rules relative thereto, is not challenged. The trial occurred one year and two months after the accident, and one year after Dr. Thompson ceased to have charge of the case.

Dr. Silliman testified in Dishman's favor in part as follows:

"The plaintiff has been coming to my office for treatment for about a year. When he first called upon me, I found a hollow over the wrist, where the band that goes around the wrist had been torn, and some of the tendons that come from the forearm into the fingers had been torn off, and others had been dislocated and out of place. There was more or less displacement of the small bones of the wrist. There are eight bones in the wrist joint, and those had been sprained at the same time that the ligaments and tendons had been torn. The plaintiff told me that he fell in such a way that at the wrist there was a bend where naturally the parts would snap off. The tendons that I have referred to are the long extensor tendons, that stretch out the hand and fingers toward the back. The only method that I know of to treat broken tendons is to sew the ends together as soon as possible; just as soon as the surgeon can get his apparatus together. There is no difficulty in diagnosing a case where extensor tendons have been severed, and I had no difficulty in diagnosing plaintiff's trouble when he came to me. * * * As I remember, the plaintiff came to me a day or two after he ceased going to the Beneficial Association's hospital—either on the 27th or 28th of February, 1915."

"Q. Is it proper treatment, Doctor, of an injured wrist, with broken tendons, such as you found to exist in the wrist of the plaintiff, to fail to suture those tendons and to bring them together for a period of 30 or 60 days afterwards? A. Under no circumstances. When the extensor tendons of the wrist are severed, the

individual loses all strength in his fingers, as far as stretching them out and extending them. The muscles pull up, and the movement is practically lost, except by the use of some small weak muscles between the bones of the fingers. One of the first results of the severing is that they get smaller and shrivel up; then the muscles contract permanently. That makes it more difficult to sew it to the other parts, and then the parts are never in better condition for sewing than they are just after the injury. * * * If they are sewed together later, it is hard to remedy the results, because the parts do not move freely, although you may succeed in sewing the ends pretty well together. After a delay of 30 or 60 days the nourishment is affected, and they have a tendency to shrivel up. The usual result, if an operation is performed immediately, and it is properly done, is that the patient will recover the use of the injured part."

"There was no breaking of the skin, no infection which would be likely to set up an inflammation, with the formation of pus that would complicate the situation, and the results would be less likely to be satisfactory if there had been any inflammation there which had ruptured the parts; but, as there was none, you should expect a favorable result. * * * These injuries are not very common. It is well recognized that they do occur, and that the only treatment is suturing of the ends together as soon as possible."

"Q. And, Doctor, now, or at the time he came to you, in your judgment, would it have been possible to have then operated upon his arm so as to have given him a useful arm? A. I think it would have been possible. Q. Well would it have been probable? A. It would have been probable that the ends of the tendons could have been sewed together, so that he would have pretty fair extension. Q. Why didn't you operate on him for the purpose of suturing the tendons which you found torn loose? A. I told him that I could not guarantee a perfect result at that time; that the result of the sprain and of the tearing of the tendons and ligaments should have been remedied at once. Q. I know that is what you testified to, but I say why didn't you operate—you had charge of the case, didn't you? A. To a certain extent. He had charge of his own case. Q. Did you recommend an operation? A. I told him that he should be the judge; that he might get good results even then, and he might not, but I would not guarantee good results then."

Dr. Cole testified in Dishman's behalf in part as follows:

"I do most of the X-ray work for Dr. Silliman, and also for other physicians and surgeons; also lawyers. When I took the picture and examined the wrist, the tendons on the plaintiff's left wrist appeared to be ruptured. It seemed to be in about the same condition as it is now. I think he told me it was about 60 days after he was injured that I took the picture. The tendons that run over the joint of the wrist appear to be injured or ruptured. The one on the outside seemed to be more plainly ruptured from an examination of the plate. The extensor tendons of the fingers are also broken; I would not say how many, but several. I always consider that a broken tendon is never satisfactorily mended unless it is sutured, as a rule, and usually the time for suturing, if there is not much swelling, is immediately after the injury, or, if there is swelling, after a few days, after the swelling recedes. I would not think that a reasonably careful surgeon would wait a period of 30 or 60 days for suturing tendons, such as I found to be injured in plaintiff's left wrist. I make a specialty of X-ray work, and from an examination of Plaintiff's Exhibit B it would appear that the scaphoid bone had been fractured. All of the carpal bones of the left

wrist show that they have been subject to more or less inflammation. * * *

"Referring to treatment, I would say that there would be some difference in the treatment accorded in case a man had a severed tendon, varying in regard to the various conditions. By that I mean, if there was also a great disturbance and tearing loose of the ligaments, and breaking of the bones. I would always figure that the greatest injury was the one to be attended first. The carpal bones of the wrist perform a very important function, and sometimes when they are broken we first endeavor to get good apposition, and if that cannot be done it becomes necessary to cut out pieces of these bones. If there is considerable displacement, we might endeavor to get a good apposition. When you ask whether or not, in case a tendon was torn, the doctor himself would determine whether or not he would try to get the tendons in apposition by operation or other methods, I would say it would depend upon his knowledge and experience and own judgment. * * *

"In order to get the hand upon the level, such as the plaintiff can do, he must have the use of some of the extensor tendons, and the fact that he can get it up on the level, and then can reflex and open his fingers, indicates to me that at least some of the extensor tendons are working. If a man came to me with a hand that he could not overextend, the first thing I would do would be to take a picture, and I would say, if there was no compound fracture, no opening of the skin, one would not want to stick a knife in there unless he thought there was some reason for it; and I would say that if a doctor really and honestly felt that he could treat patients without an operation, and without laying open the skin and flesh, that would be the thing to do. The question as to whether or not a doctor would endeavor to avoid an operation, however, depends on the doctor sometimes. I would state, however, that there are numerous ligaments connecting the muscles and carpal bones of the ulna and radius, and that the wrist and carpal bones are a very complicated structure, and a doctor would hesitate about cutting into the wrist and carpal bones unless it was absolutely necessary; unless he was a very skillful man, he would hesitate. I do not know whether a doctor, finding a great displacement of the carpal bones, and the breaking thereof, and the tearing of the ligaments, would put on splints or not. I do not see wherein he would get very much benefit from the splints. If there was much swelling, he could put on a wet dressing. I would not say, however, that if he did put on splints he did not know what he was doing, because medicine is a matter of judgment sometimes, and of experience, and when a man goes to a doctor it is up to the doctor to use his good honest judgment."

Dr. Paschall testified in Dishman's behalf in part as follows:

"I made an examination of the plaintiff on Friday or Saturday of last week. I also examined the X-ray plate marked 'Plaintiff's Exhibit B,' and all I know about him is limited to the one examination I made and an examination of the X-ray plate, together with what I have seen in the courtroom. As to the condition of his wrist now, it seems to me that all of the tendons which extend the fingers are cut. It would not be absolutely necessary to be cut to have the appearance that the wrist has, but it seems that they are all cut, with the additional tendon here which goes down to the ulnar bone, which is called the extensor crepitum ulnaris. The bones may or may not be fractured. It is rather hard to tell at this late date, although the X-ray looks as if the bones of the wrist had been either broken or separated, and the ligaments torn, to a certain extent. * * *

"Repairing of the tendon does not in any way interfere with the healing of the broken bones,

while if the broken bones should heal ever so well, and we did not repair the tendons, the arm or hand or wrist would always be crippled. There is practically only one way of repairing the long tendons. In a very short tendon it is not as necessary, but in a very long tendon, the sooner the ends are sewed together, the better results you will get. You can operate as soon as the inflammation has gone down, which is usually from 3 to 6 days, and every day after that makes it much worse for the patient, and I would say that a reasonably careful and prudent surgeon would not allow tendons to remain for 30 or 60 days without any operation, and he would not do it if he knew it. * * * Even if ruptured tendons are accompanied by fracture of the carpal bones of the wrist, the same treatment would be followed.

"Q. What, doctor, in your opinion, would have been the probability or improbability of his having a well hand, if the operation had been performed at the end of 60 days, basing your answer on the condition which you find the plaintiff's wrist in at the present time, and your examination of the X-ray which has been admitted in evidence? A. I would say that the results would not have been as good as if it was done at once, but would be better than if it was done now. * * * There would be practically no danger from infection in operating to suture the tendons of the plaintiff's wrist. * * * A surgeon can never do any harm by making a nick. I mean, if there is any doubt, in a modern hospital, you never can do any harm in cutting open a man and looking in. There is no argument against early operation in case of doubt."

Dr. Mowers, chief surgeon of the Beneficial Association's hospital at Tacoma, testified in Dr. Thompson's behalf in part as follows:

"Mr. Dishman came to the hospital on December 28, 1914, and was treated as an office case by Dr. Thompson. The injury to the wrist was treated by keeping the wrist immobilized by splints. He came in from time to time, and the splints were removed and fresh dressings reapplied. * * * When Dishman first came to the hospital, the wrist was treated by Dr. Thompson, who called me to see the wrist about January 25th, at which time he showed me the X-ray plate and explained to me the treatment which he was giving him. I examined the wrist carefully at this time; it was swollen and tender. He was able to extend the wrist on the forearm, and the only limitation in the movements was an inability to completely overextend. There was a fracture of one of the carpal bones, and a depression over the insertion of the tendon of the extensor carpi radialis brevis, indicating a probable tear of this ligament. From the history of the injury and from the examination there had evidently been a severe stretching and probable tearing of the numerous ligaments uniting the small bones of the wrist. At the time I saw this man, this had not yet repaired, as was indicated by the swelling. I did not at that time consider it would be advisable to attempt to suture the tendon, which was probably torn. Owing to the injured condition of the tissues, there was great danger of infection, which would not only prevent the healing of the tendon, but would possibly do very serious damage to the wrist. Furthermore, at this time there was no evidence, so far as the motion of the wrist was concerned, of any bad results following from the tear. The injured condition of the ligaments between the small bones of the wrist was not one which could be treated surgically at all. At this time the hand was again splinted, on my advice, and I saw him about a month later. At this time the condition of the wrist was practically the same as at my former examination. The swelling was somewhat lessened. He was still able to move the wrist in any direction, excepting that he still could not

completely overextend. A sufficient time had elapsed to warrant the removal of the splints, and I advised that these be removed, and that he be treated by means of liniments and massage to the wrist, in order to see how much the wrist would improve in this way. Later on, if necessary, an attempt could be made to suture the tendon. I did not believe at any time that the best results to the wrist would warrant operative procedure. Dishman did not return to the hospital after the splints were removed, to the best of my knowledge. It is my professional opinion, as a physician and surgeon, that the treatment accorded to the plaintiff by Dr. Thompson was in accordance with good medical practice. * * * I think the wrist will be weak, owing to the injury of the ligaments of the wrist joint, not from injury to the tendons. In my opinion, no man with an injury to the small bones of the wrist, such as Mr. Dishman had, would ever have a wrist as strong as it was before the injury."

Dr. Argue, first assistant surgeon of the Beneficial Association's hospital at Tacoma, testified in behalf of Dr. Thompson in part as follows:

"As near as I recollect, the first time I personally examined the plaintiff's hand was at the time Dr. Mowers and Dr. Thompson were examining it in the X-ray room of the hospital. At that time [about January 25th] I also examined what X-ray plates had been taken, and remember of seeing from the plates one or more of the carpal bones broken in the wrist. At that time I remember of Dr. Mowers testing out the function of the tendons of the forearm—of the wrist, and at that time the plaintiff had the ability to extend the hand on the wrist, on the level with the forearm, and to extend the fingers on the hand. * * * A fracture of a carpal bone is considered a serious fracture. * * * I have examined plaintiff's hand in court, and also examined it in the hospital, and I have examined the various X-ray plates and, based upon my examinations of the hand and the X-ray plates, I would state that I have never yet seen any reason for believing that there were any ruptured tendons in the plaintiff's injured hand."

"Q. Doctor, will you please state to the jury, based upon your learning, examination of authorities, and experience as a surgeon, the propriety of cutting into a wrist or a joint where there is no compound fracture, in cases where there are fractures of the carpal bones of the wrist more particularly, or of any of the bones going to make up the joint? A. I would consider it poor practice to cut in and produce a compound fracture in the carpal bones at an early date, for any purpose whatever. The reason for it would be the danger of infection. Where small bones are fractured, we find, if it is a compound fracture—that is, where the skin is broken; that is what we call a compound fracture, where the skin is broken; that is, the fracture communicates with the open world—in such a case it is a frequent occurrence to have bone necrosis take place. Bone necrosis is the death of bone; it does not live. Consequently the fragments have to be taken out later on. On account of this risk, I think it is poor practice to convert a simple fracture into a compound fracture, especially in the presence of small bone. * * *

"From my examination of the plaintiff's hand in the hospital, and examination of the X-ray plates, and the history which he gave, in my professional judgment, the proper treatment would be that of immobilization of the hand and wrist joint and forearm on a splint for a considerable time, which varies in individual cases. In this case I would keep it in a splint at least 30 days, and follow by massage and passive motion, to get the joint, as well as the ligaments and muscles and tendons, limbered up

as near the normal function as possible, for a reasonable time. * * * In this particular case, taking into consideration the history of the case, it is my professional opinion, based upon my knowledge, experience, and study, that, even if I diagnosed a broken tendon in connection with the other injuries—that is, the tearing of the ligaments and the breaking and disturbance of the carpal bones—the treatment I have outlined would be proper, and the tendon could be operated on later. I have myself operated on several tendons 4 and 5 months after they were severed, and brought their ends together, and got excellent results. In this particular case, with the condition of the carpal bones and the other injuries which we all know were sustained, even if I made a positive diagnosis of a ruptured tendon, I would consider the tendon the least important for the first 30 days, for it is my opinion, based upon personal experience and upon my knowledge and education, that it is possible to obtain good results in 60 and 90 days. This is based upon my actual experience.

"From the examination I made of the plaintiff's hand in the hospital and in the courtroom, it is my opinion at this time that the chief trouble in his wrist is due to the fracture of the wrist bones—that is, the carpal bones—and the tearing of the capsular ligaments that hold the carpal bones in position. There may be possibly some injury to the tendons; I would not state positively. From the fact that he can still extend his fingers and flex them after a lapse of a year and 2 months, it is my professional opinion that none of the communis tendons have been severed. I know of no authority in the medical science, nor do I know of any case, nor is there anything in my experience or knowledge of medicine or surgery, which would lead me to believe that any man could raise his fingers in extension a year after the communis tendons had been cut. * * *

"It is not my opinion that if there were broken extensor tendons in this man's wrist that it would have been a difficult matter to suture them after he had left the hospital. Operations of that kind are performed after that, even after a year's time, or more than that. * * * It is my opinion that the treatment accorded to the plaintiff was in accordance with scientific methods and proper professional treatment, as followed by skillful members of the medical profession."

Dr. Calhoun testified in behalf of Dr. Thompson in part as follows:

"I was chief surgeon at the City Emergency Hospital for four years. During my experience and practice I have had occasion to treat injuries to the wrist, carpal bones, extensor tendons, and ligaments. I have examined the X-ray plates, and have personally just examined the plaintiff's injured wrist and hand, and from the personal examination of his hand and wrist, from a study of the four X-ray plates, and from the history of the case, I would give it as my diagnosis that the plaintiff's injury is the result of a fracture of the carpal bones of the wrist, one or more of the carpal bones of the wrist, a sprain of the ligaments of the wrist, and a contusion—that means a bruise—an injury to the synovial sheaths of the wrist, the little sacs that lie between the different carpal bones of the wrist, setting up inflammation in the wrist and surrounding structures.

"Q. Did you diagnose, either from that history or from the examination, any broken extensor tendons? A. He has no broken tendons at all. * * *

"If in a particular case I positively diagnosed a severed extensor tendon, and found at the same time a disturbance of the ligaments around the carpal bones, and found that some of the carpal bones were fractured, the fracture not being a compound fracture, I would always avoid making a compound fracture out of a sim-

ple fracture, and in a case of violence, such as you have mentioned, it would be my opinion that it would be inadvisable to open it up at once, especially where the synovial membranes between the little joints are inflamed. * * * There is always a questionable result in suturing tendons, but in quite a percentage of cases you get good results, and tendons are sutured with success even after a lapse of 60 or 90 days."

Dr. Elmore testified in behalf of Dr. Thompson in part as follows:

"I have examined the three X-ray plates, and in connection with Dr. Calhoun I examined the plaintiff's wrist. I would say, from an examination of the X-ray plates, the history of the case, and my examination of plaintiff's wrist, that he is suffering from a fracture of two and possibly three of the carpal bones of the wrist. I do not think that there are any extensor or other tendons of his hand ruptured. I have personally sutured with success broken extensor tendons after the lapse of 60 or 90 days. In case of broken carpal bones, after fixation of a period of about 4 weeks, if complete function is not then restored, it is my judgment that the next treatment to be followed is passive and active motion; that is, when there is increased immobility of the joint. * * * Q. What motion do you find this man's hand to possess? A. He has the power of flexion and extension at the wrist joint through a limited degree. By that I mean he can't extend it just now, I should judge, over 20—15 or 20—per cent. of the normal motion of the wrist, but he has motion in both directions in this limited way. Approximately that (showing)—not much, but he has flexion and extension. Q. Would that indicate that any of those communis tendons were ruptured? A. It would indicate to me, and I also can feel, that at the present time there are no ruptured extensor tendons. * * * You would not resort to open operation, unless you had positive proof that there was a rupture of the tendons, which would disenable the man to extend his hand."

Dr. Sharples testified in behalf of Dr. Thompson in part as follows:

"I have looked over the various X-rays, and have personally this morning examined the plaintiff's hand. I have in mind the history of the manner in which the plaintiff was injured, he having his wrist on the grabiron, when his foot went out from under him, suspending his weight on the wrist, and from such history, an examination of the various X-ray plates, and an examination of the plaintiff's hand, I would diagnose the condition as one of a fracture of the carpal bones of the wrist and of the styloid process of the radius. There are no broken tendons shown in any of the X-ray plates, and in my judgment the plaintiff has no broken extensor tendons in his injured wrist."

Dr. Thompson, the defendant, testified in his own behalf as follows:

"I have in mind the time the plaintiff came to the hospital. When he came there, I was doing the X-ray work, and the first thing I did with him was to remove the splints which had been put on, and I took a radiograph. I then told him to return the next day. I then developed the picture, and made an examination of the picture. I also examined his hand to find the amount of damage—the amount of function he had, and the amount of swelling, and took his own history. * * * The X-ray picture showed an unquestionable fracture of the scaphoid, and in my opinion there was a fracture of the styloid process of the radius. I could not find any reason to believe that there was a rupture of one of the extensor tendons, but I did believe there was severe laceration and rupture of the dorsal ligaments of the wrist joint; that is, the

ligaments tying these small joints together. * * * In giving him the treatment I have outlined, I used my best professional judgment, and that judgment still holds good to-day. I think it was proper treatment. When he came into the hospital, he was able to extend the wrist, and was able to extend the fingers to the level, practically, with the back of the forearm. He was not able to overextend the hand. * * *

"Prior to this case coming to my care, I had personally sutured tendons, and I know how to suture tendons, and have observed others, and have assisted others, and the fact is that, if there is nothing wrong with a man but a broken tendon, the thing to do is to immediately suture the tendon; but, if there are complications or contusions, it is my judgment that it is proper to treat the case as I treated this man until a definite diagnosis is made. I have seen the plaintiff's hand in court since this trial begun and I have looked at the X-ray plate, Plaintiff's Exhibit B, and from my treatment of this man at the time he was in the hospital, and my observation of his hand in court, and the X-ray plate, I do not believe any of the extensor tendons of his hand are broken, and I doubt very much if the plaintiff, in an accident such as he sustained, could have broken his tendons without absolutely opening up his entire wrist. The tendons are attached to the muscles, and it is my judgment that, before a tendon can break loose, there will be a rupture of the wrist, and I do not think these tendons could break, without breaking out through the wrist, in an accident such as was sustained by the plaintiff."

We quote this testimony of Dr. Thompson more particularly for the purpose of showing his original diagnosis of Dishman's injuries, from which it appears that he diagnosed Dishman's injuries substantially the same as the doctors who testified in his behalf upon the trial, being of the opinion that there was no severance of the extensor tendons. There is some conflict in the evidence as to whether or not Dr. Thompson discovered the fracture of the bones of the wrist until about January 25th, a month following the accident, upon an examination of the X-ray plates together with Drs. Mowers and Argue. But, whatever failure he may have made to correctly diagnose the injuries as to the fractured bones of the wrist previous to that time, it would in no event have had any influence upon his treatment of the injury as he viewed the necessities of the case; it being also apparent that the judgment of the doctors who testified in his behalf as to his proper treatment of the case was not influenced in the least by the fact that he might have failed to discover the fractured bones during the first month following the accident.

We may here remark that there is nothing in the record before us indicating that any of the doctors who testified for Dishman and for Dr. Thompson were other than well-qualified physicians and surgeons, or that their professional opinions expressed in their above-quoted testimony were other than their honest convictions arrived at from a painstaking examination of the injured parts of Dishman's hand and wrist and the X-ray photographs thereof.

The testimony given upon the trial of this case is very voluminous, covering nearly 600

typewritten pages of the usual size. By far the larger part of it is the testimony of physicians and surgeons, and is expert or opinion testimony bearing upon the question of whether or not Dr. Thompson should have operated upon the hand and wrist and sutured the alleged severed tendons thereof during the two months he was treating the injured parts. We have painstakingly read all of the testimony as furnished us in the abstract thereof, and find that of the eight physicians and surgeons testifying, other than Dr. Thompson, three are of the opinion that the extensor tendons of Dishman's hand and wrist were severed, that Dr. Thompson should have operated upon the injured parts and sutured the extensor tendons, and that in failing to do so he was guilty of such unprofessional and unskillful practice as amounted to negligence, notwithstanding the carpal bones of the wrist were seriously disturbed in their setting, some of them were cracked, and the outer flesh of the wrist and hand was not broken. On the other hand, of the eight physicians and surgeons testifying, five, of apparent equal skill and learning in their profession with the other three, are of the opinion that the extensor tendons of Dishman's hand and wrist are not severed, that Dr. Thompson not only did not fail to exercise a reasonable degree of skill and judgment in not operating upon the injured parts, but that his treatment of the injury was in their opinion such as the judgment of a skillful and prudent physician and surgeon would, under all of the circumstances, have dictated. Not only that, the opinion of these five physicians and surgeons is in substance that Dr. Thompson would have been pursuing the correct course in not operating upon the injured parts, even had he been of the opinion that the extensor tendons were severed, in view of the serious injury to the carpal bones of the wrist and the fact that there had been no breaking of the outer flesh and skin.

Such are the conflicting views of the learned doctors testifying in this case touching this manifestly intricate and delicate question of surgical science. To allow a jury or court to award damages against a physician for failure to perform such a delicate and risky surgical operation, where learned men of the profession have conflicting views touching the advisability of performing such an operation as appears by the evidence in this case, would be, indeed, to allow the awarding of damages to rest upon mere speculation and conjecture. We have not noticed the testimony of these learned doctors at such length for the purpose of determining which entertained the correct and which the erroneous opinion touching Dr. Thompson's treatment of Dishman's hand and wrist, but their testimony has been noticed by us with a view of demonstrating that neither Dr. Thompson nor any other physician could, in the light of

Dishman's injury and in the light of medical and surgical science, as the evidence in this case shows, have determined with any degree of certainty whether the treatment he pursued or the surgical operation which it is claimed he should have performed would have produced the better results. Had he operated, as it is claimed he should have done, and the result been no better than the treatment he gave, or worse, as the testimony of a majority of these learned doctors seems to indicate, there would have been just as good ground for Dishman to rest a claim of damages upon against Dr. Thompson as that upon which Dishman's present claim of damages is rested.

The law applicable to the question of Dr. Thompson's alleged negligence, it seems to us, has been thoroughly settled by the decisions of this court. In *Just v. Littlefield*, 87 Wash. 299, 303, 151 Pac. 780, 781, Judge Holcomb, speaking for the court, said:

"The principal question here is whether a physician is, as a matter of law, liable for a wrong diagnosis and ensuing treatment based thereon, even where there may be an honest difference of opinion among members of the medical profession as to the diagnosis, if the diagnostician proceeded with due care, skill and diligence in treating the patient. The law is, of course, well settled that a physician is liable for a wrong diagnosis of a case, resulting from a want of skill or care on the part of the physician, and followed by improper treatment, to the injury of the patient. But, unless improper treatment follows, a wrong diagnosis gives no right of action. 80 Cyc. 1575; 22 Am. & Eng. Ency. Law (2d Ed.) 302; 5 Thompson, Negligence, § 6717; Richardson v. Carbon Hill Coal Co., 10 Wash. 643, 39 Pac. 95. It is now well settled that a physician is entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, and is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice. 30 Cyc. 1578; Merriam v. Hamilton, 64 Or. 476, 130 Pac. 406; Wells v. Ferry-Baker Lum. Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; Coombs v. James, 82 Wash. 403, 144 Pac. 536; Lorenz v. Booth, 84 Wash. 550, 147 Pac. 31."

In *Dahl v. Wagner*, 87 Wash. 492, 495, 151 Pac. 1079, 1080, Judge Chadwick, speaking for the court, said:

"It has been the uniform holding of this court that where doctors of equal skill and learning, being in no way impeached or discredited, disagree in opinion upon a given state of facts, that the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. This is the logic of *Brydges v. Ounningham*, 69 Wash. 8, 124 Pac. 131. It is enough if the treatment employed 'have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment.' Lorenz v. Booth, 84 Wash. 550, 147 Pac. 31. The reason is obvious. A man who is called upon to exercise professional judgment is bound only to the exercise of reasonable skill and learning and diligence. 'He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession.' Wells v.

Ferry-Baker Lum. Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235; *Shearman & Redfield, Negligence*, §§ 433-435; *Witthaus & Becker, Medical Jurisprudence*, p. 30. This court will not assume to pass upon the facts, or find the preponderance of the evidence upon any question of fact; nor can it be said that we are doing so in this case, for the facts are not reasonably disputable. But we may assume to say, if men of skill and learning express contrary opinions upon admitted facts, and such opinions differ, although not preponderating the one way or the other (as they do in this case), that the law will not impose a liability upon a professional man who acts within the reasonable limit of either opinion. Nor will a court hold a man guilty of malpractice when doctors disagree as to methods of treatment, although it be suggested that there is a more modern method than the one employed, or the surgeon employs a modern method to the exclusion of one theretofore adopted as a standard."

In addition to the previous decisions of this court cited in the above quotations, those of *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664, and *Coombs v. James*, 82 Wash. 403, 144 Pac. 536, may be noted as in harmony with these views.

It seems unnecessary to look to the decisions of other courts, in view of the extent to which the question has been dealt with by this court. We quote briefly, however, from two well-considered decisions of other jurisdictions. In *Staloch v. Holm*, 100 Minn. 276, 283, 111 N. W. 264, 267 (9 L. R. A. [N. S.] 712), Judge Jaggard, speaking for the court, said:

"Physicians and surgeons deal with progressive inductive science. On two historic occasions the greatest surgeons in our country met in conference to decide whether or not they should operate upon the person of a president of the United States. Their conclusion was the final human judgment. They were not responsible in law, either human or divine, for the ultimate decree of nature. The same tragedy is enacted in a less conspicuous way every day in every part of the country. The same principles of justice apply. Shall it be held that in such cases, where there is a fundamental difference among physicians as to what conclusion their science applied to knowable facts would lead to, then what they with their knowledge, training, and experience are unable to decide, and what, in the nature of human limitations, is not susceptible of certain determination, shall be autocratically adjudged by twelve men in a box, or by one man on the bench, or by a larger number in an appellate court, none of whom are likely to have the fitness or capacity to deal with more than the elements of the controversy? All the court can properly do if an action for negligence should be brought in such a case would be to direct a verdict for the physician. In *Williams v. Poppleton*, 3 Or. 139, 145, Upton, J., said of a charge of negligence in the reduction of a dislocation: 'In cases like this the court and jury do not undertake to determine what is the best mode of treatment or to decide questions of medical science upon which surgeons differ among themselves.'"

In *Ewing v. Goode* (C. C.) 78 Fed. 442, Judge Taft, then Circuit Judge, observed:

"The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, es-

tablish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, 'Res ipsa loquitur,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

We are of the opinion that this record is wholly wanting in evidence, such as the law requires in cases of this kind, sufficient to show that there was a failure to exercise honest judgment on the part of Dr. Thompson in the treatment of Dishman's hand and wrist. Indeed, the evidence not only fails to show want of exercise of honest judgment, but according to a majority of the learned doctors testifying upon the trial (and this is manifestly a question of opinion) Dr. Thompson properly refrained from performing the operation it is claimed he should have performed. We feel constrained to decide as a matter of law that Dishman cannot recover against Dr. Thompson because of failure of proof of negligence on his part. It follows as a matter of course that no recovery can be had against the Beneficial Association, since it in no event could be liable for any negligence other than that of Dr. Thompson.

The judgment against Dr. Thompson is reversed, with direction to the superior court to dismiss the case with prejudice as to him. The judgment of dismissal as to the Beneficial Association, from which Dishman has cross-appealed, is affirmed.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

MYERS v. EXCHANGE NAT. BANK.

(No. 13702.)

(Supreme Court of Washington. May 11, 1917.)

1. COURTS — 97(1) — FEDERAL QUESTION — NATIONAL BANKS.

Whether a national bank is liable as custodian of a will for failure to deliver it is a federal question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 329.]

2. CUSTOMS AND USAGES — 8 — ILLEGALITY.

No rights can spring from a custom that violates a law.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 8-10.]

3. WILLS — 211 — CUSTODY BY NATIONAL BANK — LIABILITY FOR FAILURE TO DELIVER UP — STATUTE.

Where testator mailed his will to a national bank for safe-keeping in a sealed envelope with a letter requesting the bank to hold the will subject to his order during life, and, upon satisfactory proof of his death, to deliver it to either of two parties, and the bank acknowledged receipt of the letter and sealed envelope, saying that the envelope had been filed for safe-keeping, under the terms of the letters which passed between testator and the bank there was no liability on

the bank *ex contractu* or *ex delicto*, under Rem. Code 1915, §§ 1289, 1292, providing that any person having custody of a will shall, within 30 days after he receives knowledge of testator's death, deliver the will into the superior court, etc., for its failure to deliver up the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 518.]

4. BANKS AND BANKING — 233 — NATIONAL BANKS — LIABILITY IMPOSED BY STATE.

The state cannot impose any liability upon a national bank by adding any powers to those expressly granted or fairly implied in the act authorizing its creation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 879, 887.]

5. LIMITATION OF ACTIONS — 35(1) — ACTIONS FOR PENALTIES — STATUTES.

Under Rem. Code 1915, § 159, subd. 6, providing that an action upon a statute for a penalty or forfeiture must be commenced within three years, an action against a national bank to recover for failure to deliver up a will intrusted to it for safe-keeping by testator, as required by Rem. Code 1915, §§ 1289, 1292, commenced more than three years after the last act in administration of testator's estate, was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158, 159, 161, 164.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Annie Myers against the Exchange National Bank. From judgment dismissing the action, plaintiff appeals. Affirmed.

Merritt, Lantry & Merritt, of Spokane, for appellant. Cullen, Lee & Matthews and Post, Russell, Carey & Higgins, all of Spokane, for respondent.

WEBSTER, J. This is an action for damages. A demurrer to the amended complaint having been sustained and the plaintiff declining to plead further, a judgment was entered dismissing the action. The plaintiff has appealed.

The essential allegations in the complaint are that the respondent is, and at all times hereafter stated was, a national bank doing business in the city of Spokane; that it has from the beginning been the custom of all banks, including the respondent, to receive and accept wills for safe-keeping, to be delivered as directed upon the death of a testator; that Enos S. Perdue, under the name of William Perdue, was for a number of years a resident of the city of Spokane, a customer of the respondent, one of its stockholders, and was well known to its officers; that in April, 1909, Perdue mailed, from the city of Los Angeles in the state of California, his last will and testament to the respondent for safekeeping, in a sealed envelope, with a letter requesting it to hold the will subject to his order during his lifetime, and, upon "satisfactory proof" of his death, to deliver it to either his friend Michael D. Shea of Spokane or a brother, William Perdue, of

Glenmont, Ohio, and that respondent acknowledged receipt of the letter and sealed envelope, saying that the envelope had been filed for safe-keeping. It is further alleged that Shea was well known to the officers of the bank, was a resident of Spokane, and kept a place of business therein; that Perdue died in February, 1911, in the state of Ohio; that, believing Perdue died intestate, Shea, at the instance of the heirs of Perdue, was appointed administrator of his estate; that the estate was settled and distributed to the father and mother of Perdue, they being his sole heirs at law; that none of the beneficiaries under the will knew that the will existed until its delivery to Shea in October, 1914; that the respondent, through its president and other officers, had notice and knowledge of the death of Perdue pending the administration of the estate; that the appellant, under the terms of the will, would have received in excess of \$4,000 had the will been produced; that the respondent retained the will in its possession until October, 1914, when it delivered it to Shea inclosed in the sealed envelope; that the estate of Perdue had then been administered and closed and the property dissipated or lost, and that up to that date the respondent "concealed the existence" of the will from the appellant, the other beneficiaries named in the will, and from Shea and the brother William Perdue.

The respondent demurred to the complaint upon two grounds: (1) That it does not state facts sufficient to constitute a cause of action; and (2) that the action had not been commenced within the time limited by law.

The appellant, if we correctly interpret the brief, relies: (a) Upon the contract evidenced by the two letters; and (b) upon the statute of this state. The sections of the statute relied upon are 1289 and 1292, 1 Rem. Code, which provide that any person having the custody of a will shall, within 30 days after he shall have received knowledge of the death of the testator or testatrix, deliver the will into the superior court having jurisdiction or to the person named in the will as executor, and that any person "who shall willfully fail or neglect" to so deliver a will shall be liable to every person interested in the will for damages by such neglect.

[1] The respondent is a national bank, and the solution of these questions necessitates an interpretation of the National Bank Act and a review of the decisions of the federal courts. This obviously presents a federal question. The applicable provisions of this act are found in Federal Statutes Annotated, vol. 5, §§ 5133, 5136, 5169, 5211, and 5228 (U. S. Comp. St. 1916, §§ 9658, 9661, 9711, 9774, 9815). Section 5133 provides that:

"Associations for carrying on the business of *banking* [italics ours] under this title may be formed by any number of natural persons, not less in any case than five."

Section 5136, subd. 7, provides that every association shall have power:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of *banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

Section 5211 provides that every association shall make to the Comptroller of the Currency "not less than five reports" during each year; "each such report shall exhibit in detail and under appropriate heads the resources and liabilities of the association at the close of business on any past day by him specified." Section 5228 provides that in the contingencies there stated, which are not material here, it shall be lawful for the association "to deliver special deposits."

The act authorizing the creation of a bank of the United States received its first interpretation by the federal Supreme Court in the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The question there presented was whether a state could tax a branch of the Bank of the United States. In deciding that a state has no such power the court said:

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void."

It has been held that the same rule applies to national banks. *Farmers' & Merchants' Ntl. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. The reason assigned is:

"The national banks * * * are instruments designed to be used to aid the government in the administration of an important branch of the public service."

In *Easton v. Iowa*, 183 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452, the president of a national bank was convicted and sentenced, under the provisions of a statute of the state of Iowa, for receiving a deposit at a time when he knew the bank was insolvent. In reversing the case the court said that the federal law creating and regulating national banks "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."

In *McCormick v. Market Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817, it was decided that a national bank in process of organization, but which had not been authorized by the Comptroller of the Currency

mence the business of banking, was ble for a breach of a five-year lease it had executed with a view to obtain offices to be used and occupied by banking purposes. This view was based on the provisions of the federal statute,

effect that no such association shall at any business "except such as is incidental and necessarily preliminary to its organization," until it has been authorized by comptroller to commence the business of banking. In the course of the opinion the said:

* * * The lease is void, cannot be made void by estoppel, and will not support an action over anything beyond the value of what the defendant has actually received and expended.

California Bank v. Kennedy, 167 U. S. 7, 7 Sup. Ct. 831, 42 L. Ed. 198, the action brought to recover a judgment against a national bank which had sought to subscribe for stock in a savings bank. Both banks had become insolvent. The action was based upon a statute of the state of California on the theory that the national bank was a stockholder in the savings bank and in consequence liable under the laws of the state for the debts of the savings bank in proportion to the amount of stock held and owned by it. The bank had received a dividend from the state bank before the latter became insolvent. The record presented two questions:

- 1) Do the statutes of the United States (Stat. § 5136 et seq.), relating to the organization and powers of national banks, protect them from purchasing or subscribing to stock of another corporation.
- 2) The transfer of the stock in question to a bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?"

Both questions were resolved in favor of the immunity of the national bank. In deciding the first question the court said:

As to the first question, it is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on a business for which they are established. *Loan County Bank v. Townsend*, 139 U. S. 67, [11 Sup. Ct. 496, 35 L. Ed. 107]. No express power to acquire the stock of another corporation is conferred upon a national bank, but has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628 [25 L. Ed. 48]. So, also, a national bank may be considered to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Addressing itself to the second question, it was said:

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act. * * * A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." * * * As said in *McCormick v. Market National Bank*, 165 U. S. 538, 549 [17 Sup. Ct. 483, 436 (41 L. Ed. 817)]: "The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." * * * Applying the principles of law thus settled to the case at bar, the result is free from doubt. The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an ultra vires act. Being such, it is without efficacy. *Pearce v. Railroad Co.*, 21 How. 441, 445 [16 L. Ed. 184]. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. *Cook on Stock and Stockholders*, vol. 1, p. 435, note 1 to section 316, and authorities there cited."

It was further held that the bank was not estopped from questioning its ownership of stock and consequent liability because of its receipt of dividends on the stock of the savings bank.

The same principles were announced in *Concord First Natl. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007, where a receiver of an insolvent national bank sought to enforce a stockholder's liability against another national bank which, prior to its insolvency, had purchased of a third party, with a portion of its surplus funds, a number of shares of stock of the insolvent bank as an investment. In meeting an argument that the liability was not contractual, but statutory, the court said:

"In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory. Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or con-

tracted to be subject to the obligation. However, whether, in the case of persons sui juris, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case."

Merchants' National Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613, 50 L. Ed. 1036, had its origin in a bill for the dissolution of a partnership, a receiver, and an account. The partnership was formed to purchase, improve, divide into lots, and sell a leasehold. The Merchants' National Bank took nine shares as security for a debt, and afterwards became the owner of them in satisfaction of the debt. It developed that a contribution was required to pay the debts of the firm. Some of the parties being insolvent, the bank was charged with the full share of an insolvent partner. Differentiating between a corporation and a partnership, the court said:

"But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do. * * * As the bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts."

In *First Ntl. Bank of Ottawa v. Converse*, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537, it was decided that a national bank cannot take stock in a new speculative corporation with the common double liability in satisfaction of a debt. In *Farmers' & Merchants' Ntl. Bank v. Smith*, 77 Fed. 129, 23 C. C. A. 80, it was held that the bank was not liable upon its guaranty of a mortgage bond which it had sold on commission as a broker, because the brokerage business was not within the legitimate sphere of banking. In *Bowen v. National Bank*, 94 Fed. 925, 36 C. C. A. 553, it was held that the bank was not liable on its engagement to pay debts of a third person when such person had no funds on deposit, a fact known to both the plaintiff and the bank. The case was complicated by the fact that the plaintiff relied upon the guaranty and cashed the checks on the faith thereof. The court said there was in the federal act authorizing the creation of national banks "no grant of power to guarantee the debt of another, nor can such guaranty be said to be incidental to the business of banking." It is important to bear in mind that neither of these cases presented the question of a guaranty upon an indorsement of commercial paper taken in the ordinary course of banking and rediscounted.

Commercial Ntl. Bank v. Pirie, 82 Fed. 799, 27 C. C. A. 171, voices the same principle. In *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402, it was held that a national bank which has lawfully acquired a mining property has implied authority to pump the water out of the shafts and drifts to put it in a condition in which it could be examined by a purchaser, but that it has no authority, when no pur-

chaser was found, to expend money in prospecting for paying ore upon the property in which none had ever been discovered. In *Hotchkiss v. Third Ntl. Bank*, 219 Mass. 234, 106 N. E. 974, it was held that the bank was not liable in damages for the breach of an executory contract to sell and deliver shares of the capital stock in another corporation, which it did not have, but which belonged to a client whom it sought to represent. The court distinguished between stock acquired by a national bank in payment or in satisfaction of a loan and the buying and selling of stocks as a source of revenue or profit.

In support of the theory that the will was a special deposit within the meaning of National Bank Act, § 5228, supra, the appellant has cited *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750. In that case a national bank received for safe-keeping certain government bonds, which the jury found were lost by the gross negligence of the bank or its officers, and returned a verdict for the depositor for the value of the bonds. It was held that National Bank Act, § 5228, supra, authorized national banks to deliver "special deposits," implying clearly that a national bank as a part of its legitimate business may receive such "special deposits," and that the phrase "special deposits" thus used embraces deposits such as that here in question.

Among other cases cited by the court to sustain its view is *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168. In that case the special deposit was a cask containing gold. Quoting from *Pattison v. Syracuse Ntl. Bank*, 80 N. Y. 82, 36 Am. Rep. 582, it was said:

"A reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, to be specifically returned to the depositor; that such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and that the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

In *American Ntl. Bank v. E. W. Adams & Co.*, 44 Okl. 129, 143 Pac. 508, L. R. A. 1915B, 542, it was held that a stock of shoes was not a special deposit within the meaning of the National Bank Act. In that case the shoes were received by the bank as a special deposit, and stored in a room under its control and adjoining its office.

There is a wide hiatus between a cask containing gold, coin, money, bullion, and plate and a stock of shoes. No case has been cited in which a federal court has held anything to be a special deposit except something having an intrinsic value. In *National Bank v. Graham*, the court adverted to the fact that the cashier of the bank cut the coupons from the bonds and placed the proceeds to the credit of the depositor.

Sections 5136 and 5228 of the National Bank Act should be read and construed to-

gether. It must be kept in mind that national banks can only be incorporated to carry on the business of banking. Section 5136, subd. 7, defines the manner in which banking shall be carried on; that is:

"By discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

The words in this section "by receiving deposits" and the words "special deposits" in section 5228 mean substantially the same thing, viz. that the deposit must be such as is fairly embraced in the "business of banking." The meaning is made clear in *California Bank v. Kennedy*, supra, where it is said that the statute relative to national banks constitutes "the measure of the authority of such corporation," and that they cannot rightfully exercise any powers except those specially granted, or which are incidental to the carrying on of business for which they are established. The right to receive deposits is expressly granted. The right to receive special deposits is impliedly granted, but these special deposits must be incidental to the business of banking.

The purpose of the National Bank Act is twofold: First, the bank is an agency of the federal government to aid it in carrying out its enumerated powers; second, the bank is designed to afford a safe means of doing business. The act confers large powers upon the Comptroller of the Currency in aid of the accomplishment of both of these ends. It provides many checks and balances. The bank is required to make frequent reports to the Comptroller. Each report must exhibit in detail "the resources and liabilities" of the association. If a national bank may be permitted to hold a will for safe-keeping for one of its customers, it may do so for all. It is obvious that a large city bank might thus become the custodian of many hundreds of wills. If liable at all in consequence of such holding, there might arise many large obligations which would not appear in the report to the Comptroller and of which he would have no knowledge, thus nullifying at least some of the safeguards of the statute.

[2] It is alleged in the complaint that it has been the custom of the respondent to receive wills for safe-keeping. Language may be found in *National Bank v. Graham* which would impose a liability upon the bank under this allegation, but we think this view is modified by the later opinions of the federal Supreme Court which we have reviewed. The view of the later cases is that the power to receive such a deposit must be expressly granted or fairly implied. It is elementary that no rights can spring from a custom that violates a law. *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601.

[3, 4] Is the respondent liable under our statute? We have determined that there is no liability upon the respondent, either ex contractu or ex delicto, under the terms of the letters which passed between the respondent and Perdue. It is equally plain that, under the federal decisions which we have reviewed, the state cannot impose any liability upon a national bank by adding any powers to those expressly granted or fairly implied in the act authorizing its creation.

[5] There is another reason why the appellant cannot recover under our statute. The decree of distribution in the administration of the Perdue estate was entered on the 23d day of July, 1912. This action was commenced in October, 1915, more than three years after the last act in the administration of the Perdue estate was performed. Then, if at all, the cause of action arose. An action upon the statute for a penalty must be commenced within three years from the date the cause of action arose. 1 Rem. Code, § 159, subd. 6. The cause of action, if any, is under this section, and not under subdivision 4, "an action for relief upon the ground of fraud." This view is supported by the recent decisions of this court: *Thomas v. Richter*, 88 Wash. 451, 153 Pac. 333; *Golden Eagle Min. Co. v. Imperator-Quill Co.*, 161 Pac. 848; *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279.


It is argued by the respondent that the cause of action arose, if at all, at the time the property was appraised, in view of the fact that the respondent's president was one of the appraisers, and that this fact is relied upon by the appellant as showing the knowledge of the bank of the death of Perdue. We need not decide whether this date or the date of final settlement and distribution of the estate controls, as the statute operates as a bar in either case.

The judgment is affirmed.

ELLIS, O. J., and MORRIS and MAIN, JJ., concur.

MARMENI v. BELLARTS.

(Supreme Court of Oregon. May 15, 1917.)

VENDOR AND PURCHASER  44—RESCISSI—SUFFICIENCY OF EVIDENCE.

Testimony of plaintiff purchaser and another that the vendor misrepresented a boundary line, does not warrant a rescission, where the abstract, deeds, and maps correctly describing the property were examined by the plaintiff's agents, especially where plaintiff seeks to rescind after the property has decreased in value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69-76.]

Department 1. Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

Suit by Eugene Marmeni against Henry J. Bellarts. Decree for defendant, and plaintiff appeals. Affirmed.

This is a suit to rescind a sale of real property, to cancel a mortgage and note and to recover the payments made on the purchase price. H. J. Bellarts owned land in the city of Portland upon which was located a large 10-room dwelling house. The premises are described thus: Lot 6 in block 4 in Beacon Heights, and also a strip 30 feet in width along the east end of lot 6. Bellarts conveyed by warranty deed lot 6 and the 30-foot strip along the east end of the lot, "all according to the duly recorded map and plat thereof as the same appears of record in said Multnomah county, Oregon," to Eugene Marmeni on March 15, 1912, for the agreed price of \$3,750, of which \$600 was paid in cash, and Marmeni paid the remainder of the purchase price by giving his promissory note for \$3,150, and a mortgage on the realty as security. The principal sum of the note, with interest, was made payable in monthly installments of not less than \$25, commencing with April 15, 1912. Marmeni at once took possession, rented the premises, and received the rents. He paid the monthly installments on the note until and including the month of June in 1914. In August, 1914, Marmeni tendered a deed, together with the rentals collected by him, and demanded that Bellarts cancel the note and mortgage and return the payments made by him. Upon the refusal of Bellarts to comply with the demand, Marmeni commenced this suit to rescind the sale, on the ground that he had been induced to purchase by misrepresentations concerning the location of the boundaries of the premises. The defendant denied the charge of fraud, alleged an affirmative defense, and also prayed for a foreclosure of the mortgage. The decree of the trial court was for the defendant, and the plaintiff appealed.

Henry M. Kimball, of Portland, for appellant. E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). We can have a better understanding of the situation if we first describe the premises. Bellarts owned lot 6, together with a 30-foot strip on the east end of the lot. Lot 6 faces Ninth street on the west, with a frontage of 45 feet, and it is 51.8 feet in depth. Adding the 30-foot strip to lot 6, it will be seen that the premises owned by Bellarts were 45 feet in width by 81.8 feet in length. Adjoining the east end of the premises owned by Bellarts is a second 30-foot strip which has been made prominent by this litigation. For convenience the first 30-foot strip, or, in other words, the one adjoining lot 6, will be referred to as A, and the other 30-foot strip will be designated as B. An iron fence extended across the front end of lot 6. A board fence extended along the south side of lot 6, A and B, and the same kind of a fence was maintained along the

north line of lot 6, A and B; and a similar fence was constructed along the east line of B. In brief, if we consider lot 6, A and B as a single tract, they were inclosed with an iron fence on the west, and with a board fence along the north and south sides on the east end. While the evidence is conflicting, it fairly appears that a fence of wire netting was maintained on the line between A and B. The dwelling house covers nearly all of lot 6 and A, as it is about 8 or 10 feet from the front of the building to the street, and it is about the same distance from the rear of the house to the east line of A.

The persons to be kept in mind are H. J. Bellarts, the vendor, Eugene Marmeni, the vendee, Louis Deluchi, a real estate agent, and M. G. Montrezza, who was admitted to practice as an attorney at law in June 1912.

Marmeni had "a little money" in 1912, as he expressed it, "I thought I better buy a little piece of property before I spend the money." Montrezza was advised by his client Marmeni that the latter "wanted to purchase a house somewhere," and the former then asked Deluchi "if he had anything to submit." Deluchi afterwards took Montrezza and Marmeni and showed them the property on March 12, 1912. Deluchi had previously seen Bellarts and arranged for a broker's commission in the event he found a purchaser for the property. Deluchi avers that Bellarts told him that his property included all within the board fence; but Bellarts denies this, and says that he did not tell Deluchi anything about the dimensions except that he owned lot 6 and a 30-foot strip. Marmeni testified that when looking over the premises Deluchi told him that the property he was to buy included all the land within the board fence, and Deluchi testified to the same effect. After inspecting the property Marmeni, Deluchi, and Montrezza immediately went to Bellarts, and after some conversation Marmeni agreed to purchase the property, paid Bellarts \$40 to bind the bargain, and took a receipt, which recited the payment of the deposit, and that Marmeni was to have an opportunity to examine the abstract. The receipt was not produced; but Montrezza testified that he prepared the receipt, and he also stated that because of the fact that he had not yet been admitted to practice as an attorney at law he was especially careful to see that it contained a correct description of the property. Bellarts produced and delivered an abstract, together with three deeds, one from Sarah Calvet to Otto Myhre, one from the guardian of the estate of Myhre to Bellarts, and one from Myhre to Bellarts. Not wishing to assume the responsibility of examining the title, Montrezza delivered the abstract to Samuel Olson, an attorney, who examined the abstract and gave a written opinion on March 15, 1912, to the effect that Bellarts owned the property

simple. The sale was closed on March 12, 1912, when Marmeni, Montrezza, Deluchi, Bellarts went to the office of J. A. Strowe for the purpose of signing and passing the necessary papers. Marmeni paid Bel-

\$560, which with the \$40 deposit made a cash payment of \$600. Bellarts delivered a warranty deed to Marmeni, and the latter delivered his note and mortgage to the latter. Before the deed and mortgage were recorded, Montrezza examined them for the purpose of ascertaining whether they were properly drawn, and more especially to see whether the description corresponded with the description in the abstract.

The description in the deed to Marmeni is in exact conformity with the description in the abstract and three deeds which were delivered with it, and also with the description found in the written opinion by the court concerning the title. The first page of the abstract reads thus: "Lot 6, block 4, Bacon Heights, also a strip of land 30 feet wide along the east side of said lot 6." The second page contains a map of lot 6 and the other lots in the block facing Ninth street. The map plainly shows that the width of lot 6 is 45 feet and that its length is 51.8 feet.

While the liability of Bellarts does not necessarily depend upon whether he showed the premises to Deluchi or upon whether he told Deluchi that he owned all the property within the board fence, nevertheless the testimony concerning those matters may be helpful in determining the credibility of the witnesses. The testimony of Deluchi concerning a woman cleaning the house, together with what Mrs. Bellarts says about cleaning the house, rather indicates that Bellarts never accompanied Deluchi to the premises. Bellarts knew that he owned lot 6 and A, and he also knew that the deeds under which he claimed title did not embrace B. Bellarts had the abstract, and it is to be presumed that he knew that the map showed that lot 6 was 51.8 feet long, and that he, therefore, knew that 81.8 feet was the depth of his property. Being aware of all of this, it would be quite extraordinary for Bellarts to represent that he owned all within the board fence, and then deliver the abstract and three deeds for inspection, knowing that the abstract plainly showed the dimensions of the premises owned by him. One cannot read the transcript without being impressed with the idea that Deluchi is decidedly friendly to Marmeni, and yet it is a most significant circumstance that Deluchi admitted that when they inspected the premises, the board fence along the east end of B appeared to be more than 100 feet from the street. When a witness for the plaintiff asked, "How far did it look from the front fence to the back fence?" he answered, "Fully over a hundred feet." And in response to the next question, "Anybody could see that, the same as you?" he answered, "Sure." It will

be recalled that Montrezza prepared the receipt for the \$40 deposit, and that he was careful to insert the description in the receipt. Montrezza knew what Marmeni was buying, and so did Olson. Both Montrezza and Olson were agents for Marmeni, and their knowledge was his knowledge. Olson knew the length of the property to be purchased, because the map in the abstract told him the dimensions, and it is fair to assume that Montrezza likewise knew the depth and width of lot 6 and A.

The subsequent conduct of Marmeni throws additional light upon the contention he now makes. On July 22 or 23, 1913, Deluchi received a letter from J. Landigan, giving notice that the latter held a warranty deed to B, and complaining because B was fenced in. Deluchi immediately notified Marmeni of the receipt of this letter, and the latter in turn consulted with Montrezza. It is true that Marmeni excuses his subsequent conduct by the claim that his suspicions were quieted and his mind lulled to rest by certain representations made by Bellarts; but it is also true that this claim of Marmeni is flatly denied by Bellarts, and, moreover, Marmeni paid the taxes on July 24, 1913, after being told of the Landigan letter received by Deluchi. Marmeni continued to pay the monthly installments on the note, and he collected the rents until finally on June 24, or 25, 1914, Marmeni received from Landigan a letter dated June 3, 1914, notifying Marmeni "to take down your fence and improvements on my ground east of 614 East 9th." Soon after the receipt of this letter Marmeni consulted an attorney, and subsequently demanded that Bellarts rescind the sale.

It would not be difficult to imagine a variety of situations where a vendee would be entitled to rely upon representations by the vendor or his agent concerning the location of a boundary line; and, because of such reliance, upon ascertaining the falsity of the representations, he could rescind the sale. However, at the very outset of the present investigation, we find the contention of plaintiff clouded with suspicion. In 1912 property values were elevated. When Marmeni purchased there was talk of the construction of a bridge which would have materially benefited the property, but at the fall election the proposal to build the bridge was defeated. With the year 1914 came financial depression and marked reductions in realty values. The property was amply worth the price in 1912, but it was not worth the price in 1914. If Marmeni was deceived at all, it was only because of what Deluchi claims he told him about the board fence. Marmeni insists that there was no wire fence on the line between A and B, although he concedes that a wire fence ran across one corner. It will be recalled that Montrezza prepared the receipt that was given by Bellarts to Marmeni when the \$40 deposit was

made. According to the testimony of the plaintiff himself, "Mr. Montrezza drew that up, before we went to Mr. Bellarts." Having prepared the receipt before they saw Bellarts, it is obvious that Montrezza had gone to the trouble of ascertaining the description of the land owned by Bellarts before they inspected the premises, because it is conceded that Montrezza, Marmeni, and Deluchi went to Bellarts immediately upon completing their examination of the property. Montrezza explained that he took unusual care to obtain the correct description, because he had not yet been admitted to practice, and naturally he wished to avoid any possibility of making any mistake. Deluchi tells us that it appeared to be more than a hundred feet from the front fence to the board fence on the east end of B, and that "anybody could see that." The map, abstract, and deeds all showed that the land owned by Bellarts was 81.8 feet, and not 111.8, in depth. Olson examined the abstract, and presumably ascertained the depth of the property owned by Bellarts. Marmeni relied upon Montrezza, not only for legal, but also for business, advice. Montrezza was paid by Marmeni "for looking over the premises," and Montrezza advised Marmeni to take the deed, because the former thought that the latter "would be getting what he bought." In contemplation of law Marmeni knew what his agents Olson and Montrezza knew, and their knowledge that the property owned by Bellarts was only 81.8 feet in length must be imputed to him. Marmeni could not remain blind to what he saw with his own eyes. His witness Deluchi says that anybody could see that the board fence on the east end of B was more than 100 feet from the front of lot 6, and consequently Marmeni is in no position to claim that he was induced to buy because of a misrepresentation of a boundary line, when "anybody could see" that the line claimed to have been shown would give the property a depth of more than a hundred feet, and he must have known that the land deeded to him was only 81.8 feet in depth. *Waymire v. Shipley*, 52 Or. 464, 473, 97 Pac. 807; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; *New Orleans v. Musgrove*, 90 Ala. 428, 7 South. 747; 2 Pom. Eq. Jur. (3d Ed.) § 892. If a vendee knows that he is buying a strip of land 81.8 feet long, he cannot successfully claim that he has been defrauded if he is shown a line which he knows would make the strip more than 100 feet long. The evidence does not warrant a rescission, and the decree is therefore affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

STATE ex inf. GOYNE, Dist. Atty., v. BOZORTH et al.

(Supreme Court of Oregon. May 15, 1917.)

MUNICIPAL CORPORATIONS—§46—ENACTMENT OF CHARTER—INITIATIVE AND REFERENDUM.

The Bay City city council having previously adopted an ordinance providing for exercise of the initiative and referendum powers reserved to the voters under the Constitution, and in pursuance thereof having in the absence of one of its members unanimously adopted an ordinance referring to the voters charter amendments and calling a special election for adoption or rejection, due notice of which was given by posting, publication, and distribution to each voter of a copy of the measure, the proposed new charter, on receiving a majority vote and being proclaimed duly ratified by mayor, became the fundamental law of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 123-125.]

In Banc. Original proceedings by quo warranto by the State, on information of T. H. Goyne, District Attorney, for Tillamook County, against John O. Bozorth and others. Dismissed.

W. A. Johnson, of Portland, and George P. Winslow, of Tillamook, for defendants. Webster Holmes, of Tillamook, *amicus curiæ*.

MOORE, J. This action was instituted in our court in the name of the state upon the relation of the proper district attorney to determine the respective rights of the defendants to act as and discharge the duties of mayor, recorder, and councilmen of Bay City, Or., a municipal corporation. The information herein was induced by and predicated upon the decision rendered in the case of *Provost v. Cone* (Or.) 162 Pac. 1059, where it was held that Ordinance No. 3 of that municipality, adopted October 17, 1910, and ratified at an election held December 20th of that year, purporting to amend and substitute another charter in lieu of the original organic act of the city, was ineffectual for that purpose. The question there involved was the validity of a municipal tax attempted to be levied pursuant to the provisions of the proposed amendment. In that suit the only proceedings of the council that were or could have been brought up and considered occurred prior to the attempted imposition of the tax. At that time no general provision had been enacted by the council relating to the initiative and referendum, though the time for holding an election thereunder had been prescribed. Subsequently, however, as appears from the answer to the information herein, Ordinance No. 107 was adopted and approved, providing for an exercise of the initiative and referendum powers reserved to the legal voters of municipalities under the Constitution of Oregon. A section of that ordinance referring to the attempted amendment of the charter which was considered in the case of *Provost v. Cone*, supra, reads:

"Whereas, some question has arisen concerning the regularity, sufficiency, and legality of the adoption of the present charter of Bay City, submitted to the legal voters of said city on the 20th day of December, 1910; and whereas, an issue of bonds for the purpose of providing public docks for said city has been attempted to be authorized under the provisions thereof; and whereas, owing to the irregularities and illegalities connected with the passage of the same, it is impossible to sell and dispose of said bonds; and whereas, the charter of said municipality imposes upon its officials the duty of providing wharves for said city, and for said purpose the city officials have attempted to sell and dispose of bonds therefor, which it has been unable to do owing to the above irregularities and illegalities; and whereas, it is necessary that a new charter be adopted in the manner provided by law at as early a date as possible and in order proposed so to do it is necessary to enact this ordinance: Now, therefore, an emergency is hereby declared to exist and this ordinance shall immediately go into force and effect upon its adoption and approval."

Pursuant to the provisions of that enactment the council on June 2, 1914, in the absence of one member, unanimously adopted a resolution, which was immediately approved by the mayor, referring to the voters of Bay City a new charter, denominated, "Charter Amendments Submitted to the Voters by the Council," which proposed alteration included the attempted amendment of December 20, 1910, and all subsequent alterations thereof, and also contained provisions authorizing the issuance and sale of municipal dock bonds. The resolution, though denominated such, was in fact an ordinance, enacted in the same form and manner as such legislation, and provided for the publication of Ordinance No. 107, containing the new charter as prepared, and calling a special election to be held June 22, 1914, for the purpose of adopting or rejecting the substituted organic law. Due notice thereof was given by publication of the proposed new charter in the city official newspaper, by posting copies thereof in the required public places for the prescribed time, and also by distributing to every voter in the municipality a copy of the measure. The election was held at the time appointed, and a majority of all the votes cast thereat having been found to be in favor of the adoption of the new charter, it was, on June 26, 1914, by proclamation of the mayor, declared to have been duly ratified, since which day the new charter has been acted upon and treated as the fundamental law of the municipality, and each of the defendants holds office pursuant to its provisions.

The answer to the information sets forth copies of the entire proceedings whereby the new charter was undertaken to be substituted for the original organic act and all attempted amendments thereto. It is deemed unnecessary to advert particularly to the form and manner of inaugurating or consummating the ultimate alterations referred to, a careful examination of which convinces us that, under the rules adopted in the cases

of State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806, and Duncan v. Dryer, 71 Or. 548, 143 Pac. 644, the new charter was enacted with all the formalities prescribed by law, thereby regularly amending the original organic act of the municipality and all attempted alterations thereof.

The defendants herein are therefore the duly chosen, legally qualified, and acting officers of Bay City, Or., under and pursuant to the provisions of its new charter, which went into effect June 26, 1914, when so proclaimed by the mayor, and each defendant is entitled to the respective office so held by him.

It follows that this action should be dismissed and it is so ordered.

WALLER v. CITY OF NEW YORK INS. CO.

(Supreme Court of Oregon. May 15, 1917.)

1. INSURANCE ⇐282(8) — CONSTRUCTION OF FIRE POLICY—ABSOLUTE OWNERSHIP.

A party in possession under a partly performed contract for the purchase of realty is the sole and unconditional owner in fee simple within the Oregon standard fire insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 617-620.]

2. APPEAL AND ERROR ⇐1033(4)—HARMLESS ERROR—INSTRUCTIONS.

Where the court should have instructed that plaintiff insured was the owner of property burned, defendant insurance company cannot complain because the question was left to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4058; Trial, Cent. Dig. § 587.]

3. INSURANCE ⇐641(2)—PLEADING—REPLY—WAIVER.

An insured cannot declare upon the policy and, when charged by the insurer's answer with shortcomings, reply that such omissions were waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1628.]

4. PLEADING ⇐180(2)—REPLY—DEPARTURE.

A plaintiff cannot allege that he has fully complied with a contract, and later shift his ground by replying that the omissions charged in defendant's answer were waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 366, 371.]

5. APPEAL AND ERROR ⇐1066 — REVIEW — INSTRUCTIONS.

Although defendant insurance company's allegations regarding plaintiff's misrepresentations were insufficient, yet instructing that such defense might be waived, constitutes reversible error where waiver was not an issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Trial, Cent. Dig. § 596.]

6. INSURANCE ⇐256(2)—FRAUDULENT REPRESENTATIONS—PLEADING.

A fraudulent misrepresentation avoiding a fire insurance policy must have been knowingly false, have misled the insurer, and increased the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540.]

7. INSURANCE — 640(2)—FRAUDULENT REPRESENTATIONS—PLEADING.

Defendant fire insurance company's allegations that plaintiff secured insurance on a house which defendant had previously refused to insure by misstating its name and location, held insufficient where facts showing the materiality of such representations and the resulting damage to defendant were not stated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618.]

Department 1. Appeal from Circuit Court, Multnomah County; T. E. J. Duffy, Judge.

Action by Frank L. Waller against the City of New York Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action by the assured to recover on a policy of insurance in the standard statutory form for loss by fire of property described as a 1½-story frame building and its additions occupied as a dwelling, and situate on the realty mentioned therein. The complaint alleges the corporate character of the defendant and the making of the contract of insurance upon the consideration of a premium of \$12, setting out as an exhibit a copy of the policy. It also avers that the plaintiff was the sole owner of the property; that it was destroyed by fire August 22, 1914, without any fault of his while the policy was in force; that thereafter he gave notice of the loss and made proof of the same; that the value of the property was greatly in excess of the amount of the insurance, and that although he has fully and substantially performed the contract on his part to be performed the defendant has refused to pay the loss notwithstanding his demand therefor. The answer admits the execution of the policy "purporting to be on a dwelling house" and the presentation of proofs of loss, but otherwise denies the allegations of the complaint. Besides stating in each the corporate character of the defendant as an insurance company, it sets up three separate defenses as follows:

1. "That on or about the 18th day of August, 1914, this plaintiff did by false and fraudulent means and misrepresentations induce this defendant to issue and deliver the insurance policy mentioned in plaintiff's amended complaint; that prior to the time said policy was issued, this plaintiff called upon the agents and representatives of this defendant in the city of Portland, Or., and at said time requested a policy of insurance upon a building, commonly known as 'The Hut'; that the defendant and its agents refused to issue any policy upon said building; that said building at said time was used for roadhouse purposes; that prior to the time said policy was issued this plaintiff wrongfully, intentionally, and fraudulently represented that the property upon which said policy was to be placed was not the roadhouse, commonly known as 'The Hut,' but was a building situated back of Willamette Heights in the city of Portland, county of Multnomah, Or.; that the plaintiff knew that said representations were false and fraudulent and were made intentionally, and said representations were acted upon to the damage and injury of this defendant; that said policy of insurance was secured through fraudulent and false means by this plaintiff. * * *

2. "That on or about the 18th day of August, 1914, this defendant, because of the fraud and misrepresentations of this plaintiff, made, executed, and delivered to the plaintiff the policy of insurance mentioned in plaintiff's amended complaint; that said insurance policy provides that the plaintiff and holder of said policy should be the owner in fee simple of the premises sought to be insured; that at the time of the execution of said policy and at the time of the fire complained of by the plaintiff, this plaintiff was not the owner in fee simple of said property, and at no time mentioned in said amended complaint was the plaintiff the owner in fee simple of the property described in said complaint, and in the policy of insurance set forth in said complaint, and the plaintiff at the time of the issuance of the policy set forth in his complaint fraudulently misrepresented his title to the property insured, all to the damage of this defendant. * * *

3. "That at the time of the issuance of insurance policy set forth in plaintiff's amended complaint said property was not used as a dwelling house and has never been used as a dwelling house; that said property is commonly known as 'The Hut,' and used for roadhouse purposes; that said building was not occupied at the time of the issuance of said policy, nor at any time mentioned in said complaint."

The reply traverses each of these defenses, and asserts the following:

"That after said fire occurred and after said defendant was informed of all of the alleged matters set forth in said first, second, and third separate answers and alleged defenses, the said defendant demanded of and received from the plaintiff the full premium on said policy of insurance, and furthermore requested and demanded that the plaintiff submit himself for examination under and by virtue of the terms of said policy, and the said plaintiff in conformance with said request did submit himself for examination, and was examined relative to the matters contained in said policy of insurance by the defendant and its agents; that the defendant has otherwise requested of and from the plaintiff additional information; that because and by reason thereof, the said defendant has waived any right that it might otherwise have had to urge said defenses, and has by reason of its actions, as aforesaid, affirmed and ratified said contract of insurance."

A jury trial resulted in a judgment for the plaintiff, from which the defendant appeals.

F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, on the brief), for appellant. M. W. Seitz, of Portland (Seitz & Clark, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] One of the questions urged on appeal is whether the plaintiff was the sole and unconditional owner of the property within the meaning of the policy and held the fee-simple estate in the ground on which the burned house was situated. From the documentary evidence on file it appears that the North Portland Investment Company contracted with the plaintiff's predecessor in interest to sell to him, and the latter agreed to buy, the realty on which stood the destroyed building, upon his payment of certain sums of money which he agreed to pay, and that in pursuance thereof the plaintiff was

in possession of the property at the time of the insurance and of the fire. It is also without dispute in the testimony that the plaintiff was not in default in his payments up to the time of the trial, although the purchase price had not been fully paid.

The contract was for the sale of the fee in the land, and not for any less estate such as one for life or for years. Under such circumstances the grantor or one who contracts to sell the property becomes the trustee of the legal title for the benefit of the grantee, while the latter enjoys the real beneficial interest in the property, and upon him would fall the loss in case of destruction of its tenements. The object of insurance is to reimburse the beneficial owner upon whom the loss would fall if the structure thereon were burned. Keeping in view the purpose of the transaction, his estate within the meaning of the standard form of policy is to be considered as to its quality, and not merely by his muniments of title. In other words, we are not called upon in this proceeding to examine an abstract of title, nor to adjudicate the ownership of the realty in an ejectment action. We are to ascertain upon whom the loss fell in the burning of the insured property, and if the plaintiff is the only one in that category he fulfills the terms of the policy on that point. Of course the vendor in a title bond may have an insurable interest in the subject of the contract, but it must be described in the policy in apt terms other than those of the standard form used in this instance.

It likewise appears in this case that, as an incident to the transaction, a deed from the original owner to the plaintiff's immediate grantor had been prepared and left as an escrow with a depository to be delivered when the purchase price was fully paid. It is contended by the defendant and rightly, too, that an escrow does not of itself operate to pass title until it has been regularly delivered as stipulated. That, however, is not by the mark in the present case. Whatever estate the plaintiff had passed by operation of the contract to sell the realty in question. The doctrine about ownership is thus laid down by Judge Sanborn in *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569, 572:

"The object of the provision in policies of insurance that they shall be void if the interest of the assured in the property is not the sole and unconditional ownership of it is to prevent gambling contracts, and to protect the companies against the claims of those who have no insurable interest in the property injured or destroyed. The purchaser of the property, who is in the possession of it under a contract whereby the former owner agrees to sell and the buyer absolutely binds himself to purchase and to pay an agreed price for the property, is almost universally held to be the unconditional owner of it under the clause under consideration, because the loss from any injury or destruction of the property falls upon him. If the owner has agreed to sell and the vendee has agreed to buy on definite terms, the purchaser

is the sole and unconditional owner of the property within the true meaning of the clause upon this subject in insurance policies, because the vendor can compel the purchaser to pay for the property notwithstanding its injury or destruction, and hence to suffer the loss occasioned thereby"—citing numerous authorities.

In the same case the learned judge distinguishes this doctrine from the rule applicable where a would be purchaser has a mere option, which he may exercise or decline, to purchase the land, and points out that in the latter instance he is not the owner of the property within the purview of the clause under discussion. Again in *Loventhal v. Home Ins. Co.*, 112 Ala. 110, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17, the court said:

"The term 'fee simple' has never been used to distinguish between legal and equitable estates. It is used to denote the quantity or duration of estates—whether the enjoyment is limited or unlimited in point of continuance or duration. It defines the largest estate in land known to the law. It is an estate of inheritance, unlimited in duration, descendible to all the heirs alike of the owner to the remotest generations. It may be of a legal or equitable nature. If of the latter, the legal holder is a mere trustee for the equitable, who is the real owner, and, restrained by no provision of the trust, in cases not within the statute of uses, may at any time be compelled to execute the legal estate in him."

In *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807, Mr. Justice Wolverton reviews the authorities and arrives at the conclusion embodied in the syllabus that:

"A warranty that the insured is the sole and undisputed owner of the insured property, and that the title to the land is in her name, is not broken by the fact that legal title has not been conveyed to the insured, where she has gone into possession under a contract of purchase, and has performed on her part all the conditions thereof to the date of application, as the term 'title' is to be construed in the ordinary acceptance of the term."

The cases are practically unanimous in holding that where the insured is in possession under a partly performed contract for the purchase of the land in which the grantor covenants to sell and the grantee agrees to buy, the latter, within the terms of the standard insurance policy, is the sole and unconditional owner in fee simple of the realty. On the other hand, the grantor in such cases does not come within the descriptive words of the contract of insurance. The following precedents verify this doctrine: *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. 529; *Milwaukee Mechanics' Ins. Co. v. Rhea*, 123 Fed. 9, 60 C. C. A. 103; *Ramsey v. Phenix Ins. Co. (C. C.)* 2 Fed. 429; *Insurance Co. of America v. Erickson*, 50 Fla. 419, 39 South. 495, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495; *Clay, etc., Ins. Co. v. Huron, etc., Mfg. Co.*, 31 Mich. 346; *Rosenstock v. Miss. Home Ins. Co.*, 82 Miss. 674, 35 South. 309; *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596; *Matthews v. Capital Fire Ins. Co.*, 115 Wis.

272, 91 N. W. 675; *Allen v. Phenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797; *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; *McCullough v. Home Ins. Co.*, 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605; *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171; *Conn. Fire Ins. Co. v. Colorado Leasing, etc., Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Hankins v. Williamsburg City Fire Ins. Co.*, 96 Kan. 706, 153 Pac. 491.

With the documentary evidence before it, the court should have instructed the jury as to its legal effect and declared that the plaintiff was the sole and unconditional owner in fee of the land upon which the building stood within the meaning of the policy. L. O. L. § 136. In support of its contention that the plaintiff was not the sole and unconditional owner in fee simple the defendant cites *Finlon v. National Union Fire Ins. Co.*, 65 Or. 493, 132 Pac. 712, *Oatman v. Bankers' Fire Relief Association*, 66 Or. 388, 133 Pac. 1183, 134 Pac. 1033, and *Howard v. Horticultural Fire Relief Association*, 77 Or. 349, 150 Pac. 270, 151 Pac. 476. These cases are not applicable to the matter in hand. The *Finlon* Case was where the insured only had a lease with an option to buy the premises. In the *Oatman* Case the plaintiff possessed in his own right only an undivided half of a dower interest in the realty, while the remainder of the beneficial interest was owned by several other parties, including heirs of the former owner of the property. The report of the *Howard* Case discloses that one of the plaintiffs in fact held merely as a trustee, having purchased the title with funds of an estate and for its benefit, although he took out insurance in his own name.

[2-4] The defendant complains of instructions leaving to the jury the question about the ownership. Although the court ought to have taken this question from them on the documentary evidence involved, yet the error in that aspect is favorable to the defendant, and it cannot complain. Reverting to the pleadings, we note that the reply avers for the first time in the history of the case that the defendant waived the defenses it sets up. It is a rule of pleading in this state that where the plaintiff relies upon a contract he must show full performance on his part or else some valid excuse, as an example of which latter waiver may be classed, and that all this must appear in his complaint. In other words, the plaintiff must state his whole cause of action and all the grounds thereof in his first pleading. He cannot aver there that he has fully complied with the contract, and, when charged by the answer with shortcomings in that respect, shift

his ground in his reply and show that the omissions stated by the defendant were waived by it, thus excusing the plaintiff from performance. *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 128 Pac. 427; *Squires v. Modern Brotherhood*, 68 Or. 336, 135 Pac. 774; *Decker v. Jordan*, 79 Or. 109, 154 Pac. 431.

[5] Error is predicated upon the court's giving this instruction, among others:

"You are further instructed if you find that at the time this policy was issued on the building that this building was not used for dwelling house purposes, and was not used as a dwelling house in the common acceptance of that term, I instruct you that the plaintiff cannot recover in this case, and your verdict must be for the defendant, unless the company, knowing of the facts, went ahead and issued the insurance."

The latter clause about the company acting with knowledge of the facts is referable to the doctrine of waiver, and was erroneous because that issue was not properly pleaded so as to be a matter for consideration. Conceding that the statement in the third affirmative defense was invalid, yet, even then the giving of the instruction above quoted would be abstract and would work out a reversal under the doctrine of *Tonseth v. P. Ry. L. & P. Co.*, 70 Or. 341, 141 Pac. 868.

[6, 7] The defendant complains of some of the instructions given by the court relating to fraud and misrepresentation. It has no sufficient foundation in its pleading, however, to uphold its contention against that class of directions to the jury. In *Anderson v. Adams*, 43 Or. 621, 637, 74 Pac. 215, Mr. Chief Justice Moore succinctly lays down the rule affecting the pleading of fraud thus:

"To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating to the contract about which the representation was made, which, if true, would have been to plaintiff's advantage, but, being false, caused him damage and injury"—citing authorities.

This rule has been followed in many other subsequent cases, for instance, in *Wheeler v. Vanderbilt*, 69 Or. 326, 138 Pac. 857, and in *Outcault Advertising Co. v. Buell*, 71 Or. 52, 141 Pac. 1020. The first affirmative defense falls far short of complying with this standard. It does not show that the defendant believed the representations or that it relied upon them; and, moreover, it does not disclose wherein it was damaged by the alleged fraud, or how its risk was increased thereby. It is true it states that the building insured was known as "The Hut," which the defendant had previously refused to insure, and that in order to obtain the policy the plaintiff represented that it was not "The Hut" but a dwelling situated on Willamette Heights. The name of a structure does not necessarily make it uninsurable or a more dangerous risk. There is nothing in the boards or beams or bricks of a house by

whatever name called that per se makes it an undesirable risk. In short, matter showing the materiality of the representations should be averred so as to enable the court to draw a conclusion that the representations were fraudulent. On this point the error was in submitting the question of fraud to the jury at all. All the challenged instructions, however, contain the element of waiver, which, as we have shown, was not properly in the case, and, whether abstract, or in fact faulty, the error thus committed is sufficient to reverse the case. The cause is therefore remanded to the circuit court for further proceedings not inconsistent with this opinion.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

LITTLE v. HALLOCK. (No. 6815.)
(Supreme Court of Oklahoma. March 20, 1917
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. EXPRESS STATUTORY PROVISION—APPEAL FROM DECISION OF COMMISSIONERS OF LAND OFFICE.

Under section 7187, Rev. Laws 1910, a person desiring to appeal from a decision of the commissioners of the land office to the district court, must serve written notice upon the secretary to the commissioners within 15 days after the rendition of the decision complained of, and must, within a reasonable time after the service of such notice, execute and file a bond in such sum as the secretary shall prescribe, not to exceed double the rental value of the land affected by such appeal.

2. PUBLIC LANDS §165½, New, vol. 25 Key-
No. Series—DECISION OF COMMISSIONERS—
APPEAL—NOTICE.

Notice of appeal sent by telegram, which is actually received by the secretary to the commissioners within the time fixed is sufficient.

3. PUBLIC LANDS §165½, New, vol. 25 Key-
No. Series—SCHOOL LANDS—LESSEE'S RIGHT
TO IMPROVEMENTS—COMMISSIONERS' JURIS-
DICTION.

After school lands have been appraised and the lessee has indorsed his written acceptance of the appraisement of his improvements on the report of the appraisers, and the land and improvements have been sold under said appraisement, and the value of the improvements has been deposited by the purchaser with the commissioners, and possession surrendered to the purchaser by the lessee, the lessee is immediately entitled to the appraised value of his improvements, and the commissioners are without jurisdiction to order said amount or any part thereof returned to the purchaser.

Error from District Court, Harper County;
W. C. Crow, Judge.

In proceeding for sale of leased school lands, Charles A. Little, purchaser, filed a protest as to the appraisement of improvements placed by D. H. Hallock, a lessee. The commissioners of the land office recommended that the sum of \$500 deposited by the purchaser as the appraised value of the lessee's irrigation improvements be refunded, and from an order of the court on the lessee's appeal dismissing the protest and ordering

that the commissioners pay over to the lessee the amount deposited, the purchaser brings error. Affirmed.

Charles Swindall, of Woodward, for plaintiff in error. Joseph L. Griffiths, of Buffalo, and Chas. L. Moore, of Oklahoma City, for defendant in error.

HARDY, J. D. H. Hallock, who is defendant in error, was the lessee of certain school lands, having the preference right under a clause in his lease to purchase them in case of a sale thereof at the highest bid offered. The improvements upon said lands had been appraised at \$895; \$500 of said amount being for the "fair and reasonable" value of a certain irrigation ditch one-half mile in length. Hallock's written acceptance of the appraisement was indorsed thereon. On September 9, 1912, a hearing was had upon a protest filed by one William Little as to the appraised value of the drainage ditch and certain alfalfa. It does not appear that any notice was given to Hallock or that prior to waiving his preference right to purchase the lands he had any knowledge of such protest. At said hearing it was ordered that the lands be sold under the appraisement with the understanding that, if purchased by a person other than the lessee, the appraised value of the improvements in so far as it related to the drainage ditch and alfalfa would be investigated by the commissioners, and, if excessive and erroneous, the same would be readjusted and fixed at its true and correct value, if any, and the amount so fixed and determined would be paid over to the lessee, and the balance returned to the purchaser; and the superintendent of sales was authorized to announce the action of the commissioners as above set out immediately prior to offering said lands for sale. The land was bid in by Charles A. Little for the sum of \$10,000, who deposited with the commissioners 5 per cent. of his bid, as required by law and the appraised value of the improvements located on said land. A contract of purchase in due form was executed and delivered to him on September 12th, the date of purchase, in which it was recited that the appraised value of the improvements had been deposited by him which was to be paid to lessee as provided by law. On December 12, 1912, a hearing was commenced before the contest and protest committee upon a protest filed by Charles A. Little as to the appraisement of Hallock's improvements, at which hearing both Hallock and Little appeared. On July 7, 1913, the committee reported that in its opinion the irrigation ditch was not an improvement, and recommended that the protest be sustained and the sum of \$500, the appraised value of the ditch which had been deposited by Little, should be refunded to him. Thereupon the report of the committee was adopted by the commissioners and the

money ordered refunded to Little. On July 21, 1913, the secretary of the commissioners was notified by telegram that notice of appeal in said proceeding had been forwarded by mail, which notice was filed July 23d, upon which last-named date the secretary made an order fixing the amount of the appeal bond at \$100. Bond was filed and approved August 23d, and a transcript of the proceedings was thereafter filed in the office of the clerk of the district court of Harper county. On March 4, 1914, Little filed motion to dismiss Hallock's appeal upon the ground that notice thereof and bond had not been filed within 15 days from the date of the order appealed from. On March 20th Hallock filed motion to dismiss Little's protest theretofore filed with the commissioners, which motion was sustained, the court finding that the commissioners were without authority of law to entertain said protest, and entered an order that the commissioners should pay over to Hallock the amount deposited to cover the appraised value of said irrigation ditch, from which judgment and order of the court appeal was duly prosecuted by Little.

[1, 2] The plaintiff in error contends that the district court acquired no jurisdiction of Hallock's appeal because same was not perfected within the time required by law. Section 7187, Rev. Laws 1910, authorizes an appeal from all decisions of the commissioners of the land office by any person affected thereby to the district court of the county where the land is situated. Said appeal must be taken by the appellant serving written notice upon the secretary to the commissioners within 15 days after the rendition of the decision complained of, and by executing a bond with sureties in such sum as the secretary shall prescribe, not to exceed double the annual rental of the land affected by such appeal. The telegram notifying the secretary that notice of appeal had been mailed was received and filed by him before the expiration of the 15 days, and was treated by him as a notice of appeal, and was so considered by the court. There is no form of notice prescribed nor any particular method of service required in said section, and we think, as did the secretary and the trial court, that said telegram was a sufficient compliance with the requirements as to the service of notice. *Western Union Tel. Co. v. Bailey*, 61 L. R. A. 933, note.

It does not appear whether the formal written notice deposited in the mail was received by the secretary prior to the expiration of the 15 days or not, but, even if not received until the day it was filed, the telegram was sufficient. Appeal bond was not filed within said time, and the failure to do so is said to be fatal to the jurisdiction of the court. The requirement of the statute is that the notice shall be served within 15 days after the rendition of the decision complained of, and that a bond shall be executed in such sum as the secretary shall prescribe. The

secretary apparently construed the statute as permitting the bond to be given after the expiration of the 15 days in which the notice is required to be served, and this seems to be a reasonable construction. The notice may be served at any time within 15 days, and the secretary would not be required to determine the amount of the appeal bond until notice had in fact been served; neither could the party appealing execute and file said bond until the amount thereof had been fixed, and, after the secretary had acted, he would be entitled to a reasonable time within which to do so.

A similar question was presented in *Union Bond & Investment Co. et al. v. Bernstein et al.*, 40 Okl. 527, 139 Pac. 974, where it became necessary to construe section 6153, Compiled Laws 1909. Said section required any person furnishing material or performing labor under a subcontract with a contractor, in order to obtain a lien upon the land or improvements for such labor or material, to file with the clerk of the district court of the county in which the land was situated, within 60 days after the date upon which the material was last furnished or labor performed under such subcontract, a statement verified by affidavit and by serving a notice in writing of the filing of such lien upon the owner of the land or improvements or both. It was held under this section that a subcontractor had all of the 60 days within which to file his lien statement, and a reasonable time thereafter to serve the notice. In support of its conclusion the court quoted from *Deatherage v. Henderson*, 43 Kan. 684, 23 Pac. 1052, construing a similar statute in Kansas as follows:

"If such a contractor had all of the 60 days within which to file his statement, it would have been impossible for him, in many cases, to furnish a copy thereof to the owner or agent of the premises within the 60 days if his statement was not filed until the last day. A more reasonable construction of the statute would be to give the subcontractor a reasonable time after filing his lien to furnish a copy thereof to the owner or agent of the premises."

Applying the same rule in the construction of the statute before us, we hold that the notice and bond were served and filed within due time, and upon the filing of a transcript in the office of the clerk of the district court of Harper county that court acquired jurisdiction of the appeal from the decision of the commissioners.

Upon appeal being perfected, the district court was required by the provisions of section 7187 to hear and try said cause *de novo*. Its jurisdiction was appellate, and it was authorized to make such orders as ought to have been made by the commissioners. Therefore, if the commissioners had no jurisdiction to entertain and determine said protest, the judgment of the court is right and should be affirmed.

Section 7150 authorizes the commissioners to provide for a new appraisal of said lands where it is made to appear that any such lands or improvements have not been

properly appraised and requires notice to be given to the lessee of the appraised value of his improvements before such lands are offered for sale, and if any lessee, within 80 days from notice of the appraisal of his improvements, shall notify the commissioners in writing of his dissatisfaction therewith, the land covered by said lessee's contract must be reserved from sale pending a review of the appraisal in the district court of the county in which said land is located, and section 7151 authorizes an appeal from the board of appraisers to be taken as in the case of the condemnation of land for railway purposes and requires the procedure on such appeal and the review and demand for jury trial to conform to the procedure in such cases.

Section 7153 requires the purchaser at such sale, when other than the lessee, to pay to the commissioners of the land office or their authorized agent to reimburse the lessee having a preference right of purchase for the appraised value of all improvements upon the lands sold, and provides that upon possession being given by the lessee the commissioners shall immediately pay to him the value of all such improvements paid to them by such purchaser.

Section 7160 requires the purchaser to make an affidavit that the land is purchased for his own use and benefit, and not either directly or indirectly for the use and benefit of another, before a certificate of purchase is issued.

[3] Under the authority given the commissioners had caused said lands to be appraised, notice of which was given to Hallock, and the appraisal accepted by him, and the lands ordered sold subject to such appraisal, and said lands were in fact sold, the appraised value of the improvements deposited with the commissioners as required, and affidavit executed by the purchaser and possession surrendered by the lessee, and when Hallock accepted said appraisal and surrendered possession to the purchaser, he became entitled immediately to the sum deposited to cover the value of his improvements (section 7153), and the commissioners were without any authority thereafter to entertain any protest against the payment of such sum or to reduce the appraised value of any of the improvements or to order any portion of the sum deposited repaid to the purchaser. It would be manifestly unfair to the lessee, who had acquiesced in the appraisal and surrendered possession of his improvements, to thereafter deprive him of any part of the money to which he was entitled and the statute authorizes no such proceeding, and it seems clear that it was the intention that such should not be done. An additional reason why Little is not entitled to the relief sought is that he purchased said lands subject to said appraisal and deposited the amount thereof with

the commissioners and went into possession under a contract of purchase which recited that the sum deposited by him was for the benefit of and should be paid to the lessee.

The judgment of the court was right, and is therefore affirmed. All the Justices concur.

WINTERS v. OKLAHOMA PORTLAND CEMENT CO. (No. 8077.)

(Supreme Court of Oklahoma. Nov. 28, 1916.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 553(2)—RULING ON DEMURRER—TRANSCRIPT.

Error in sustaining a demurrer to a petition may be presented upon transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2463.]

2. PLEADING \S 418(1)—DEMURRER—WAIVER.

When a demurrer is sustained to a pleading, and the pleader takes leave to plead over, error in the order sustaining the demurrer is waived; but, where such pleader obtains leave of court to withdraw an amendment filed after such leave to amend is taken, and to stand upon the pleading to which the demurrer has been sustained, and is granted leave to appeal from the order of the court, the issues still being incomplete, he will not be held to such waiver.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1399, 1403.]

3. INDIANS \S 27(3) — SUIT TO SET ASIDE GUARDIANSHIP SALE—PAYMENT ON TENDER OF CONSIDERATION.

Where a minor citizen of the Choctaw Nation of Indians sues to set aside a void guardianship sale of his lands, and alleges that he has no part of the consideration of the sale and never received any part thereof, such minor is not required to pay or tender back such consideration as a prerequisite to the maintenance of his suit.

4. GUARDIAN AND WARD \S 107 — SALE — IRREGULARITIES—CURE BY CONFIRMATION.

After a county court obtains jurisdiction of a guardianship sale proceeding, all irregularities and defects between the acquirement of jurisdiction and the order of confirmation are cured by the order of confirmation, to the extent that the order of confirmation may not be collaterally attacked on account of such irregularities; but this rule does not extend to jurisdictional matters.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 392, 393.]

5. GUARDIAN AND WARD \S 103 — PRIVATE SALE—CONFIRMATION—JURISDICTION.

The provision of the statutes (Rev. Laws 1910, \S 6384) which provides that no sale of lands of minors at private guardianship sale shall be confirmed where the bid is not 90 per cent. of the appraised value, or where there has been no appraisal of such lands within a year prior to the sale, is mandatory, and goes to the jurisdiction of the court to make the order of confirmation. Where an order of confirmation of such a sale is made in violation of such provision, the order of confirmation is void for want of jurisdiction.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 378-381, 391.]

6. JUDGMENT \S 511—VALIDITY—FRAUD.

Orders and judgments procured by fraud are void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 951, 954.]

7. JUDGMENT \Rightarrow 489 — INVALID JUDGMENT — COLLATERAL ATTACK.

Where a want of jurisdiction to enter the particular order or judgment is affirmatively shown by the record proper upon which such order or judgment is based, such order or judgment is void and subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925.]

(Additional Syllabus by Editorial Staff.)

8. APPEAL AND ERROR \Rightarrow 802 — RULING ON MOTION TO DISMISS—REASONS.

It is not necessary for the court to state its reasons on overruling a motion to dismiss an appeal because certain orders, as contained in the case-made, did not contain the filing marks and were not shown to have been entered upon the journal of the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3167, 3168.]

Commissioners' Opinion, Division No. 3. Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by Walter B. Winters, a minor, by J. M. Daggs, next friend, against the Oklahoma Portland Cement Company. Judgment for defendant, and plaintiff brings error. Reversed, and remanded for further proceedings.

Wadlington & Wadlington, of Ada, for plaintiff in error. J. F. McKeel, of Ada, for defendant in error.

JOHNSON, C. This is a suit by plaintiff in error, Walter B. Winters, by J. M. Daggs, next friend, against the defendant in error, Oklahoma Portland Cement Company, a corporation, for the recovery of 60 acres of land allotted to plaintiff as a citizen of the Choctaw Nation of Indians. The prayer is for ejectment and cancellation; plaintiff seeking to set aside a certain deed executed by his guardian and the order confirming the sale upon which the deed was based. The next friend is the grandfather of plaintiff, and the guardian is plaintiff's father.

The amended petition alleges, in substance, that the said guardian of plaintiff is weak and illiterate and under the control of the defendant; that defendant and the said guardian entered into a secret corrupt and fraudulent agreement under which the said guardian was to sell, procure the confirmation of the sale, and convey to defendant 60 acres of the land of plaintiff of the approximate value of \$8,000 for the grossly inadequate consideration of \$2,750; that at such sale no bids were to be received or considered except the bid of defendant; that the sale was to be for the exclusive benefit of defendant and the said guardian; that this agreement was carried out, and the land sold and conveyed under it for the said consideration of \$2,750, whereas the actual value of the land was over \$8,000, and the value of it as appraised in such guardianship sale proceeding was \$4,200; that the said sale was a private sale; and that, by fraudulent-

ly concealing the appraisement from the court and diverting the mind of the court therefrom, defendant and the guardian fraudulently procured an order of the county court confirming such sale, regardless of the fact that the bid was less than 90 per cent. of the appraisement, and in fact only approximately 60 per cent. thereof. Plaintiff further alleges that the said purchase price of said land was divided between defendant and the said guardian; that plaintiff has never received any benefit or thing of value as the proceeds of said sale, and has no money or other thing of value in his possession as the result of the sale; and that the guardian now has nothing of value and no money in his possession as a result of said sale. Plaintiff further alleged that the said guardianship sale, order of confirmation, and conveyance were void on account of such fraudulent acts, and for the further reason that the purported sale was for less than 90 per cent. of the appraised value of the property.

A demurrer of defendant to such amended petition was sustained by the court on October 6, 1915, upon the ground that the petition did not contain an offer to pay back the said consideration of said sale. Plaintiff asked and was allowed time to amend such amended petition, and filed an amendment thereto. On November 17, 1915, plaintiff, having obtained leave of court to withdraw the amendment to his amended petition and stand upon the amended petition and his exception to the action of the court in sustaining the demurrer thereto, did so, and the case was dismissed by the court upon such election to stand upon the amended petition, and plaintiff was granted time to appeal.

[8] Defendant in error moved to dismiss the appeal upon the ground that certain orders, as contained in the case-made, did not contain the filing marks and were not shown to have been entered upon the journal of the lower court, and such motion has been overruled. In its brief defendant in error asks for dismissal of the appeal upon additional grounds, and complains that the former motion to dismiss was overruled without any reason being given therefor. It was not necessary for such reason to be given, but, as a matter of courtesy toward the present complaint of counsel, we refer to the opinion of this court in cause No. 7694, St. L. & S. F. R. Co. v. Tallaferro, 160 Pac. 610, not yet officially reported, which announces the rule controlling the former motion.

[1] In its brief defendant urges the dismissal of the appeal upon the ground that the case-made was not served within 15 days from the date of the order sustaining the demurrer to the amended petition, although it was served within the time granted after the order of dismissal, which was based upon the refusal to plead after the demurrer was

sustained. It is not necessary to go into the sufficiency of the service of the case-made, as the case made herein is sufficient as a transcript, and the questions on appeal, being as to error in sustaining a demurrer to the amended petition, are such as may be presented by transcript. See *O'Neill v. James*, 40 Okl. 661, 140 Pac. 141. The second motion to dismiss should therefore be overruled.

[2] In its brief on the merits defendant in error contends that error in sustaining the demurrer to the amended petition may not be presented, for the reason that it was waived by defendant in error taking leave to plead over. Defendant in error cites numerous cases from this court holding that taking time to plead over and pleading over waives error in an order sustaining a demurrer to a pleading. This proposition, as covering the only error urged on the appeal, was presented to and passed upon by this court in the first motion to dismiss the appeal. However, it may be well enough to say that in each of the cases cited in support of the alleged waiver of error the party whose pleading was affected by the order sustaining demurrer had finally accepted and enjoyed the full benefit of the exercise of the discretion of the lower court in allowing him to plead over, and had gone on to another phase of his case in disregard of the error in the order upon his pleading. The rule is based upon the fact that the party, by going ahead with his case, definitely accepts a lack of finality in the order as foreclosing his right of action. In none of the cases were the facts similar to those in this case. Here, while the plaintiff took time to plead over and actually filed an amendment to his petition, the formation of the issues was still incomplete, and still within the influence of the court's discretion. The court allowed plaintiff to withdraw the last amendment to his petition, and to stand upon his original amended petition granting the right of appeal. It was well within the discretion of the court to permit plaintiff to rectify a mistake in taking time to plead, particularly where the mistake would result in a deprivation of substantial rights, and the confusion resulting in the mistake came from a patent substantial error of the court itself. We shall hold that the granting of leave to withdraw the amendment and stand upon the original amended petition, with right of appeal from the order, placed plaintiff in the position occupied by him before he took leave to plead over.

On the merits this appeal presents three propositions, viz.: (1) Under the allegations of fraud in the guardianship sale proceedings, was it necessary for plaintiff to tender back the consideration of the guardian's deed? (2) Was the fact that the bid was less than 90 per cent. of the appraisement a mere irregularity, or did it avoid the entire proceeding? and (3) Is the attack upon these deficiencies properly made in this cause?

[3] The question of the necessity of the tender back of the consideration, as applicable to the pleading of plaintiff in this case, has been decided by this court favorably to the contentions of plaintiff in error. In the opinion of this court in cause No. 6228, *Bridges v. Rea et al.*, 165 Pac. —, not yet officially reported, under date of May 18, 1916, this court held void a deed to the allotment of an Indian minor based upon a fraudulent guardianship sale proceeding, and, with reference to the necessity of a tender back by the minor of the purchase price, said:

"But, the deed being void, she was not required to return the consideration as a condition precedent to relief in equity, but, aside from this, in the absence of a showing, that at the time she brought the suit or the case was tried she had in her possession any of the consideration received for the land was sufficient reason for not requiring her to do so."

In *Tirey v. Darneal*, 37 Okl. 606, 133 Pac. 614, referring to a deed by an Indian minor himself and the necessity of a tender back of the consideration, this court said:

"* * * And we therefore hold that the pretended deed from Darneal to Tirey was absolutely void, and, this being true, Darneal could not be compelled to refund the purchase price, especially since it is not shown that he had any part thereof in his possession at the time the answers were filed and the case tried, and the court committed no error in so holding."

With reference to void Indian minor deeds, executed by the allottees themselves, the rule that it is not necessary to relief in equity against the deed that the consideration be refunded, especially where it appears that the grantor has no part thereof, has been adhered to by a great number of decisions in this court, and is so well established that it is not necessary to refer to other cases upon the point. There would be less reason to require the refund by a minor who alleges that he never received any part of the consideration, but that the consideration was for the joint profit and benefit of the guardian and his grantee, under a collusive plan to defraud the minor.

[4, 5] Plaintiff in error, in his petition in the lower court, alleged that the sale by his guardian was for less than 90 per cent. of the appraised value of the land, the sale being for \$2,750, while the appraisement was \$4,200, and contends that, for this reason, the order of confirmation and guardian's deed were void.

Defendant in error contends that the confirmation of the sale for less than 90 per cent. of the appraised value was a mere irregularity, and not such a defect as to render the proceeding absolutely void, and that the defect was cured by the order of confirmation, which is conclusive. In support of this position he cites the following decisions of this court, viz.: *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372, and other cases from this court and the courts of other states,

holding that, after the county court acquires jurisdiction of a guardianship sale proceeding, the order of confirmation will cure intermediate irregularities. The cases cited lay down correct rules, so far as they are applicable, but they are not applicable to this situation; for the defect alleged here is not a mere irregularity, and was not a defect occurring between the filing of the petition of sale and the confirmation, but was a jurisdictional departure in the order of confirmation itself.

In *Eaves v. Mullen*, supra, which announced the rule as to intermediate irregularities, this court said:

"A valid decree of confirmation of the sale was necessary to pass title to the purchaser at the sale, from whom it is alleged plaintiff herein derived his title."

Section 6384, Revised Laws 1910, so far as pertinent, reads:

"6384. *Limit of Price—Appraisement.*—No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale."

The words of this section are expressly prohibitory. They do not simply and only say that an appraisement shall be had, but directly say that the court shall not act except under the given conditions. The inhibition strikes at the power of the court, and leaves no discretion whatsoever in the court. It does not pertain to any step intermediate to the acquirement of jurisdiction of the sale proceeding and the order of confirmation, but to the power to make the order of confirmation itself. The appraisement is not even necessarily a part of the sale proceeding proper, but may have been made at any time within a year prior thereto, and long before the court acquired jurisdiction of the sale proceeding; but the statute provides that the court shall not make the order, except it is in existence, and in conformity to it.

The rule announced in *Eaves v. Mullen*, supra, as to the effect of irregularities and defects after the acquirement of jurisdiction and antecedent to the order of confirmation was based upon decisions from the Supreme Court of the United States and the appellate courts of California, South Dakota, and Arkansas. We do not find where the three first named courts have passed upon the question as to whether a violation of the appraisement by the order of confirmation, in a private guardianship sale, is a mere irregularity or is a jurisdictional departure, but the Supreme Court of Arkansas, in the case of *Mobbs v. Millard et al.*, 106 Ark. 563, 153 S. W. 821, rendered after the decisions in the Arkansas cases cited in *Eaves v. Mullen*, held that such a violation was not an irregularity, but a jurisdictional departure, rendering the order of confirmation absolutely void. In *Mobbs v. Millard et al.*, supra, the Arkansas court said:

"Under the law a minor cannot act for himself, and his guardian is his statutory agent.

The requirement that no real estate of any minor shall be sold for less than three-fourths of its appraised value was passed for his protection pursuant to a general principle of public policy. Appraisement means valuation. Thus it will be seen the Legislature provided a means for fixing in advance the lowest valuation at which a minor's land can be sold. In the instant case it is conceded that the land was sold for less than three-fourths of its appraised value. * * * We hold that the sale was not in substantial compliance with the statute and is invalid. * * * We do not wish to be understood as holding that errors and irregularities in making the appraisements or in otherwise complying with the provisions of the statute in regard to the sale would not be a substantial compliance with the provisions thereof. * * * But we do hold that an essential requirement of the statute in regard to the sale of a minor's land cannot be entirely omitted and wholly disregarded."

The Supreme Court of Missouri, in the case of *Carder et al. v. Cubertson*, 100 Mo. 269, 13 S. W. 88, 18 Am. St. Rep. 548, said:

"By stipulation filed it is agreed that the sole question to be determined is whether the curator's deed is valid. There can be no hesitation; * * * it is a plain matter of statutory provision. Sections 28, 29, and 30, p. 460, General Statutes 1865, control this case. The last-named section declares: 'No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value,' etc. The probate court had no jurisdiction to approve such a sale. Its order of approval was therefore coram non jure, and the deed showing the facts already recited was void on its face."

The same conclusion was reached by the Supreme Court of Louisiana in the case of *Thibodeaux v. Thibodeaux*, 112 La. 906, 38 South. 800. 21 Cyc. 140, under the head of Guardian and Ward, says:

"J. *Purchase Price and Payment.*—Where the ward's property is ordered to be sold on application of a guardian, after appraisal, a sale for less than the appraised value is void."

10 Enc. of Pleading & Practice, 820 and 821, after laying down our rule that the order of confirmation will cure all defects and irregularities, says:

"*Jurisdictional Defects.*—But confirmation will not cure defects in the proceedings which go to the jurisdiction of the court, and consequently will not protect the sale from collateral attack upon any such grounds."

Our statute on judicial sales of real property provides that no property shall be sold for less than two-thirds of its appraised value. This court has held that provision mandatory, and that an order of the district court confirming such a sale is absolutely void (*Page v. Turk*, 43 Okl. 667, 143 Pac. 1047), citing in support of such holding several decisions from the Supreme Court of the United States, as well as an extensive list of authorities from others courts.

Our statute provides that, under a mortgage containing a waiver of appraisement, sale under foreclosure of such a mortgage shall not be had until the expiration of six months from the date of judgment. This court has held that a sale in violation of that provision is void. *Hancock v. Youree*, 25

Okl. 460, 106 Pac. 841; Tolbert v. State Bank, 80 Okl. 403, 121 Pac. 212.

The express statutory limitations upon the district courts in the above instances are no stronger, and are not as direct, as the limitation upon the county court in the section of the statutes we have under consideration; and yet the limitations were held to be, not merely the subject matter of irregularity, but jurisdictional.

In reference to guardianship sale procedure, the tendency of the courts is to construe as directory language which may fairly have that intent, and which pertains to proceedings after the vesting of jurisdiction. If such construction were not the rule, no guardianship sale would be safe, for some error creeps into almost every proceeding; and it seems to be the theory of the courts generally that some discretion is vested in the courts having direct jurisdiction of the proceeding to determine the effect of irregularities as tending or not tending to deprive wards of substantial rights. However, this discretion cannot be said to extend beyond an express limitation upon the particular judicial act. In public sales by guardians the law assumes that the public bidding, coupled with authority in the court upon confirmation to review the sufficiency of the price, will insure protection of the ward, and in such sales no appraisal is required. In private sales, as a protection to the ward, the law has substituted appraisal for public auction, and expressly limited the power of the court to review the sufficiency of the sale price by an express limitation as to amount.

We must hold that the provision that no private guardian's sale shall be confirmed by the court unless the sum offered is at least 90 per cent. of the appraisal, nor unless the real estate sold has been appraised within one year from the time of such sale, is mandatory, and that an order of confirmation and guardian's deed violating this provision are absolutely void. We should not be understood as holding, however, that mere irregularities in the appraisal proceedings would have such effect, if such irregularity was not such as to deprive the appraisal of substance.

Defendant in error says, however, that the appraisal in this case is irregular and does not amount to an appraisal, for the reason that it was not properly signed by the appraisers, and that there was no appraisal in fact. This would not help the situation; for under the section of the statutes in question the sale would be void if there were no appraisal. However, the appraisers were properly appointed, the oath of the appraisers was signed, the bill for fees was signed and verified, the affidavit stating that the services had been rendered, and the appraisal returned and properly filed, and the defects in it are only irregularities.

[6, 7] As to the proposition that this suit is a collateral attack upon the guardianship deed and sale proceedings in the county court, while the recent decisions of this court (Bridges v. Rea, supra, and Brewer v. Dodson, 159 Pac. 329, not yet officially reported) hold that an attack upon a judgment upon the ground of fraud is a direct attack, yet in this case the directness or collateralness of the attack is immaterial, both of the grounds set up in the amended petition, if true, rendering the judgment of confirmation absolutely void and subject to collateral attack. A judgment obtained by fraud is absolutely void. Bridges v. Rea, supra; Brewer v. Dodson, supra; Brown v. Trent, 36 Okl. 239, 128 Pac. 895; Sockey v. Winstock, 43 Okl. 758, 144 Pac. 372.

If the facts alleged in this case are true, the order of confirmation would be absolutely void on account of fraud vitiating the jurisdiction, as held by the above cases and numerous other cases in this court, and also would be void for the further reason that it violated the appraisal, which the court was without jurisdiction to do, as hereinabove shown. A void judgment is a nullity, and may be attacked collaterally. Roth v. Union Nat. Bank, 160 Pac. 505, not yet officially reported; Jefferson v. Gallagher, 150 Pac. 1071, not yet officially reported; Brewer v. Dodson, supra.

The jurisdictional invalidity of the order of confirmation in this case, in so far as affected by the violation, is shown by the record of the sale proceeding in the county court, upon which the order is based. Where the record in a case affirmatively discloses the facts to be such that the court was without power in such case to make the order or decree it assumes to make, the order or decree is void and subject to collateral attack. Roth v. Union Nat. Bank, supra.

The opinion in the last-cited case of Roth v. Union Nat. Bank, by Mr. Justice Thacker, contains an unusually comprehensive citation and analysis of authorities from this court and other courts upon the effect of the verity imported by a judgment, and concludes that, if the lack of jurisdiction to make the judgment or order affirmatively appears in the record proper, upon which the judgment or order is based, the judgment or order is subject to collateral attack.

From the above it follows that the amended petition in this case stated causes of action upon the two grounds set up by it, that it was not necessary for plaintiff, in this particular case, to tender back the consideration of the deed, and that the lower court was in error in so holding.

The order and judgment of the lower court sustaining the demurrer to the amended petition and dismissing the cause should be reversed, and the cause remanded for further proceedings in accordance herewith.

PER CURIAM. Adopted in whole.

ARNOLD et al. v. BURKS. (No. 5204.)
(Supreme Court of Oklahoma. April 10, 1917.
Rehearing Denied May 8, 1917.)

(Syllabus by the Court.)

GARNISHMENT \S 180, 187—JUDGMENT \S 130,
153(4) — PLEADING \S 367(6) — ANSWER—
PETITION.

Record examined, and *held*, that motion to set aside the judgment was properly overruled.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 351-356, 359-364; Judgment, Cent. Dig. \S 265-268, 301; Pleading, Cent. Dig. \S 1187-1193.]

Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action by L. M. Burks against Charles Arnold, with garnishment against T. J. Presley and others. Judgment against defendant and the garnishees, and from the overruling of their motion to vacate the judgment, defendants bring error. Order affirmed.

H. A. Ledbetter, of Ardmore, for plaintiffs in error. H. B. Lockett, of Comanche, for defendant in error.

HARDY, J. The parties hereto will be designated as they appeared in the trial court. The plaintiff, L. M. Burks, brought an action against defendant Charles Arnold and had a garnishment issued and served on defendants Bogle, T. J. Presley, and A. J. Presley. On the 24th day of November, 1911, judgment was rendered against defendant Arnold for his debt and against garnishees in stated amounts. On March 11, 1912, defendants filed in the trial court a motion to set aside the judgment theretofore rendered, alleging in substance that said cause was set for trial November 18, 1911, and that said garnishees had on file in said court in said cause their answer, denying any indebtedness to said Arnold, and that the said Arnold had on file therein a motion to make plaintiff's petition more definite and certain, and that on said day the presiding judge of said court announced that no cases involving "Indian questions" would be tried at that term of court unless by agreement of parties, and that this case involved an Indian question; that defendants' attorney, relying thereon, left Duncan, where court was being held; that on November 24, 1911, the case was called up by attorney for plaintiff in the absence of defendants and their attorneys, and judgment taken against defendant Arnold for the amount sued for and against garnishees as debtors of the said Arnold in certain stated amounts. Soon after judgment was obtained, an execution was issued, but upon the filing of the above motion the execution was recalled to await action on the motion to vacate the judgment. In due time said motion was heard and overruled, and defendants have appealed from that ruling.

The garnishees urge that said judgment against them should be vacated for the reason that at the time same was rendered, they had on file a verified answer denying any indebtedness to defendant Arnold. An examination of the answer shows that said garnishees admitted the execution of their promissory note in the sum of \$250 in favor of defendant Arnold, which was due and unpaid, and that said garnishees had contracted and agreed to pay to said defendant the further sum of \$350, which amount was at the time of the filing of said answer unpaid. It was further alleged that the amounts agreed to be paid by said garnishees were for certain lands in the Chickasaw Nation, Ind. T., claimed to be owned by said Arnold, which he had sold to garnishees in consideration of said amounts, that garnishees were informed that said property was not in fact the property of said Charles Arnold and that their promise to pay was procured by said Arnold, by means of fraudulent misrepresentations and garnishees prayed judgment of the court whether they were in fact indebted to said Arnold in said amounts. This answer cannot be construed as a denial of indebtedness within the authorities relied upon by counsel for defendant. What garnishees in fact did was to state the facts and submit them to the court for a determination of their liability. Under these circumstances the court was authorized, as it did, to determine whether the facts stated rendered garnishees liable for the amount of their obligations, the execution of which was admitted in the answer.

In *Pace v. Merrill Drug Co.*, 2 Ind. T. 218, 48 S. W. 1061, the statutes regulating the procedure in cases of this character which were in force in the Indian Territory were construed by the Court of Appeals, and the procedure adopted by the trial court in the case at bar was held to be proper. The fourth paragraph of the syllabus in that case is as follows:

"If a garnishee appear and answer that he has property of, or is indebted to, defendant, or states the facts and submits a determination of his liability to the court, the court may order the garnishee to deliver the property, or to pay the amount owing by the garnishee into court, to the amount of plaintiff's demand, and may enter judgment against garnishee and issue execution thereon for the amount."

That is just what was done in this case. The garnishees answered admitting the execution of certain obligations to defendant, and stated the facts out of which said obligations grew, and the court, upon consideration thereof and upon sufficient showing, adjudged them to be liable to defendant in the amount of their admitted obligations. This contention is not good for another reason. The entire record in the trial court is not incorporated in the case-made and we are unable to determine whether issue was joined upon the answer as defendant contends it

should have been, and a trial thereafter had upon the issues so made. The judgment recites that said garnishees had been duly summoned and had filed answer, and that it had been shown to the court that they were indebted to defendant Arnold in certain sums for which judgment was rendered. A reasonable construction of this recital in the journal entry justifies the conclusion that a sufficient showing was made of a character to satisfy the mind of the court from which the court found that said garnishees were indebted to defendant in the amounts for which judgment was rendered; and this conclusion is supported by the presumption of regularity which attaches to the proceedings of a court of record, acting within the scope of its jurisdiction. 16 Cyc. 1075.

Defendant Arnold urges that the court erred in rendering judgment against him while he had pending a motion to make the petition more definite and certain. It affirmatively appears that on May 2, 1906, this motion was sustained and the petition which is incorporated in the case-made is designated as "first amended complaint," and the indorsements thereon show same to have been refiled September 25, 1907, which was after the order to make more definite and certain had been sustained, and it thus appears that said motion had been acted upon and the pleading amended in response thereto, and no demurrer appears to have been lodged against said pleading as amended.

On the day the case was regularly set for trial plaintiff appeared in person and by his attorney and had his witnesses present, and defendant appeared by his counsel Mr. Gilbert, who at that time announced that he had no objections to judgment being taken. Had said motion not been acted upon, this of itself would have constituted an abandonment and a waiver thereof.

It is claimed that the petition was insufficient to support the judgment rendered because same did not state facts sufficient to constitute a cause of action in that plaintiff was seeking to recover for the purchase price of improvements on Indian land without first showing that the person selling the improvements was an Indian citizen. We do not so construe the petition. As we understand it, plaintiff was seeking to recover for the price agreed to be paid for a certain lease upon lands belonging to one Minnie Shirley, an Indian citizen. The petition and the contract attached as an exhibit thereto discloses that plaintiff had advanced to said Minnie Shirley and her husband money with which to purchase improvements upon certain lands which had been conveyed to them, in consideration of which the Shirleys acknowledged themselves to be indebted to Burks in a certain amount, and had rented him the premises for a certain stipulated rental per annum. The action is not upon the contract of purchase between the Shirleys and the original owner of the improvements; for that was

consummated and the consideration paid. About one year after the foregoing arrangement defendant Arnold and the Shirleys agreed to purchase plaintiff's lease upon said lands for the sum of \$600, for which amount judgment was claimed. The objection to the petition is not well taken.

Conceding that the presiding judge announced that cases involving Indian questions would not be tried except by agreement, such announcement has no bearing in this case for the reason that counsel who now appear did not then represent any of the parties hereto, and no action of his at that time had any reference to this litigation. It does not appear that defendant or garnishees were present or that they absented themselves because of any reliance upon the announcement of the trial judge, nor that any act or conduct upon their part was influenced thereby. Counsel for defendant who represented him at the time in effect consented to the rendition of judgment in plaintiff's favor, and garnishees had submitted the facts to the court and prayed an adjudication as to their liability, and it does not appear to us that the court erred in overruling the motion to set aside the judgment.

This litigation was commenced as early as 1905, and, while plaintiff was at all times insisting upon a trial, it seems he was never able to reduce his claim to judgment until the year 1911, and after all these years, having succeeded finally in obtaining a judgment to which he was apparently entitled, the trial court was right in refusing to set it aside upon the showing made.

In *McAdams v. Latham*, 21 Okl. 511, 96 Pac. 584, this court recognized the rule that a trial court has a wide and extended discretion in setting aside judgments and decrees rendered in its own court when it does so at the same term in which judgment or decree was rendered, but further declared the rule to be that after a final decree or judgment had been rendered and the term expired there must be a substantial compliance with the terms of the statute in order to give the court further jurisdiction over the same.

These requirements, in our judgment, were not satisfied by the showing made, and the order from which this appeal is prosecuted is therefore affirmed. All the Justices concur.

STATE ex rel. COMBS et al. v. MEACHEM,
Sup't of Public Instruction of Custer
County. (No. 8656.)

(Supreme Court of Oklahoma. April 10, 1917.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

MANDAMUS ¶4(5)—APPOINTMENT OF MEMBER AND CLERK OF SCHOOL DISTRICT.

School district No. 67, lying partly in B. and partly in C. counties, was joined by the action of the superintendents of public instruction of said counties, upon petition by sufficient number

of freeholders in said counties, to school district No. 11, C. county. Thereafter said district was known as joint district No. 11, C. county. No appeal was taken from the action of the superintendents, as provided by law. The officers of school district No. 11 as it formerly existed were retained as officers of school district No. 11 joint. In a suit in mandamus by plaintiffs to compel the superintendent of public instruction of C. county to appoint a member and clerk of school district No. 11 as it formerly existed, *held*, that for failure of plaintiffs to appeal from the action of said superintendents in combining said districts into district No. 11 joint, mandamus will not lie.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 20, 21, 24-33.]

Error from District Court, Custer County; Thos. A. Edwards, Judge.

Petition by the State of Oklahoma, on relation of E. B. Combs and others, for a writ of mandamus against George A. Meachem, Jr., Superintendent of Public Instruction of Custer County. Demurrer to the evidence sustained, and petition denied, and plaintiffs bring error. Affirmed.

Geo. T. Webster, of Clinton, for plaintiffs in error. A. E. Darnell, Co. Atty., of Arapaho, for defendant in error.

TURNER, J. On September 6, 1916, the state of Oklahoma, on relation of E. B. Combs, N. C. Hershberger, and Elmer Willert, filed its petition in the district court of Custer county for writ of mandamus against Geo. A. Meachem, Jr., superintendent of public instruction of Custer county, to compel him to immediately appoint a member and a clerk of school district No. 11 in said county, and to notify them of such appointment. The case was submitted to the judge at chambers, and tried upon the following agreed statement of facts:

"District No. 11 herein refers to that school district which it is claimed by defendant was joined to district No. 67 joint. District No. 11 joint refers to the territory and school district created by the joining of districts Nos. 11 and 67 joint.

"First. That plaintiffs are voters, taxpayers, patrons, and residents of what was known prior to April 25, 1916, as district No. 11, described in plaintiffs' petition.

"Second. That Geo. A. Meachem, Jr., and Daisy M. Pratt are superintendents of public instruction of Custer and Blaine counties, respectively.

"Third. That E. B. Combs was duly appointed to the office of director of school district No. 11, in September, 1914, and duly qualified and is now such director of district No. 11 joint, is nonexistent.

"Fourth. That H. Kippenberger was appointed to fill the vacancy caused by the removal of McDill Giles from the county, and when joint district No. 11 was created said H. Kippenberger refused to act as clerk of said district No. 11, and now refuses to act, all of which is known to defendant, who is ratifying the acts of said Kippenberger in refusing to act as said clerk of district No. 11, and no clerk has been appointed.

"Fifth. That D. M. Hooper was duly appointed to the office of member of said district No. 11, and is now claiming to hold over as the member of district No. 11 joint, and refuses to act as member of district No. 11 referred to in plaintiffs' petition.

"Sixth. That defendant has been advised by plaintiffs, and knows of his own knowledge, that H. Kippenberger and D. M. Hooper refuse to act as clerk and member, respectively, of said district No. 11, and he has refused to appoint any suitable person to succeed him.

"Seventh. That said school district No. 11, if such exists, has about 62 students of school age, and has a schoolhouse and has maintained a school therein each year for many years, and has no funds on hand to maintain a school.

"Eighth. That the excise board of Custer county has heretofore convened and adjourned, and is still in existence, not having adjourned sine die.

"Ninth. That no estimate has as yet been submitted by the board of school district No. 11.

"Tenth. That Exhibit A, attached to plaintiffs' petition, is a copy of the records relating to the organization of joint district No. 11 from districts Nos. 11 and 67 joint.

"Eleventh. That defendant and Daisy M. Pratt conducted all communications relative to the organization of district No. 11 joint over the phone."

In addition to said agreed facts, attached to the petition as exhibits, are the proceedings of the county superintendents of said counties, showing the proceedings taken by them for the purpose of combining these districts into district No. 11 joint. By these proceedings, it is shown that a petition was filed with the said superintendents signed by more than one-half of the taxpayers of each of said school districts, asking that school district No. 67 joint, which was partly in Blaine county, be attached to said school district No. 11, Custer county; said consolidation to be known as district No. 11 joint. On March 30, 1916, notice was given by the county superintendent of Custer county that a hearing would be had on said petitions on April 25, 1916. On April 26th, notice was given that at said hearing said district No. 67 joint was attached to district No. 11, and said district No. 67 was abolished; said notice reciting that if no appeal was taken therefrom within 10 days, said action would become final; that on May 12th notice was duly published by said superintendents to the effect that district No. 67 joint had been abolished by attaching the same to district No. 11, Custer county. To this notice the name of Daisy M. Pratt was signed by defendant in error here, Geo. A. Meachem, Jr., and by himself as superintendent of Custer county. It is further shown that said Meachem was authorized by telephone to sign the name of said Pratt to said notice of dissolution and consolidation. Defendant demurred to the evidence, which was sustained, and the petition for writ of mandamus denied, and judgment rendered and entered accordingly, to reverse which this appeal is prosecuted.

The court did not err in refusing the writ. This for the reason that plaintiffs had an adequate remedy at law by appeal under section 2, art. 4, c. 219, Sess. Laws 1913, which provides:

"If, in the alteration of, or refusal to alter, the boundaries of any joint school district, any person or persons shall feel aggrieved, such person or persons may appeal to the state superin-

tendent of public instruction, and notice of such appeal shall be served on the superintendents of public instruction of the several counties represented in said district within ten days after the rendition by them of the decision appealed from."

No notice of appeal was ever served, and no appeal taken. Plaintiffs contend that no decision was rendered from which an appeal could have been taken. In this they are in error, for the reason that it is shown by the proceedings of said superintendents that notice was duly published that a hearing would be had on the petitions filed on April 25, 1916; and on April 26th notice was given that at said hearing district No. 67 joint was attached to district No. 11, and said district No. 67 abolished, which notice provided that if no appeal was taken therefrom within 10 days, as required by law, the action of the superintendents would become final, and on May 12th notice was duly published that district No. 67 had been abolished by attaching the same to district No. 11, Custer county, said district to be thereafter known as district No. 11 joint.

Affirmed. All the Justices concur.

PURVINE v. AKERS TP. (No. 5682.)

(Supreme Court of Oklahoma. May 1, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶773(2)—DISMISSAL—FAILURE TO FILE BRIEF.

Appeal dismissed for failure of plaintiff in error to file brief in compliance with the rules of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106.]

Error from District Court, Carter County; S. H. Russell, Judge.

Action between M. L. Purvine and Akers Township, in Carter County, Okl. Judgment for the latter, and the former brings error. Appeal dismissed.

John D. Chappelle, of Guthrie, and Potterf & Walker, of Ardmore, for plaintiff in error. Sigler & Howard, of Ardmore, for defendant in error.

RAINEY, J. This appeal was taken by the plaintiff in error from a judgment in favor of the defendant in error in the district court of Carter county, Okl. The appeal was filed in this court on October 15, 1913. The case was submitted on September 20, 1915. The defendant in error has filed a motion to dismiss the appeal on account of the failure of the plaintiff in error to file and serve a brief as required by rule 7 of this court (38 Okl. vi, 137 Pac. ix). An examination of the record discloses that the motion is well taken. The appeal is therefore dismissed. Turner Hardware Co. v. John Deere Plow Co., 39 Okl. 633, 136 Pac. 417. All the Justices concur.

BROWN et al. v. MAYHALL. (No. 4757.)
(Supreme Court of Oklahoma. May 1, 1917.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER ¶9(1)—NATURE OF ACTION—RIGHT OF ACTION.

The action of forcible entry and detainer is possessory in its nature, and has for its purpose the restitution of possession of lands and tenements to one who has been deprived of such possession by force. The right to maintain the action is not determined by plaintiff's right of possession, but by whether he has been in possession, and such possession has been taken from him by force, and, unless otherwise provided by statute, a person who has never been in possession of lands cannot maintain the action.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 37.]

2. FORCIBLE ENTRY AND DETAINER ¶9(1)—POSSESSION—RIGHT OF ACTION.

Under the statutes of this state, in the absence of the relation of landlord and tenant, a person who has never been in possession of the premises in controversy cannot maintain an action of forcible entry and detainer against one in possession under color of title.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 37.]

Error from County Court, McCurtain County; E. E. Cochran, Judge.

Action of forcible entry and detainer by F. M. Mayhall against Catherine Brown and Davis Brown. From a judgment of the county court, on appeal from a judgment in justice court for plaintiff, directing a verdict for plaintiff, defendants bring error. Reversed and remanded, with directions.

R. C. Martin and N. W. Gore, both of Idabel, for plaintiffs in error. I. C. Sprague, of Idabel, for defendant in error.

RAINEY, J. This is a forcible entry and detainer action, instituted originally by the defendant in error in a justice court of McCurtain county, Okl. One Mayhall obtained judgment in said court from which the defendants, Catherine Brown and Davis Brown, appealed to the county court of said county. At the trial there evidence was introduced in behalf of the plaintiff and defendants, whereupon the court directed a verdict for the plaintiff. The plaintiffs in error (defendants below) bring the case here. After the defendant in error had filed a motion to dismiss the appeal, by leave of court plaintiffs in error were permitted to and did withdraw the case-made for correction, and later refiled the corrected case-made in this court. Thereafter defendant in error filed a supplemental motion to dismiss the appeal. The alleged grounds for dismissal as stated in the original and supplemental motions were principally predicated upon defects in the case-made. Since these defects have been corrected, and finding no merit in the other alleged grounds for dismissal, we are of the opinion that the original and supplemental motions to dismiss should be and the same are hereby overruled.

The material facts in this case are as follows: Catherine Brown, a Choctaw freedman, was the allottee of the land in controversy, and she and her husband, Davis Brown, were residing on and claiming title to said land at the time of the institution of the suit in the justice court. In fact they had been in continuous possession of the premises for over 20 years. The plaintiff, Mayhall, purchased the land from one L. E. Williams, the wife of R. D. Williams. The land had been conveyed to Mrs. L. E. Williams by W. J. Hill and B. B. Williams. B. B. Williams was the wife of Pete Williams. There was admitted in evidence a deed from Catherine Brown and Davis Brown to W. J. Hill and B. B. Williams, which said deed the old negroes claimed W. J. Hill and Pete Williams procured from them by false and fraudulent representations. The undisputed evidence discloses that the plaintiff, Mayhall, had never been in possession of the land in controversy, and had never taken the rents and profits therefrom. The relation of landlord and tenant had never existed between Mayhall, or any person in his chain of title, and the Browns, who were holding the premises adversely to all the world. Mayhall was not entitled to judgment, and the court erred in directing a verdict in his favor. Why?

[1] The case at bar is governed by the decisions of this court in the cases of *Link v. Schlegel*, 33 Okl. 458, 128 Pac. 576; *Northcutt et al. v. Bastable*, 39 Okl. 124, 134 Pac. 423, and *Gross v. Baker*, 148 Pac. 734. In the first-named case Justice Hayes, speaking for the court, said:

"The action of forcible entry and detainer is possessory in its nature, and has for its purpose the restitution of possession of lands and tenements to one who has been deprived of such possession by force. The right to maintain the action is not determined by plaintiff's right of possession, but by whether he has been in possession and such possession has been taken from him by force, and, unless otherwise provided by statute, a person who has never been in possession of lands cannot maintain the action."

See, also, 19 Cyc. pp. 1115, 1128.

Sections 5504 and 5505, Revised Laws of Oklahoma 1910, which are identical with sections 6429 and 6430, Compiled Laws of 1909, read as follows:

Section 5504: "Any justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into land or tenements, unlawfully and by force hold the same, and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

Section 5505: "Proceedings under this article may be had in all cases against tenants holding over their terms; in sales of real estate on execution, orders or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales

by executors, administrators, guardians and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper court, and the same, by said court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession. This section is not to be construed as limiting the provisions of the first preceding section."

Construing section 6429, Compiled Laws of 1909, the court, in an opinion by Mr. Justice Hayes in the case of *Link v. Schlegel*, supra, said:

"It is apparent that the foregoing statute contemplates that the result of the action shall be a means of restoring possession of lands and tenements to persons who are deprived thereof in one of the two ways named, to wit, by an unlawful and forcible entry and detention, or by an unlawful and forcible detention after a lawful and peaceable entry. In each instance, however, the possession of the complaining person must have been entered either unlawfully or lawfully; and in the second case held by force. Statutory provisions similar to the foregoing are generally construed by the courts not to authorize one who has never been in possession to maintain the action."

And continuing with reference to section 6430, Compiled Laws of 1909, said:

"Under the succeeding section of the statute the action may be maintained in some instances by plaintiff who has never been in possession."

We agree with and reaffirm the views of the court in the case of *Link v. Schlegel*, and hold that if plaintiff, having the right of possession, although not having the actual possession, may maintain the action, if defendant occupies the lands and tenements without any color of title. This is also the holding of the court in the case of *Northcutt et al. v. Bastable*, supra, wherein this court in an opinion by Commissioner Robertson, said:

"Section 5505, Rev. Laws 1910, provides that the action of forcible detainer may, in some instances, be brought by one who has never been in possession, as witness the following clause. * * * 'and in cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession.' Thus, if the defendants are occupying the premises without color of title, such an action might be maintained."

[2] But does the instant case fall within section 5505? We think not, for the reason that the Browns were in possession, claiming under color of title, Catherine Brown being the patentee of said land. In directing a verdict for the plaintiff, Mayhall, the trial court doubtless entertained the view that the Browns had not substantiated their claim of fraud, or, if there was any fraud, that the same was without the procurement or knowledge of Mayhall, and that the defense urged was not a lawful defense to the action. This was not a proper issue in the case. It is true that the title to the land in controversy could not be adjudicated in a forcible entry and detainer action, but this was immaterial, as we have already pointed out that May-

hall was not entitled to maintain the action in the first instance, and it was therefore unnecessary for the defendants to introduce any evidence. The plaintiff did not bring the right kind of action. He should have sued in ejectment.

It follows that the judgment of the trial court should be reversed, and the cause remanded, with directions to dismiss the case. All the Justices concur.

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OWENS et al. v. CULBERTSON et al.
(No. 7106.)

(Supreme Court of Oklahoma. Jan. 2, 1917.
Rehearing Denied May 15, 1917.)

(Syllabus by the Court.)

1. EXPRESS STATUTORY PROVISION.

Section 4016, Rev. Laws 1910, Ann., provides, in substance, that when the words "and waive the appraisalment" are written or printed in a mortgage on real estate, in case of foreclosure and sale of the premises under said mortgage, no order of sale shall issue thereunder for six months after the date of judgment, and the premises must be sold without appraisalment.

2. APPEAL AND ERROR ~~§~~1170(1)—MORTGAGES ~~§~~502—FORECLOSURE ON DECREE—"AND WAIVE THE APPRAISEMENT"—SURPLUSAGE—AFFIRMANCE.

Where, in a decree of foreclosure, the mortgage has written or printed therein, "and waive the appraisalment," and the order of sale has not been issued until the expiration of six months from the date of judgment, and the journal entry provides that said premises shall be sold "according to the provisions of law relating to the sale of real estate under execution," such words will be held to mean that said premises shall be sold in accordance with the stipulation in the mortgage "without appraisalment," and where appraisalment has been made in the proceedings to sell said real estate under such foreclosure, such appraisalment will be regarded as surplusage, and, if necessary, this court on appeal may direct the journal entry and entire record to be modified by striking such provisions out of the record, and if it appears from the entire record that all other proceedings in foreclosure have been duly and regularly taken and performed, and that there has been no miscarriage of justice nor substantial violation of any constitutional or statutory right the judgment of the lower court in confirming the sale will not be reversed nor set aside, but, on the contrary, will be affirmed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4082, 4086, 4454, 4540; Mortgages, Cent. Dig. §§ 1470, 1489.]

3. EXPRESS PROVISION OF STATUTE.

The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Commissioners' Opinion, Division No. 6. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by G. J. Culbertson and another against Samuel Owens and Phillip Owens. Judgment for plaintiffs, and defendants bring error. Affirmed.

William Neff and L. E. Neff, both of Muskogee, for plaintiffs in error. Chas. A. Moon, of Muskogee, for defendant in error Lain.

ROBERTS, C. [1] This is an appeal from an order of the superior court of Muskogee county, confirming a sheriff's sale in a mortgage foreclosure case. Judgment was rendered December 8, 1913. The property was decreed to be sold "according to the provisions of law relating to the sale of real estate under execution and subject to a mortgage to F. C. Finerty for \$900 and interest." There was no specific findings in the judgment that the mortgage contained the words "appraisalment waived," but the mortgage was attached to the petition, and made a part thereof, and has written therein the following:

"And the said parties of the first part for said consideration do hereby expressly waive an appraisalment of said real estate."

Section 4016, Rev. Stat. 1910, Ann., provides that:

"When the words, 'and waive the appraisalment' are * * * printed therein, the premises mortgaged must be sold without appraisalment, in case of foreclosure and sale thereunder, and in such case no order for such sale shall issue for six months after the date of judgment."

The judgment was dated December 3, 1913, and the order of sale was issued June 4, 1914, which was more than six months after the date of judgment, and the land was sold on July 14, 1914. This is all made plain by the record.

The record shows that the order of sale directed the sheriff "to sell said real estate with appraisalment, and subject to a prior mortgage of F. C. Finerty for the sum of \$900, and any interest thereon," and also that the land was advertised for sale subject to said mortgage, and was appraised at \$1,200. The order of confirmation sets out the proceedings, and finds that the property "was bid off by Fred A. Lain for the aggregate sum of \$1,400, to wit, \$500 in cash, and the assuming of a \$900 prior mortgage upon said premises, as set out in said notice of sale." The sheriff's return shows that he collected \$500, which, with the \$900 mortgage, made up the \$1,400.

Counsel for plaintiffs in error in their brief state that:

"The errors argued will be based upon the fact that the full amount of the bid was not collected."

The purchaser at the sale, and the plaintiffs in the action are made defendants in error. The record shows all the facts necessary to a final determination of the case. No appearance was made in any branch of the proceedings in the lower court by the defendants, and no exceptions saved, but it has frequently been held by the Supreme Court of Kansas and this court that errors appearing upon the face of the record may be re-

viewed, although no formal exceptions were saved. *Dexter v. Cochran*, 17 Kan. 447; *Lenders v. Caldwell*, 4 Kan. 339; *Territory v. Caffrey*, 8 Okl. 193, 57 Pac. 204; *International Harv. Co. v. Cameron*, 25 Okl. 256, 105 Pac. 189; and in *Ferguson v. Tutt*, 8 Kan. 370, it is held that:

"A sheriff's return on an order of sale, showing that he had collected money thereon, is a part of the record of the proceedings."

The rule laid down by Justice Tarsney, in *Territory v. Caffrey*, *supra*, is as follows:

"It may be conceded that the taking of exceptions and preserving the same is necessary to a review of the evidence, or upon the law as applied to the evidence, to preserve for review errors of law occurring on the trial, and that, generally, the rulings of the trial court must be excepted to at the time, and such exceptions be preserved, in order that such rulings may be considered on appeal; but there are exceptions to this rule, under which exceptions, in our view, this case may be considered. These exceptions are that exceptions are not necessary to enable the court to examine and correct errors apparent upon the record proper, and an exception is not necessary to enable the court to correct an error in the judgment, if such judgment is, upon its face, contrary to law. When the error in the judgment does appear in the record proper, the court will consider and correct it, although no exceptions have been taken."

Numerous authorities are cited in support of this rule.

[2, 3] The points contended for by counsel for plaintiffs in error are apparent upon the face of the record, but we cannot agree with counsel in their contentions. It appears that every step necessary to a regular and complete record in the trial court, including the sale and confirmation was taken, except as to the matter of appraisement of the land. There seems to be some uncertainty about that. This record is made on regular printed form, and is as follows:

Description of Property.	Appraisement.
The west half of the northwest quarter of section twenty-nine (29), township thirteen (13) north, range eighteen (18) east of the Indian base and meridian, in Muskogee county, state of Oklahoma.	\$1,200.00

From the face of this appraisement, it might seem that the full value of the land was fixed at \$1,200, but the entire record, including the petition, the mortgage, which is made a part thereof, the judgment and decree of foreclosure, the order of sale, the notice of sale, the return of the sheriff, and order confirming sale, all show that the land was to be, and was, sold subject to the \$900 mortgage. But suppose we admit for the sake of argument in support of counsel's contention that it was the intention of the appraisers to fix the value of the defendants' equity in the land at \$1,200. To our minds, that would be immaterial. The agreement between the parties as shown by the mortgage and the entire record is that the land should be sold without appraisement. The statute *supra* says that "where appraisement is waived, the land cannot be sold until six

months after the judgment, and must be sold without appraisement." Under the facts and the record in this case, if an order of sale had been issued prior to the expiration of the six months after judgment, and the land sold, such proceeding would certainly have been voidable, if not absolutely void, in the face of this record and the statute. The decree of foreclosure does not order the land appraised, but directs that it be sold "according to the provisions of law relating to the sale of real estate under execution." The contention of counsel is that the language here used impliedly directs that the land be sold under appraisement, but we do not so construe this language. That provision of the order of sale was entirely unauthorized, and should be treated simply as surplusage and disregarded, so far as it relates to, or might relate to, the contention of counsel for plaintiffs. If necessary, the decree could be modified by striking this particular provision from the journal entry, but, as we look at it, it is unnecessary. The entire record shows conclusively that this land should have been sold without appraisement. No appraisement was necessary; however, no harm was done by the appraisement. It was simply an unnecessary, unauthorized, futile act on the part of the clerk in putting it in the order, and in the sheriff in the appointment of the appraisers, and also in the appraisers in proceeding to appraise the land. In *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123, a case involving to some extent the question here presented, Justice Harlan says:

"The writ of seizure and sale directed the sheriff to seize and, after the legal delays, to advertise and sell, according to law. * * * The writ, it is true, did not in terms require the sale to be made without appraisement. * * * We think, in view of the petition and order for executory process, the words 'according to law' in the writ imported a sale in accordance with the stipulations of the mortgage and the prayer of the petition, viz. without appraisement."

So it may be said that the language used in this case, to be "sold according to the provisions of law," etc., imports a sale in accordance with the stipulation in the mortgage, to wit, without appraisement. But, as stated before, all of these acts were without authority of law; they were unnecessary, and will be treated as surplusage herein. Section 4791, Rev. Stat. 1910, Ann., provides:

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

And section 6005, same statute, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has

probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

After careful examination of the record, we are fully satisfied that no injustice has been done, and that no constitutional or statutory right has been violated. *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359; *St. L. & S. F. R. Co. v. Houston*, 27 Okl. 719, 117 Pac. 184.

No other errors being contended for, and it further appearing to the court that the judgment, sale, and information are regular and binding upon all the parties to the transaction, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

ARDMORE STATE BANK v. THOMPSON. (No. 6867.)

(Supreme Court of Oklahoma. Feb. 29, 1916.
Rehearing Denied May 8, 1917.)

(Syllabus by the Court.)

1. USURY \Leftrightarrow 138—RATE OF INTEREST—RECOVERY—STATUTE.

Section 1004, Rev. Laws 1910, provides that by contract parties may agree upon any rate of interest not to exceed 10 per cent. per annum; therefore, where by contract the borrower agrees to pay and the lender agrees to take a sum in excess of 10 per cent. per annum, and where such excessive amount has been paid, the contract is usurious as defined by section 1005, Rev. Laws 1910, and the party paying such usurious interest may recover in a proper action twice the amount of the entire interest so paid, as usury, instead of twice the amount of the interest paid, over and above the rate allowed by law.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 424.]

2. USURY \Leftrightarrow 142(1)—REQUEST FOR RETURN OF INTEREST.

When the contract is usurious as above set forth, and the borrower makes a written demand requesting the return of the whole interest so paid, instead of twice the interest paid, over and above the rate allowed by law, such borrower is within his rights.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 428, 429, 431.]

Commissioners' Opinion, Division No. 4. Error from County Court, Carter County; W. F. Freeman, Judge.

Action by E. H. Thompson against the Ardmore State Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnson & McGill, of Ardmore, for plaintiff in error. Fred C. Ryburn, of Ardmore, and Kelly Brown, of Muskogee, for defendant in error.

WATTS, C. Plaintiff in error appeals from a judgment of the county court of Carter county wherein it was held to pay \$120 and attorney's fee of \$50, because it had charged and collected \$60, which was more than the lawful rate of interest for the time a loan ran.

The parties do not differ as to the facts,

but the law is the bone of contention. After payment of the principal and the interest mentioned, and on January —, 1913, defendant in error served the following notice on plaintiff in error:

"To the Ardmore State Bank, Ardmore, Oklahoma—Gentlemen: I herewith make demand of you for the return to me of the sum of \$60.00 paid by me as interest on a certain note executed by me, and in your favor, bearing date of January 10, 1911, for the sum of \$300.00, numbered 4439, and which was paid by me and taken up on the 17th day of January, 1912.

"You are hereby notified that a failure on your part to return to me the interest so paid by me on said note, that I will proceed against you under the statutes of Oklahoma relating to usury"

—with which it refused to comply.

Revised Laws 1910 provide:

"Sec. 1004. *Legal and Contract Rates of Interest.*—The legal rate of interest shall not exceed six per cent., in the absence of any contract as to the rate of interest, and by contract parties may agree upon any rate not to exceed ten per cent. per annum. Said rates of six and ten per cent. shall be respectively, the legal rate and the maximum contract rates of interest.

"Sec. 1005. *Actions to Recover Forfeiture.*—The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract: Provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for return of such usury.

"Sec. 1006. *Attorney's Fee.*—In all cases where an action is brought by any person to recover the penalty prescribed by the preceding section the prevailing party in such action shall be entitled to recover, as part of the costs, a judgment against the other party to such action for a reasonable attorney's fee in a sum not less than ten dollars, to be fixed by the court, for the use and benefit of the attorney of record of the prevailing party, together with all costs."

[1] We think with one exception (the last proviso of section 1005) our statute is very similar to those of most of the states, as well as the statute of the United States. Rev. St. § 5198; U. S. Comp. St. 1901, p. 3493. We find minor changes here and there, but the object of all is a declared policy against "taking * * * or * * * charging" usury, and a penalty therefor. Section 1004, supra, uses the words "legal rate of interest shall not exceed." The first sentence of section 1005 uses the words "rate of interest greater than is allowed by the preceding section." The second sentence in section 1005 uses the words "in case a greater rate of interest has been paid," "receiving same," and "interest so paid," while the last proviso in said section uses the words "such usurious inter-

est" and "such usury," all of which, we think, are used synonymously and have the same interchanged meaning.

In order to reduce the section to simplicity, preserving, however, its meaning, as applicable to the facts in the instant case, eliminating so much of section 1005 as is surplusage, we quote:

"The taking * * * a rate of interest greater than is allowed * * * shall be deemed a forfeiture of twice the amount of interest * * * paid thereon.

"In case a greater rate of interest has been paid, the person * * * may recover from the person * * * receiving same, * * * twice the amount of the interest so paid: * * * Provided * * * before any suit can be brought to recover such usurious interest, the party * * * must make written demand for return of such usury."

But, as above pointed out, it can be seen that the words quoted may be transposed to other parts of the section and with but little or no change read therein effectively.

Eliminating the last proviso, which we have not found in any other statute, most of the states, as well as the Supreme Court of the United States (*Farmers' & Merchants' Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 25 Sup. Ct. Rep. 49, 49 L. Ed. 238), are in harmony. For instance, in *Waldner v. Bowden State Bank*, 13 N. D. 606, 102 N. W. 169, 3 Ann. Cas. 847:

"Error is also assigned on the charge of the court in respect to the amount recoverable when usurious payments have been accepted. The rule was given to the jury that twice all sums paid as interest were recoverable, if the transaction was tainted with usury. Defendant claims that twice the interest paid over and above the rate allowed by law can only be recovered back. A determination of this question requires a construction of our Code bearing upon the rate of interest allowed and the recovery of sums paid as interest when exceeding the sum allowed by law. Section 4064, Rev. Codes 1899, reads as follows: 'No person, firm, company or corporation shall directly or indirectly take, or receive, or agree to take or receive in money, goods or things in action or in any other way any greater sum or any greater value for the loan or forbearance of money, goods or things in action than twelve per cent. per annum; and in the computation of interest the same shall not be compounded. Any violation of this section shall be deemed usury: Provided, that any contract to pay interest not usurious on interest overdue shall not be deemed usury.' Section 4066, Rev. Codes 1899, reads: 'The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 4064, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred.' The latter section provides for a penalty for usurious transactions under two independent conditions: (1) When usury rests in contract, and has only been charged; (2) when it has been paid. In cases where usury has been charged and not paid, and the

usurer brings an action upon his contract, the illegality of the contract may be alleged as a defense, and, if proven, the entire interest due upon the contract becomes forfeited, and no recovery can be had upon the contract, except as to the principal sum loaned. In cases where the usury has been paid, and it is sought to recover back the sum paid as interest, a more difficult question is presented, as the meaning of the statute is not clear. By construing section 4066 in its entirety, we think the legislative intention was that all sums paid as interest, whether within or beyond the provisions of the statute, are recoverable in double the sums paid. It does not seem reasonable that the intention of the Legislature was that all interest was forfeited when it rests in contract merely, and that the illegal part only is forfeited if the debtor has paid the whole sum contracted to be paid as interest. The words 'the amount of interest thus paid' refer to the 'greater rate,' which includes a legal and an illegal rate, and they include the same sums as are included in the words 'the entire interest,' in the first part of the section. When recovery is allowed for the sum paid as a 'greater rate,' it includes a recovery for the whole sum paid, whether legal or illegal, and is the same as the entire interest contracted to be paid. Such is the construction generally given to statutory provisions identical or similar to section 4066 in other states, and this seems to us correct, although some cases hold to the contrary. The following cases sustain the construction which we have given to the statute: *Lebanon National Bank v. Karmany*, 98 Pa. 65; *National Bank v. Trimble*, 40 Ohio St. 629; *Smith v. First National Bank*, 42 Neb. 687, 60 N. W. 866; *Bank v. McInturff*, 3 Kan. App. 536, 43 Pac. 839; *National Bank v. Bollong*, 28 Neb. 684, 45 N. W. 164; *Colgin v. Bank*, 16 Tex. Civ. App. 346, 40 S. W. 634; *Watt v. First National Bank*, 76 Minn. 458, 79 N. W. 509; *Henderson National Bank v. Alves*, 91 Ky. 143, 15 S. W. 132; *Louisville Trust Co. v. Kentucky National Bank (C. C.)* 87 Fed. 143, and *Id. (C. C.)* 102 Fed. 442; *Hill v. National Bank (C. C.)* 15 Fed. 432."

In light of the above cases, we do not think the court erred in holding that the defendant in error was entitled to recover twice the amount of the entire interest so paid instead of twice the amount of the interest paid over and above the rate allowed by law.

[2] 2. Plaintiff in error finds fault with the notice served on him and says:

"It will be seen that defendant in error did not make a demand for the return of the usury before bringing his action, but that, instead, he made a demand for the return of the whole interest paid."

But, as above pointed out, the words "usury" and "whole interest paid" are used synonymously, equal to the same thing, and therefore equal to each other. We think the proviso requiring written demand before bringing suit was in a measure to relieve the person taking or charging the usurious interest by permitting him on demand in writing to return the whole interest collected and thereby save himself from twice the amount and an additional attorney's fee as a penalty, but as plaintiff in error did not take advantage of the option given by the law, he must suffer that which plainly follows.

After the borrower has done what the law requires and the lender does not act accord-

ingly, the hardship must be borne as additional punishment for the violation.

We therefore hold that the defendant in error was within his rights in his written demand requesting the return of the whole interest so paid, instead of twice the interest paid over and above the rate allowed by law. The judgment should be affirmed.

PER CURIAM. Adopted in whole.

WEATHERLY v. BRISTOW. (No. 6096.)
(Supreme Court of State of Oklahoma. March 7, 1916. Rehearing Denied March 21, 1916.)

(Syllabus by the Court.)

RECOVERY OF USURIOUS INTEREST.

Syllabus same as in *Ardmore State Bank v. E. H. Thompson*, 164 Pac. 977.

Commissioners' Opinion, Division No. 3. Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by Carrie Bristow against E. B. Weatherly. Judgment for plaintiff, and defendant brings error. Affirmed.

John F. Curran, of Enid, for plaintiff in error. A. L. Zinser, of Enid, for defendant in error.

RITTENHOUSE, C. It is contended that a written demand for the return of usury, as condition precedent to the commencement of an action under section 1005, R. L. 1910, should be for the return of the amount of interest received in excess of the legal rate, and not for the whole interest received. Subsequent to the filing of briefs, the case of *Ardmore State Bank v. E. H. Thompson*, 164 Pac. 977, was decided adversely to this contention.

The judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

HICKMAN et al. v. JACKSON et al.
(No. 7034.)

(Supreme Court of Oklahoma. Jan. 2, 1917. Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

GUARDIAN AND WARD — 15—BOND—OBLIGEE—ACTION.

Where a guardian's bond is made payable to the state of Oklahoma instead of to the county judge, as provided by law, held, same does not invalidate the bond, and if the condition of the bond substantially conforms with the statute, showing for whose benefit it was given, such party may maintain an action regardless of the obligee named therein.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 53-64.]

Commissioners' Opinion, Division No. 6. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by Stella Jackson, minor, by her

guardian and next friend, Henry Ramsey, against P. E. Hickman and James Johnson, sureties on the bond of Robert Maxwell, her former guardian. Judgment for plaintiffs, and defendants bring error. Affirmed.

Brook & Brook, of Muskogee, for plaintiffs in error. S. E. Gidney, of Muskogee, for defendants in error.

FREEMAN, C. On the 25th day of April, 1906, Robert Maxwell was duly appointed and qualified as curator of the estate of Stella Jackson, a minor, by the United States Court for the Western District of Indian Territory at Muskogee. After statehood, all the records of this cause were transferred to the county court of Muskogee county, as provided by law. Afterwards, in 1908, said Robert Maxwell, as curator or guardian, petitioned the court for the sale of real estate belonging to said minor, and on the 18th day of December, 1908, said petition was allowed directing that the said Maxwell execute an additional bond in accordance with the statute before making such sale. This bond was executed by giving P. E. Hickman and James Johnson, plaintiffs in error, as sureties. The bond was made payable to the state of Oklahoma, conditioned in accordance with the statute, and was duly approved by the county judge on the 16th day of January, 1909. The land was sold by Maxwell, but he failed to make any report thereof as required by law, and the court entered an order directing the said Maxwell to appear and render a final exhibit and accounting of the funds, moneys, and properties which he had received as curator or guardian of said estate, and it further ordered that in case said Maxwell should fail to appear and render a final exhibit at said time, that a hearing would be had on a certain date, which was done, and the amount due by the said Maxwell to said estate determined.

In August, 1913, Henry Ramsey was appointed by the court as guardian of the person and estate of said minor, after the said Maxwell had been removed, and Stella Jackson, the minor, by her next friend and guardian, Ramsey, instituted suit in the superior court of Muskogee county on the bond above referred to. The defendants, plaintiffs in error, filed a general demurrer to the petition, which was overruled by the court. Later another demurrer was filed, specifically setting forth the grounds upon which the defendants relied, which was also overruled and exceptions saved. The defendants declined to plead further, and judgment was entered against them, from which judgment this appeal is prosecuted.

Plaintiffs in error contend that the bond executed by them was void because it was made payable to the state of Oklahoma instead of the county judge, as provided by the statute, and insisted that if it was valid, the

state of Oklahoma, and not the guardian, should have brought the suit for the use and benefit of the minor. We think the plaintiffs in error are wrong in both of these contentions.

The bond in question contained the following condition:

"Whereas, on the 18th day of December, 1908, an order was entered by the county court of Muskogee county, state of Oklahoma, authorizing the above-named principal as curator of the estate of Stella Jackson, a minor, to sell certain real estate belonging to the said estate, and providing therein that said Robert Maxwell should give an additional bond in the above-named sum (\$500.00) before making such sale:

"Now, therefore, if the said Robert Maxwell as such curator shall faithfully execute the duties of such trust according to law, then this obligation to be void, otherwise to remain in full force and effect."

The purpose for which this bond was given, and the party for whose benefit it was made, is clear.

The sureties on this bond, plaintiffs in error, cannot complain after the principal has failed to execute the duties of such trust according to law, because the bond was made payable to the state of Oklahoma instead of the county judge, for it is immaterial who was named as obligee, so long as the purpose and the real party in interest are manifest. This question was, we think, conclusively decided in the case of *Title Guaranty & Surety Company v. Slinker*, 35 Okl. 128, 128 Pac. 696. In that case suit was brought in the name of the minor by the guardian on a bond payable to the United States of America, which had been executed prior to statehood, and the contention was made there that the guardian had no right to bring the action, but that the same should be brought by the United States. Justice Kane, in rendering that opinion, held:

"A minor by his legal guardian may maintain an action on the official bond of a former guardian, although the bond, which was executed prior to statehood, was made payable to the United States of America."

And he quoted with approval from the case of *Crowell et al. v. Ward*, 16 Kan. 60, which was an action on a guardian's bond made payable to the state of Kansas, in which the Kansas court held:

"Indeed, she must do so if she is the only party in interest and for breaches of officers' bonds, executors' bonds, and administrators' bonds, any person injured may sue in his or her own name, although such bonds are executed in the name of the state as obligee. * * * We would therefore expect to find by an examination of the laws that any person injured by a breach of a guardian's bond would have a right to sue therefor in his or her own name. Such mode of procedure would certainly seem to come within the spirit of the laws of Kansas. * * * The bond in this case was executed in the name of the state as obligee. Such a bond we think is valid. But it might also be valid if it were executed in the name of the court, or the minor, or some one else, as obligee."

Later, in the case of *Lyons et al. v. Fulson*, 153 Pac. 868, this opinion was followed and approved.

We are of the opinion that the spirit of our law has been complied with, and as the conditions of the bond comply with the statute, the sureties who executed the same ought not to be permitted to escape liability on the claim that the bond is void, or that the suit should have been brought by the state of Oklahoma. It is very evident that if the suit had been brought as contended for by plaintiffs in error, it necessarily would have been for the use and benefit of this minor, because the state of Oklahoma had no interest in the controversy. The minor was the real party in interest, the conditions of the bond show that, and the action should have been brought in the name of the ward, the party in interest, no matter to whom the bond was made payable. It is therefore our opinion that said cause should be affirmed.

Plaintiffs in error insist in their brief that this cause was consolidated with another case styled "*P. E. Hickman and James Johnson v. Lizzie Jackson*," after judgment had been rendered in each case; but as we find nothing in the record with reference to this last case, except the order consolidating the cases, and as there are no assignments of error relating to the last case, there is nothing before this court to consider.

It further appearing to this court that the plaintiff in error executed a supersedeas bond when this appeal was taken, with John E. French and A. L. Gregory as sureties thereon, it is ordered and decreed that judgment be entered on said supersedeas bond against the plaintiffs in error and the said sureties for the amount of the judgment against the plaintiffs in error, together with interest and costs.

Judgment affirmed.

PER CURIAM. Adopted in whole.

ROGERS et al. v. RALSTON et al.
(No. 6934.)

(Supreme Court of Oklahoma. Feb. 13, 1917.
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

PARTNERSHIP \S 344—ACTION TO ESTABLISH PARTNERSHIP INTEREST—FINDING AND CONCLUSION OF LAW.

Record examined, and held: (1) That the findings of fact of the trial court are not clearly against the weight of the evidence; (2) that the trial court did not err in its conclusions of law.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. \S 813-818.]

Error from District Court, Nowata County; T. L. Brown, Judge.

Suit in equity by G. A. Rogers and O. O. Owens against John Ralston, in which on their motion J. H. Flippin, A. B. Crowell, F. M. Crowell, J. F. Flippin, and F. M. Reed, Jr., were made parties defendant. Judgment for plaintiff Rogers, directing the de-

defendants, other than Ralston, to execute to him an assignment of his interest, and judgment against plaintiff Owens, and plaintiffs bring error. Affirmed.

Rogers & Fulghum and McGuire & Devereux, all of Tulsa, and W. D. Humphrey, of Oklahoma City, for plaintiffs in error. Adams & Wills, of Claremore, for defendants in error.

KANE, J. This was a suit in equity, filed in the district court of Nowata county by G. A. Rogers and O. O. Owens, plaintiffs in error, plaintiffs below, against John Ralston, defendant in error, defendant below, the purpose of which was to establish a joint adventure, a joint undertaking, partnership, or trust relation between the plaintiffs, Rogers and Owens, and the defendant John Ralston, in relation to two oil and gas mining leases covering two separate and distinct tracts of land. After the commencement of the suit the other defendants named above, upon their motion, were made parties defendant upon their showing to the effect that they were the owners by assignment of the oil and gas mining leases involved in the controversy between Rogers and Owens and Ralston. Upon trial to the court there were findings of fact to the effect that the plaintiff O. O. Owens never at any time obtained any right, title, interest, estate, or claim in and to said oil and gas mining leases; that the plaintiff G. A. Rogers and the defendant John Ralston entered into a certain agreement whereby Ralston became entitled to an undivided three-sixteenths interest in and to the lease covering one of the tracts of land. Upon these findings of fact the court made conclusions of law to the effect that the plaintiff O. O. Owens take nothing by his suit, that the plaintiff G. A. Rogers is the owner of and entitled to an undivided three-sixteenths interest in and to one of said oil and gas mining leases, and that the defendants J. H. Flippin, Allie B. Crowell, F. M. Crowell, J. F. Flippin, and F. M. Reed, Jr., are directed and ordered to execute to said Rogers an assignment for said interest. From this action of the court Rogers and Owens prosecuted this proceeding in error.

Counsel for plaintiffs in error in their brief present their grounds for reversal under three subheads, entitled "Point One," "Point Two," and "Point Three." As point 1 and point 2 relate exclusively to the sufficiency of the evidence to sustain the findings of fact of the trial court, all that we deem it necessary to say in relation to them is that we have carefully examined the voluminous record in the case, and have reached the conclusion that the findings of fact of the trial court are not clearly against the weight of the evidence. All of the evidence taken at the trial is presented to this court for review in two large volumes, and no useful purpose could be subserved by attempting to set it out in

this opinion at any great length. It is sufficient to say of it that at all material points it is irreconcilably conflicting, and, not having the advantage of hearing the witnesses testify and noting their demeanor upon the stand, as the trial court did, we are not disposed to disturb the judgment rendered upon the ground that it is clearly against the weight of the evidence.

Point 3 is as follows:

"The trial court erred in its application of the law to the following finding (page 471): 'The court further finds that on or about the 25th day of October, 1913, the defendant John Ralston and the plaintiff G. A. Rogers entered into a joint parol agreement and understanding whereby they were to procure an oil and gas mining lease upon the following described real estate, to wit: The east half of the northeast quarter of section 10, township 28 north, range 14 east, situated in Nowata county, state of Oklahoma.' But the court further finds that the plaintiff O. O. Owens was no party to said contract, and never at any time obtained any right, title, interest, estate, or claim in and to said oil and gas mining lease; and the court further finds that, after the procurement of said oil and gas mining lease last above described, the plaintiff G. A. Rogers and the defendant John Ralston entered into a partnership arrangement, whereby said parties to said lease agreed to sell and dispose of an undivided five-eighths interest in and to said oil and gas mining lease for the purpose of having the same drilled for oil and gas. The court further finds that, after the taking of said above-described oil and gas mining lease last above described, the said defendant John Ralston caused to be erased from said lease the name of the said plaintiff G. A. Rogers, and that the erasure of the name of said plaintiff G. A. Rogers was unauthorized by said plaintiff G. A. Rogers; that thereafter the defendant John Ralston, in pursuance of the aforesaid partnership arrangement existing between him, the said John Ralston, and the plaintiff G. A. Rogers, did sell, set over, and assign unto the defendants the whole of said oil and gas mining lease last above described, as has been more fully set out herein; that said defendants became invested with a five-eighths undivided interest in and to said oil and gas mining lease, and that the plaintiff G. A. Rogers is, by reason of the partnership agreement existing between him and the defendant John Ralston, relative to the sale of the five-eighths undivided interest in and to said oil and gas mining lease, estopped from claiming more than an undivided one-half interest in the remaining interests of said oil and gas mining lease, to wit, an undivided one-half of an undivided three-eighths interest in said oil and gas mining lease."

From counsel's argument of this point in their brief, it is a little difficult to gather the precise question of law they wish to present for review. If we understand them correctly, their contention is that, inasmuch as the court found that Ralston and Rogers entered into a partnership agreement whereby they were to procure the oil and gas mining lease, in which the court found Rogers had an undivided one-half interest, it was error to hold that he was estopped to claim more than an undivided one-half of an undivided three-eighths interest in said oil and gas mining lease. This seems to be the interest that Rogers would be entitled to according to his own version of his contract with Ralston.

The arrangement between Rogers and Ralston, as detailed by Rogers, was that they should procure the leases, each putting into the enterprise an equal amount of cash. But it was also well understood that it would be necessary for Ralston and Rogers to dispose of five-eighths of the lease to other parties, in order to raise sufficient funds to develop the property, and that they were to retain only the remaining three-eighths interest. On this point Rogers testified:

"Q. You say it was the original agreement between you and Mr. Owens and Mr. Ralston that you were to sell five-eighths and retain three-eighths? A. Yes, sir. Q. You didn't intend to derive any profits from the five-eighths? A. No, sir. We wanted just enough money to drill the well, and the parties all agreed to pay it."

This evidence, no doubt, furnished the basis for the court's finding that Rogers was entitled to only an undivided one-half of the remaining three-eighths interest. We are unable to perceive any error in this conclusion.

For the reason stated, the judgment of the court below is affirmed. All the Justices concur.

NORTH RIVER INS. CO. OF NEW YORK v. O'CONNER. (No. 7258.)

(Supreme Court of Oklahoma. July 11, 1916.
On Rehearing, May 22, 1917.)

(Syllabus by the Court.)

INSURANCE §378(3), 390—FIRE INSURANCE—
KNOWLEDGE OF AGENT—IRON SAFE CLAUSE
—ESTOPPEL.

The local agent of a fire insurance company having power to accept a risk and countersign and deliver a policy, with full knowledge that assured has no fireproof safe, but at the time was keeping and purposed thereafter to keep his books and inventories in the same building with the insured property at night, represented both before and after the execution and delivery of the policy that, if the assured slept and continued to sleep in said building, it would be unnecessary to keep such books and inventories in a fireproof safe or at some other place at night, but the fact that assured slept in the building was sufficient compliance with the terms of the policy. Relying upon such representations, assured paid the premium, accepted the policy, and kept his books and inventories at night in the building where he slept, and was sleeping when fire communicated from another building destroyed the property insured, together with his books and inventories. *Held*, that the knowledge of the agent was the knowledge of and binding upon the principal; and, having under such circumstances received and retained the premium, recognizing the existence and validity of the contract until loss had occurred thereunder, that notwithstanding the provisions of the policy requiring that such books and inventories be kept at night in a fireproof safe or at some other place not exposed to fire which would ignite or destroy such building, and in case of loss be produced for inspection, and that no officer or agent could waive any provision or condition of the policy, the company will not be permitted to escape liability by denying the integrity and repudiating the acts of its agent, but is estopped

to invoke in avoidance the very thing such agent represented to be compliance with the contract. [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 969, 971, 973, 974, 977-997, 1037, 1038.]

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Pat O'Conner against the North River Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilson & Tomerlin, of Oklahoma City, for plaintiff in error. Scothorn, Caldwell & McRill, of Oklahoma City, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Oklahoma county by Pat O'Conner to recover against the North River Insurance Company of New York on a standard form policy issued by it insuring him against loss or damage by fire to a certain stock of merchandise in the sum of \$1,000. The parties appear and are referred to here as in the trial court. Plaintiff recovered, and defendant has appealed. Fire originating in another building was communicated to that in which the stock covered by the policy was situated, causing loss of more than \$5,000. The policy contained what are commonly known as the "inventory, book warranty, and iron safe clauses," and provides:

"The assured will keep such books and inventories, and also the last preceding inventory, securely locked in a fireproof safe at night and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories at night, and at all such times, in some place not exposed to fire which would ignite or destroy the aforesaid building; and in case of loss the assured specifically warrants, agrees and covenants to produce such books and inventories for the inspection of said company.

"In the event of failure on the part of the assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.

"This policy is made and accepted, subject to the following stipulations and conditions together with such other agreements or conditions as may be indorsed thereon, or added hereto, and no officer, shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provision and condition, no officer, agent or representative shall have such power or be deemed to have held or waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privileges or permission effecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

"This policy shall not be valid until countersigned by the duly authorized agent of the company at Geary, Okla., this 23d day of November, 1912. H. G. Bailey, Agent."

parent that the policy sued on was blank form, signed by the president of the company, and filled in, signed, and delivered by its agent. It failed to comply with the provision of the "iron safe clause," and his iron safe and books were destroyed with the merchandise. It is pleaded and admitted that with specific knowledge of the plaintiff had no fireproof safe in which to keep his books and inventories, but he did not intend to keep same at some place not exposed to fire which might destroy the building in which the property was located, but, on the contrary, he purposed to keep such books and papers at night in said building, where his wife slept, the agent of defendant represented to plaintiff, both before and after the complete execution and delivery of the policy, that if he and his wife did not continue to sleep in said building, he did not be required to keep his books and inventories in a fireproof safe, or at some place at night; that the fact of his sleeping in such building was a sufficient compliance with the terms of the policy; that he relied upon such representations and acted thereby to accept the policy, pay premium therefor, and keep his books and inventories in such building at night when he and his wife continued to sleep.

The question presented for our consideration is whether the knowledge and representations of its local agent who was authorized to issue the policy are binding upon the defendant.

Western Nat. Ins. Co. v. Marsh, 34 Okl. 25 Pac. 1004, 42 L. R. A. (N. S.) 991, cites hundreds of authorities are collated, and conclusion on a policy containing the provisions:

"This entire policy, unless otherwise provided to the contrary, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property insured in whole or in part by this policy"

was held:

"When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy, is advised of the full knowledge of the fact that other insurance upon the property is in force, and that knowledge accepts the premium and issues the policy, such policy is binding upon the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent to indorse on the policy, and notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy."

and in the body of the opinion it is said:

"* * * If, therefore, this agent has authority to make the contract of insurance, and authority to indorse thereon the consent of the company to the existence of other insurance, it is to us that when he is advised of this other insurance, and has full knowledge thereof, and issues and delivers the contract and receives

the premium from the insured, the company is bound by his knowledge, and that it is immaterial whether we call it a waiver or an estoppel, or any other name."

In *Germania Fire Ins. Co. v. Barringer*, 43 Okl. 279, 142 Pac. 1026, it is held:

"Where the local agent of a fire insurance company, who has power to accept the risk and deliver the policy of insurance, at and prior to the time of its delivery in renewal of another policy has knowledge of the fact that, intermediate the time of the issuance of the original and renewal policy, the title to the property whereon the insured building was located had changed, assuming that fact to be material to the risk, and that the insured failed to mention that fact at the time of the delivery of the renewal policy, held that, after having received the premium and delivered the policy, the same is binding upon the company, notwithstanding the fact that it contains a provision that none of the company's officers or agents can waive any of the provisions, except in writing indorsed on the policy."

In *Springfield Fire & Marine Ins. Co. v. Halsey* (not yet officially reported) 153 Pac. 145, it is held:

"When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy is advised and has full knowledge of the fact that a portion of the property insured is incumbered by a chattel mortgage, and with that knowledge accepts the premium and delivers the policy, such policy is binding upon the company notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy."

In *Conley v. Northwestern Fire & Marine Ins. Co.*, 34 Okl. 749, 127 Pac. 424, it is held:

"In an action brought on a fire insurance policy written prior to statehood in the Indian Territory, it was alleged in the petition that the defendant company knew that the fee-simple title to the land upon which the insured building was situated was in the Choctaw and Chickasaw Tribes of Indians, and not in the plaintiff, and that defendant company for a long time prior thereto had been engaged in the fire insurance business in said territory, and had full knowledge of the character of land titles therein, and that thereby the condition of the policy with reference to sole and unconditional ownership and fee-simple title to the plaintiff was waived. Held, that the petition stated a good cause of action, and that the court committed reversible error in sustaining defendant's demurrer to plaintiff's petition. Under the facts charged, the defendant company was estopped from claiming a forfeiture under the terms of the policy."

See, also, *Rochester German Ins. Co. v. Rodenhouse*, 36 Okl. 378, 128 Pac. 508.

In the instant case the insurer appointed an agent, vouching, impliedly at least, for his competency and trustworthiness, who, with full knowledge of all the facts which might, and now are, insisted upon to avoid the same, completed the execution and delivered the policy in suit to the assured, who, relying upon the truth of the representations of such agent, was induced thereby to pay the premium, accept the policy, and pursue a course of conduct conformable to such representations, believing himself indemnified. In such circumstances, where the company has

received and retained the premium recognizing the existence and validity of the contract until loss has occurred thereunder, it will not be thereafter permitted to escape liability by denying the integrity, and repudiating the acts of the agent. The company is estopped to invoke in avoidance the very thing its agent represented to be compliance with the contract.

In *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356, 15 N. E. 166, it is held:

"A waiver by an insurance agent duly authorized to issue and deliver policies and receive premiums of the conditions of a printed slip, attached to the policy and signed by the agent alone, and providing that the policy shall be void for failure to keep the inventories and books of the assured in a fireproof safe, is binding upon the company."

See, also, *Carp v. Queen Ins. Co.*, 116 Mo. App. 528, 92 S. W. 1137.

It will be seen from the foregoing decisions that the established rule in this jurisdiction is that the knowledge of an agent of a fire insurance company who has power to accept a risk and countersign and deliver a policy of insurance is the knowledge of and binding upon the company, and, notwithstanding provisions to the contrary in the policy, may waive compliance with certain of its terms on the part of the assured, or may estop the company to insist upon a forfeiture for failure to comply therewith. Such rule must on principle apply alike to all provisions of the contract inserted for the benefit of the company including the "iron safe clause."

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

On Rehearing.

HARDY, J. On rehearing it is urged that the opinion by the commission has not passed upon the real question claimed to be decisive of this case, viz. that the alleged agreement of the agent who countersigned and delivered the policy was a parol variance of a written contract, and that the opinion is in conflict with prior and controlling decisions of this court which have been overlooked. The decisions referred to are in cases where the contract of insurance was written prior to statehood, at which time the rights of the parties were determined by the rule announced by the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, which was held to be controlling or in cases not involving insurance contracts. In all of that class of decisions affecting insurance contracts relied upon the question as to whether the court would follow the same rule was reserved with reference to contracts made after statehood. The opinion of the commission discloses that this court has declined to follow the rule in cases involving contracts made after the admission of the state. The

present case is not different in principle from those cited in the opinion where the issuing agent, with authority to countersign and deliver the policy, did so with knowledge of an existing incumbrance or of concurrent insurance or of a breach of the warranty of title. The agent was informed prior to and at the time the policy was delivered that the insured possessed no iron safe, and had been in the custom of sleeping in the rear of the store building where the books were kept. When the agent, with knowledge of these facts, delivered the policy and accepted the premium, this constituted a waiver of this condition, and the company is precluded from setting up failure to comply therewith as a forfeiture of the policy. *Sprott v. New Orleans Ins. Assn.*, 53 Ark. 215, 13 S. W. 799; *Bush v. Mo. Town Mut. Ins. Co.*, 85 Mo. App. 155; *Rudd v. Am. Guar. Fund. Mut. Fire Ins. Co.*, 120 Mo. App. 1, 96 S. W. 237; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720, 33 South. 500; *Mitchell v. Miss. Home Ins. Co.*, 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 65 S. W. 611, 99 Am. St. Rep. 295; *Home Ins. Co. v. Gurney*, 56 Neb. 306, 76 N. W. 553; 3 *Cooley's Briefs on Ins.*, 2644.

In *Rudd v. American Guaranty Fund Mutual Fire Insurance Co.*, 120 Mo. App. 1, 96 S. W. 237, defendant claimed that the oral assent by its agent to plaintiff's keeping his books and inventories in the storeroom and exposed to destruction by a fire which would destroy the merchandise was given during the negotiations for insurance and anterior to the delivery of the policy, and that such oral agreement was superseded by the policy which when delivered became the sole evidence of the contract. It was held that the trial court committed no error in refusing to instruct a verdict for the company, because plaintiff failed to preserve his books and inventories safe from fire, and instructed that, if he communicated to the agent the facts regarding his inability to comply with the iron safe clause, and the agent consented to waive compliance, the failure of plaintiff to comply therewith was not a defense.

Mitchell v. Mississippi Home Insurance Co., 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535, involved the same question. The trial court refused to permit appellant to file a replication to a plea setting up a failure to comply with the iron safe clause. Her replication alleged, in substance, that when the contract for insurance was made the defendant knew that plaintiff had no safe and did not intend to procure one, and that plaintiff intended to keep her books in the store and at her dwelling house just as they were kept when the contract of insurance was made. The refusal of the court to permit this plea to be filed was held error, and in so holding the court said:

"To ask us to hold that an insurance company shall ostensibly contract for keeping an inventory and books of account in an iron safe, or at some secure place apart from the premises on which the property insured is kept, and yet, with full knowledge that the insured had and intended to have no safe, and with full knowledge that such inventory and books of account had been kept and were to be continued to be kept, at the store, to receive the insured's premiums as for a valid policy, the company intending to deny its validity if loss should occur, is to ask us to sanction trickery and fraud. The insurer cannot be permitted to collect premiums with full knowledge of the existence of facts which might avoid the policy, and with full knowledge of the insured's purpose to continue, in disregard of a provision working a forfeiture, to conduct the business as theretofore in such disregard. We cannot legalize by our sanction such perfidy."

The Supreme Court of Nebraska in *Home Fire Ins. Co. v. Gurney*, 56 Neb. 306, 78 N. W. 553, considered a similar question. The plaintiff in that case had told the agent of defendant that he had no safe and had no place to keep the books other than his store and was informed by the agent that it would make no difference, and upon this statement the plaintiff paid and the company received the premium for the policy, and it was held that the company was bound thereby. We are not without authority upon this question in this state. While not involving the precise facts, the case of *Scottish Union & National Ins. Co. v. Cornett Bros.*, 42 Okl. 645, 142 Pac. 315, supports the conclusion of the commission. In that case it was said that the company should be held to have waived the iron safe clause because the agents who issued the policy had knowledge that the insured had no iron safe, and for that reason kept the policy in their own safe for safe-keeping for the insured, but these facts were held not sufficient to constitute a waiver of the provision for keeping the books and inventories safe from loss by keeping them in a safe place elsewhere. The policy of the law in this state is well summed up in *Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134, in the third paragraph of the syllabus, as follows:

"Any agreement, declaration, or course of action on the part of the insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract."

We think the commission has reached the correct result, and that its opinion should be approved. When the agent, with full knowledge of the facts, accepted the premium and delivered the policy, he was acting for the company with authority to waive any provision of the policy and knowledge imparted to him was notice to the company, and with that notice and knowledge it accepted and retained the premium paid by plaintiff, and will not now be heard to urge a forfeiture

of the policy because of the failure of plaintiff to comply with a provision thereof which has been waived.

The rule which defendant urges does not apply upon the state of facts here presented, and the petition for rehearing is therefore denied. All the Justices concur.

CITY OF TULSA et al. v. McCORMICK.
(No. 8487.)

(Supreme Court of Oklahoma. April 24, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §430—PUBLIC IMPROVEMENT—ASSESSMENT—"BLOCK."

The charter of the city of Tulsa provides that the board of commissioners shall have power to assess the whole cost of construction of improvements of streets, avenues, and area of street intersections, etc., against the owners of property abutting upon the street improved, who are benefited thereby, and in apportioning the cost thereof requires that each quarter block shall be charged with its due proportion of such cost, which shall be apportioned among the lots or subdivisions of such quarter blocks according to the benefits received. *Held*, that same should be construed to mean that for the purpose of taxing for improvements of streets, all property is subject to assessment which is included between lines drawn parallel with the street improved and back from it one-half block on each side (citing Words and Phrases, "Block").

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1040.]

2. MUNICIPAL CORPORATIONS §437—STREET IMPROVEMENTS—SPECIAL ASSESSMENT.

It is the purpose of the law authorizing the improvement of streets and avenues of cities and towns by special assessment to require that all property benefited thereby shall be taxed in proportion to the benefits received.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1061.]

3. CONSTITUTIONAL LAW §290(2)—MUNICIPAL CORPORATIONS §407(1)—ORDINANCES—DUE PROCESS OF LAW—SPECIAL ASSESSMENT.

An ordinance levying assessments to pay for the cost of constructing certain paving upon the streets of the city of Tulsa which creates arbitrary differences in the property to be assessed without regard to the benefits received and which permits certain property benefited to wholly escape assessment violates section 7, art. 2, Wms. Ann. Const., and the Fourteenth Amendment to the Constitution of the United States.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871, 873; *Municipal Corporations*, Cent. Dig. § 1003.]

Error from District Court, Tulsa County; Conn Linn, Judge.

Action by F. P. McCormick against the City of Tulsa, J. H. Simmons, Mayor, A. L. Funk, and others, members of its board of commissioners. Judgment for plaintiff directing the passage of an assessment ordinance, and defendants bring error. *Affirmed*.

John B. Meserve, City Atty., and John R. Woodard, Asst. City Atty., both of Tulsa, for plaintiffs in error. Randolph. Haver & Shirk, of Tulsa, for defendant in error.

HARDY, J. The city of Tulsa, operating under a charter form of government, contracted with F. P. McCormick to construct certain paving upon certain streets and avenues within the city, which work has been performed according to contract and accepted by the city. After the completion and acceptance of the work, McCormick requested the board of commissioners to pass an assessment ordinance and to issue to him tax bills pursuant thereto. In response to this request, the board of commissioners adopted a resolution in which it was recited that the contract had been completed and the work accepted, and that the apportionment of the costs of the work against the property benefited thereby as provided in the ordinance proposed was just and equitable, but refused to pass the ordinance on the ground that it would be in excess of the power of the city to make the assessment as provided therein, because of the previous decisions of this court in *M., K. & T. Ry. Co. v. Tulsa*, 45 Okl. 382, 145 Pac. 398, and *Flanagan v. City of Tulsa*, 155 Pac. 542. They offered, however, to pass an ordinance assessing the cost of such improvements in a manner different from that provided in the ordinance, which plaintiff desired to have passed. By direction of the board of commissioners, the city attorney entered into an agreed statement of facts upon which this case was submitted. The lower court found that it was within the jurisdiction of the city to enact, and directed the passage of the ordinance requested by plaintiff.

[1] The question to be determined is, How should the assessments for the cost of the improvements be distributed? The charter authorizes the board of commissioners to assess the whole cost of the construction against the owners of the property abutting upon the streets involved, who are specially benefited thereby, in apportioning the cost of the improvements requires that each quarter block shall be charged with its proportion of the cost of paving the front and side streets of each block, together with the area of the street intersections, etc., which cost shall be apportioned among the lots or subdivisions of such quarter blocks, according to the benefits of each lot or parcel. The city insists that in construing the charter the word "block" must be construed to mean a platted block, as found in the recorded plat of any particular addition or subdivision of the city, as laid off and platted by the person platting and subdividing the same, whether such platted block shall conform to the ordinary city block or not, while plaintiff contends that the word "block" should be given its ordinary meaning when used to designate a portion of a city; i. e., one of the smallest portions of a city, surrounded by streets or avenues. The charter contains no definition of the word, but in the case of *M., K. & T. Ry. Co. v. Tulsa*, the word was defined thus: "A

'block' or 'square' is a portion of a city bounded on all sides by streets or avenues." And this definition is in accord with that generally given in the authorities. Words and Phrases; 1 Page & Jones, *Taxation by Assessment*, 1064; *Fraser v. Ott*, 95 Cal. 661, 30 Pac. 793; *City Street Imp. Co. v. Laird*, 138 Cal. 27, 70 Pac. 916; *Bowlus v. Iola*, 82 Kan. 774, 109 Pac. 405. In the case of *M., K. & T. Ry. Co. v. Tulsa*, the railway company sought to enjoin the collection of assessments on certain lots within the north half of blocks 15 to 21, both inclusive, which abutted north on Fourth street, and south on Cameron street, both of which streets ran east and west. Said blocks were separated by streets which intersected Fourth and Cameron streets at right angles; Cincinnati avenue intersecting said streets between blocks 21 and 22. The company's right of way ran east and west over the north half of these blocks, and covered the lots upon which the assessment was sought to be levied, and also included Fourth street, which had been vacated for right of way purposes. The city contended that by the vacation of Fourth street each of the blocks from 15 to 21, both inclusive, and the corresponding block north of said vacated street, became one block for assessment purposes, and that as the company's lots were within the south half of the block thus formed, they were liable to the special assessment to pay the costs of paving Cameron street. This contention was denied, and in the opinion it was said:

"In other words, the charter means that, for the purpose of taxing for improving Cameron street, the taxing district shall include all the property between lines drawn parallel with that street and back from it one-half block on each side."

An additional reason for the conclusion of the court in that case was stated thus:

"Blocks 15 to 21, both inclusive, appear upon the official plat as blocks, and as blocks they should have been considered by the taxing power of the city in fixing the taxing district. In other words, in so doing, the official plat of the city should have governed, and the north line of the taxing district drawn so as to divide blocks from 15 to 21, both inclusive, equally north and south."

It appeared in that case that the original plat showed blocks 15 to 21 to have been designated thereon as separate blocks, and that Fourth street along the north line of said blocks had been vacated; but it was held that this did not change the situation, nor authorize the property to be assessed in a manner different from that which would have been permitted, had Fourth street not been vacated. In *Flanagan v. Tulsa*, the plaintiff owned lot 8 in block 3 of the Hodge addition. Block 6 of said addition lay immediately south of block 3. These blocks were platted, and were of the same size as ordinary blocks of the city. Block 3 was bounded on the north by East First street, on the east by Madison avenue, on the south by block 6, and on the west by Lansing ave-

nue. Block 6 was bounded on the north by block 3, on the east by Madison avenue, on the south by Third street, and on the west by Lansing avenue. East Second street ran from some point east of these two blocks west to the center thereof. In the fall of 1911 the city undertook to pave said First street from Madison avenue to Lansing avenue, and for that purpose created improvement district No. 58-A. At that time East Second street had not been opened or extended between blocks 3 and 6, and the city in determining the assessable territory to pay for the paving of said First street treated and considered blocks 3 and 6 as one block, and attempted to assess a portion of the costs against lot 8, which was in the southwest corner of block 3. The court held that this could not be done. It was stated in the opinion:

"We therefore conclude that the defendant city, in determining the assessable territory of said improvement district, did not have the power to treat blocks 3 and 6 as one block, but that it was its plain duty to be governed by the platted blocks, and that, even though East Second street was not extended between blocks 3 and 6, it should have treated it as constructively extended for the purpose of determining the assessable territory in said improvement district. Lot 8 is not within the assessable territory, and is therefore not liable for any portion of the cost of improving East First street."

The conclusion in each of those cases is undoubtedly correct upon the facts presented, but the city now contends that because of the expressions used therein, where it was said that the block should be considered as the platted block, it follows that whether the platted block conformed to the block, as that term is ordinarily understood, the authority of the city is limited and controlled by the platted block. This does not necessarily follow. It was not the intention of the city in adopting its charter provision to so declare, nor would such a construction thereof bring about a result that would be equitable and just. The general thought running through all laws authorizing the improvement of streets and avenues by special assessments therefor is that all property benefited by the improvements shall be taxed to pay therefor, and this principle applies with special force where the territory contiguous to the public way improved is divided into squares by streets and avenues. *Engelhard et al. v. Kentucky & Ind. Const. Co.*, 162 Ky. 774, 173 S. W. 131.

[2, 3] It is admitted that the assessments provided by ordinance which the city refused to enact showed due regard to and is governed by the benefits conferred by the improvements constructed on the property assessed, while under the ordinance the board offered to pass the assessments in some instances exceed the value of the property assessed, while in other cases property clearly benefited and clearly within the natural block escapes assessment entirely, and in some in-

stances the rule is wholly incapable of application, as may be illustrated where the paved street has been projected through a platted block, leaving parts of the block on each side of the street. Another result which would follow the passage of the latter ordinance is that some property which would be benefited by paving the streets surrounding the block of which it forms a part would not be subject to assessment for any part of such paving. This situation may be fairly illustrated by the four city blocks lying between Sixteenth and Eighteenth streets, running east and west, and between Main street and Boston avenue, running north and south. Seventeenth street runs east and west, and divides the blocks north and south, while Baltimore avenue runs north and south, and divides the blocks east and west; the south half of that block lying between Sixteenth and Seventeenth streets, and between Main street and Baltimore avenue is designated as block 1 of the Harbour addition, while the north half is designated as blocks 2 and 6 of the Stansbury addition. The rule contended for by the city would result in an assessment for paving on Seventeenth street extending north from that street 150 feet to a line drawn east and west through the middle of block 1 of Harbour addition, thereby excluding from taxation for such paving the north half of said block 1 of Harbour addition, although said territory is in fact embraced within the south half of said city block. The same result would be reached in the north half of the block. A like situation would also arise in all four of the blocks embraced within the territory mentioned. The property subject to assessment for paving on Roosevelt avenue under the theory of the city would extend south of that street approximately 150 feet, while on the north it would extend to a distance of about 35 feet. The north boundary of the property assessed for paving on Thirteenth street extends in some places a distance of 115 feet from Thirteenth street, and drops immediately to approximately 33 feet, and then immediately rises again to about 115 feet, without any consideration of difference in the benefits conferred, and the south boundary of the property assessed for improvements on Thirteenth street is even more variable because of the same arbitrary rule. A construction of the city charter which would require the enactment of an ordinance assessing benefits upon this rule would be contrary to section 7, art. 2, Wms. Ann. Const., and the Fourteenth Amendment to the Constitution of the United States.

In *Gast Realty & Inv. Co. et al. v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523, the Supreme Court of the United States reversed a judgment of the Supreme Court of Missouri which had affirmed a judgment of the circuit court for the city of St. Louis, holding valid an assessment

ordinance of the city of St. Louis, which created a taxing district under the city charter whereby three-fourths of the costs of paving a street was assessed according to area, and established a boundary line that after running for some distance on a line not 100 feet back from the street, jumped to nearly 500 feet, where it encountered an undivided tract, and that on the opposite side of the street was 150 feet and 240 feet away; and it was held that this ordinance violated the Fourteenth Amendment to the United States Constitution, because such differences were not based upon any consideration of differences in benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The ordinance was referred to as a farrago of irrational irregularities throughout. In the ordinance which the board of commissioners offered to pass, the property to be assessed is mechanically determined, without any consideration of difference in the amount of benefits conferred, and results in many cases in unjust and oppressive assessments, and permits in others the escape of property benefited from any taxation whatever. The charter should be construed to prevent this result, and this may be done, and a just and equitable result arrived at, and the assessment to pay for such paving distributed over all the property benefited thereby, if the word "block" should be given its ordinary meaning as hereinbefore defined, and held to mean a portion of the city bounded on all sides by streets or avenues, unless under circumstances similar to those mentioned in the Missouri, Kansas & Texas Railway Company and Flanagan Cases, where injustice would result, and authority for applying a different rule in such circumstances is found in the proviso to section 6, art. 9, of the Tulsa Charter, which authorizes the board, in particular cases, where the rule we have announced would be unjust, to assess and apportion said cost in such proportion as to it may seem just and equitable, having in view the benefits received by the owner of such property.

The judgment is affirmed. All the Justices concur.

FILES v. DISTRICT JUDGE et al. (No. A-2918.)

(Criminal Court of Appeals of Oklahoma.
April 24, 1917.)

Prohibition by Bert Files against the District Judge and District Court of Garfield County. Demurrer to petition sustained, and writ denied. See, also, 162 Pac. 1136.

G. W. Buckner, of Enid, for petitioner. R. McMillan, Asst. Atty. Gen., for respondent.

PER CURIAM. Petition for writ of prohibition against the district judge and dis-

trict court of Garfield county, prohibiting further proceedings in two criminal cases, wherein petitioner was convicted, on the ground that by reason of former jeopardy said court had lost jurisdiction.

Demurrer to petition, interposed by counsel for the state, sustained, and writ denied.

Ex parte BEAL.

Ex parte IVERS.

(Nos. A-2896, A-2902.)

(Criminal Court of Appeals of Oklahoma.
April 16, 1917.)

Habeas corpus by A. L. Beal and by Sam Ivers against W. B. Nichols, Chief of Police of Oklahoma City. Writs allowed, and petitioners discharged.

Albert S. Gilles and J. D. Chastain, both of Oklahoma City, for petitioners. B. D. Shear, Municipal Counselor, and Frank Watson, both of Oklahoma City, for respondents.

PER CURIAM. Upon petitions alleging that they were illegally restrained of their liberty, writs of habeas corpus issued, directed to W. B. Nichols, chief of police of Oklahoma City, and in obedience to the same the petitioners were brought before the court and returns made to the writs.

Upon the hearing, for the reasons stated in the opinions in Ex parte Johnson, 12 Okl. Cr. —, 161 Pac. 1097, and Ex parte Monroe, 12 Okl. Cr. —, 162 Pac. 233, the writs were allowed, and the petitioners discharged.

Ex parte DIX. (No. A-2693.)

(Criminal Court of Appeals of Oklahoma.
April 16, 1917.)

Petition for bail by Mrs. J. W. Dix, held on preliminary examination to appear on a complaint charging her with murder. Petitioner admitted to bail, fixed at \$15,000.

Pruett & Sniggs, of Oklahoma City, for petitioner. R. McMillan, Asst. Atty. Gen., S. T. Roberson, Co. Atty., and E. F. Maley, Asst. Co. Atty., both of El Reno, for respondent.

PER CURIAM. The petitioner, Mrs. J. W. Dix, on a preliminary examination held to appear to the district court of Canadian county on a complaint charging that in said county on the 27th day of February, 1916, she did kill and murder one Henry Bausert by shooting him with a pistol, applied to this court for a writ of habeas corpus for the purpose of discharge on bail, upon the ground that she is not guilty, and upon the ground that the proof was not evident nor the presumption great, and does not even raise a presumption of guilt; that her ap-

plication to the district court of Canadian county was denied.

After a careful examination of the evidence offered, we are of opinion that the petitioner should be let to bail, and that her bail should be fixed at the sum of \$15,000. It is therefore ordered that the petitioner, Mrs. J. W. Dix, be and she is hereby admitted to bail upon the charge of murder now pending against her in the district court of Canadian county, and that her bail is hereby fixed at the sum of \$15,000, and that she be released from custody upon giving bond in said sum, conditioned as required by law.

WARD v. STATE. (No. A-2656.)

(Criminal Court of Appeals of Oklahoma.
March 10, 1917.)

Appeal from County Court, Pottawatomie County; Hal Johnson, Judge.

George Ward was convicted of violating the prohibitory law, and he appeals. Affirmed.

G. A. Outcalt, of Tecumseh, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, George Ward, was convicted at the December, 1915, term of the county court of Pottawatomie county, on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$50 and imprisonment in the county jail of Pottawatomie county for a period of 180 days.

An examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

HULSE v. STATE. (No. A-2703.)

(Criminal Court of Appeals of Oklahoma.
March 27, 1917.)

Appeal from County Court, Canadian County; R. B. Forrest, Judge.

James Hulse was convicted of violating the prohibitory law, and appeals. Affirmed.

J. N. Roberson, of El Reno, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was convicted upon a charge of having sold whiskey to one Tom Whiteshirt, and his punishment fixed at three months' imprisonment in the county jail and a fine of \$400. From the judgment rendered in pursuance of the verdict he appealed, by filing in this court on

April 8, 1916, a petition in error with case-made.

No brief has been filed, and on the call of the case for final submission the Attorney General moved that the judgment be affirmed for failure to prosecute the appeal. An examination of the record discloses that the evidence is ample to support the verdict, and, no error appearing that could affect the merits of the case, the judgment is affirmed.

Ex parte HAYES. (No. A-2539.)

(Criminal Court of Appeals of Oklahoma.
April 24, 1917.)

Buford Hayes applied for a writ of habeas corpus. Demurrer to petition sustained, and writ denied.

PER CURIAM. Demurrer to petition sustained, and writ denied.

Ex parte COX. (No. A-2654.)

(Criminal Court of Appeals of Oklahoma.
April 24, 1917.)

Application by W. G. Cox for a writ of habeas corpus to be let to bail. Writ denied, and bail refused.

Kennamer & Coakley, of Madill, for petitioner. R. McMillan, Asst. Atty. Gen., and George L. Sneed, Co. Atty., of Madill, for respondent.

PER CURIAM. This was an application to this court for a writ of habeas corpus for the purpose of discharge on bail.

It appears from the petition that upon a preliminary examination before Isaac O. Lewis, justice of the peace, of Madill, the petitioner, W. G. Cox, was held to the district court of Marshall county to answer upon a charge that he did kill and murder Marion Cox, his son; that he made application for bail before Jesse M. Hatchett, judge of the district court of Marshall county, at chambers, and the said judge refused to allow bail. It is further averred that petitioner is not guilty of said charge. Attached to said petition is the deposition of the petitioner, wherein he states that in a gun fight with another son, Oliver Cox, the said Oliver Cox fired the fatal shot.

Without entering into a discussion of the evidence, we deem it sufficient to say that upon a careful consideration of the same, we are of opinion that petitioner is not entitled to be admitted to bail as a matter of legal right.

It is therefore considered and adjudged that the writ be denied, and bail refused.

Ex parte DANIELS et al. (No. A-2531.)
(Criminal Court of Appeals of Oklahoma.
March 10, 1917.)

Habeas corpus by Eb. Daniels, Henderson Leopard, and James Blue against M. C. Binion, Sheriff of Oklahoma County. Writ discharged and petitioners remanded to custody of respondent.

Giddings & Lillard, of Oklahoma City, and Thos. Wallace, of Sapulpa, for petitioners. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. This is an application for writ of habeas corpus to prevent M. C. Binion, sheriff of Oklahoma county, from transferring and delivering Eb. Daniels, Henderson Leopard, and James Blue to the sheriff of Garvin county, Okl.; it appearing from the answer filed by respondent that the petitioners are held in custody by virtue of an order of the county judge of Garvin county, committing said petitioners to the custody of the sheriff of Oklahoma county, and that they are now held subject to the order of said court to answer a complaint wherein said petitioners are jointly charged with the crime of conjoint robbery.

The writ is discharged, and the petitioners are remanded to the custody of the respondent.

Ex parte FOSTER. (No. A-2798.)
(Criminal Court of Appeals of Oklahoma.
April 16, 1917.)

Application by O. F. Foster for writ of habeas corpus. Writ issued, directed to sheriff of Texas county, Okl., returnable to the district court of that county.

E. L. Fulton, of Oklahoma City, for petitioner.

PER CURIAM. Application of O. F. Foster for writ of habeas corpus presented to this court. Writ issued, directed to the sheriff of Texas county, Okl., and made returnable to the district court of Texas county, at 9 o'clock a. m., August 25, 1916.

FREELY v. STATE. (No. A-2568.)
(Criminal Court of Appeals of Oklahoma.
March 10, 1917.)

Appeal from County Court, Comanche County; R. J. Ray, Judge.

William Freely was convicted of violating the prohibitory law, and he appeals. Affirmed.

John A. Lenertz, of Lawton, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, William Freely, was convicted at the July, 1915, term of the county court of Comanche county, on a charge of having the unlawful possession of intoxicating liquor with intent to sell same. His punishment was fixed at a fine of \$50 and imprisonment in the county jail for a period of 30 days.

An examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

Mandate ordered forthwith.

JOHNS et al. v. LINN, District Judge.
(No. A-2698.)
(Criminal Court of Appeals of Oklahoma.
April 18, 1917.)

Petition of John T. Johns and others for writ of mandamus against Conn Linn, District Judge. Case dismissed by consent.

A. F. Moss, Ed. Crossland, and Pat Malloy, all of Tulsa, for petitioners. The Attorney General and R. McMillan, Asst. Atty. Gen., for respondent.

PER CURIAM. This was a proceeding in mandamus on behalf of John T. Johns, B. H. McLaughlin, Ben Green, C. H. Overton, R. J. Allison, and D. W. Moore, the defendants named in certain indictments returned and presented in the district court of Tulsa county, to require the respondent, Conn Linn, judge of said district court, to certify his disqualification to preside as such judge at the trials of said cases, on the ground of the bias and prejudice of said judge against the petitioners. The respondent filed an answer to the petition, denying that he entertained any bias or prejudice against said petitioners. The case was heard and submitted upon the pleadings and the evidence adduced. It now appears that the cases in question were assigned to another judge, and by agreement of the parties this case is to be dismissed.

The case is dismissed.

SPRADLEN v. STATE. (No. A-2399.)
(Criminal Court of Appeals of Oklahoma.
May 15, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1156(4)—APPEAL—DISCRETION OF TRIAL COURT—PREJUDICE OF JURY.

Where, in a motion for new trial on the ground that one of the jurors who sat in the case was prejudiced against the defendant and evidence is introduced both in support of and in opposition thereto, a question of fact is presented to be determined by the trial court. In the absence of a showing of abuse of discretion in this matter the judge's determination of this

question of fact will not be disturbed by the court on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070.]

2. CRIMINAL LAW § 1156(4) — APPEAL — GRANTING NEW TRIAL — ABUSE OF TRIAL COURT'S DISCRETION.

Where the evidence in support of a motion for a new trial, on account of the prejudice of a juror within the definition of actual bias, is clear and convincing, and the rebuttal evidence is doubtful and evasive, the refusal of the trial court to grant a new trial under such circumstances amounts to an abuse of discretion such as will authorize this court to reverse the judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070.]

Appeal from District Court, Bryan County; Jesse Hatchett, Judge.

J. E. Spradlin was convicted of embezzlement, and he appeals. Reversed.

W. E. Utterback and V. B. Hayes, both of Durant, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. Among other assignments of error it is alleged that the court erred in overruling the appellant's motion for a new trial. This motion was based upon several grounds, some of which we deem it unnecessary to discuss. Among others was the ground that one of the jurors, to wit, Frank Lewis, who sat in the case and acted as foreman of the jury, had, previous to his selection as a juror, expressed in effect an opinion that the defendant was guilty of the offense charged against him, and also had disclosed a state of mind which showed that he was biased and prejudiced against this defendant personally. That discovery of such prejudice was not made by counsel representing accused until after the jury had been selected and sworn and the trial was in progress. The trial progressed continuously, and was concluded in one day.

While counsel should have called this matter immediately to the attention of the court, and are subject to criticism for not so doing—is the fact that such was not done sufficient of itself to authorize this court to ignore the alleged fact that this juror was prejudiced and attribute the laches of counsel to the accused himself? It may be asserted that to reverse a judgment under these circumstances places a premium upon perjury and encourages deception and misconduct on the part of the sworn officers of the court. However true that may be, where the granting of a new trial for such reason rests within the sound discretion of the trial court, this court will not reverse the judgment of conviction, unless it appears clearly that there has been an abuse of such discretion. We have no apprehension of our ability to control such matters. The merits of such controversies are governed solely by the record in each case. Sharp practices and deception

by counsel on either side will not be tolerated or encouraged. Hereafter we advise counsel to call this matter to the attention of the trial court immediately upon its discovery, and if the trial is in progress an investigation may be had that will save both the state and the accused further annoyance and expense.

[1] After the presentation of the motion for a new trial the court heard evidence upon this assignment. Such procedure was proper. *Stewart et al. v. State*, 4 Okl. Crim. 564, 109 Pac. 243, 32 L. R. A. (N. S.) 505.

[2] It clearly appears by the testimony of witnesses in support of the motion for a new trial, all of whom were members of the bar, that this juror, although asked on his voir dire examination if he had expressed any opinion as to the guilt or innocence of this defendant, and also whether he had any prejudice against the defendant indicated in his answers that he had not expressed any opinion as to the guilt or innocence of the defendant, and also that he was not prejudiced against the defendant personally. It also appears, and is undisputed, that the counsel for defendant, who were actively engaged in the trial of the case, had no knowledge previous to the trial of the alleged fact that this juror had made the expressions attributed to him by the witnesses. One of these witnesses swears positively that this juror on the morning of the day that the case was called for trial, and on his way to the courthouse, made the statement:

"That damn fellow ought to be sent to the penitentiary anyhow. He got everything from that estate he could get his hands on."

This statement is corroborated in substance by another witness.

The juror Lewis was examined, and when asked with reference to whether or not he made such a statement testified, "That he did not remember of it at all; that he didn't know a thing about Spradlin, and if he said anything about the case he didn't remember it." In his cross-examination he testified that he did remember walking down the street with Mr. McDonald on the morning of the trial, and that he possibly did say something about having to serve on the jury, and regretting that he had to serve; that after the trial he did have a conversation with Mr. McDonald in which he was asked what he meant by qualifying as a juror; that if he said anything about the case he must have been joking about it; that he didn't know anything about the defendant, or that any case was pending against him.

It is also shown by the record that the witness W. H. Ritchie, an attorney at law, who represented the defendant in the settlement of his accounts in the county court, but who did not represent him in the trial of this case, had a conversation with the juror Lewis some time before the trial in which Lewis expressed the opinion, according to Ritchie,

"That damn scoundrel ought to be in the penitentiary," referring to the defendant, "for robbing that child of his." That the witness Ritchie never communicated this information to counsel for the defendant until after the trial of the case and until after the witness McDonald was testifying to what he had heard the juror Lewis state, but which testimony the witness Ritchie says refreshed his recollection as to what Lewis had previously stated to him. The juror Lewis testified that he had never had such a conversation with Ritchie. Section 5858, Revised Laws 1910 (stating grounds of challenge of jurors for express or implied bias), provides:

"For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias.

"For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias."

The grounds of challenge to a juror on account of actual bias are the existence of a state of mind on the part of the juror with reference to either party or to the case which satisfies the court in the exercise of sound discretion that he cannot try the issue impartially. One of the essentials of a fair and impartial trial under our statutes is that the person accused of crime shall be tried by men who are not prejudiced against him or against his cause. Where, upon the hearing of a motion for a new trial, two reputable members of the bar testify positively that a juror had expressed the opinion that the defendant ought to be sent to the penitentiary, that he had stolen everything he could from that estate, and it is apparent that he referred to the matter in controversy in the trial, and the juror, although admitting he had a conversation with such witness at the time and place mentioned, only testifies that he has no recollection of making such statement, can it with reason be said under such circumstances that the defendant has had that fair and impartial trial guaranteed him by our Constitution and statutes? On the one side the testimony is positive and convincing; on the other doubtful and evasive; yet only 17 days intervened between the date of the alleged conversation and the hearing on the motion. The impartiality of the jury goes to the very foundation of the accused's liberty, and where evidence is introduced such as is disclosed by this record of a convincing character to show that there is a strong probability that the accused was not accorded that fair and impartial trial guaranteed to him by the Constitution and laws of this state, and the rebuttal evidence is of a very unsatisfactory character, the verdict should be set aside and a new trial granted.

It requires the unanimous consent of the jury to convict, and a fair and impartial jury is not had by 11 impartial men and one man shown to be prejudiced within the definition of actual bias.

We deem it unnecessary to discuss the other alleged errors assigned as causes for reversal. For the foregoing reason the judgment is reversed, and a new trial granted.

DOYLE, P. J., concurs. ARMSTRONG, J., not participating.

PENN v. STATE. (No. A-2378.)*
(Criminal Court of Appeals of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §15 — REPEAL OF STATUTES—RETROSPECTIVE OPERATION—CONSTITUTIONAL PROVISIONS.

Section 54, art. 5, Constitution, provides: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." Above section construed in part, and held, "that statutes repealing penalties for offenses committed in this state operate prospectively and are applicable only to offenses committed after the statute became effective."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 16-20; Statutes, Cent. Dig. § 373.]

2. INDICTMENT AND INFORMATION §111(1)—RAPE—NEGATIVE DEFENSIVE MATTER.

Matters purely of defense need not be pleaded in the indictment or information. The latter sentence contained in section 2415, Rev. Laws 1910, creates a defense to the crime of rape committed on a female over the age of 14 years with her consent. It is not necessary to negative such defense in the indictment or information charging such crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295.]

3. CRIMINAL LAW §369(8) — EVIDENCE OF OTHER OFFENSES — SUBSEQUENT INTERCOURSE.

In a prosecution for statutory rape, evidence of acts of sexual intercourse between the prosecutrix and the defendant occurring subsequent and related in time to the act upon which the prosecution is based is admissible to show the intimate relation and familiarity of the parties and as corroborative of the ultimate fact sought to be proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823.]

4. CRIMINAL LAW §938(4) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DEFENSE.

It is not error for the court to overrule a motion for new trial based on newly discovered evidence, where it appears that by the exercise of due diligence the alleged evidence could have been elicited upon the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2309.]

5. CRIMINAL LAW §1141(2), 1172(1)—APPEAL — BURDEN OF SHOWING ERROR—ASSERTION OF ERROR.

The burden of showing error rests upon the appellant, and it is the duty of counsel for appellant to clearly point out any errors in the court's instructions and support the same with

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

*Rehearing denied June 2, 1917.

argument and authority. Mere assertions of error contained in the brief cannot be considered, unless it is apparent to the court that there has been a probable miscarriage of justice and the substantial rights of the appellant have been injuriously affected by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3015, 3022, 3128, 3154.]

Appeal from District Court, Greer County; G. A. Brown, Judge.

Isaac Penn was convicted of the crime of statutory rape, and sentenced to imprisonment for five years, and he brings error. Affirmed.

S. B. Garrett and E. M. Stewart, both of Mangum, Jarrett Todd, of Oklahoma City, and Wilkin B. Garrett, of Mangum, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. The defendant was convicted of the crime of statutory rape in the district court of Greer county, and sentenced to imprisonment in the state penitentiary for a term of five years, the information alleging the crime as defined by subdivision 2 of section 2414, Rev. Laws 1910. He took the witness stand in his own defense, and while virtually admitting the commission of the act pleaded that at the time the crime was committed he was under the age of 18 years, and was entitled to be acquitted under the provisions of section 2415, Rev. Laws 1910, which provides:

"No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged unless his physical ability to accomplish penetration is proved as an independent fact and beyond a reasonable doubt. Nor can any person be convicted of rape on account of an act of sexual intercourse with a female over the age of fourteen years, with her consent, unless such person was over the age of eighteen years at the time of such act."

The latter sentence in said section became a part of the law of this state May 16, 1913.

[1] This alleged offense was committed on May 9, 1913. The effect of the adoption in the 1910 Code of the foregoing provision of section 2415 was to repeal the pre-existing penalty attached to the crime of rape committed upon a female over the age of 14 years with her consent should it appear that the person charged was not over the age of 18 years at the time such act was committed. After the taking effect of such provision, no matter how completely the act of sexual intercourse be proven, if it appeared that the prosecutrix was at the time of said act over 14 years of age and consented thereto, and the defendant was not over 18 years of age, there could be no conviction. The penalty theretofore existing for such an offense was entirely wiped out by the statute.

Now in this case it is contended that although the crime, if any, was committed prior to the taking effect of the statute, said statute being operative at the time of the trial was applicable to this prosecution. With this contention we cannot agree. Sec-

tion 54, art. 5, Constitution (section 144, Williams') provides:

"The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."

The very minute this crime was committed the defendant became amenable to the law as it then existed. He then and there by his own voluntary conduct incurred the penalty of that law, and the constitutional provision aforesaid prevents the Legislature of this state from wiping out penalties for crimes committed prior to the taking effect of a repealing statute.

At the time this act was committed the accused, although not over 18 years of age, was subject to prosecution and a penalty attached for an act of sexual intercourse with a female of previous chaste and virtuous character between 16 and 18 years of age either with or without her consent. The fact that the Legislature afterwards saw fit to change the law cannot avail this defendant so as to relieve him of the penalty he had already incurred. In principle this identical question was passed upon in *Lilly v. State*, 7 Okl. Cr. 284, 123 Pac. 575, Ann. Cas. 1914B, 443. In that case it was held:

"The Constitution provides that: 'The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred or proceedings begun by virtue of such repealed statute.' Williams' Const. § 144 (article 5, § 54).

"Section 2815, Wilson's Rev. & Ann. St. 1903, provides: 'The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.'

"Under these provisions of the written law, it is held that the district court of Lincoln county, upon a retrial of this case, should submit the punishment for conjoint robbery under the statute as it existed at the time the offense is alleged to have been committed, which punishment is life imprisonment."

We hold, therefore, that this defendant was subject to any penalty imposed by law for this crime on the date of its commission, and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect.

The prosecutrix was shown to be of the age of 17 years at the date of the commission of the offense, and to be of previous chaste and virtuous character. While the defendant attempted to controvert both of these propositions by insinuations and innuendoes, there is no evidence worthy of consideration tending to disprove the positive evidence of the state on both points. The evidence on behalf of the state is amply sufficient to sustain the verdict and judgment.

[2] It is contended, among other assignments of error, that the information is in-

sufficient because it fails to negative that the defendant was less than 18 years of age at the time of the alleged offense. While it is not necessary in view of what we have heretofore held in this opinion to pass upon this question in this case, we deem it advisable to do so for the reason that the same question is very apt to arise in subsequent prosecutions under this statute. The allegations contained in this information were the same as those approved by this court in *Hast v. Territory*, 5 Okl. Cr. 162, 114 Pac. 261, and as the adoption in the Code of the provision contained in the last sentence of section 2415, supra, merely creates a new defense, and forms no part of the definition of the crime itself, it was not necessary to negative each defense in the indictment or information. Matters purely of defense need not be pleaded in the indictment or information. The following cases are in point: *Smythe v. State*, 2 Okl. Cr. 286, 101 Pac. 611, 139 Am. St. Rep. 918; *De Graff v. State*, 2 Okl. Cr. 519, 103 Pac. 538; *State v. Knighten*, 39 Or. 63, 64 Pac. 866, 87 Am. St. Rep. 647. In the latter case the Supreme Court of Oregon said:

"The defendant was convicted of the crime of rape by carnally knowing a female child under the age of 16 years. Objection was made to the introduction of any testimony for the state on the ground that the indictment does not state a crime, because it does not allege the defendant was over the age of 16 years when it was alleged to have been committed. The statute (Sess. Laws 1895, p. 67) provides that, 'if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years,' etc., he shall be deemed guilty of rape. It is argued that under this statute the age of the defendant is an essential ingredient of the crime, and must be averred in the indictment. But, as we understand the statute, its only effect is to raise the age of capacity of the male from 14, as it was at common law, to 16 years. At common law, a boy under 14 years of age was conclusively presumed to be physically incapable of committing the crime of rape, but it was never held that it was necessary to allege the age of the defendant in an indictment for that crime. 16 Am. & Eng. Enc. Law, 315; *Commonwealth v. Scannel*, 11 Cush. [Mass.] 547; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *State v. Ward*, 35 Minn. 182, 28 N. W. 192. Nor is it necessary under the statute. If the defendant was below the requisite age, it is a matter of defense. Mr. Bishop says the age of the defendant need not be set out 'though the statutory words are "any person of the age of fourteen years and upward, who shall have carnal knowledge." If he is below fourteen, it is simply matter for defense.' Bish. St. Crimes (2d Ed.) § 482."

[3-5] It is also contended that this judgment should be reversed because the court erred in overruling the motion for a new trial on account of evidence newly discovered, tending to prove the unchaste character of the prosecutrix at the time this offense was committed. This allegation of error is based upon the affidavit of one John Hash filed in support of the motion to the effect that he (Hash) had had sexual intercourse with the prosecutrix some time during the month of December, 1910. But John Hash

was a witness for the defendant in this case, and made no such disclosure. Hash lived in the immediate vicinity of these parties, and as this prosecution was pending for eight or ten months before trial and the defendant had learned that this witness had kept company with the prosecutrix prior to the time this offense was alleged to have been committed, and where it appears that counsel for the defendant in the cross-examination of the prosecutrix, her father and mother, indicated by questions asked that Hash had been guilty of illicit relations with the prosecutrix, which alleged fact was strenuously denied, and counsel for defendant failed to ask Hash, when a witness, anything about such matter, and the affidavit of Hash states that had he been asked concerning his relations with the prosecutrix he would have sworn that he had had sexual intercourse with her in December, 1910. There is no such showing of diligence on the part of the defendant and his counsel as to entitle him to a new trial on account of newly discovered evidence.

It clearly appears, if Hash is to be believed at all, that by the exercise of reasonable diligence this evidence could have been elicited upon the trial. This assignment of error is wholly without merit. It is contended also that the court erred in permitting the prosecutrix to testify to a series of acts of sexual intercourse with the defendant occurring subsequent, and related in time, to the act upon which the prosecution was based. This assignment presents no new question. In the case of *Morris v. State*, 9 Okl. Cr. 241, 131 Pac. 731, the same contention was made and the question decided adversely to the contention of counsel. The weight of modern authority is to the effect that such evidence is admissible to show the relation and familiarity of the parties and as tending to corroborate the prosecutrix as to the particular act relied upon for conviction. As was said in *Woodruff v. State*, 72 Neb. 815, 101 N. W. 114, such evidence, if believed, "is corroborative of the ultimate fact sought to be proved; that is, the act of sexual intercourse as charged in the information."

The court gave an instruction covering the purpose for which such subsequent acts of sexual intercourse might be considered by the jury. The substance of the instruction is to the effect that the defendant cannot be convicted because of such subsequent acts, if believed to be true, but that such evidence is only to be considered in connection with the other evidence in determining whether or not the defendant had sexual intercourse as charged in the information. It is claimed that such instruction was one on the weight to be given to such evidence.

The instruction contained no comment on the probative force of the evidence of subsequent acts of sexual intercourse, but was given for the purpose of informing the jury that such acts did not form the basis for

convicting the defendant. The instruction placed correct limitation upon the jury in considering this evidence. *Woodruff v. State*, supra.

Also instruction No. 4 is complained of. Said instruction is as follows:

"No person can be convicted of rape on account of an act of sexual intercourse with a female over the age of 14 years with her consent, unless such person was over the age of 18 at the time of such act; and in this case you are instructed that if you find the witness Bettie Robertson consented to the act of the alleged intercourse on May 9, 1913, then before you can convict the defendant you must believe from the evidence beyond a reasonable doubt that he was at the time of such intercourse over the age of 18. But if you find from the evidence beyond a reasonable doubt that the defendant had sexual intercourse with the witness Bettie Robertson on the 9th day of May, 1913, as such intercourse is defined in paragraph 2 of these instructions, and that she did not consent to such intercourse, then it will be your duty to find the defendant guilty, whether or not he was then and there over the age of 18."

For the reasons herein stated the defendant in this case was not entitled to interpose this defense for the purpose of avoiding the penalty imposed by law and which he incurred at the time the crime was committed. The instruction therefore was erroneous in that it was prejudicial to the state, but of such errors the defendant cannot avail himself. The law never considers a question of error except in behalf of those who are injured thereby. *Hunter v. State*, 6 Okl. Cr. 446, 119 Pac. 445.

We have carefully examined the entire record. The instructions as a whole correctly state the law applicable to the facts, and are as favorable to the defendant, if not more so, than the law and evidence warrants. In our opinion the defendant had a fair and impartial trial, was clearly proven guilty, and the punishment assessed is not excessive. The judgment of conviction is therefore affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

THOMAS v. STATE. (No. A-2718.)

(Criminal Court of Appeals of Oklahoma. May 19, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1159(3)—APPEAL—VERDICT ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

The jury is the exclusive judge of the weight of the evidence and credit to be given to the witnesses. Where there is a direct conflict in the evidence, or it is such that different inferences may be properly drawn from it, the jury's determination will not be interfered with upon the ground that the evidence is insufficient to sustain a conviction, where there is competent evidence from which the jury could rationally conclude that the appellant was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

2. HOMICIDE §215(4) — EVIDENCE — DYING DECLARATION.

The deceased, as part of his dying declaration, made the statement, "Those negroes shot me and robbed me." Held, that such statement was admissible in a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 454-456.]

3. CRIMINAL LAW §830—TRIAL—REQUESTED INSTRUCTION.

Where an instruction requested by the defendant is not in proper form, but pertains to a material issue in the case, made by the evidence, the court should give a correct instruction, if he has not otherwise instructed upon that issue. After such request, it is error for the court to refuse to instruct upon such issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017.]

4. CRIMINAL LAW §424(3), 673(3)—EVIDENCE — CONTRADICTORY STATEMENTS BY CODEFENDANT.

Contradictory statements made by a codefendant after the commission of the crime, not shown to have been made in the presence or hearing of the defendant being separately tried, are in no sense original evidence against the latter. Where such statements relate to material matters and proper foundation is laid, they may be shown and shall be considered by the jury only for the purpose of affecting the credibility of the witness making them. And when requested it is the duty of the court to clearly inform the jury that such statements cannot be considered as independent substantive evidence against or in favor of the defendant, but only for the purpose of affecting the credibility of the witness. Refusal of the court to instruct upon this issue after such request is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1004, 1875.]

5. CRIMINAL LAW §925½(1)—NEW TRIAL—GROUNDS — RECEIVING EVIDENCE OUT OF COURT—STATUTE.

Where evidence introduced at the trial consists in part of the testimony of witnesses given at the preliminary examination and reduced to writing, and such evidence is attached to other written evidence of witnesses examined at the preliminary examination and not produced at the trial, and after retiring to deliberate upon its verdict the jury makes a demand for that portion of such evidence introduced at the trial, the court should see that such evidence is detached from that not introduced before permitting the jury to have it. Where this is not done, and the jury is permitted to have access to that evidence given at the preliminary examination not introduced at the trial, and such evidence is damaging to the defendant, the substantial rights of the defendant have not been properly safeguarded. It is a ground for new trial for the jury to receive evidence out of court other than that resulting from a view of the premises. Section 5987, Rev. Laws 1910.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2248, 2250.]

Error from District Court, Seminole County; Tom. D. McKeown, Judge.

Tom Thomas was convicted of murder, and sentenced to imprisonment for life, and brings error. Reversed and remanded.

Tom Thomas was convicted in the district court of Seminole county for murdering one George Gammill, and his punishment fixed at imprisonment in the state penitentiary for life. The alleged offense occurred on the 7th day of February, 1915; this defendant being

informed against in conjunction with John Cudjo, Robert Cudjo, George Cudjo, all three of whom were cousins of his, and Jim Thomas, a brother of his. The killing occurred at night on a public highway close to the home of this defendant, and in the Little River country of Seminole county. The facts and circumstances surrounding the homicide are about as follows:

George Gammill, the deceased, and Claude Allen, his brother-in-law, at whose home the deceased was staying at the time, lived about five miles from the place of the killing. It appears that on Sunday morning, February 7, 1915, the deceased came to Allen's house with a suitcase full of whisky, and stayed there with Allen and his family until about 4 o'clock in the afternoon, when Gammill suggested that they go down in the Thomas neighborhood, and try to sell some of the whisky. They started out afoot, and reached the home of Abe Thomas, the father of Jim and Tom Thomas, about 7 or 8 o'clock at night. It was then dark, and Gammill stood at the gate and hallooed. Jim Thomas came to the door, and Gammill asked him if he wanted to buy some whisky. He answered, "Yes," and asked them to come into the house. Gammill and his companion, Allen, then went into the south room of the Thomas house, carrying the suitcase of whisky. In a very short time Tom Thomas came in, and shortly after Tom Thomas arrived the three Cudjos came. The Thomases and Cudjos were all negroes. Gammill and Allen were white men. They sat around in the room for a few minutes, and Gammill and Allen took the suitcase of whisky out into the yard. Jim Thomas followed them, and wanted a bottle of whisky. Gammill produced a quart bottle of whisky from the suitcase, and Jim Thomas took it, but did not pay for it, and when requested to pay promised Gammill that he would pay him for the whisky before he broke the bottle. Tom Thomas came out into the yard, and also wanted a bottle of whisky, which Gammill produced from the suitcase; but Tom Thomas also did not pay for the whisky, and made the same promise to Gammill that his brother Jim had made. A short time thereafter Robert Cudjo came out of the house and wanted a bottle of whisky, but by this time Gammill had become suspicious, and requested Cudjo to produce the money for the whisky before he would give it to him. Cudjo apparently did not have any money, and became somewhat incensed, at this time pulling a quart bottle out of his pocket, which was about half full of whisky, and remarked to Gammill, with an oath, "that he didn't care, he had whisky any way." Immediately thereafter these three negroes gathered together and began whispering to each other, but what was said by them could not be understood by Allen and Gammill. Allen then suggested to Gammill that they had better get away, they would likely have

trouble, and Gammill said that he would go back into the house, and did so. Allen picked up the suitcase of whisky, and went out in the yard near the fence. In a short time Gammill again came out to Allen, but returned to the house to collect for the whisky. At this time Allen took the grip of whisky, and started south from the Abe Thomas home down the road in the direction of where Tom Thomas lived, which was about 100 yards southwest of Abe Thomas' residence. Allen proceeded down the road a distance of about 100 yards, and stopped in the road. In a short time Jim Thomas and George Gammill came down to where Allen was, and stopped a short distance, five or ten steps south of Allen. Immediately thereafter three negroes came up behind Allen, and stopped about five steps north of him. Gammill and Jim Thomas were whispering to each other, and immediately Jim Thomas called Tom Thomas, who apparently was not among the negroes present at that time. Allen says that when he started down the road south with the suitcase of whisky he saw somebody running down the road ahead of him, but did not know who it was. After Jim Thomas called for Tom Thomas some negro came out to the road to where these parties were standing, and came up to Claude Allen with a drawn pistol in his hand, and, pointing it at Allen, picked up the suitcase of whisky and started to back away to the north with it. At this time Allen called to Gammill, who faced around, and thereupon the negro with the pistol fired a shot at Gammill. Gammill dropped to his knees and pulled a revolver, and returned the fire four or five times. After the shooting all the negroes had disappeared; the whisky also could not be found. Allen says that the person who came up with the revolver and fired the shot to the best of his knowledge was Tom Thomas, and that the three negroes who came down and stood behind him were the Cudjo negroes. This shooting occurred about 10 o'clock at night. Gammill lived until 8 o'clock the next evening. Before his death he made some dying statements in which he said in one of them that he believed "Tom Thomas shot him; that it was either Tom Thomas or John Cudjo; that those negroes had shot him and robbed him." After the shooting all of these negroes gathered at the house of Gibson Payne, another negro, who was distantly related to them. None of them lived at Payne's residence. A deputy sheriff went to Payne's house about 11 o'clock the night of the shooting and arrested Robert Cudjo. None of the others were arrested at that time, but Jim Thomas and George Cudjo and Tom Thomas were arrested the next day. In the meantime John Cudjo had fled, and up to the time of the trial had never been apprehended. It was the contention of the defendant that John Cudjo killed Gammill, and, while the defendant did not take the witness stand in his own behalf, he pro-

duced George Cudjo as a witness, and George swore that John was the man who did the shooting.

From the foregoing statement of facts it is apparent that it was the theory of the state that Tom Thomas shot and killed George Gammill on this occasion, or, if Tom Thomas did not fire the fatal shot, the killing was a result of a conspiracy between all of these negroes to rob George Gammill of the suitcase of whisky, and to kill him if necessary to accomplish that purpose; that all the negroes were present at the scene of the killing, and had so located themselves as to be in a position to perform their part, whatever that might be, to carry into effect the purpose of the conspiracy, when necessary. The theory of the defendant was that John Cudjo, the fugitive, killed Gammill, and that the evidence on the part of the state to prove a conspiracy was insufficient to connect this defendant with it.

Orwig & Moore, of Wewoka, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1] It is first contended that the court erred in refusing to direct the jury to return a verdict of not guilty for the reason that the state failed to make out a case against this defendant by sufficient evidence. It is not necessary to enter into a lengthy discussion of the merits of this contention. The foregoing statement of facts to our mind discloses evidence sufficient, if believed, to authorize the jury to convict this defendant either upon the theory that Tom Thomas himself fired the fatal shot, or upon the other theory that he was a coconspirator with the one who did kill Gammill and as such aided and abetted in the killing. The rule is well established in this jurisdiction that the weight of the evidence is for the jury, and where there is any evidence in the record which, if believed, is sufficient to authorize a conviction under the law this court will not disturb the judgment because of insufficient or conflicting evidence. It is true that this is a murder case, and the penalty imposed is severe; but the province of an appellate court is to determine questions of law and to establish principles of law by which fair and impartial trials may be had. It is just as essential that courts abstain from invading the province of the jury as it is essential that the jury be guided by the law as given by the court. In no other way can justice be fairly administered. If trial and appellate courts were constantly invading the province of juries in this state, the jury system would become a farce and of no protection whatever to the accused. It is only in cases where this court can say, as a matter of law, that there is no competent evidence supporting the charge, that the judgment of conviction will be reversed.

There is evidence in this record fully suffi-

cient to authorize the jury to conclude that the appellant was guilty. Our investigation need go no further, except to determine whether or not the jury was influenced by improper motives in reaching a verdict. *Bishop v. State*, 9 Okl. Cr. 175, 130 Pac. 1178; *Maggard v. State*, 9 Okl. Cr. 236, 131 Pac. 549; *Cagle v. State*, 3 Okl. Cr. 621, 105 Pac. 681.

[3, 4] It is also contended that the court erred in admitting incompetent, irrelevant, immaterial, and hearsay evidence offered by the state and duly excepted to at the time, which evidence the defendant requested the court to instruct the jury not to consider, which request was by the court denied, and to which ruling of the court the defendant at the time excepted. This assignment of error relates to certain testimony of one Ed Welsman, a deputy sheriff, who was introduced by the state in rebuttal. It was attempted to be shown by Welsman that the defendant's witness George Cudjo had made certain statements to Welsman at the time of his arrest contradictory of his testimony upon the witness stand, and at the time Welsman was first called to testify the court sustained the objection of defendant's counsel to this testimony on the ground that proper foundation had not been laid for its admission. Thereafter the court permitted the state to place the witness George Cudjo upon the witness stand for a further cross-examination, and the state did lay the proper foundation for impeaching Cudjo by Welsman. So that the only question left to be determined is whether or not the statements alleged to have been made were material. George Cudjo in his direct examination testified that John Cudjo, his half-brother, fired the fatal shot that killed Gammill; that he was close to him, and saw the shot fired, and recognized his brother John at the time. For purposes of impeachment he was asked if he did not state to Welsman in substance, at the time that Welsman arrested him, the following: "I don't know who did the shooting of that boy up there. I did not know anything about that shooting up there, or did not know anybody was shot." He was also asked if at any time the night of his arrest or the next day he told Ed Welsman that John Cudjo did the shooting. It requires no argument to convince a person of ordinary intelligence that this evidence was material. Cudjo at the time of his arrest stated that he did not know who did the killing. At the time of the trial he stated positively that John Cudjo did the killing. It was a material inquiry, according to the theory of the defendant, as to who fired the fatal shot, and it became relevant, therefore, for the state to contradict the only witness who took the stand for the defendant and testified that John Cudjo fired the shot. Counsel for defendant concede that a witness may be impeached by evidence tending to show contradictory statements on material

matters, but contend that this evidence was immaterial. With this contention we firmly disagree. It was material to prove that either the defendant or one of his codefendants fired the fatal shot, and where a witness makes contradictory statements as to that fact he may be impeached by showing the same. It is not necessary to cite authorities in support of this principle which has been repeatedly recognized by this court.

It is also contended that the statement made by the witness George Cudjo, and upon which he was impeached, to wit, "I am going to Wewoka for a long long time," addressing his remarks to the people at Gibson Payne's home, at the time of his arrest, was immaterial. We think that it was proper to contradict this witness by showing that he made this statement, which he denied. It tended to discredit him, and was material in disclosing a state of mind on his part at the time of his arrest, shortly after the homicide, which indicated his connection with the homicide and knowledge of its commission, indicating that he was concerned in the conspiracy that resulted in the death of Gammill, and understood why he was being arrested. The defendant had produced this witness, and he had testified to a state of facts which indicated that neither himself nor the defendant was in any way connected with the killing, or had any knowledge that Gammill was to be robbed at that time. It certainly tended to discredit the testimony that he had given to that effect, and for that reason, in our opinion, it was sufficiently material for impeachment purposes.

But the serious question, in connection with this evidence is the refusal of the trial court to instruct the jury to limit its consideration of same solely as tending to impeach the witness George Cudjo. Counsel for defendant did not request an instruction directly covering this matter, but did request the court to give the following instruction:

"You are instructed that the state has wholly failed to prove that a conspiracy existed, and in this connection you are instructed not to consider any statements of witnesses, except for the purposes of impeachment of other witnesses, concerning what was said or done, unless the defendant were personally present and heard what was said. And you are further instructed in this connection, a conspiracy not having been proved by the state, that before you can find the defendant guilty you must find beyond a reasonable doubt that he fired the shot that took the life of George Gammill, the deceased."

Said instruction was properly refused because of reasons heretofore given to the effect that there was evidence before the jury sufficient to submit the question of conspiracy.

But that portion of said instruction, "and in this connection you are instructed not to consider any statements of witnesses, except for the purpose of impeachment of other witnesses, concerning what was said or done, unless the defendant were personally present and heard what was said," certainly directed

the court's attention to this impeaching evidence sufficiently to require the court to give a proper instruction covering the purpose for which it should be considered by the jury. This the court entirely failed to do.

It has been held that "where an instruction * * * is not in proper form, but pertains to a material issue in the case as made by the evidence, the court should correct it and give it in proper form, if he has not otherwise instructed upon that issue; and after such request it is error for him to fail or refuse to give an instruction upon such issue." *Roberson v. United States*, 4 Okl. Cr. 337, 111 Pac. 984; *McIntosh v. State*, 8 Okl. Cr. 469, 128 Pac. 735; *Morris v. Terr.*, 1 Okl. Cr. 618, 99 Pac. 760, 101 Pac. 111; *Fairgrieve v. State*, 10 Okl. Cr. 109, 134 Pac. 837. It was the duty of the court after this request to instruct the jury that such contradictory statements could only be considered by them for the purpose of affecting the credibility of the witness George Cudjo, and for no other purpose. These contradictory statements by George Cudjo were in no sense original, evidence against this defendant, but the jury was left open to consider them for any purpose it might have seen fit. This was error, and especially prejudicial to the defendant in this case because his entire defense was based upon the testimony of this witness.

In *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57, this court held:

"When contradictory statements made by a witness are admissible in evidence for the purpose of impeaching him, they must be confined to contradictions of the testimony of the witness which are injurious to the party seeking to impeach him, and it is the duty of the court to clearly inform the jury that such statements cannot be considered as independent, substantive evidence against or in favor of the defendant, and that the jury can only consider such contradictory statements for the purpose of affecting the credibility of the witness, if they decide that such statements do have this effect, and that it is unlawful for the jury to consider such statements for any other purpose."

The refusal of the trial court to instruct the jury on the purpose for which this testimony was alone receivable requires a reversal of this judgment.

[5] Other matters are urged in the brief of counsel for defendant in error which appear to be well grounded, especially that the jury was permitted to have access to certain testimony, given at the preliminary examination, of witnesses who were not examined on the trial. It appears that the entire transcript of the testimony given at the preliminary examination was upon request allowed to be taken to the jury room for the purpose of permitting the jury to read certain portions of such evidence introduced upon the trial both as original and impeaching evidence. While it is not clearly shown that the jury considered or read any of this evidence except such as was introduced upon the trial of this case, it is clearly evident that the opportunity to receive and examine other evidence than that

received in court was afforded. This should not be permitted under any circumstances.

The second subdivision of section 5937, Rev. Laws, makes it ground for new trial for the jury to receive evidence out of court other than that resulting from a view of the premises. Sections 5912 and 5913, Rev. Laws, provide:

"On retiring for deliberation the jury may take with them the written instructions given by the court, the forms of verdict approved by the court, and all papers which have been received as evidence in the cause, except that they shall take copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession."

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the county attorney and the defendant or his counsel, or after they have been called."

Had there been a disagreement between jurors as to any testimony introduced other than the documentary evidence, the jury should have been returned into court and the evidence read to them. And where the evidence is written or documentary, and is attached to other such evidence not introduced on the trial, it should be detached from that not introduced before the jury is permitted to take the same to the jury room. The foregoing statutes should be strictly complied with, as it is a substantial right of the defendant to have the jury kept free from any improper influences while considering its verdict as well as during the entire progress of the trial.

[2] Another matter which is complained of, and will in all probability likely arise on a retrial of this charge, is that the court erred in admitting that part of the dying declaration of Gammill in which he said, "Those negroes shot me and robbed me." It is contended that this evidence should have been excluded because it was nothing more than the opinion of the deceased, and the deceased, if living, would not have been permitted to testify to such effect. There seems to be two rules upon this question: First, the strict rule which is followed by some courts to the effect that it is indispensable that the dying declaration should consist solely of facts and not of conclusions or opinions; and, second, the liberal one that opinion rule is not necessarily applicable to dying declarations.

The latter rule is pointed out by this court in the case of Blair v. State, 4 Okl. Cr. 359, 111 Pac. 1003. The doctrine is well established in this state that matters like this should be construed liberally. This rule is laid down by Prof. Wigmore in his work on Evidence, § 1447, as follows:

"The opinion rule has no application to dying declarations. The theory of that rule (post,

§ 1918) is that, wherever the witness can state specifically the detailed facts observed by him, the inferences to be drawn from them can equally well be drawn by the jury, so that the witness' inferences become superfluous. Now, since the declarant is here deceased, it is no longer possible to obtain from him by questions any more detailed data than his statement may contain, and hence his inferences are not in this instance superfluous, but are indispensable."

Numerous cases are cited in the note to this section which disclose that expressions very similar to the one here made by the deceased have been admitted, such as the following:

"He cut me for nothing." "He killed me for nothing." "I know that one of the two shot me." "You have killed me without cause." "They have murdered me." "He shot me down like a dog," etc.

—all of which contain certain expressions of opinion and conclusion on the part of the deceased. Applying the liberal rule, therefore, which we hold to govern in this state, it is our opinion that the statement aforesaid made by the deceased in his dying declaration was admissible.

The contention that because whisky is contraband property in this state as against the state and its officers entitles others to rob and murder in order to obtain possession of it from one who is using it unlawfully is wholly without merit. Neither robbery nor murder may be justified or excused on such a ground.

For the reasons given the judgment of conviction is reversed and the cause remanded. The warden of the state penitentiary is instructed to surrender the defendant to the custody of the sheriff of Seminole county upon proper demand at said penitentiary.

DOYLE, P. J., and ARMSTRONG, J., concur.

GANT v. STATE. (No. A-2549.)

(Criminal Court of Appeals of Oklahoma.
May 19, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW — § 1159(2) — CONVICTION — REVERSAL.

When all of the evidence introduced at the trial of a criminal case, considered together, is sufficient to authorize a legitimate conclusion of guilt by the jury, a judgment of conviction will not be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8075.]

Error from County Court, Jefferson County; Ben F. Saye, Judge.

O. P. Gant was convicted of violating the prohibitory law, and he brings error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, O. P. Gant, was convicted at the July, 1915,

term of the county court of Jefferson county, on a charge of having unlawful possession of intoxicating liquors with intent to sell the same, and his punishment fixed at a fine of \$50 and imprisonment in the county jail for 30 days. An appeal was duly prosecuted to this court.

The only proposition urged in the brief is that the judgment is contrary to the evidence.

It appears that plaintiff in error is a farmer, living near Waurika, and at the time of the charge was building a residence, pending the completion of which he was living in a tent near by; that he went to Byers, Tex., and got two barrels of beer and brought them home. On the day he arrived with the beer, a deputy sheriff living at Ardmore telephoned the sheriff of Jefferson county to be on the lookout for a wagonload of intoxicating liquors. A deputy from the sheriff's office picked up the trail of the wagon, which led to the camp of the defendant. When they arrived at his place he told them that he had two barrels of beer and had bought them for his own use. Some argument was had, and the deputies agreed to leave the beer until the plaintiff in error could come into town to see the sheriff. He came into town the following morning, but the sheriff was absent. He then returned to his camp. The deputies again visited the camp, and could find only five bottles of beer. When defendant was questioned concerning the disposition of the beer, he told them it had been stolen. One witness testified that he bought beer at a tent located in the direction of where the tent of the plaintiff in error was admittedly situated; that he made a check for the same payable to O. P. Gant. This witness declined to identify the plaintiff in error as the person from whom he purchased. He was a very reluctant witness, and was apparently endeavoring to shield the plaintiff in error.

One of the other witnesses who was in the party at the time was a very unwilling witness, and gave no incriminating evidence, but admitted being in the party.

The plaintiff in error produced a number of witnesses in his own behalf, who testified that they had worked on the house he was building as carpenters and paper hangers; that they had seen beer and had drunk beer there, but had never seen any sold at any time. One of these witnesses testified that he worked there in April; that another tent was located near by the Gant tent some time during May, but that it was not there at the time the offense was said to have been committed.

The plaintiff in error himself testified, admitting that he had the beer. He denied selling any; denied knowing the state's witnesses; denied receiving a check payable to his order for beer. He admitted telling the sheriff's deputies at one time that the beer

had been stolen and at another time that it was in a pond. He said that one of his small children took the beer out of the barrels and put it in the pond while he was gone to town to see the sheriff; that he used the beer instead of drinking water on account of the fact that there was no drinking water nearer than a mile, and, further, that some physician had advised him to use beer on account of the ill health of his wife.

We are unable to agree with counsel that this conviction is contrary to the evidence. The testimony offered by the plaintiff in error in his defense, taken together with the facts offered by the state, raised an issue exclusively for the jury to determine. The testimony of plaintiff in error is such that the jury was warranted in scrutinizing carefully this transaction. It is a most unreasonable and unbelievable story that an ordinary farmer would drive 15 or 20 miles to get two barrels of beer at a cost of \$25 to be used for drinking water, instead of hauling a barrel of water, which would cost nothing, the distance of a mile. It is not unreasonable for people in ordinary circumstances to drink beer in lieu of tea or coffee with their meals, or even more frequently, but to ask a jury of intelligent men to believe that an ordinary farmer suspended the use of water altogether, and substituted beer, was presuming a little too much. When this kind of defense to a charge of having the unlawful possession of liquor with intent to sell same is made, and a conviction follows, the judgment will not be disturbed on appeal.

Taking all of the facts disclosed by the record together, we are of opinion that the judgment of the trial court should not be reversed on the ground that it is contrary to the evidence.

The jury saw and heard all the evidence, observed all of the witnesses on the stand, and were citizens of the same community, and probably neighbors to the accused. They found, under their oaths, that he was guilty of having this liquor in his possession with intent to sell the same, and the local court approved their verdict. The circumstances and proof offered are such that this deduction was legitimate.

Affirmed.

DOYLE, P. J., and MATSON, J., concur.

MURPHY et al. v. STATE. (No. A-2487.)
(Criminal Court of Appeals of Oklahoma. May 19, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1115(1) — TRIAL — SEVERANCE—DISCRETION OF COURT—REVIEW.

Under Procedure Criminal, § 5878, Rev. Laws 1910, when two or more defendants are jointly prosecuted for a misdemeanor, the granting or refusal of a severance rests in the discretion of the court. The exercise of such dis-

cretion is reviewable; but, to be reviewed, the case-made or bill of exceptions must show an application for severance setting out sufficient grounds therefor, and supported by affidavits or oral testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2922, 2923, 2923.]

Appeal from Superior Court, Muskogee County; H. R. Thurman, Judge.

William Murphy and Mrs. R. T. Kane were convicted of the violation of the prohibitory law, and they appeal. Reversed as to defendant Murphy, and affirmed as to defendant Kane.

W. W. Momyer, of Muskogee, for plaintiffs in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The information in this case jointly charged that Will Murphy, Mrs. R. T. Kane, and R. D. (Dudie) Minter did on the 23d day of February, 1915, knowingly and unlawfully have the possession of certain intoxicating liquors, to wit, seventeen pints of beer and three small drinking glasses full of whisky, with the intention then and there on the part of them to sell the same. When the case was called for trial the county attorney dismissed as to the defendant Minter, whereupon the plaintiffs in error each orally moved the court for a severance of the case against them, and a separate trial thereof, which motions were by the court overruled. The trial proceeded, and they were convicted, and their punishment assessed at a fine of \$50 and 30 days' confinement in the county jail. From the judgments rendered on the verdict they appealed.

The first error assigned is that the court erred in refusing to grant a severance. Under our Procedure Criminal:

"When two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly, in the discretion of the court." Section 5578, Rev. Laws 1910.

In *Steen v. State*, 4 Okl. Cr. 309, 111 Pac. 1097, this court said:

"The exercise of the discretion here given to the trial court in granting or refusing a severance in a misdemeanor case is reviewable; but, to make the same the subject of review, the case-made or bill of exceptions must show an application for a severance setting out some unusual and extraordinary condition or state of facts in connection with the case which would materially prejudice the rights of the applicant in a joint trial, and this must be supported by affidavits or oral testimony, and it may be controverted by the state in the same way. In the absence of such showing on the part of the applicant the trial court cannot know and is not required to anticipate that a situation will arise in the trial justifying a severance. The fact that the trial does subsequently develop such a situation is immaterial; and unless such application is filed and thus supported, there is nothing before the court calling for the exercise of the discretion given it."

In the case at bar the record fails to show upon what ground the plaintiffs in error based their demand for a separate trial. It

follows that the motions for separate trials were properly overruled.

The only other assignment of error in the case may be considered under that of the insufficiency of the evidence to support the verdict and the judgments. The substance of the testimony of the state's witnesses, J. D. Robbins, B. D. Hughes, and Doyle Jay, deputy sheriffs, was that on the day alleged they went to the second floor of the Alaska Building, in Muskogee, where Mrs. Kane was conducting a rooming house, and in an ice box in one of the rooms found seventeen pint bottles of beer and a tray with three glasses on it, partly filled with whisky; that while they were removing the liquor Mrs. Kane knocked the glasses off the tray; that at the time there were three men in another room across the hallway; that Dudie Minter was there. Witness Robbins testified that shortly after Will Murphy appeared and said he did not want us to arrest the woman this time, and that it was his place. The state also introduced in evidence a certified copy of the records of the United States internal revenue collector for the district of Oklahoma, showing that Mrs. R. T. Kane had paid the special tax required of retail liquor dealers for six months, commencing January 1, 1915, and that her place of business was her rooming house.

As a witness in his own behalf William Murphy testified that he did not own or ever have any interest in the building or the rooming house; that he called there when the officers were raiding, and had a conversation with witness Robbins, wherein he offered to make bond for Mrs. Kane, or do anything that would keep the officers from taking her to jail; that he did not say that he owned the place; that he went there in answer to a telephone call from Mrs. Kane; that she was arrested and wanted him to make bond for her. Mrs. R. T. Kane, as a witness in her own behalf, testified that she was the proprietor and sole owner of the Elks' rooms; that the beer in question was placed in her ice box by the men who were sitting in her parlor room and the glasses contained ginger ale; that the men said they were going to order a lunch and drink the beer; that her retail liquor dealer's license was secured because the collector had told her that she would have to have a revenue license to sell near beer or anything like that. Dudie Minter testified that he resides at the Elks' rooms; that Mrs. Kane owned the place, and he knew that the defendant Murphy had no interest in the place.

As to the defendant Murphy, we are of opinion that the evidence is insufficient as a matter of law to sustain the verdict finding him guilty, and for this reason the judgment of conviction is reversed as to Murphy. However, we are unable to see any ground upon which the judgment against the defendant Mrs. Kane should be reversed. Finding no material error in the record, and

there being evidence sufficient to sustain the verdict against her, the judgment as to Mrs. R. T. Kane will be affirmed.

ARMSTRONG and MATSON, JJ., concur.

ALLEN v. STATE. (No. A-2483.)
(Criminal Court of Appeals of Oklahoma.
May 19, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1171(1)—TRIAL—REMARKS OF COUNTY ATTORNEY.

Remarks of the county attorney in his argument will be considered and construed in reference to the evidence, and in order to constitute reversible error the impropriety indulged in must have been such as may have improperly influenced the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127.]

2. CRIMINAL LAW §1186(1)—APPEAL—NEW TRIAL—FUNDAMENTAL ERROR.

Where the guilt of the appellant is clearly and conclusively established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could, or would, with reason and propriety arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3217, 3219, 3230.]

3. CRIMINAL LAW §855(2)—TRIAL—MISCONDUCT OF JURY—USE OF INTOXICANTS.

The use of small quantities of whisky or other intoxicants mixed with curative drugs, or diluted and used strictly for medicinal purposes, by jurors when not deliberating upon the verdict, is not such misconduct as will vitiate the verdict and authorize the granting of a new trial, where it appears that such jurors were in no way incapacitated thereby for the proper performance of their duties. *Bilton v. Terr.*, 1 Okl. Cr. 566, 90 Pac. 163, distinguished.

4. CRIMINAL LAW §925½(4), 1174(5)—TRIAL—MISCONDUCT OF JURY—STATUTE.

Record examined as to other alleged misconduct of jury, and held not reversible error in this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2252, 3175.]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Robert Allen was convicted of murder and sentenced to imprisonment for life, and he brings error. Affirmed.

Pruett, Sniggs & Tripp, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. A statement of facts will not be necessary for a determination of the questions presented in this appeal, except to state that the evidence upon the part of the state shows a willful, premeditated and intentional killing without any justifiable or excusable cause, while the defendant claimed either that he was too drunk to know what he was doing, or else he killed the deceased in self-defense. The defendant's testimony is

conflicting as to which theory of defense he relied upon. The theory of temporary insanity as well as self-defense were both covered by the court's instructions. The sole errors relied upon relate entirely to alleged improper argument on the part of the assistant county attorney and improper conduct of the jury while impaneled and considering the evidence in the case. The first alleged error relied upon for a reversal is the improper conduct and argument of the assistant county attorney. The excerpts from said argument contained in the brief of plaintiff in error which are claimed to be improper and prejudicial to this appellant are as follows:

First: "You took the life of a man who was there defenseless. You know it, Allen. You were there. You know it."

This remark was objected to by counsel for the appellant, and that part of the argument "You know it, Allen," was by the court promptly stricken, and the jury admonished not to consider it.

Second: "If you went home to your wife and little children and told them what you had heard from the witnesses, what would their conscience tell them?"

Counsel for appellant made the following objection to this line of argument:

"Note our exceptions to that argument as not legitimate and not germane to the case."

Third: "No, you would not say that child's conscience told it wrong. Don't go home and have a child tell you those things."

To the foregoing statement the following objection was interposed by counsel for appellant:

"We object to this kind of argument as being made for the purpose of arousing prejudice only."

Fourth: "Go home and look your dear wife in the face. When you speak to her and she says, 'John, what did you do in the face of that testimony?' You do not have any doubt of his guilt."

To the foregoing counsel for appellant objected as follows:

"We object as not germane or legitimate argument, not relevant and note our exceptions."

Fifth: "Let's go beyond the personalities in this case and get down to the real issues. There is no politics in this case. Pruiett took it out when he discovered a man with a John Fields button on."

To the foregoing remark counsel for the appellant excepted as follows:

"Note our exceptions to that argument."

After which the county attorney continued as follows:

"I don't care for your exceptions. Who brought that into this case? Not a man on the jury will say that I brought it in here. Where does it cut any figure anyway? Be courageous, men."

Whereupon counsel again excepted as follows:

"Note our exceptions to the argument of counsel as being highly improper."

"By the Court: Just a minute, Mr. Choate, gentlemen of the jury, these arguments of counsel both for the state and the defendant in re-

gard to politics having entered into this case; the court fails to see where any politics has entered, and fails to see where it is relevant or should be commented upon by counsel for the state or the defendant either one. You will therefore disregard all statements of counsel in regard to politics having entered into the case, the same being impertinent and not properly before you."

[1] The foregoing excerpts from the brief of counsel for the appellant and the record itself contain all the statements of the assistant county attorney alleged to be improper, and the rulings of the trial court thereon. It will be noted that although there was no request on the part of counsel by the appellant that the court withdraw any of this argument from the consideration of the jury that the court of its own motion, however, did withdraw certain portions of this argument from the jury and instructed the jury not to consider it. The assistant county attorney engaged in a line of argument which is not to be commended, and we agree with counsel for the appellant that the argument made had a tendency to appeal to the passion and prejudice of the individual members of the jury. However, it is not such argument as the making of which is a ground for a new trial under the statutes of this state. In our opinion, this argument could have been cured by its withdrawal from the consideration of the jury by the trial court, and counsel for the appellant should have requested its withdrawal in order that the court might have cured the error, if any. This was not done. Counsel at the time only saw fit to object and take an exception without any ruling by the trial court upon the impropriety of certain of these remarks. Others the trial court of its own motion, as heretofore indicated, saw fit to withdraw and admonished the jury not to consider. It is not every species of improper argument that justifies this court in reversing a judgment of conviction. The argument may be improper, but the proof of guilt may also be so overwhelming that it is evident that upon a second trial an impartial and intelligent jury could arrive at no honest conclusion except that of guilt. That is the situation in this case. The proof upon the part of the state when considered in connection with the evidence of the defendant is so convincing and conclusive that it is readily to be seen that a verdict of guilty of murder was the only logical conclusion that an intelligent jury could have arrived at in this case. It would be an imposition upon the law-abiding citizens of this state and an unjust burden upon the taxpaying public to reverse this judgment because of these alleged errors in the argument where no request was made to have the trial court withdraw the remarks from the consideration of the jury. It is not the rule in Oklahoma that error presumes injury, but this court is required to examine the entire record carefully and determine from all the facts and

circumstances surrounding the case (where the error is not fundamental—i. e., such as involves the violation of some express constitutional or statutory right of the defendant) to determine whether the error complained of has probably resulted in a miscarriage of justice. This cannot be said to be true in this instance because of the conclusive proof of the guilt of this appellant.

[2] We hold, therefore, that where the guilt of the appellant is clearly established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could or would with reason and propriety arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error.

[3] It is also contended that the jury, while considering the evidence in the case drank whisky. The evidence in support of this alleged ground for a new trial is substantially as follows: It appears that after the jury was impaneled and while the evidence was being introduced the court took a recess over Thanksgiving Day, and on said day the jury was kept together, in charge of a sworn bailiff, a part of the time being located in a room at a hotel in Oklahoma City. One of the jurors was sick, and on the recommendation of his physician was told to take a little quinine and whisky. In some manner, not disclosed by the record, this juror procured a half pint of whisky, and mixed the quinine with it, and during Thanksgiving Day, while the jury was not considering the evidence, this juror drank the greater part of such mixture. It appears also that another juror drank two drinks of this mixture on that day. On the next morning before going to the trial this sick juror took one drink of the whisky and quinine.

The foregoing is the misconduct complained of. Counsel for appellant rely largely upon the decision of this court in the case of *Bilton v. Territory*, 1 Okl. Cr. 566, 99 Pac. 163, in which it was held:

"The use of intoxicating liquor as a beverage by a juror during the trial and consideration of a capital case will vitiate a verdict of guilty, and entitle the accused to a new trial."

It will be noted that in that case the intoxicating liquor was used as a beverage, while in this case it was prescribed as a medicine and used upon the advice of a physician. In the *Bilton Case* the whisky was drunk at a time when the jury was considering the evidence. In this case the whisky and quinine was taken at a time when the jury was not considering the evidence, but during a recess occasioned by the happening of Thanksgiving Day. It also appears from the *Bilton Case* that the decisions upon which that holding of this court rests are based upon the use of intoxicants after the jury had retired to consider of its verdict. The drinking of whisky or any other intoxicating beverage by the jury or by any member thereof should not be tolerated, and the bailiff in

charge of a jury should be very careful to guard against the reception and use of such intoxicants by the jury.

The Bilton Case, we think, is distinguishable from this case. First, in that in the Bilton Case the jury used whisky as a beverage and drank considerable quantities of it throughout the progress of the trial, while in this case only two members of the jury partook of whisky mixed with quinine as a medicine, and then during a recess in the trial, and it is not shown that the effect of such mixture deadened the sensibilities of the jurors to any extent whatever, or rendered either of them incapable for the proper performance of their duties. Further, it is not contended in this case that after the jury retired to consider of their verdict that any intoxicants were consumed by any member thereof. In the Bilton Case it was shown that certain members of the jury drank whisky at a saloon "while hearing this case and deliberating upon their verdict." So that it may be readily seen that the facts in the Bilton Case are very dissimilar to the facts in this case.

The Supreme Court of Iowa in the case of *State v. Morphy*, 33 Iowa, 273, 11 Am. Rep. 122, distinguishes in fact and principle the case of *State v. Baldy*, 17 Iowa, 39 (cited with approval in the Bilton Case), as follows:

"It is next assigned as error that the court refused to set aside the verdict of the jury on the ground that one of the jurors drank intoxicating liquor during the progress of the trial. The affidavits as to the fact that the juror did so drink are not set out in full in the abstract. So far as we are able to determine the circumstances upon the abstract and arguments they are, that one of the jurors, not in the habit of drinking, was ill during the trial, and took for medicinal purposes, without medical advice or prescription, some brandy and blackberry balsam or mixture; that it was done during the hearing of the case and not after the jury retired. There is no showing or claim that its effects were intoxicating or other than remedial; nor is it shown that the facts concerning it were not well known to defendant and his counsel at the time and before the cause was submitted to the jury. The case is not, either in its facts or principles, within *State v. Baldy*, 17 Iowa, 39, nor *Ryan v. Harrow*, 27 Iowa, 494 [1 Am. Rep. 302], and there was no error in the action of the court in this respect."

The facts in the *Morphy* Case are very similar to the facts in this case. In the case of *Gilman v. Ham*, 38 N. H. 114, the use of a small quantity of brandy by a juror for medicinal purposes is held not to be error where his disease is real and manifest, and the use of brandy had been previously prescribed by a physician. This later case distinguishes the principle previously announced by that court in the cases of *State v. Bulard*, 16 N. H. 139, and *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323 (cited with approval in the Bilton Case), although the former decisions were not mentioned. In *Gilman v. Ham*, supra, the court said:

"We see no sufficient cause for setting aside the verdict, in the conduct of the juror in drinking a small quantity of brandy, which, upon the

evidence before us, he must be held to have taken only and strictly as a medicine, previously prescribed by his physician, as a remedy for the disease under which he was manifestly laboring at the time, and not as a beverage. It was taken by him alone, apart from and without the knowledge of any of his fellows, in good faith, as a remedial agent for a serious and troublesome malady. The facts found by the case do not seem to us to differ substantially in effect from what they would have been if the juror had carried in his pocket a vial of medicine for the relief of the difficulty under which he was suffering, and had taken a dose of it on one of the numerous occasions when he was obliged, as the consequence of his illness, to leave the juryroom. His disease was real and manifest, and not feigned; the juror was not in the habit of using spirituous liquors; he requested the officer to obtain the small quantity of brandy for him, as the medicine prescribed by his physician for the disease under which he was palpably suffering; he drank it privately as a medicine, and not as a beverage, after his mind was made up in the case; and it is impossible to conceive how, under the circumstances, the defendant can have suffered from the influence of the liquor upon the judgment of the juror, or what injurious influence can be exerted on the community as the result of such an occurrence. There would not seem to have been anything in the conduct of the juror, as disclosed by the case, which can rightfully be regarded as imprudent or injudicious, much less deserving the severe reprehension and rebuke which would be involved in setting aside the verdict on that account."

A similar distinction is made in the case of *Pope v. State*, 36 Miss. 121, wherein it was held:

"The introduction by the bailiff of intoxicating liquors, in a sufficient quantity to produce drunkenness, into the room where the jury in a felony case are deliberating upon their verdict, is illegal and improper; and if nothing more appear, the verdict will be set aside upon the ground that the jury were thereby exposed to an improper influence; but if it appear that such liquor was used by only one of the jury, who was sick, and that he was not intoxicated thereby, the presumption which would otherwise arise against the purity of the verdict is rebutted, and it will not be disturbed."

Other cases to like effect are *State v. Cucuel*, 31 N. J. Law, 249, and *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709.

While there appears to be a direct conflict in the authorities as to whether or not the use of intoxicating liquors as a beverage by members of the jury during the progress of the trial and while deliberating upon the verdict is of itself sufficient ground for granting a new trial, there appears to be an uniformity of modern opinion to the effect that the use of small quantities of whisky or other intoxicants mixed with curative drugs, or diluted, and used strictly for medicinal purposes by jurors is not such misconduct as will vitiate the verdict and authorize the granting of a new trial, where it appears that such jurors were in no way rendered intoxicated or incapacitated for the proper performance of their duties. There is an affirmative showing in this case that neither of the jurors who partook of whisky and quinine were in any way incapacitated thereby.

[4] Finally it is contended that other misconduct of the jury should reverse this judg-

ment. This assignment of error refers to the fact that during recesses taken during the progress of the trial the jurors were permitted to have access to certain local newspapers concerning statements of other homicides committed in Oklahoma county while the trial of this case was in progress, and also during a recess some of the jury saw the sheriff come into the courthouse carrying a hat and two butcher knives, and one of the jurors spoke to him and asked him if that was all he got, and he replied, "No, I got one dead one and five live ones." It is asserted that this conduct is such as to greatly prejudice this defendant and deprive him of a fair and impartial trial. While the conduct of the juror in yelling to the sheriff as he was passing through the courthouse is subject to criticism, and is such as the trial court should always rebuke should attention be called to it, nevertheless we cannot see wherein this defendant's substantial rights were prejudiced thereby. Our statutes (sections 5899, 5900, and 5937, Revised Laws) provide that there shall be no communication with the jury after it has been impaneled and sworn to try the case by any person on any subject connected with the trial itself, and if such a communication is had it is ground for new trial, and the verdict should be set aside. In this case it is shown conclusively that no person was permitted to communicate with the jury upon any subject connected with the trial, and it is also shown that the newspapers which the jurors were permitted to read contained no statement with reference to this particular trial; that such matters were torn or cut out of the papers before they were handed to the jurors. No statutory right of this defendant therefore was violated, the jury did not discuss these outside matters in any way, and it does not appear that the defendant was probably injured by such alleged misconduct; but on the other hand the testimony of the persons called by the defendant in support of the motion for new trial, in our opinion, shows that no injury was occasioned this defendant by any of these matters set forth in the motion.

Where the evidence is so conclusive and convincing of the guilt of the defendant of the degree of crime of which the jury found him guilty, before this court may set such a judgment of conviction aside it must clearly appear that the defendant has been deprived of some constitutional or statutory right, or that the errors complained of have probably resulted in a miscarriage of justice. In this case, it is our firm conviction, not only that there has been no miscarriage of justice, or that the defendant has been deprived of any of his constitutional or statutory rights, but also that the conviction of murder received at the hands of the jury was the only honest verdict which an intelligent and unbiased jury could have found under the evidence.

For the reasons given, the judgment of the superior court of Oklahoma county is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

PIERSON v. STATE. (No. A-1978.)
(Criminal Court of Appeals of Oklahoma.
May 19, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §784(1)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

When the state's case is based wholly upon circumstantial evidence, and the proof offered by the defendants discloses only facts which tend to exonerate him from the commission of the crime charged, an instruction on circumstantial evidence should be given by the court, and it is error to refuse to do so when it is requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1980.]

Error from District Court, McCurtain County; Summers Hardy, Judge.

Ellie Pierson was tried upon a charge of murder, convicted of manslaughter, and he brings error. Reversed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, and T. J. Barnes, of Idabel, for plaintiff in error. G. M. Barrett, Co. Atty., of Idabel, for the State.

ARMSTRONG, J. The plaintiff in error, Ellie Pierson, was indicted by the grand jury of McCurtain county in 1912, jointly with one John Flanagan, for the murder of S. B. Lyons, a negro, in April of that year. Flanagan was never apprehended. The plaintiff in error was tried in December, 1912, convicted of manslaughter in the first degree and his punishment fixed at confinement in the state penitentiary for a term of four years.

An elaborate statement of facts, as they were developed at the trial, is presented in the brief of the plaintiff in error, the correctness of which is not challenged by counsel for the state. We therefore adopt the same for the purposes of this opinion:

"George Lyons testified on behalf of the state as follows: 'I am 15 years of age, and a son of the deceased. In the spring of 1912 the deceased was working at Broken Bow. On the Saturday night of the killing, defendant and a tall fellow, neither of whom I had ever seen before, came to deceased's camp. They came in, and defendant sat leaning against the bed, and the tall fellow went outside with deceased and talked to him. They came back into the tent and got deceased's hat, and the tall fellow said that he had three cases of whisky at the log camp, and he wanted deceased to go with them and help bring it to the camp where deceased stayed. As they started out deceased turned around and said, "Boys, I will be back after while." We sat up and waited for him, but he did not come back, and we went to bed and to sleep. I next saw deceased on the following Monday. He was in the branch by the side of the railroad, dead. His throat was cut.

Deceased was not drinking any that night. I do not know whether deceased bought anything from the two men that night or not. Deceased had about \$50, but this was subsequently found under his pillow.

"Cross-examination: 'It was the "tall fellow" who took deceased outside, and at no time did the defendant say anything.'

"S. L. Brock testified in behalf of the state: 'I was not personally acquainted with the defendant, but had seen him several times. Deceased lived in the camp. I saw deceased after he was killed, close to the railroad about a quarter of a mile from where the latter lived. His throat was cut. I saw defendant and another fellow on Saturday evening before the killing about three miles out of Broken Bow going towards the front. Deceased lived at the front in a tent.'

"H. L. Stiff testified in behalf of the state: 'I was a constable and lived near Broken Bow. I did not see the deceased. I followed the defendant and Flanagan from Broken Bow to John Beavers' house, where they spent the night; learned there that they had gone to Hochatown. At Hochatown I found that they had gone to Grannis, Ark. Defendant's mother lived at Grannis; I went to Grannis and had a deputy sheriff there arrest defendant. I asked defendant where Flanagan was, and the latter replied that he didn't know; guessed he was in Louisiana by that time, as he left that morning on the train. A little later defendant said that Flanagan was over at Frank Arnold's, his brother-in-law. I went to Frank Arnold's, and the latter said that Flanagan had been gone 30 minutes. Defendant made a statement to me in regard to the killing. He said they were down there in the pole camps; that Flanagan sold the deceased some whisky, and when the latter got his pocketbook out to pay for it, Flanagan saw he had some money, about \$17, and when it got dark Flanagan decided to get deceased out and relieve him of that money. So he decoyed him off to carry some whisky he had hid, and got him out and searched him, and found that deceased didn't have any money, and Flanagan got mad and beat him around there awhile, and defendant heard the negro struggling, and said to Flanagan, "Don't kill him!" and Flanagan said, "I have done killed the son of a bitch now;" that Flanagan threw the body in the branch; that they went to Broken Bow, from there to Bob Beavers', thence to John Beavers', from thence to Hochatown, and thence to Arkansas.'

"Cross-examination: 'Defendant never stated that he had anything to do with the killing, but said that the other fellow did it. He never said that he had taken any part in decoying the negro off or in killing him. He said he was sitting on the spur a few feet away from Flanagan. He said that Flanagan threw him in the branch. Defendant voluntarily returned with me from Arkansas.'

"Here the state rested, whereupon the defendant introduced the following evidence:

"R. L. Beavers, Jr., testified on direct examination: 'I know the defendant, and have seen Flanagan. Some time during the night in which Lyons was killed Flanagan and defendant came to my house and knocked on the door, and I got up and let them in.' The defendant at this time offers to prove by the witness that on the night of the killing, between 9 and 11 o'clock, the defendant, with the said John Flanagan, came to the witness' house with the said John Flanagan, and there in the presence and hearing of the defendant stated to the witness that he didn't care to sleep any that night; that he had killed a negro down on the front, and was leaving the state of Oklahoma; that the defendant had to go with him; that the defendant took no part whatever in the killing, and defendant in no way was responsible for the killing. (State objects. Objection sustain-

ed, to which defendant excepts.) I had been with defendant that night, but the next morning, when Flanagan stepped into another to comb, defendant said, "Well, you hear, we had to say last night, and it is true, I want you to get the officers as quick as you can and follow us; I will try to get him; Bob's to-night, and you go there; and don't and go on to Arkansas, you will find them there." I was unable to find Mr. Stiff was an officer, but I told Mr. Byrd, the marshal, about it, and he got Mr. Stiff, Mr. Gravis, the night marshal of Broken Bow, myself, and another man went to look for them on the request of the defendant to follow them there. We did not find them there. The other men went to Hochatown, and I went on to Arkansas. We found the defendant at Grannis, Ark., but did not find Flanagan.'

"Cross-examination: 'I told Mr. Byrd about it either the next day or the day following. I was the only one I had told. I told him I heard of any reward being offered. I heard nothing of the killing except what Flanagan and the defendant told me at my house. We found the defendant at my uncle's house, 2 miles from Grannis. Willis Hungeat brought him there. We were looking for Flanagan; had known the defendant about all my life. That was the first time he had stayed at a house since I was married. I had known Flanagan about a month or six weeks.'

"Redirect examination: 'I went with the officers to try to catch Flanagan, and the defendant went with us. Defendant told Mr. Stiff that he had better hurry up, as Flanagan was getting word of their presence. When we got close to the house Mr. Stiff told the defendant it would be best for the latter to go in the house and get Flanagan out, if he could, and I would waylay him and arrest him. The defendant went in the direction of the house. We couldn't see the house from where we were. The rest of us stayed together. Flanagan was gone. The night when Flanagan came to my house he was wet. He threw away his socks at my house. He had a blood stain on his shirt front.'

"Recross-examination: 'After the defendant came back, we went on up to the house. We were not more than 25 or 40 steps from the house when the defendant went up to it, but the house was in the woods.'

"John Beavers testified in behalf of the defendant as follows: 'I live about 10 miles from Broken Bow. I know Ellie Pierson. I was introduced by him to a man named Flanagan, sometimes called Johnson. This was about the time the negro Lyons was killed. Flanagan, Johnson had on an undershirt and a coat. He had no overshirt and no socks. I gave him a shirt and a pair of socks.'

"Johnnie Beavers testified in behalf of the defendant as follows: 'I live at Grannis, Ark. I know the defendant. Was introduced by him or my uncle to a man named Johnson about the time the negro Lyons was said to have been killed. This was at my uncle, John Beavers' house. I was out hunting, and when I got in that evening they were there. They said they stayed at Uncle John's that night. I tried to have a private talk with the defendant, but when we started anything the other fellow always went with us. I had no opportunity to talk to him privately until the next evening. He told me then that if the officers came to Uncle Bob's to tell them to be at Hochatown that evening, and to tell them to come on, and if they were not there, to come on to Grannis, Ark.; that he was going on home, and he expected them to be at Uncle Bob's when he got back.'

"Cross-examination: 'I had known the defendant about all my life. Never met Flanagan at

ing. Defendant is not related to family in any way.' Beavers, Sr., testified in behalf of the s follows: 'I live at Grannis. I defendant, and remember the time he l. The defendant said he wanted to be certain to catch Flanagan if them; that he was afraid for his ould do all he could. He said for ry on up there. I didn't go. Mr. Beavers, Mr. Hungate, and the de- it.'

Isom testified in behalf of the de- follows: 'I live at Idabel, and work Bow; know S. B. Lyons, and have ant. I saw Flanagan, Johnson, or ey called him, at Adams' stove camp of the killing. My tent and Lyons' close together. About sundown on ; of the killing this man, known as at Lyons' tent. I saw him sell int of whisky. The defendant was

Lyons and I bought a pint between aying half. Lyons had \$20.20, and ers. He pulled his money out, and that sold the whisky said, "I will how the boys count this greenback." t and folded it, and he says, "I will how, when you want to draw one an pull it out," and he folded it and ck to him. That was the first time v the man to know him. He was out- e tent. The defendant was not there. looked like he was full. I never saw nore.'

examination: 'I saw the defendant and together near Brock's tent before the the whisky.'

Pierson testified in his own behalf as 'I live at Grannis, in Polk county, Ark. Flanagan or Johnson in a way; I personally acquainted with him. On ing of the killing I had started to the get a job of work, and I saw him as l the depot. He asked me where I g, and when I told him he said, "Well, tending to go down there myself; if you nd, I will go along; you will have com- ether I do or not." We walked together front. When we got to the tent we d. I ate supper at Sam Brock's tent, and his partner were there. After sup- went into the rooming tent and sat Flanagan, or Johnson, or Burk, what- name is, stepped out and was gone 15 inutes, and he came back and said, "Kid, o with me; I am going down here after 'hisky; there is a negro out here going g it to me." I said, "Well, I will go up ay; I am going to Sample's to stay all I suppose I will just go along." I walk- ing with him, and the negro Lyons went as; I did not know his name then. As nt up the railroad Flanagan said to me, negro is the slickest bootlegger ever come he pike." The negro said, "Yes, cap; have cotch me." We reached the log and I said, "I guess I will stop here." gan said, "No, come on and go with me; ust a little way, and we will get a drink isky." I told him I didn't care for any y; I didn't drink; very seldom. He "Come on, any way." I went on down with

We went down the track about a quarter mile from the log camp. Then he said to You stay here on the track, and we will go and see this fellow, and get the whisky." ited on the track. While they were gone there talking I heard them quarreling. I i this fellow Flanagan say, "Come on in that money, nigger." The nigger said, white folks, I left it at the house." He "Come on in with that money, nigger; if don't I will kill you." I said, "I wouldn't that." He said, "What the hell is it to ?" I said, "Nothing." He said, "I have

done killed the son of a bitch." I heard him throw something in the branch. I never left the track. Then he came back to me. He said, "You have got to leave this state with me." I asked him what that was for. He said because he was afraid he would be arrested and I could cause him trouble, and he had to get out of the state with me. He said, 'If you don't, if you make any attempt to get me into trouble or have me arrested, I will kill you.' I went on with him. He said, "We will go to Broken Bow to-night and stop, and you can sleep some." He had a gun; an automatic pistol. He told me of several crimes that he had committed; he said that he was wanted in Georgia for murder. In Jacksonville, Fla., for bank robbery, and in some place in Arkansas for highway robbery. When he told me that I had to go with him or he would kill be, I believed the statement, and I went with him through actual fear of losing my life. We went to Bob Beavers' and stayed all night. I slept some; he didn't go to bed at all. The next morning we went in to wash, and as he stepped into another room to comb I said, "You heard this man's testimony last night; we are going through the country to Grannis, Ark.; I am going to try to get him to stay at your father's house to-night. You get the officers and come on and arrest him." He went on. We stayed that night at old man John Beavers', about 9 or 10 miles from Broken Bow. Flanagan's shirt had blood on it, and he pulled it off and threw it in a creek. I next left directions for the officers at Hochatown, 6 or 7 miles from John Beavers'. From Hochatown we went to Grannis, Ark. I got away from Flanagan at Frank Arnold's, 2 miles from Grannis. I then went to Grannis to notify the officers before I went to my home. I searched for — and Hungate; they were both out of town; Hungate came back late that evening. I told him about the man and the killing, and that the man was at Frank Arnold's. He said, "Well, we will go down there." Hungate went and ate supper; he then came back to town, and he and I then went to Bob Beavers', Sr. There we found Henry Stiff and little Bob Beavers. They talked about how to arrest Flanagan. They were afraid of him, I suppose. I told them they had better hurry up, as he might get away; so they tried to get old man Bob Beavers to go along with them. They walked together, and they stopped I suppose 50 or 75 yards from the house. They sent me up to the house to get him out. They were afraid of him. I went up and called for him. Mr. Arnold came out, but Flanagan did not. I took no part whatever in the killing. I was not off the railroad track. I had nothing to do with selling the whisky. I would say that Flanagan was half drunk that night. He talked quite a little.'

"Cross-examination: 'I had known Flanagan only about 2 weeks; had not been intimately associated with him. Had not gone to and from the front with him, and I did not say I had in the statement I made to you. I had been to Broken Bow only once before. He did not go with me; he was there when I got there. I did not see Flanagan call the negro out of his tent. I did not go to the negro's tent or go in. I did not say in the statement I made to you, and which your stenographer took down, that the first time I saw the negro was when Flanagan called him out of the tent. I said the first time I saw the negro was when Flanagan called me out of the tent. The negro was standing outside, between his tent and Sam Brock's. We did not go very far; probably half a mile.'

"Mr. Barnes: We have no objection to him introducing the whole transcript in evidence.

"The transcript was then introduced, and was in substance as follows: 'My name is J. E. Pier- son. The man's name who cut the negro's throat is Flanagan. He goes by the name of John-

son. He lives at Wyandotte, Ga. I have known him about 4 or 5 weeks. I first got acquainted with him at Broken Bow. He stayed around there at first one place and then another. He took this negro out, and I suppose he first sold him a pint of whisky. The negro was about half drunk. He had some whisky up the track and he told the negro he wanted him to go up there and take that down for him, and asked me to go with them. We got up there and sat down and were talking, and directly he jumped on this negro about something, got into a quarrel, and he told him to come on in with that money, and commenced kicking him, and kicked him in the head. The negro commenced begging, said he had left the money at the house and would go and get it, and he said, "No, you have it now." And they were scuffling and talking, and he knocked him down, and grabbed his knife, and cut his throat. He told me, "You see what I have done, don't you?" And I said, "Yes;" and I told him at the start, and he said, "Come on with me or I will kill you;" and I said, "No, you won't; let the negro alone;" and he just turned around to me and said, "What is it to you?" And after he had killed him he tore my shirt off, and I said, "Don't do that; I don't intend to hurt you over it;" and he said, if I would not say anything about it he would let me alone; and we went on up to George Beavers' and stayed all night, and I said we had better go and give up, and you can swear self-defense. He had a cut place on his vest; he either put it there or the negro cut at him. He threw the negro in the branch. He went through his pockets, and he told me he must have left that money at the house; said he had \$17; said he saw it when he got that whisky. It was done Saturday night, and we stayed all night at Bob Beavers' that night. We went to old man Bob Beavers' the next morning and stayed there that night. From there we went to Hochatown, and stayed all night with Chesley Allen. Then we went to Grannis and spent the night at Frank Arnold's, my brother-in-law, and the next morning I went home. That was Tuesday night. Flanagan stayed around there; he told me he was going back to my brother-in-law's, and I gave him all the money I had, and he was afraid I would turn him in, and he would not get away from me until there at Hochatown. We came back to Bob Burk's, and he told Bob Beavers that he had killed this negro, and that I had nothing to do with it. He would go to the penitentiary 20 years before he would let me suffer for it; he also told Bob Burk that. The officers got me in town at the depot. Flanagan was 2 miles south of town; said he was going to stay all night at my brother-in-law's, and leave next morning. I haven't seen him since. He is a tall man, about 6 feet, dark brown hair, red complected, smooth-faced, scar on left jaw just below his eye, jawbone been broken with a pair of knucks, scar about 2 inches long. He weighs about 175 or 180 pounds. He said he was going to Louisiana on freight trains. My brother-in-law sent my little brother down there, and this fellow got hold of him and got sort of afraid and left there. My brother said he got a freight train at Mena, and would get a hack line out through the country. That would throw him out by Hot Springs, but he is wanted at Hot Springs, under a \$500 bond. He has gone by the name of Sinclair, besides his other names; he told me all about it. He has broke several jails. I have been gambling some at Broken Bow. Flanagan told me that he was an old whisky maker. I am under bond to appear in court in Arkansas, being charged with robbing the Grannis bank. I was raised at Grannis, and used to go to school to Judge Barnes. I will be 25 years old the 23d day of this month. I first saw the negro at Broken Bow. The first I saw of him he went to a tent and called him out. A fellow named Tom John-

son, not this man, was running the gambling house in the front of a tent. This fellow Johnson and I were together. I got with him in Broken Bow. Kirby, Ed Cole, and Will Reese are on my bond in Arkansas. I came over here without requisition papers; never saw a warrant or nothing. Mr. Stiff told me he would get me bond if I would come over here. Flanagan said he was wanted at Wyanter or Winder, about 4 miles from Atlanta, Ga., under the name of W. V. Flanagan. I don't know who he killed there; he said his mother's farm and his brother's farm are both up for his bond the 16th of this month. He is very talkative, and pretty bad to drink. He didn't say how long he had been wanted in Georgia, but said his trial was set for the 16th of this month. Said he couldn't afford to go back there; said if he got away he was wanted in Tennessee for highway robbery, and in Jacksonville, Fla., for murder. He is a bank robber and train robber. He is about 35 years or 36 years old. He broke jail in Oklahoma once; I think he said it was at Tulsa. He says there is no jail that will hold him. The officers stopped about 50 or 75 yards from the house and got me to go up there and call him out, and they were going to step up and arrest him while I was talking to him. He had nothing except what he had on. His whisky was white whisky without labels on it. He told me it was corn whisky. My trial at Mena is set for Monday or Tuesday. Flanagan had between \$15 or \$20. He said the negro had two \$5 bills, and one \$10 bill, but said he did something with it. I don't know whether he got it or not. About the first there was to it, he set down by the negro and commenced feeling in the negro's pocket, and the negro told him to quit, and the negro then taken out his knife, and Flanagan jumped up and grabbed his knife away from him and shut it up and put it back in the negro's pocket, and they were setting down, the first thing I knew he jumped up and commenced kicking the negro, and said, "Come on in with that money," and kicked him, and the negro said, "White folks, I left it at the house, and I will go get it"; and he said, "No, you won't," and kept kicking at him. He kicked one of the heels off his shoes, and went to Hochatown and bought him a pair of vici shoes in old man Burk's store. He had on a gray suit of clothes and flannel shirt. He tore his vest up after he said the negro cut it and threw it away. I let him have \$3.

"H. L. Stiff testified in rebuttal in behalf of the state as follows: 'I know little Bob Beavers. I saw him in Broken Bow on Monday after the killing on Saturday. He did not say anything to me about Pierson and Flanagan having been to his home on Saturday night.'"

This is a fair résumé of all the testimony introduced at the trial.

The first assignment of error, and the only one we shall discuss, is based upon the proposition that the court erred in refusing to give an instruction upon circumstantial evidence. It appears that counsel requested the court to instruct upon this proposition, and submitted a form of instruction, giving the jury the law upon this phase of the case. The sufficiency and form of the instruction is criticized by counsel for the state. An examination of the same, however, and an examination of the record discloses clearly that it was sufficient to call the court's attention to the fact that this issue was in the case, within the viewpoint of the defendant, and was sufficient to raise the question for review. In fact, the instruction as requested, or rather instructions, in poorer

form than the one requested, have been given and approved in many recorded cases. It appears that the trial court declined to give the instruction, not upon the ground that it was insufficient in form, but upon the ground that an instruction upon circumstantial evidence was not proper in the case. It is well settled in this jurisdiction that if an instruction requested is not in proper form, but is sufficient to call the court's attention to a material issue, it is the duty of the court to formulate and submit to the jury a proper instruction, when the record clearly indicates that no undue advantage of the court is sought. See *Roberson v. United States*, 4 Okl. Cr. 336, 111 Pac. 984; *McIntosh v. State*, 8 Okl. Cr. 469, 128 Pac. 735; *Rutherford v. United States*, 1 Okl. Cr. 194, 95 Pac. 753; *Hendrix v. United States*, 2 Okl. Cr. 240, 101 Pac. 125; *Sles v. State*, 6 Okl. Cr. 142, 117 Pac. 504; *Inklebarger v. State*, 8 Okl. Cr. 316, 127 Pac. 707; *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 542; *Price v. State*, 9 Okl. Cr. 359, 131 Pac. 1102.

The law requires the trial court to submit the issue of guilt or innocence, by proper instructions, giving the jury the rule when the state relies solely upon circumstantial evidence for a conviction. In this case, the state had no other testimony. The proof offered on behalf of the defendant does not exempt this cause from the rule. The defendant testified in his own behalf and gave a complete account of the homicide. His testimony does not in any way strengthen the state's case, but to the contrary absolves him from participation in, or willful concealment of, the crime.

Other questions raised have been determined in former opinions. We will therefore forego a discussion of them.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

DOYLE, P. J., and BRETT, J., concur.

CONWAY v. DISTRICT COURT OF EIGHTH JUDICIAL DIST. OF NEVADA IN AND FOR LYON COUNTY et al. (No. 2263.)

(Supreme Court of Nevada. May 21, 1917.)

PARTNERSHIP — 219(3) — ACTIONS AGAINST PARTNERS — CHARACTER OF JUDGMENT — INDIVIDUAL JUDGMENT.

Under Rev. Laws, § 5239, providing that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and section 5240, providing that, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper, in an action against partners, the court did not exceed its jurisdiction by rendering judgment against one of them.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 434.]

Certiorari by P. J. Conway to the District Court of the Eighth Judicial District of the State of Nevada in and for Lyon County, and another to review a judgment against petitioner. Proceedings dismissed.

Mack & Green, of Reno, for petitioner. E. E. Hull, of Yerington, for respondents.

McCARRAN, C. J. Suit was commenced in the justice court against P. J. Conway, E. J. Ross, and R. C. Mudge, as copartners. Ross and Mudge failed to appear or answer. Conway alone defended. Judgment was rendered for the plaintiff in the justice court. On appeal to the district court a trial *de novo* was had. The latter court found that no partnership existed between the parties; but, notwithstanding the fact that Conway was sued upon a debt alleged to have been contracted by the partnership, judgment was rendered against him individually. The proceedings come to this court by certiorari.

Petitioner contends that the court below exceeded its jurisdiction in rendering an individual judgment against Conway; and in this respect they contend that, the suit having been brought against the partnership, judgment could run only against the partnership, and not against individuals.

At common law in an action against two or more defendants upon an alleged joint contract of liability, the judgment was required to be against all the defendants or in favor of all. The common-law rule applicable to the question here was asserted by Lord Ellenborough in the early case of *Weall v. The King*, 12 East, 452, to be based on the principle that the proof of the contract must correspond with the description of it in all material respects. Hence, where partnership was alleged, partnership must be established by the proof, and a several judgment could not issue where at the time of the alleged making of the contract the parties sued were partners. It is generally conceded that this rule must prevail in all jurisdictions where the common law has been accepted or adopted and where no statutory provision has been enacted abrogating the same.

In a number of the states of the Union statutory provisions have been enacted, and these "joint debtors' acts," so termed, have been held to effect an abrogation of the common-law doctrine. Hence we inquire: Has the common-law rule been interfered with by our statute?

Section 5239, Revised Laws (section 297 of the Civil Practice Act), provides:

"Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

The following section provides:

"In an action against several defendants, the court may, in its discretion, render judgment

against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

Mr. Black, in his Treatise on the Law of Judgments, vol. 1, § 208, in discussing the effect of the "joint debtor acts," lays down the general principle to the effect that, where such acts exist, a plaintiff suing several as partners for a breach of a contract may recover against such as he can prove to be parties to the contract without proof of partnership.

A provision in the Code of California identical to the one found in our Civil Practice Act was construed by the Supreme Court of that state in the case of *Morgan v. Righetti*, 45 Pac. 260,¹ and the application made in earlier cases was referred to and reaffirmed. *Rowe v. Chandler*, 1 Cal. 167; *People v. Frisbie*, 18 Cal. 402; also *Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962.

In the late case of *Dobbs v. Purington*, 136 Cal. 70, 68 Pac. 323, the Supreme Court again referred to the rule laid down in *Rowe v. Chandler*, supra, and reaffirmed its position taken in *Lewis v. Clarkin*, 18 Cal. 399; *Shain v. Forbes*, 82 Cal. 583, 23 Pac. 198; *Bailey v. Hall*, 110 Cal. 490, 42 Pac. 962; *Morgan v. Righetti*, supra.

In all these cases the court recognized the common-law rule, but held, however, that in view of the statutory provision the common-law rule was no longer applicable, and that judgment might be given against one of several defendants sued on a partnership debt; this, too, where, as here, it was found that no partnership existed.

Counsel for petitioner complain of the doctrine asserted in these decisions, and claim that it is not supported by authority generally.

In Missouri the statute provides:

"In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Section 2772, Rev. St. Mo. 1909.

Section 1981 of the same act provides:

"In all actions founded on contract and instituted against several defendants, the plaintiff shall not be nonsuited by reason of his failure to prove that all the defendants are parties to the contract, but may have judgment against such of them as he shall prove to be parties thereto."

These provisions were construed by the Supreme Court of Missouri in the case of *Crews v. Lackland*, 67 Mo. 619, and it was there held that, by reason of the Code of Missouri, the plaintiff suing several as partners for breach of contract might recover against such as he could prove to be parties to the contract without proof of the partnership.

In the case of *Bagnell Timber Co. v. Missouri, K. & T. Ry. Co.*, 180 Mo. 420, 79 S. W.

1130, the Supreme Court of Missouri reversed a judgment because the evidence failed to show that one of the parties defendant entered into the contract jointly with the other. The court in that instance failed to give recognition to the force of the statute making all contracts joint and several. After retrial in the lower court, the court of last resort again considered the question, and in the latter instance reversed its former decision, and held that under statutory provisions such as found here contracts which at common law were joint only are now joint and several, and any one or more of the obligees thereto may be sued and a recovery had against those only whom the evidence shows to be liable thereon. Speaking of its former decision, the court says:

"It is inconceivable * * * what induced the court to hold on the former appeal that because the petition declared upon a joint contract a recovery could not be had against those defendants who the evidence showed were liable thereon." *Bagnell Timber Co. v. Missouri, K. & T. Ry. Co.*, 242 Mo. 11, 145 S. W. 469.

To the same effect were the cases of *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71, 152 S. W. 52, and *Berkshire Lumber Co. v. Chick Inv. Co.*, 168 Mo. App. 342, 153 S. W. 1078.

Section 429 of the Civil Practice Act of the state of Nebraska (Cobbey's Ann. St. 1911, § 1414) provides that:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper."

In the case of *Long & Smith v. Clapp*, 15 Neb. 417, 19 N. W. 467, the Supreme Court of that state, in an action against two defendants charging them with the making and breach of a joint warranty, held that, the evidence being ample as to one, but insufficient as to the other, defendant, the judgment might be against one and for the other.

Similar provisions in the Code of Colorado led the Supreme Court of that state to hold that the equitable doctrine that partnership debts are joint and several does not obtain in a purely legal action, and that a several judgment might be rendered where the suit was commenced against a partnership. *Exchange Bank v. Ford et al.*, 7 Colo. 315, 3 Pac. 449.

A provision in the Code of Tennessee of similar import was applied by the Supreme Court of that state in the early case of *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188, and there the court held that under the provisions of the statute a creditor might sue any one or more of several joint obligors or partners, and such suit was not a bar to a suit subsequently brought against the remaining partners or obligors.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 113 Cal. xvii.

The case of *Francis v. Dickel & Co.*, 68 Ga. 255, involved the question of the application of a provision in the Code of that state where suit was brought against a partnership and judgment rendered against an individual. The court held that by reason of the provisions of the statute, if it appears on the trial of such a case that some of the defendants are not liable and ought not to be joined in the action, the suit will not abate or be quashed on that account, but may proceed against the other defendants. To the same effect was the earlier case of *Wooten & Co. v. Nall*, 18 Ga. 609.

The Code of Oregon provides:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."

Sections 180 and 181, L. O. L.

The Supreme Court of Oregon, in the late case of *Bertin & Lepori v. Mattison*, 80 Or. 354, 157 Pac. 153, after reviewing many decisions rendered by that court upon an application of the statute, held that the common law had been abrogated by legislation; and under such statutes the plaintiff may recover from those defendants against whom he is able to establish his case, although he is compelled to lose his hold upon the others from whom he seeks to recover.

In the case of *Knatz v. Wise*, 16 Mont. 555, 41 Pac. 710, the court had presented to it conditions analagous to the matter at bar. There, as here, the action was in part for services rendered. Parties named as defendants were alleged to be copartners. Judgment was rendered against one of the parties named in the copartnership. The action was dismissed as to the other defendants. The court held that, if recovery could be had against any of the defendants upon the facts proved, had they been sued alone, then the recovery was proper, although plaintiff may have joined others in the action against whom no liability was shown. This decision rested entirely on the provision in the Practice Act of Montana.

In all of the jurisdictions where this question has been considered, the authorities have recognized that individual judgments in such cases gain sanction only by reason of statutory enactments which set aside the common-law rule. From an almost uniform line of decisions applying such statutes the rule has become crystallized to the effect that, if a plaintiff sues two or more defendants on a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be li-

able when the others are not liable. 23 Cyc. 807.

The facts presented to the district court upon which it based its judgment and conclusion are not before us. The matter being here by the process of certiorari, the sole question is as to whether the lower court exceeded its jurisdiction in rendering an individual judgment against one of the parties named in the copartnership. By reason of our peculiar statute, we conclude that the judgment of the district court must remain undisturbed. The proceedings are dismissed. It is so ordered.

COLEMAN and SANDERS, JJ., concur.

OMAHA STRUCTURAL STEEL WORKS v. LEMON et al.

(Supreme Court of Idaho. April 28, 1917.)

APPEAL AND ERROR §—113(3) — APPEALABLE ORDERS—SETTING ASIDE DEFAULT.

An order made by the district court, setting aside a default entered by the clerk of said court under the provisions of subdivision 1, section 4360, Rev. Codes, and granting leave to the defendant to answer or otherwise plead, is not an appealable order under the provisions of section 4807, Rev. Codes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 766, 767.]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by the Omaha Structural Steel Works against F. H. Lemon and S. J. Doolittle, copartners as Lemon & Doolittle. From an order setting aside a default entered by the clerk with leave to answer or otherwise plead, plaintiff appeals. Motion to dismiss sustained.

Elliott & Healy, of Boise, for appellant. Van W. Hasbrouck, of Homedale, and J. W. Stauffer, of Boise, for respondents.

BUDGE, C. J. This is an appeal from an order made by the district court, setting aside a default entered by the clerk of said court under the provisions of subdivision 1, section 4360, Rev. Codes, and from the action of the trial court in giving to each of the parties "5 days to suggest death of member of partnership and ask substitution of party, and defendant given 10 days thereafter to answer or to plead otherwise."

The respondents move to dismiss the appeal taken from the above order upon the ground and for the reason that the same is not an appealable order. Section 4807, Rev. Codes, which specifies what judgments and orders are appealable, contains no provision providing for an appeal, either from a default entered by the clerk of a district court, or from an order of said court setting aside such default. Neither does said section provide for an appeal from any of the other matters contained in the above order. Maple

v. Williams, 15 Idaho, 642, 98 Pac. 848; *Rose v. Leland*, 17 Cal. App. 308, 119 Pac. 532; *Reitmeir v. Slegmund*, 18 Wash. 624, 43 Pac. 878; *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 Pac. 249; *Rauer's Law & Collection Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.

While it is true that this court entertained an appeal from an order of the district court, setting aside a default entered by the clerk, in the case of *Leonard v. Brady*, 27 Idaho, 78, 147 Pac. 284, the question as to whether or not such an order was appealable was not raised nor called to the attention of the court in that case. However, in view of the statutory provisions above noted and the decisions referred to we have reached the conclusion that the order in question is not an appealable order. Nor does the case of *Leonard v. Brady*, *supra*, pass upon the question as to whether or not such an order is appealable.

The appeal is dismissed. Costs awarded to respondents.

MORGAN and RICE, JJ., concur.

COBURN v. THORNTON et al.

(Supreme Court of Idaho. April 24, 1917.)

APPEAL AND ERROR \Rightarrow 19, 781(1)—EVIDENCE \Rightarrow 44—MOOT QUESTION—DISMISSAL—COSTS.

Held, where an appeal from an order of the district court, denying a motion for a change of venue and continuing the cause, for the term, is prosecuted upon the ground that the trial judge is disqualified, and where upon the hearing of such appeal it appears that such disqualification has ceased to exist because such trial judge is no longer an incumbent in office, this court will take judicial notice of that fact, and the appeal will be dismissed, for the reason that no actual relief can now be afforded other than the awarding of costs, and, costs being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63–80, 312; Evidence, Cent. Dig. § 66.]

Appeal from District Court, Cassia County; Edward A. Walters, Judge.

Action by J. B. Coburn against H. H. Thornton and others, Commissioners of Cassia County, Idaho, W. O. Pratt, as Sheriff, and others. From an order denying plaintiff's motion for a change of venue and continuing the cause for the term, he appeals. Appeal dismissed.

W. E. Abraham and T. Bailey Lee, both of Burley, for appellant. S. T. Lowe, of Burley, for respondents.

BUDGE, C. J. On March 2, 1914, appellant commenced an action against respondents in the district court, in and for Cassia county, for damages alleged to have been sustained while confined in the county jail of said county, for default in payment of a

money fine theretofore imposed upon him in said district court. Appellant alleges, among other things, that he had been ordered by the respondent commissioners and sheriff of said county to labor upon the county roads, and upon his refusal to comply with such order he was, by said respondents, unlawfully and maliciously restricted for a period of 11 days to a diet of bread and water, resulting in his physical and mental injury, to his damage in the sum of \$10,000. The respondents filed their verified answer, denying the illegality of their conduct, as alleged in plaintiff's complaint, and further denying the existence of malice, and affirmatively alleging the fact to be that, if the appellant suffered loss of health, or sustained injury to his physical or mental condition, or deterioration in weight, it was due to the confinement by reason of said judgment imposed upon him by the district court and to no act or acts of the respondents or either of them. Respondents further alleged in their answer that they wholly relied, in restricting appellant to a bread and water diet, upon the advice and direction of their legal adviser, namely, the county attorney, and the advice of the honorable district judge of the district court, in and for Cassia county. When the cause came on for trial the appellant made a motion for a change of venue, upon the ground that the presiding judge was disqualified because of the alleged advice, that he had given to respondents to restrict appellant's diet to bread and water should he refuse to perform work and labor upon the highways of said county, as appeared from the sworn answer of the respondents, and filed in said cause. An order was made denying said motion and continuing the cause for the term. This appeal is from the order.

While it is not a matter of record in this case, it is a matter of which this court must take cognizance, that the Hon. Edward A. Walters, then district judge in and for said county, before whom the foregoing proceedings were had, is no longer such district judge. It is therefore apparent that the only ground upon which a change of venue is sought has been removed, and there is no real controversy before this court, for the reason that if the disqualification did exist at the time the motion for a change of venue was made and the cause continued for the term, it is non esse. The determination of this appeal in favor of appellant could not result in any actual relief to him, except in the matter of costs. Costs, being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal. *Bryan v. Sullivan*, 29 Okl. 686, 119 Pac. 124; *Harper v. Grasser*, 86 Wash. 475, 150 Pac. 1175; *Board of Com'rs v. Stogner* (Okl.) 157 Pac. 923. Therefore, since the right of the appellant to have a change of venue has

ceased to exist, the appeal presents only a hypothetical proposition, and must be dismissed. *State v. Lambert*, 52 W. Va. 248, 48 S. E. 176; *Albright et al. v. Erickson*, 23 Okl. 544, 102 Pac. 112; 3 C. J. 358; 2 R. O. L. 145; *City of Wallace v. Deane*, 8 Idaho, 344, 69 Pac. 62; *Jenal v. Felber*, 77 Kan. 771, 95 Pac. 403; *Fain v. Fain (La.)* 72 South. 801; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293. In the latter case the court said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. * * *

From what has been said it follows that the appeal in this case must be dismissed; and it is so ordered. Costs awarded to respondents.

MORGAN and RICE, JJ., concur.

BENNETT v. THORNTON et al.

(Supreme Court of Idaho. April 24, 1917.)

Appeal from District Court, Cassia County; Edward A. Walters, Judge.

Action by Don Bennett against H. H. Thornton and others, as the Board of County Commissioners of Cassia County, Idaho, and W. O. Pratt, as Sheriff, and others. From an order denying plaintiff's motion for a change of venue, and continuing the case for the term, he appeals. Appeal dismissed.

W. E. Abraham and T. Bailey Lee, both of Burley, for appellant. S. T. Lowe, of Burley, for respondents.

BUDGE, C. J. By stipulation of counsel, entered into in this court, the above-entitled cause was submitted with the case of *Coburn v. Thornton et al.*, 164 Pac. 1012, the same state of facts being involved. And upon the authority of that case the appeal from the order of the trial court, in this action, denying the motion for a change of venue and continuing the case for the term, is dismissed. Costs awarded to respondents.

MORGAN and RICE, JJ., concur.

PARKER et al. v. HERRON.

(Supreme Court of Idaho. April 19, 1917.)

1. SALES §52(7)—ACTION FOR PRICE—FRAUDULENT REPRESENTATIONS—EVIDENCE.

The evidence in this case examined, and held to be insufficient to sustain the allegations of the answer wherein fraud is charged.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 140-144.]

2. FRAUD §13(2, 3) — FRAUDULENT REPRESENTATIONS—KNOWLEDGE OF FALSITY.

In order to establish fraud in a case of this kind, it must be shown, in addition to falsity

of representations of a material fact, or facts, upon which the party to whom they were made innocently acted to his injury, that the party making them knew them to be false, or that he made them recklessly, without knowledge of their truth or falsity.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 4, 5.]

Appeal from District Court, Twin Falls County; Chas. O. Stockslager, Judge.

Action by G. A. Parker and F. S. Marshall against I. A. Herron. Judgment for plaintiffs in the sum of \$1, and they appeal. Reversed, with direction to grant a new trial.

George Herriott, of Twin Falls, and Arthur W. Ostrom, of Buhl, for appellants. C. M. Booth, of Twin Falls, for respondent.

MORGAN, J. This action was commenced by appellants to recover the balance alleged to be due upon three promissory notes for \$400 each, given by respondent in payment for a secondhand gasoline engine, which he purchased from them for the purpose of furnishing power with which to operate a grain separator. Respondent, in his answer, admitted the execution of the notes, and that only the amount alleged in the complaint to have been paid thereon had been paid, but denied that any amount was due, and alleged that the machinery for which the notes were given was, by appellants, represented and described to him as being well built, properly adjusted, and capable of performing the work for which it was intended; that by reason of these representations he bought the machinery, giving therefor the notes above mentioned; that all of the statements, representations, and claims made by appellants to him regarding the machinery, as to the build, workmanship, adjustment, and quality thereof, were false and fraudulent, and were known by appellants to be false and fraudulent at the time they were made; that such statements, representations, and claims induced him to make, execute, and deliver the notes set out in the complaint, and he claimed damages by reason of the alleged fraud of appellants in the transaction. The case was tried to a jury, which returned a verdict in favor of appellants for the sum of \$1. Judgment was thereupon entered, from which this appeal is prosecuted.

[1] Appellants contend that the evidence is insufficient to establish the falsity of the representations relied upon by respondent. The portion of the record tending to show that appellants, or either of them, made any representations whatever with respect to the engine, is to be found in the testimony of respondent and is as follows:

"Q. What did Mr. Marshall tell you, if anything, with reference to this engine, so far as its power and capacity was concerned? A. He told me it was a 20 horse power gasoline traction engine, and that the separator has a 28-inch cylinder. Q. What make of a separator was it? A. A Case. Q. You say that was a Case separator? A. Yes, sir. Q. Where did you buy the separa-

tor? A. From Parker and Marshall. Mr. Marshall was the agent and the man I done the business with. Q. Do you know whether or not, at the time you bought this engine, they knew you were buying it to run this separator? A. They certainly did; that is what I wanted; I wanted a complete outfit. Q. Now, at the time you bought the engine I will ask you to state whether or not Mr. Parker or Mr. Marshall told you anything as to whether or not this engine would successfully run this separator. A. That was my understanding; that it would. We had several talks over it; I forget how often we talked about it, but it was some two or three times, and he didn't say anything to the contrary, and of course we talked it over, and I understood it was all right for that purpose. Q. You told him what you wanted with the engine, did you? A. Yes, sir."

While there is abundance of evidence tending to show that the engine failed, after respondent purchased it, to furnish power sufficient to successfully run the separator, it will be observed that the testimony above quoted falls far short of sustaining the allegations of the answer, to the effect that statements and representations were made by appellants that the engine was well built, properly adjusted, and capable of performing the work for which it was intended. It is true respondent testified that himself and Mr. Marshall talked the matter over, and it was his understanding that the engine would do the work, but the evidence does not justify the conclusion that this understanding was produced by any statements or representations, false or otherwise, made to him. The only statement by Marshall which respondent attempted to quote, even in substance, is to the effect that it is a 20-horse power gasoline traction engine, and there is nothing in the record to indicate that it is not. Upon the other hand, it is shown that the engine in question is rated by its manufacturers as of 20 horse power and the record discloses that while in possession of its former owner its work was entirely satisfactory, and the power it developed was amply sufficient to run the separator.

[2] If, by any stretch of the imagination, the conclusion could be reached from the evidence in this case that Marshall made representations to respondent which were untrue and which misled and deceived him into buying the engine, a material element of fraud, as the basis of an action or defense in a case of this kind, would still be lacking. In addition to the falsity of representations it must be shown that the party making them knew them to be false, or that he made them recklessly, without knowledge of their truth or falsity. If he honestly believed the representations to be true, and they were not recklessly made, then he is not liable for fraud. 20 Cyc. 24; Security Savings Bank of Wellman v. Smith, 144 Iowa, 203, 122 N. W. 825; Curtley v. Security Savings Society, 46 Wash. 50, 89 Pac. 180; Wilde v. Bank, 59 Or. 551, 117 Pac. 807; Wann v. Northwestern Trust Co., 120 Minn. 493, 139 N. W. 1061;

Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783.

The evidence discloses that appellants, who are dealers in gasoline engines and accessories, during the fall of 1910 sold the engine to a Mr. Eveleth, who used it in connection with the separator, and that it gave entire satisfaction; that Marshall saw the engine while it was being so used; that Eveleth had trouble in meeting certain payments of the purchase price, and consented that it be sold to respondent, who, at appellants' request, went to Eveleth's place, inspected the engine, and thereafter bought it.

The burden of proof to show scienter was upon respondent. Not only has he offered no evidence tending to show that false statements were made with knowledge of their falsity, or with reckless disregard of what the facts might be, but the uncontradicted evidence indicates that appellants acted entirely in good faith; that the statement as to the horse power of the engine was based upon the rating given it by its manufacturers, and it had been seen, by the man who made the representations, to do the class of work an engine of that capacity should do.

We do not desire to be understood to hold that it is necessary, in order to establish fraud, to show what was in the mind of a man, shown to have made misrepresentations of a material fact, at the time he made it. Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, or indicating a reckless disregard for the truth, may be shown, from which a jury may conclude scienter, but in this case there is a total lack of such circumstances.

The necessity for proof of scienter distinguishes such an action as this from one for breach of warranty. Northwestern S. Co. v. Dexter Horton & Co., 29 Wash. 565, 70 Pac. 59.

The judgment is reversed, with direction that a new trial be granted. Costs are awarded to appellants.

BUDGE, C. J., and RICE, J., concur.

WEISER NAT. BANK v. WASHINGTON COUNTY et al.

(Supreme Court of Idaho. April 21, 1917.)

1. CERTIORARI \S 64(1)—REVIEW—CONSTITUTIONALITY OF STATUTE.

In proceedings upon writ of review, the constitutionality of the statute upon which the inferior tribunal the action of which is reviewed based its authority cannot be passed upon.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 183, 184.]

2. TAXATION \S 380 — BANK'S INVESTMENTS OUTSIDE OF COUNTY—DEDUCTION.

According to the intent and purpose of section 173 of the Revenue Act of 1913 (Sess. Laws 1913, p. 230), the proportion of the capital stock, surplus, and undivided profits of a bank invested in or represented by property outside of the county in which the bank is located is not to be

deducted from the full cash value of its capital stock in listing the same for assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 630.]

Appeal from District Court, Washington County; Chas. P. McCarthy, Judge.

Proceeding by the Weiser National Bank against Washington County and others to review the action of the board of equalization. From a judgment of the district court modifying the board's action and granting a part of the relief sought, petitioner appeals. Affirmed.

Ed R. Coulter, of Weiser, for appellant. T. A. Walters, Atty. Gen., J. P. Pope, Asst. Atty. Gen., and George Donart, Pros. Atty., of Cambridge, for respondents.

MORGAN, J. The appellant is a national bank located at Weiser, in Washington county. On the second Monday of January, 1915, its capital stock was \$75,000, divided into 750 shares of the par value of \$100 each, and its surplus and undivided profits amounted to \$15,540, making a total of \$90,540. It appears that \$32,368 of this amount was invested in the bank building, furniture, and fixtures, \$4,350 in real estate in Weiser, \$1,652.67 in real estate in Owyhee county, and \$2,600 in real estate in Adams county. In April, 1915, appellant gave to the assessor of Washington county a sworn statement showing the capital stock, surplus, and undivided profits as they existed on the second Monday of January, 1915, and also the proportionate amount of the same which was invested as above set forth. The assessor deducted from the sum of \$90,540 the \$32,368 invested in the bank building, furniture, and fixtures, and the remainder, \$58,172, he prorated among the 750 shares of stock and assessed it against the shares in the names of the shareholders. The other real estate was assessed, respectively, by the assessors of Washington, Owyhee, and Adams counties, and the taxes upon the same were paid by the bank. The payment of taxes assessed against the capital stock of the bank to the assessor and tax collector of Washington county was made under protest, and a petition was filed with the board of county commissioners, sitting as a board of equalization, praying that an additional deduction from the capital stock, surplus, and undivided profits, amounting to that proportion of the same invested in the real estate in the three counties above named and not used in connection with the bank, be allowed. This was denied. Appellant thereafter procured a writ of review from the court below, and respondents moved to quash the same. After hearing the matter, the court made and entered findings of fact, conclusions of law, and judgment modifying the action of the board of equalization only to the extent that the deduction prayed for was allowed so far as it related to the property situated in Washington county. This appeal is from that judgment.

[1,2] The question to be determined is this: Should the amounts invested in property outside of Washington county, the county in which the bank is located, have been deducted from the total capital stock, surplus, and undivided profits before the same was assessed and prorated among the shareholders? The question involves a construction of section 173 of the Revenue Act of 1913, found on page 230 of the Session Laws of that year, which is as follows:

"The shares of capital stock of any bank, existing by authority of the United States or of this state and located within this state, or of any building and loan association, trust company or surety and fidelity company organized under the laws of this state and doing business within this state, shall be assessed for taxation where such bank, company, association or other corporation is located and not elsewhere, at the full cash value thereof at twelve o'clock meridian on the second Monday of January in each year, except the proportionate part of any portion of such capital stock, or the surplus or undivided profits of such bank, company, association or other corporation which is at the time of assessment actually invested in and represented by other property owned by and standing upon the records of the county wherein such shares of capital stock is assessed in the name of such bank, company, association or other corporation and which has been assessed and entered for taxation in said county for the said year, which proportionate part of such portion shall be deducted from the full cash value of such shares of capital stock in listing such capital stock for assessment: Provided, that no deduction in the assessed valuation of such shares of capital stock shall be made on account of any property obtained by such bank, company, association or other corporation on foreclosure of any lien, or in the settlement of any debt, unless it is shown to the satisfaction of the assessor that the amount sought to be so deducted is actually included in the value of such capital stock. Any property so represented in such capital stock, on account of which a deduction has been made in the assessed valuation of the shares of such capital stock, shall be assessed separately at its full cash value, as other property."

Appellant insists that this section should be so construed as to make a deduction from the assessment of the capital stock, surplus, and undivided profits of the bank by reason of its ownership of property situated in and taxed in other counties of the state as well as in the county wherein the bank is located, and insists that, if the language of the law be literally construed, it will be violative of section 5, art. 7, of the Constitution, wherein it is provided that:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, * * *" and "duplicate taxation of property for the same purpose during the same year, is hereby prohibited."

The proceedings in the court below were upon certiorari, or, as denominated by our Revised Codes, writ of review. Sections 4962 and 4968, Rev. Codes, limit the extent of the inquiry which may be made in proceedings upon writ of review. The court below could not, in this case, and consequently we cannot determine the constitutionality of the act under which the inferior tribunal claimed its

authority. *McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

Proceeding upon the theory that section 173, Revenue Act of 1913, *supra*, is valid, and, as above indicated, its constitutionality cannot be questioned in this proceeding, its language is too plain to permit of judicial interpretation. To hold differently and sustain the contention of appellant above stated would be, in effect, to repeal the section and substitute a new law.

The judgment of the district court is affirmed. Costs are awarded to respondents.

RICE, J., sat at the hearing, but took no part in the decision of this case.

BUDGE, C. J. I concur in the conclusion reached, upon the ground that the constitutionality of the statute cannot be inquired into upon a writ of review, and, viewing the statute (section 173, Revenue Act of 1913) in this light, its language is unambiguous. However, I do not wish to be understood as intimating that the law is constitutional or that its constitutionality is not subject to attack, in a proper proceeding, upon the ground of double taxation.

GREEN et al. v. CONSOLIDATED WAGON & MACHINE CO. et al.

(Supreme Court of Idaho. April 27, 1917.)

1. CHATTEL MORTGAGES ¶256 — GROWING CROPS—ASSUMPTION—EVIDENCE.

Evidence examined, and held sufficient under a written contract to sustain the findings of the trial court to the effect that the respondents did not assume and agree to pay the indebtedness secured by mortgage of appellant Consolidated Wagon & Machine Company.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 528.]

2. CHATTEL MORTGAGES ¶127—CROPS—LIEN.

The lien of a chattel mortgage executed upon a crop to be grown upon leased premises does not attach to a crop subsequently planted thereon by another than the lessee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 216, 217.]

3. EVIDENCE ¶452—PAROL EVIDENCE—LATENT AMBIGUITY.

Parol testimony is incompetent to vary the terms of a written contract, but may be admitted to explain a latent ambiguity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2093-2101.]

4. ASSIGNMENTS ¶12—WAGES—VALIDITY.

Where one enters into a contract to labor with the understanding that the proceeds of said labor shall be paid pro rata to creditors, a subsequent assignment of the wages earned, without the consent of the said creditors, is invalid in that there is nothing owing under said contract upon which the assignment could operate.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 20.]

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Action for injunction by Harvey S. Green

and another against the Consolidated Wagon & Machine Company and H. C. Vanausdell, Sheriff of Twin Falls County, Idaho, with cross-complaint by defendant Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

James H. Wise, of Twin Falls, for appellants. Sweeley & Sweeley, of Twin Falls, for respondents.

RICE, J. This action was brought by the respondents herein to obtain an injunction against the appellants restraining them from proceeding with the foreclosure of a chattel mortgage given upon crops to be grown during the year 1913 upon certain land described in the complaint. The appellant Consolidated Wagon & Machine Company answered, denying the material allegations of the complaint, and by way of cross-complaint set up their note and mortgage, and nonpayment of the same, and asked for a foreclosure thereof. They also asked for a judgment against respondents for the amount represented by their note.

On the 24th day of November, 1911, the respondents leased certain land to one T. L. Corum for a term of four years. Under the terms of the said lease Corum was to receive two-thirds of the crops raised on the said premises during the term of the lease. On the 9th day of December, 1912, Corum and his wife executed a chattel mortgage to appellant Consolidated Wagon & Machine Company, covering all crops then growing or to be grown during the year 1913 upon the land included within the lease, to secure the payment of a note for \$878.10. The mortgage was filed for record in the office of the recorder of Twin Falls county. On the 12th day of April, 1913, Corum and respondents, by an instrument in writing, released each other from their mutual obligations under the terms of said lease. Thereupon, on the same day, Corum and respondents entered into a written contract whereby Corum, for the consideration therein named, agreed to cultivate, seed, and corrugate the lands which had been included within the lease, being the same lands mentioned in the chattel mortgage. According to the terms of the contract between Corum and respondents, Corum was to receive only as much of the money to be earned thereunder as was necessary to pay his expenses while he was thus engaged. The balance of the money after completion of the contract was to be disposed of according to the following paragraph contained in the said contract:

"That when said work is completed and said moneys shall become thereby due, the party of the first part shall pay the same to the creditors of the said second party pro rata, except that a certain chattel mortgage covering a crop owned by said party of the first part, and now planted, shall be caused to be released, and so much money as may be necessary therefor shall be first used to that purpose."

At the time of the giving of the chattel mortgage and the execution of the release and the contract last mentioned, only 80 acres of the said premises had been planted. The respondents excepted this 80 acres in their complaint, and did not ask for an injunction against the foreclosure of the chattel mortgage upon the crop thus planted.

[1, 2] After the execution of the release Corum, under the contract between himself and respondents, had no interest in the crops, but occupied the position of an employé. Under section 3406, Rev. Codes, the lien of the mortgage given by Corum to appellant Consolidated Wagon & Machine Company did not attach to the crops sown by the respondents upon the lands described in the mortgage or any interest therein. The injunction was therefore properly granted.

Appellants, however, assign as error the action of the court in holding that the respondents did not assume and agree to pay the mortgage made and executed by Corum and wife upon the 9th day of December, 1912, and in not giving the answering appellant a judgment for the amount of the note secured thereby. Appellants base their contention upon the paragraph of the contract of employment above quoted. The paragraph referred to appears to be somewhat ambiguous. Upon its face the court would not be justified in holding that the respondents had assumed and agreed to pay Corum's note. Appellants attempted to show by oral testimony of certain witnesses that the respondents did assume and agree to pay this note. We think the written paragraph contains the contract between the parties, and that the oral testimony of witnesses is incompetent for the purpose of proving the contract between the parties, or for any purpose other than explaining the ambiguity of the written contract.

[3] With reference to the oral testimony, it must be said that it fails to show that it was the intention of the parties that the respondents should assume the payment of Corum's note. The contract was not to pay Corum's debt to appellant Consolidated Wagon & Machine Company, but only to cause the release of the chattel mortgage on the crop then planted, and for that purpose the respondents might use as much money as would be necessary.

The trial court did not err in finding that the respondents did not at any time assume or agree to pay the mortgage of the said Corum, nor in failing to give judgment against the respondents for the amount thereof.

[4] It appears that on the 5th day of July, 1913, Corum assigned to appellant company the sum of \$906 earned by him upon his contract of employment. Appellants contend that by virtue of this assignment the company is entitled to judgment for said amount. By the terms of the contract itself, Corum had

already entered into an agreement as to the manner in which the amount earned by him was to be disbursed, and for that reason was unable, without the consent of the other parties interested, to make an assignment thereof in a manner contrary to the provisions of the contract.

Finding no error in the record, the judgment of the district court is affirmed. Costs awarded to respondents.

BUDGE, C. J., and MORGAN, J., concur.

KATERNDAHL v. DAUGHERTY, State Secretary.

(Supreme Court of Idaho. April 25, 1917.)

1. STATUTES ~~§~~16(2)—GOVERNOR'S APPROVAL AND SIGNATURE—AMENDMENT.

Under section 10 of article 4 of the Constitution, every bill passed by the Legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law. *Held* that, where a bill, properly certified by the presiding officers of the two houses of the Legislature, was presented to the Governor and approved and signed by him, no amendment or alteration of the bill so approved and signed can be made.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 15.]

2. MANDAMUS ~~§~~73(1)—APPROVAL OF STATUTE—AMENDMENT OR ALTERATION.

Under chapter 141, Sess. Laws 1913, p. 502, it is made the duty of the secretary of state to publish or cause to be published in book form a sufficient number of books containing all the laws, resolutions, and memorials passed by each session of the Legislature of the state of Idaho. *Held* that, where a law is properly certified by the presiding officers of the two houses of the Legislature, and is approved and signed by the Governor and lodged in the office of the secretary of state, such officer cannot be required by writ of mandate to make any alteration or insert any amendment in the law so certified and approved.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144-146, 149.]

Original application for mandamus by R. W. Katerndahl against W. T. Daugherty, Secretary of the State of Idaho. Writ denied.

R. W. Katerndahl, of Dubois, in pro. per. T. A. Walters, Atty. Gen., for defendant.

RICE, J. This is an application for writ of mandate to require the defendant, as secretary of state, to correct enrolled House Bill No. 14 by inserting therein a certain amendment and to publish the same as so corrected.

[1, 2] By the agreed statement of facts it appears that House Bill No. 14 was regularly passed by the House of Representatives and transmitted to the Senate; that the Senate amended the bill, passed the same as amended, and transmitted it to the House; that the House thereupon concurred in the Senate amendment and passed the bill as amended; that it was referred to the committee on

engrossed and enrolled bills for enrollment; and that thereafter it was reported correctly enrolled. The bill was signed by the Speaker of the House and transmitted to the Senate; it was duly signed by the President of the Senate and transmitted to the Governor for approval, and approved by the Governor, as enrolled, on the 20th day of March, 1917. It was further agreed that the bill now on file in the office of the secretary of state, bearing the signatures of the presiding officers of the two houses and the Governor, does not contain the amendment which was made by the Senate and agreed to by the House.

By the provisions of chapter 141, 1913 Sess. Laws, p. 502, it is made the duty of the secretary of state to publish or cause to be published in book form a sufficient number of books containing all the laws, resolutions, and memorials passed by each session of the Legislature of the state of Idaho.

Section 10 of article 4 of the Constitution reads in part as follows:

"Every bill passed by the Legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals and proceed to reconsider the bill."

Under this section of the Constitution, no bill can become a law unless it is presented to the Governor for his approval. By the agreed statement of facts the bill as amended was never presented to the Governor, and therefore cannot be a law of the state. This proposition is sufficient to dispose of this case.

The question as to whether the bill as certified by the presiding officers of the two houses of the Legislature, and signed by the Governor, is a valid law is not presented in this case, and will not be decided.

The writ is denied.

BUDGE, C. J., and MORGAN, J., concur.

In re ORGANIZATION OF DRAINAGE DIST. NO. 1 OF ADA COUNTY.

HAYES et al. v. FARMERS' UNION DITCH CO., Limited, et al.

(Supreme Court of Idaho. April 24, 1917.)

1. DRAINS ~~6~~14(3)—DRAINAGE DISTRICT—ORGANIZATION—ORDER—APPEAL.

An order of the district court, declaring a proposed drainage district duly organized, under the provisions of section 4, c. 16, Sess. Laws 1913, is not an appealable order under section 4800, Rev. Codes, since it is not a final order, and a further hearing upon the question in the district court is provided by the Drainage Act of 1913, which also provides for an appeal from the order of the court confirming the report of the commissioners, upon which appeal the question sought to be raised in this appeal might properly be raised.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 5.]

2. APPEAL AND ERROR ~~6~~36(1)—DRAINS ~~6~~14(3)—DRAINAGE DISTRICT—ORGANIZATION—APPEAL.

Held, that chapter 16, Sess. Laws 1913, and amendments thereto, providing for the establishment of drainage districts, does not provide for an appeal from an order of the district court declaring a district duly organized, after the first hearing upon the petition for such organization, and such preliminary order of the district court does not finally adjudicate any of the rights involved in proceedings under the provisions of said chapter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 356, 359-366, 386; Drains, Cent. Dig. § 5.]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Petition by John W. Hayes and others for the organization of a drainage district, in which David K. Eastman and others filed objections and remonstrances seeking the exclusion of their lands. From an order declaring the proposed district duly organized as drainage district No. 1 of Ada county, and excluding the Farmers' Union Ditch Company, Limited, the remonstrants appeal, and the district prosecutes a cross-appeal. Both appeals dismissed.

Martin & Cameron, of Boise, for appellants. B. F. Neal, of Boise, for respondents and cross-appellants. Cavanah & Blake, of Boise, for cross-respondent. Richards & Hagg and McKeen F. Morrow, all of Boise, amici curiæ.

BUDGE, C. J. This is an appeal from an order declaring a proposed drainage district duly organized. A cross-appeal has also been prosecuted by the respondent drainage district from that portion of the court's order excluding the Farmers' Union Ditch Company, Limited, from the district. A petition was filed in the district court for Ada county, signed by a great number of landowners in the proposed district, and praying that the lands and property described in said petition be organized into a drainage district under the provisions of chapter 16, Sess. Laws 1913, and amendments thereto. The appellants, objecting landowners, filed objections and remonstrances, and sought to have their lands excluded from the proposed district. After due notice a hearing was had upon the petition and evidence was received touching the matters at issue. The court prepared findings of fact and conclusions of law and entered an order declaring the proposed district duly organized, defining the boundaries thereof and excluding from the district the Farmers' Union Ditch Company, Limited, cross-respondent. From this order the appeal and cross-appeal were prosecuted.

Upon our investigation and consideration of this case we find that we are confronted at the very outset with the serious question: Is the order which the trial court entered an appealable order? Or, in other words, are

the appeals being prematurely prosecuted? Section 4900, Rev. Codes, provides:

"A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this Code, *and not otherwise.*" (Italics ours.)

[1, 2] The law under which this proceeding was instituted provides: First, that a petition shall be presented. Second, that a notice shall be given, setting the time and place at which the district judge will consider said petition. Third, upon the hearing any person or corporation may appear before the court and make objection to the organization of the district and the proposed boundaries thereof, and upon final hearing the judge shall make such changes of the proposed boundaries as he may deem proper and shall establish and define such boundaries, and shall ascertain and determine the approximate number of acres which will be benefited by the proposed system, and shall find whether the proposed system will be conducive to the public health, welfare, or convenience, or increase the public revenue, or be of special benefit to the majority of the land included within the proposed boundaries of the district as established. But said judge may not change the boundaries so as to include any territory outside the boundaries described in the petition, and the judge shall cause an order to be entered by the clerk and recorded in the judgment record, setting forth the facts found. Fourth, upon the entry of the findings, if the judge finds said proposed drainage system to be conducive, either to the public health, welfare, or convenience, or that it will increase the public revenue, or be of special benefit to the majority in acreage of the lands included in said boundaries, he shall declare said district duly organized, and within ten days thereafter shall appoint three drainage commissioners. The clerk of said district court shall cause a copy of the order, declaring said district organized, to be filed in the office of the secretary of state, and from and after the date of said filing said organization shall be deemed complete. Fifth, after the drainage commissioners have qualified they are to proceed with the survey of the proposed district and report their findings to the court, if after this investigation they find that the costs, expenses, and damages are more than equal to the benefits that will be bestowed upon the lands they shall so report and the proceedings shall be dismissed. If, on the other hand, they find that the costs will be less than the benefits, they shall so report and the court shall then make and enter an order fixing a time and place when and where all persons interested may appear and contest the confirmation thereof, and notice is provided to be given of this hearing. Sixth, any of the landowners or any person or corporation affected by the work proposed may appear on the day set for hearing and remonstrate against the whole or any part

of the proposed work. The district court or the presiding judge may then fix a time for hearing the objections. If any person demands it, a jury will be impaneled to try the question of assessed benefits or awarded damages; all other issues arising on remonstrances are to be tried by the court; and, if the court finds that the report requires modification, the same may be referred to the commissioners, *who may be required to modify it in any respect.* (Italics ours.) If the findings be awarded against the validity of the proceedings the same may be dismissed, if the findings are in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, which order of confirmation is subject to the right of appeal to the Supreme Court, such appeal shall bring before the Supreme Court the propriety and justice of the amount of damages or assessment of benefits in respect to the parties to the appeal. If the proceedings are dismissed the commissioners of the district have the same right of appeal. It appears (chapter 16, § 12, Sess. Laws 1913) that if the commissioners find that the proposed district, as described in the petition filed, will not embrace all of the lands that will be benefited by the proposed work, or that it will include lands that will not be benefited and not necessary to be included in said district for any purpose, they may extend or contract the boundaries of the proposed district so as to include or exclude all such lands, the only limitation upon this being that such alteration shall not have the effect of so far enlarging or contracting said district as to render said petition void or dismissible.

It will be seen from this résumé of the statutory provisions that the order appealed from is not a final order. It may happen that when the commissioners make their report, as above outlined, the lands of appellants may be excluded from the district. At any rate a further hearing upon the question is provided to be had in the district court, and the statute expressly provides for an appeal from the order confirming the report, upon which appeal the questions sought to be raised in the case at bar may be raised. The statute does not provide for an appeal from the order of the district court which follows the first hearing upon the petition. There has been no final adjudication of the rights involved under the procedure outlined in the Drainage Act of 1913 and the amendments thereto. The order entered is not final, but is expressly made subject to modification in any respect, by the court, even to the extent of a complete dismissal of the proceedings.

We have reached the conclusion, therefore, that under the provisions of section 4900, Rev. Codes, quoted above, this court is without jurisdiction to entertain the present appeals, for the reason that the judgment or

order appealed from is not a final judgment or order. *Adams v. McPherson*, 3 Idaho (Hasb.) 117, 27 Pac. 577; *Connell v. Warren*, 3 Idaho (Hasb.) 117, 27 Pac. 730; *Thiessen v. Riggs*, 5 Idaho, 21, 46 Pac. 829; *Potter v. Talkington*, 5 Idaho, 317, 49 Pac. 14; *Cady v. Keller*, 28 Idaho, 368-371, 154 Pac. 629; *Weiser Irr. Dist. v. Middle Valley, etc., Co.*, 28 Idaho, 548-553, 155 Pac. 484; *Doudell v. Shoo*, 159 Cal. 443, 114 Pac. 579; *Williams v. Field*, 2 Wis. 421, 60 Am. Dec. 428, and note.

Both appeals are dismissed. Costs awarded to respondents and cross-respondent.

MORGAN, J., concurs. RICE, J., sat at the hearing of this case, but took no part in the opinion.

P. A. SORENSEN CO. v. DENVER & R. G. R. CO. (No. 2943.)

(Supreme Court of Utah. March 14, 1917.
Rehearing Denied May 5, 1917.)

1. APPEAL AND ERROR ⇨1058(1), 1058(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where testimony excluded on defendant's exception was or could have been later introduced by plaintiff, the error, if any, in excluding it was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4195, 4200, 4207.]

2. APPEAL AND ERROR ⇨201(1)—ADMONITION TO JURY ON VIEWING PREMISES—NECESSITY OF OBJECTION.

It was plaintiff's duty to require court to properly admonish jury as to purpose of viewing premises, or to object to admonition given if not deemed sufficient, instead of presenting the objections on motion for new trial, or on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1251-1256.]

3. TRIAL ⇨28(1)—ADMONITION TO JURY UPON VIEWING PREMISES—SUFFICIENCY.

Court's admonition to jury before viewing premises claimed to have been injured by railway fire, that jury was merely to view the premises, "not to talk about the case at all; to look is all you are to do; not to take accounts, measurements, or go out to act as detectives; not to be searchers for anything that has not been brought before you, or suggested to you"—was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 77.]

4. TRIAL ⇨242—INSTRUCTIONS—ERRONEOUS REQUESTS—REFUSAL.

A requested instruction regarding consideration of testimony after jury's view of premises was properly refused, where as a whole it was misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576.]

5. TRIAL ⇨28(1)—VIEW OF PREMISES BY JURY—PURPOSE.

The purpose of a view of premises by a jury is to enable them to better understand and more fully appreciate the evidence produced in open court, and is not for the purpose of taking independent evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 77.]

6. RAILROADS ⇨484(3) — FIRES—QUESTION FOR JURY—ORIGIN OF FIRE.

In view of conflicting evidence as to whether fire injuring plaintiff's property was caused by a railway train, no witness having seen the fire start, defendant's witnesses, who stated they saw no fire after passing of train, being in equally as good position to observe the facts as plaintiff's witnesses, the question was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1742.]

7. APPEAL AND ERROR ⇨1002—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where a verdict is based upon conflicting evidence, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by the P. A. Sorensen Company against the Denver & Rio Grande Railroad Company. Plaintiff appeals from a judgment for defendant, and from order denying new trial. Affirmed.

S. P. Armstrong, of Salt Lake City, for appellant. Van Cott, Allison & Riter, of Salt Lake City, for respondent.

COREMAN, J. This was an action brought to recover damages to property by fire, alleged to have been caused by the negligence of the defendant in the operation and management of its steam locomotive. The trial to the jury resulted in a verdict for the defendant. Plaintiff appeals.

The complaint, in substance, alleges that the plaintiff is the owner of certain lands situated in Smith's Fork of Parley's Canyon, Salt Lake county, Utah, rendered attractive and desirable as a place for summer residences, and for a summer resort, by reason of the growth thereon of large numbers of natural, ornamental, and valuable trees, vines, bushes, and vegetation; that the plaintiff, prior to August 18, 1911, had established on its lands a summer resort, and built thereon summer residences, and that the lands were in demand and valuable for building locations for summer residences; that defendant, on the 18th day of August, 1911, had wrongfully and negligently permitted grass, weeds, rubbish, and combustible material to accumulate and remain on its right of way through said canyon, and operated over its track a steam locomotive not provided with sufficient safety screens and spark arresters, so that sparks of fire and fire cinders were emitted which set fire to said combustible materials, causing a conflagration to spread and extend from its right of way over and upon adjoining premises, and thence to extend to and spread over the said lands of the plaintiff, thereby destroying the trees and vegetation thereon; and rendering the same unfit and valueless for summer resort purposes, for which the lands were alone desirable; that plaintiff had incurred special damages and expenses in an endeavor to arrest the spread

of said fire and prevent the destruction of its property thereby. The defendant, by its answer, denies all negligence on its part, and puts in issue all the material allegations of the complaint upon which the plaintiff's claims for damages were predicated.

Numerous errors are assigned and complained of by plaintiff on appeal, as follows: That the court erred in denying plaintiff's motion for a new trial because of the insufficiency of the evidence to justify the verdict, and because of errors in law occurring at the trial, in the exclusion and admission of certain testimony, and the refusal of the court to charge the jury as requested by the plaintiff. We have carefully reviewed the record, and, after doing so, find no prejudicial error committed by the court, either in the admission or exclusion of testimony excepted to by the plaintiff.

[1] Furthermore, it appears that much of the testimony, excepted to by the defendant and excluded by the court at the time, was either afterwards offered and received, or the plaintiff, under the rulings of the court, excluding it at the time, might have introduced it in the further progress of the trial, and it would serve no purpose, therefore, to here enter into a discussion of these assignments of error with particularity.

[2, 3] At the trial, on the conclusion of the testimony, the jury, after being admonished by the trial judge as to the purposes, were permitted to view the premises. Plaintiff contends that the trial judge failed to properly and sufficiently admonish the jury as to the purposes of the view, and thereafter failed to charge the jury as to what weight they should give to the knowledge attained thereby.

The record discloses that counsel for plaintiff was present in court. He made no objection whatever as to the jury not being properly admonished, nor did counsel request that more implicit instructions be then given. It will be seen, therefore, assuming that there would be some merit in the contentions of counsel, that it was due the trial court that they be presented at a time when they could have been considered and acted upon before the conclusion of the trial, not on motion for a new trial, nor on appeal to this court. However, the trial court did admonish the jury as to the purpose before the view, and, as we think, quite properly, by telling them—

"not to talk about the case at all; to look is all you are to do. Not to take accounts, measurements, or go out to act as detectives. Not to be searchers for anything that hasn't been brought before you or suggested to you. Just view the premises."

[4, 5] Plaintiff further contends that the court erred in refusing to give plaintiff's request No. 18. The request, had it been complied with, would have charged the jury in very misleading and contradictory terms as to the purpose of the view and their knowl-

edge attained thereby. First, the court would have instructed the jury,

"You should consider the testimony given in the case in the light of your inspection and of what you saw on the premises. In determining the value of the property before and after the fire, and the amount of damages to the property by the fire, you should be governed by the testimony given in court, and not by any private opinion that you may form from your inspection."

And, secondly, the court would have instructed that:

"Your verdict should be supported by other evidence than that derived from your observation, and any information, or knowledge, or ideas of value that you may have, should not be given any exclusive or predominating weight in determining your verdict."

Had plaintiff been content with the language of the first quotation above given he might well complain of the court's refusal, but by offering the instruction as a whole, inclusive of the second quotation we make therefrom, the court was amply justified in refusing the request, for otherwise the jury might well have considered the instruction as against the law now contended for by plaintiff, and have erroneously concluded that the view was for the purpose of taking independent testimony, rather than for the purpose of enabling them to better understand and more fully appreciate the evidence produced before them in open court.

Other assignments of error, in the refusal of the court to instruct the jury in compliance with plaintiff's requests, we do not deem it necessary to here discuss. It suffices to say that the instructions of the court to the jury, when taken as a whole, were without prejudice to the rights of the plaintiff to a fair trial; and we may now best consider whether the court erred in denying plaintiff's motion for a new trial because of the insufficiency of the evidence to justify the verdict of the jury, and because the verdict is against law.

[6] There is no question whatever that the evidence in this case shows that the plaintiff's property suffered substantial damage by fire. At the conclusion of the testimony given in behalf of the plaintiff it had been shown by witnesses for the plaintiff that, in the morning of the day of the fire, two of plaintiff's trains had passed up Parley's Canyon, one a freight, at about 8:30 a. m., and the other, a passenger, at about 9 a. m.; that from 10 to 40 minutes after the passenger train had passed, the fire was first discovered and was then burning, as estimated, probably 75 feet from the railroad track.

Witnesses for the defendant then testified of having seen these trains, at 8:30 and 9 a. m., respectively, pass while they were in the same vicinity as the plaintiff's witnesses. One of these witnesses for the defendant, one Wilson, a section foreman for the defendant, testified that the two trains above mentioned were the only trains up the canyon the day of the fire; that about three-quar-

ters of an hour after the last train had gone up the canyon he passed the place where the fire, as testified to by plaintiff's witnesses, had been burning in close proximity to the railroad track, and that he then saw no fire, nor any indications that there had been one, at the place testified to by plaintiff's witnesses. Johnson, another employé of the defendant, testified that he had that morning followed up the defendant's trains with a push car at about 11 a. m., stopping for 5 or 10 minutes near the place where plaintiff's witnesses had testified of having seen the fire burning, and that he then saw no indications of a fire.

So far as the record shows the witnesses for the defendant were in equally as good position to observe and say whether a fire had started and was burning in close proximity to the defendant's railroad track, at or about the time contended for by plaintiff, as were the plaintiff's witnesses. Time, place, and circumstances were all essential factors in determining how the fire originated. No witnesses testified as to having seen the fire started, and necessarily the jury were left to determine the fact as to whether or not it originated from the defendant's locomotive, from the time, place, and circumstances, as observed and testified to by the witnesses in the case.

[7] As we have heretofore seen and pointed out, the testimony of the several witnesses for the plaintiff and the defendant, in these particulars is in sharp conflict. The trial judge very properly left it for the jury to determine as to the origin of the fire and the liability of the defendant to answer in damages therefor. There being conflicting testimony, and the jury having found the issues in favor of the defendant, in keeping with the repeated rulings of this court, we cannot now disturb their findings.

We have carefully reviewed the authorities cited herein by plaintiff's counsel on appeal, and, after doing so, feel that they are in full accord with and do not in any manner qualify the views of this court as herein expressed. The judgment of the district court, denying a new trial, is therefore affirmed, with costs to respondent.

FRICK, C. J., and McCARTY, J., concur.

GWILLIAM et al. v. OGDEN CITY.
(No. 2981.)

(Supreme Court of Utah. March 27, 1917.
Rehearing Denied May 5, 1917.)

1. MUNICIPAL CORPORATIONS ¶294(4) — IMPROVEMENT ASSESSMENTS—NOTICE.

In view of Comp. Laws 1907, § 273, providing for notice of an intention to levy improvement taxes which shall state the purposes for which the taxes are to be levied, and describe the improvements, and that the city council shall acquire jurisdiction to order such improvements in the absence of written objections by the own-

ers of two-thirds of the front feet abutting on the portion of the street to be improved, a notice of an intention to create a certain curb and gutter district and to "build therein concrete curbs and gutters" and to do "the necessary grading therefor" was not notice of an intention to change the grade of the whole street, and, as such notice of intention was jurisdictional, the tax assessed for lowering the grade of the entire street was invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 783, 791.]

2. MUNICIPAL CORPORATIONS ¶516 — IMPROVEMENTS — ASSESSMENTS — COLLATERAL ATTACK.

While an improvement assessment cannot be collaterally assailed in equity for mere irregularity, where the publication of notice of intention to make such improvement is jurisdictional and the city publishing such notice does not comply with the requirements of the law and for that reason does not acquire jurisdiction to order the improvements and levy the assessment upon property, such assessment may be collaterally assailed at any time.¹

3. MUNICIPAL CORPORATIONS ¶513(8) — IMPROVEMENT ASSESSMENTS—PARTIAL INVALIDITY—REMEDY.

In an action to enjoin the collection of an improvement assessment, a court of equity will restrain the city only from enforcing the invalid portion of the tax.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1193, 1205.]

4. APPEAL AND ERROR ¶1176(4) — DISPOSITION OF CAUSE.

In a suit to enjoin the collection of an improvement assessment in which the trial court refused all relief, and it appears that only a portion of the tax was valid, and the record does not sufficiently show on appeal what portion of the tax is valid, the appellate court on reversing the case will not order new trial, but will remand to ascertain the extent to which the tax is invalid and should be enjoined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4591.]

5. APPEAL AND ERROR ¶747(2) — RESERVATION OF GROUNDS FOR REVIEW.

In an action to enjoin the collection of an improvement tax, where the city did not appeal from a portion of the judgment holding void the tax assessed in excess of the contract price, and no cross-error is assigned with respect thereto, the correctness of the ruling on that point is not before the appellate court for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3053.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Suit to enjoin the collection of a special improvement tax by Henry W. Gwilliam and others against Ogden City. From a judgment holding the special assessment legal and denying the prayer for injunction, plaintiffs appeal. Reversed and remanded, with directions.

George Halverson, of Ogden, for appellants. E. T. Hulaniski and J. C. Littlefield, both of Ogden, for respondent.

FRICK, C. J. Henry W. Gwilliam, Samuel T. Whitaker, Cora Perrins, Nannie M.

¹ Jones v. Foulger, 46 Utah, 419, 150 Pac. 933; Stott v. Salt Lake City, 151 Pac. 983; Branting v. Salt Lake City, 153 Pac. 905.

Lowe, Eliza W. Cohn, Mary De Julien, Mat-tie L. Smith, Thomas G. Phillips, Martha T. Oborn, and Aaron Jackson commenced this action in equity in the district court of Weber county to enjoin the defendant, Ogden City, from collecting a special tax which was assessed upon their property to defray the cost of a special improvement, which tax, plaintiffs alleged, is illegal and void. It is not necessary to refer to the pleadings. The district court held the special assessment legal and denied the prayer for an injunction. Plaintiffs appeal.

The improvement in question was undertaken by Ogden City under the authority conferred upon the cities of this state by Comp. Laws 1907, § 273, which reads as follows:

"In all cases before the levy of any taxes for improvements provided for in this chapter, the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements, the estimated cost of such improvements, and designate a time when the council will consider the proposed levy. If, at or before the time so fixed, written objections to such improvements signed by the owners of two-thirds of the front feet abutting upon that portion of the street, lane, avenue, or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

[1] In compliance with the provisions of that section the city published its notice of intention to make the improvement in question, which notice, so far as material here, reads as follows:

"Notice is hereby given by the board of commissioners of Ogden City of the intention of said board to make the following described improvements, to wit: To create that portion of both sides of [naming a number of streets, including the street in question] where curbs and gutters are not now built, as a curb and gutter district, and to build therein concrete curbs and gutters of the standard form adopted by Ogden City, together with the necessary grading therefor, and to defray the whole of the cost thereof, estimated at \$18,183, by a local assessment upon the lots or pieces of ground lying and being within the boundaries of the following district, being the district to be benefited and affected by the said improvements, viz. * * *

"All protests and objections to the carrying out of such intention must be presented in writing to the city recorder on or before the 9th day of September, 1912, at 8 o'clock p. m., that being the time set by said board of commissioners when they will hear and consider such objections as may be made thereto at the commissioner's chambers, at the city hall, Ogden, Utah.

"By order of the board of commissioners of Ogden City, Utah."

The requisite number of objections not having been made as provided in section 273, supra, the commissioners of Ogden City ordered the improvement to be made and in pursuance of such order published the following advertisement for bids, to wit:

"Sealed proposals for furnishing materials and doing the work of building concrete curbs and

gutters in curb and gutter district No. 108, being [naming a number of streets, including the street in question] (where curbs and gutters are not now built), under plans and specifications prepared by the city engineer and approved by the city board of commissioners, will be received at the office of the city engineer in the city hall at Ogden City aforesaid, until 10 o'clock a. m. on the 9th day of October, A. D. 1912, at which time all proposals received will be publicly opened and read aloud.

"Plans and specifications can be obtained upon application at the office of the city engineer.

"The right is reserved to reject any and all bids, and to waive any defects.

"By order of the board of commissioners."

A satisfactory bid having been obtained, the city commissioners let the contract for the proposed improvement.

In advertising for bids for the proposed improvement the advertisement was limited to the building of concrete curbs and gutters. In letting the contract, however, and in doing the work in front of the property of the plaintiffs, the street grade was lowered for a distance of more than 1,000 feet, so that the grade of said street was lowered from a depth of 2 inches at one end of the block on which the property of plaintiffs is situated, and which depth was gradually increased until in the center of the block the grade of the street was lowered slightly in excess of one foot, and from thence on again decreased until it reached the other end of the block, at which point the grade was lowered only about 2 inches, as at the beginning. It will thus be observed that, while the city published a notice of intention to create a certain district for curbing and guttering and to build concrete curbs and gutters therein, and while it advertised for bids to build "concrete curbs and gutters," it nevertheless lowered the grade of the entire width of the street in front of the property of plaintiffs to the depth aforesaid and for a distance of more than 1,000 feet, and assessed the cost of lowering the grade as aforesaid upon the property of the plaintiffs.

Plaintiffs contend that the city was not authorized to do the lowering of the grade of the street and to assess the cost of doing that work upon their property in view of the fact that in the notice of intention published by the city it had only expressed the intention of creating a certain curb and gutter district, and "to build therein concrete curbs and gutters of the standard form adopted by Ogden City, together with the necessary grading therefor." It is insisted that the purpose, and the only purpose, indicated by the notice of intention was the building of concrete curbs and gutters and for doing the necessary grading to construct them. By referring to section 273, supra, it will be seen that "the purposes for which the taxes are to be levied" must be stated in the notice of intention, and, further, that said notice "shall describe the improvements so proposed." Now, the purpose of the tax in question, as it is stated in the notice of intention, was to build certain concrete curbs and gutters

within a certain district, and the proposed improvement, as stated in the notice, consisted of said "concrete curbs and gutters * * * together with the necessary grading therefor." That was the notice that was given to the abutting property owners. They were thus advised that all the city proposed to do was to create a certain curb and gutter district and to "build therein concrete curbs and gutters," and to do "the necessary grading therefor." The abutting property owners, whose property would thus be affected by the improvement, might have been quite willing to have the improvement made as stated in the notice, and therefore may have made no protest, as they might have done, under section 273, *supra*. Again, in the advertisement for bids published by the city no intimation was given that it would depart from the notice of intention as published in making the proposed improvement. The property owners may thus again have been induced not to protest, while, if they had been informed that the street grade was also to be lowered, they might have offered timely objection to doing that part of the work. It is quite clear, therefore, that the city published a notice of intention wherein it proposed to make a particular kind of improvement and to assess the cost thereof upon the abutting property, while it in fact made additional improvements and, at a much greater cost, of which no notice of intention had been published as required by section 273, *supra*, and it thus gave the property owners no opportunity to protest or object.

[2] The law is well settled that, if what the city does merely amounts to an irregularity, either in publishing notice or in letting contracts, or in their execution, etc., the assessment or tax imposed to defray the cost of the improvement cannot be collaterally assailed in equity or otherwise. If, however, what the city does or omits to do affects its power or jurisdiction to make the proposed improvement, that is, if the publication of the notice is jurisdictional, and the city in publishing said notice does not comply with the requirements of the law, and, for that reason, does not acquire jurisdiction to order or to make the proposed improvement and to levy the special tax to defray the cost thereof upon the abutting property, then the tax may be collaterally assailed at any time. *Jones v. Foulger*, 46 Utah, 419, 150 Pac. 983; *Stott v. Salt Lake City*, 151 Pac. 988; *Branting v. Salt Lake City*, 153 Pac. 995; 4 *McQuillin*, Mun. Corp. § 2004; 5 *McQuillin*, Mun. Corp. § 2010; *Hamilton*, Law of Special Assessments, § 788. In all the foregoing cases this court held that the things required of the city by section 273, *supra*, are jurisdictional, and unless they are complied with with reasonable strictness the city authorities are without power or jurisdiction to impose a special assessment or tax to defray the cost of the proposed improvement. In the last two cases cited, however, it was also held

that the matters there complained of merely constituted irregularities which did not affect the jurisdiction of the city to make the special assessment or to levy the special tax there in question. The case at bar, in so far as it relates to the lowering of the street grade, comes squarely within the doctrine announced in *Jones v. Foulger*, *supra*, where it is held that the defect in the notice of intention in question in that case was jurisdictional, and hence the tax there in question was illegal.

So far as the work of lowering the street in question in this case is concerned, that stands the same as if no notice of intention had been given. The district court therefore clearly erred in holding that the phrase in the notice of intention, to wit, "together with the necessary grading therefor," was sufficient to authorize the city to lower the street grade as was done. In construing the notice as did the district court we must do violence to every cardinal canon of construction. The phrase "together with the necessary grading therefor" could only refer and be applied to something that had preceded that phrase. What was said in the notice of intention, and to which the phrase referred, was the building of "concrete curbs and gutters" and the grading mentioned in the notice was necessarily limited to such as was necessary to build the concrete curbs and gutters mentioned in the notice, and not to the grading or lowering of the street grade, or to any part thereof, except where the curbs and gutters were to be constructed. The notice of intention, therefore, was defective in two essentials: (1) In not correctly "naming the purposes for which the taxes are to be levied"; and (2) in not describing the proposed improvement that was contemplated in lowering the street grade and to defray the cost of which the tax in question was assessed upon the property of plaintiffs. A mere cursory reading of the two cases of *Stott v. Salt Lake City* and *Branting v. Salt Lake City*, *supra*, will disclose that there is a very marked difference between those two cases and the one at bar. In those cases it was in effect conceded that proper notice of intention had been published by the city. The city therefore had acquired jurisdiction or authority to order the improvement and to levy the tax. Such was, however, not the case here. Here, as in the case of *Jones v. Foulger*, *supra*, the notice of intention was so defective as not to confer jurisdiction upon the city to impose a tax for the cost of lowering the street grade.

Counsel for the city, however, in effect contend that, although it should be held that a portion of the tax is void, yet if any part of the tax is valid, and the portion which is valid can be determined and be segregated from the portion which is held invalid, then a court of equity will enjoin only the portion which is invalid and permit the city to

enforce that portion which is valid. By referring to the notice of intention it is made clear that the city exceeded its jurisdiction only in lowering the grade of the street, and not in constructing the concrete curbs and gutters, and in doing the "necessary grading therefor." The purpose of constructing the concrete curbs and gutters, and doing the necessary grading therefor, was properly included in the notice of intention, and the city had therefore acquired jurisdiction to order and to do that work. To that extent, therefore, the property of plaintiffs was benefited, and their counsel conceded at the hearing that the plaintiffs did not object and would not have offered any protest to the construction of the concrete curbs and gutters and the doing of the necessary grading therefor as was stated in the notice of intention. Plaintiffs thus come into a court of equity and now ask that the whole tax be enjoined for the reason that the city had exceeded its jurisdiction in lowering the grade of the street. The question therefore is: Should the city be restrained from enforcing the whole tax in question, or only that portion which represents the cost of lowering the grade of the street, which part we have held invalid?

[3] The record as it now stands does not show what was the cost of constructing the concrete curbs and gutters, and therefore we cannot segregate the valid from the invalid portion of the tax in question. If that can be done, however, then the authorities, under statutes similar to ours, hold that a court of equity will restrain the city only from enforcing the invalid portion of the tax. The precise question involved here was decided by the Supreme Court of California in the case of *Beaudry v. Valdez*, 32 Cal. 269. Mr. Justice Sanderson, speaking for the court, said:

"The passage and publication of the resolution of intention are the acts by which the city council acquires jurisdiction; and by those acts they acquire jurisdiction to make only such improvements as they describe in the resolution, and they cannot, therefore, lawfully cause work other than that which is described to be performed. But if they do, it does not necessarily follow that the entire proceedings are void. If the work described in the resolution can be separately traced through the entire proceedings, and does not become so mixed up with that which is not specified in the resolution as not to be distinguishable from it, the proceedings are valid as to the former and invalid only as to the latter. In the present case the cost of macadamizing and the cost of curbing can be readily distinguished and separated from each other; and we therefore hold that the contract was a valid contract so far as it calls for macadamizing, and invalid only so far as it calls for curbing. *Emery v. S. F. Gas Co.*, 28 Cal. 379."

That case is followed in the case of *Dyer v. Scalmanini*, 60 Cal. 637, 11 Pac. 327, and is cited in the case of *City, etc., Co. v. Taylor*, 138 Cal. 866, 71 Pac. 446. The same doctrine is laid down by the Supreme Court of South Dakota in the case of *Mason v. City of Sioux Falls*, 2 S. D. 640, at page 647,

51 N. W. 770, at page 772, 39 Am. St. Rep. 802, where, at page 807, the court said:

"But, while the property cannot be held for the cost of the curbing, it may be held for the grading, when the cost of grading, independently of the curbing, can be ascertained. In this case there seems to be no difficulty in ascertaining the cost of the grading, as the curbing was contracted for as a separate item."

The doctrine is also recognized in the case of *Haag v. Ward*, 186 Mo. 349, 85 S. W. 391, in *Union Pac. R. Co. v. Kansas City*, 92 Kan. 487, 141 Pac. 302, and in *Walker v. District of Columbia*, 6 Mackey (D. C.) 352.

[4, 5] We consider the doctrine announced in the foregoing cases as just and reasonable. To the extent that the tax is valid and as far as it benefited plaintiffs' property equity requires that their property be held to pay the same. To the extent that the city has exceeded its authority, and hence seeks to impose an invalid assessment and tax upon plaintiffs' property, they should be given relief. It is not an insurmountable objection, however, that the record does not now show what portion of the tax is valid and what portion invalid under the rule we have before stated. Nor is it necessary that the whole case be retried. That question was also definitely settled by the Supreme Court of California in the case of *Beaudry v. Valdez*, supra, 32 Cal., where at page 279, in passing upon this point, it is said:

"No new trial is necessary, except so far as to ascertain what portion of the amount sued for is for macadamizing the street. This can be ascertained by referring the matter to some competent person to make the computation, for which the assessment furnishes the necessary data. When that is ascertained the plaintiff will be entitled to a judgment for that amount, and a lien upon the lots assessed, but not a judgment over."

From what has been said it follows that the district court erred in holding that the whole tax, including that portion which was assessed to pay for lowering the street grade, was valid and enforceable. The district court, however, also held that the city had exceeded its power in adding 10 per cent. in excess of the contract price, and of the actual cost of doing the work for superintendence, and held that part of the tax void, and restrained the city from collecting the same. In view that that part of the judgment is not appealed from and that no cross-error is assigned by the city with respect thereto, the correctness of the court's ruling on that point is not before us, and we express no opinion respecting the validity or invalidity of that portion of the tax. That portion of the tax in question which was assessed to defray the cost of lowering the street grade is therefore invalid, and the conclusion of law and judgment permitting the city to enforce that portion are hereby set aside and reversed, and the cause is remanded to the district court of Weber county, with directions to permit the city to show, if it can, what portion of the tax in question was ex-

pendent to defray the cost of lowering the grade of the street, to specifically find the amount that was so expended, and, when found, to deduct the same from the amount of the tax which remains after the 10 per cent. aforesaid has been deducted, and to enter conclusions of law and judgment restraining the city from collecting that portion and to require the plaintiffs to pay the portion remaining and which was assessed upon their property for the construction of the concrete curbs and gutters and the necessary grading therefor; appellants to recover costs.

MCCARTY and CORFMAN, JJ., concur.

SMITH v. GILBERT. (No. 3008.)

(Supreme Court of Utah. April 26, 1917.)

1. EVIDENCE \S 135(2)—RELEVANCY—SIMILAR MISREPRESENTATIONS.

False representations, similar to those in issue, are admissible, where intent, motive, or knowledge of their falsity by the party making them is material, or to prove a general scheme to defraud.¹

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405.]

2. APPEAL AND ERROR \S 1052(6), 1056(4)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY VERDICT.

Where appellant prevailed in his claim, error in admission or exclusion of evidence relating thereto was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4176, 4190.]

3. EVIDENCE \S 135(2)—RELEVANCY—SIMILAR MISREPRESENTATIONS.

In action on notes claimed to have been secured by misrepresentation, testimony of others, to whom plaintiff made similar statements, that they relied thereon was inadmissible, although such representations to others might be admissible; the issue here being whether defendant relied on plaintiff's misrepresentations and the statements of others that they relied on similar misrepresentations not tending to establish a general scheme to defraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405.]

4. CORPORATIONS \S 121(5)—SALE OF STOCK—FRAUD—GENERAL SCHEME TO DEFRAUD.

A general scheme to defraud cannot be inferred merely because a vendor is charged with making certain false representations concerning stock offered for sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504.]

5. PLEADING \S 376 — ISSUES AND PROOF — ADMISSION BY PLEADING.

Where a fraudulent sale of stock was claimed, evidence that it was not treasury stock and was not nonassessable as represented was properly excluded where admitted by the pleadings, and since the statute provided that fully paid stock is nonassessable unless made so by articles of incorporation, which were in evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227.]

6. TRIAL \S 252(17) — REFUSAL OF INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In the absence of evidence from which a general scheme to defraud could be inferred, re-

fusal of instruction upon this question was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 607.]

7. TRIAL \S 240 — REFUSAL OF ARGUMENTATIVE INSTRUCTIONS.

Refusal to give argumentative instructions was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561.]

8. APPEAL AND ERROR \S 984(1)—REVIEW—DISCRETION OF COURT — ALLOWANCE OF COSTS.

Where Comp. Laws 1907, § 3341, placed the matter of allowing costs within the trial court's discretion where counterclaim was pleaded, the court's action will not be disturbed except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3881, 3883-3885, 3887.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Alma M. Smith against Jesse Gilbert. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. Q. Rich, of Logan, for appellant. Bagley & Ashton and Wilson McCarthy, all of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff brought this action against the defendant, hereinafter called appellant, to recover judgment upon a promissory note for the sum of \$6,400. The appellant admitted the execution and delivery of the note in question, and alleged that the same was obtained by the plaintiff by fraud and false representations. The appellant, in his answer, averred that the note in question was executed and delivered by him to the plaintiff for certain other notes which had theretofore been made and delivered by the appellant to the plaintiff; that the original notes were obtained by means of false representations made by the plaintiff, which, in substance, are alleged to be as follows: That the original notes were given as the purchase price of 3,000 shares of the capital stock of a certain corporation known as the Universal Metallic Tie Company, hereinafter designated tie company, or tie stock, as the case may be, and as the purchase price of 3,000 shares of a certain corporation known as the Dickerson Automatic Governor Company, hereinafter styled governor company, or governor stock, as the case may be, all of which shares were of the par value of one dollar each; that all of said shares were nonassessable; that the total number of shares issued by each of said corporations was 1,000,000 shares, one-half of which were set apart as treasury stock which was owned by said corporations respectively; that the plaintiff was the sole agent of said corporations, with the exclusive right to sell said treasury stock; that no stock could be sold by the subscribers of stock until the treasury stock was sold; that the proceeds to be derived from the sale of said stock would

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Trout & Resort Co. v. Lewis, 41 Utah, 123, 125 Pac. 637.

be used exclusively by the respective corporations for corporate purposes; that none of the tie stock could be sold for less than par, and that some had been sold for as high as \$5 per share; that a number of the great railroad companies east of the Mississippi river had made tests of the metallic tie, and had pronounced it satisfactory, and that they would use the same on their railroads; that the Universal Metallic Tie Company was about to commence the erection of a large tie factory near Pittsburg, Pa., and that the proceeds derived from the sale of the stock offered to be sold by the plaintiff would be used for the purposes aforesaid; that the Oregon Short Line Railroad Company had adopted said tie, and had ordered it to be used on its railroad. As to the governor stock it is averred that the plaintiff also represented that the corporation had received for its products during the preceding year a net profit of \$40,000; that the money derived from the sale of the stock offered by the plaintiff would be used in completing and equipping the company's factory at Salt Lake City, Utah. The appellant averred that each and all of said representations were false. The appellant, by way of counterclaim, also alleged that before he had discovered the falsity of the representations and statements of the plaintiff respecting said stock he had paid two of the original notes amounting to \$500 which he had made and delivered to the plaintiff for 500 shares of the tie stock, and after reiterating the false representations and statements in his counterclaim he demanded judgment for the \$500 paid as aforesaid, with interest. The appellant, in his answer, also averred that he had tendered all of said 6,000 shares of stock to the plaintiff, and that he brought the same into court for the plaintiff, and demanded judgment for the cancellation and return of said note. The appellant also averred that the \$6,400 note was obtained by fraud and duress after the original notes were due. The plaintiff filed a reply, in which he denied that he had made said false representations, or any of them. He admitted that the stock which appellant alleged he purchased as aforesaid was not treasury stock, but was his individual stock; that said corporations had no interest therein whatever; that the stock in question was assessable; and that the same was all sold for the sole use and benefit of the plaintiff. The issues were submitted to a jury, which returned a verdict that the appellant return to the plaintiff the 3,000 shares of tie stock, and that he recover from the plaintiff the \$500 paid on said stock, which, with interest at the time of the trial, amounted to \$713; that the plaintiff recover from the appellant the sum of \$2,950 as the balance due on said governor stock. The plaintiff was thus given a verdict of \$2,950 for the 3,000 shares of governor stock, and the appellant was given a verdict for the sum of \$713 for

the money paid on the tie stock and was relieved from making any further payment upon the tie stock. The court deducted the \$713 from the amount found due plaintiff on the governor stock, which left a balance in favor of plaintiff of \$2,237, for which the court entered judgment. The appeal is from that judgment.

From appellant's brief it appears that the 3,000 shares of tie stock were sold on divers days between September, 1910, and May, 1911; that while the precise days on which the governor stock was sold does not appear, yet it was sold on divers days during 1911 and 1912. The exact dates or times when the sales were made are, however, not material. There were 3,000 shares of each stock sold at \$1 per share. The appellant executed and delivered notes to the plaintiff from time to time as the stock was sold. There were two notes of \$250 each given for the tie stock which were paid by the appellant to the plaintiff. None of the other notes were paid, and all of them, with accrued interest, were subsequently, to wit, on the 19th day of January, 1914, merged in one note for the sum of \$6,400, which is the note sued on. Appellant's defenses were directed to the whole consideration evidenced by the promissory notes aforesaid, and he demanded judgment for the cancellation of the \$6,400 note, which was given in place of the original notes, as aforesaid, and also demanded judgment for the sum of \$500, with interest, paid as aforesaid. While the representations respecting the various transactions are averred to have been practically the same in appellant's answer, yet the evidence respecting the governor stock, in many respects, greatly differs from the evidence relating to the tie stock. Considerable controversy arose between counsel of the respective parties during the trial respecting the character of the evidence that appellant might introduce with regard to the representations made by the plaintiff to others than the appellant and the effect of such evidence.

[1] The district court, in ruling upon the admission of evidence, attempted to be governed by the rule laid down by this court in the case of Trout & Resort Co. v. Lewis, 41 Utah, 183, 125 Pac. 687, where the rule is stated in the tenth headnote in the following words:

"False representations, similar to the ones involved in an action, are admissible where the intent, motive, or knowledge of their falsity by the party making them are material, or where it is sought to prove a system or general plan or scheme to defraud."

The court thus permitted appellant to prove by other witnesses to whom the plaintiff had sold some of the capital stock of said corporations about the time the appellant purchased the stock in question that the plaintiff had made representations and statements to them to the same effect as those which appellant testified were made to him

concerning the stock. The court also permitted the appellant to testify that he believed the representations and statements made by the plaintiff to be true, and that he relied on them in entering into the contract of purchase and in executing and delivering the promissory notes. Counsel, however, also attempted to prove by other witnesses that they also believed the representations and statements made by the plaintiff to them to be true. Plaintiff's counsel objected to the proffered testimony as being irrelevant and immaterial, and the court sustained the objection. Appellant's counsel now insists that the court erred in its ruling in that respect.

We remark that there were four witnesses who testified for the appellant that they also bought some of the tie stock from the plaintiff, and that he had made similar representations and statements to them concerning the said stock that the appellant testified he made to him. Counsel offered to prove by all of those witnesses that they believed the representations and statements made by the plaintiff concerning the tie stock, and the court rejected the offer.

[2] As before pointed out, the appellant prevailed in his claim respecting the tie stock, and hence whatever error the court may have committed, if any, respecting the admission or exclusion of evidence upon the issue relating to that stock, is wholly immaterial now, and hence is unavailing to the appellant. Counsel, however, says in his brief:

"Precisely the same state of facts was shown, or offered to be shown and proven, with regard to the respondent's operation in selling the stock of the Dickerson Automatic Governor Company. The two cases were in all respects parallel, the only difference in the two being that the latter stock scheme was operated just after the first one; but the respondent's system and his scheme was the same precisely in each case."

While appellant's counsel did not abstract the evidence relating to the governor stock, yet we have examined into it carefully, and we cannot agree with counsel that "the two cases were, in all respects, parallel." True, appellant's allegations in his answer were practically the same with respect to both stocks, but his own testimony respecting the transactions relating to the governor stock leave little room for doubt that he purchased that stock entirely upon his own judgment after making full investigation into its merits by consulting others who possessed full information concerning the merits of the stock. The jury, no doubt, took that view, and hence required appellant to pay for the governor stock, although they sustained his contention respecting the tie stock.

[3] Assuming, without deciding, that the appellant is in a position to complain of the court's ruling in excluding the proffered evidence of the one witness who testified to certain representations concerning the governor stock that the witness believed the representations to be true, did the exclusion

of what that witness believed with respect to the alleged representations constitute error? We are clearly of the opinion that it did not. Suppose the witnesses to whom it is claimed plaintiff made representations like those the appellant claims were made to him should insist that they did not believe the representations to be true. Would their belief have affected appellant's rights in the premises in any way or to any extent? Clearly not. The question was not what others believed, but what did the plaintiff believe, and upon what did he rely in purchasing the stock and in executing and delivering the notes? True, the representations that the plaintiff made to others respecting the stock were relevant and material for the purposes stated in the case of *Trout & Resort Co. v. Lewis*, supra. Counsel, however, insists that the proffered evidence was also material and relevant to prove "a system or general scheme to defraud." How what a witness believed respecting certain representations would establish a general plan or scheme to defraud we are utterly unable to understand.

[4] Nor is it true that "a system or general plan or scheme to defraud" may be inferred merely because the vendor is charged with having made certain false representations and statements concerning the stock he was offering for sale. While such a plan or scheme may, perhaps, be inferred from some particular representations and statements that might be made respecting such a transaction, yet it may not be inferred simply because certain representations and statements respecting certain stock are alleged to be false. If it were assumed, therefore, that there were some representations or statements that were made respecting the tie stock from which some interested and biased person might possibly infer a general plan or scheme to defraud, yet, in view of appellant's own testimony, there was absolutely nothing of that kind with respect to the governor stock. In view of the record as it is presented the court committed no error in excluding the proffered evidence.

[5] It, however, is also contended in this connection that the court erred in excluding from the jury certain stock certificates which represented stock in said corporations, and which were purchased from the plaintiff by the witnesses who testified for appellant. Those certificates were offered: (1) To show that the stock was not treasury stock; and (2) that it was not nonassessable stock. As to the first proposition the plaintiff had admitted in his reply that the stock in question was not treasury stock, and hence no proof was necessary on that point. As to the second proposition our statute provides that fully paid capital stock is nonassessable unless it is made so in the articles of incorporation, and then it is assessable only as therein provided. The court admitted in evidence the

articles of incorporation, and hence the best evidence upon that subject was produced and admitted. But here again plaintiff's reply was a conclusive admission that the stock was assessable. No error was therefore committed in excluding the stock certificates.

[8, 7] Complaint is also made respecting instructions given by the court to the jury. The principal ground of complaint, however, is that the court refused to charge the jury that they might infer a general plan or scheme to defraud from the representations and statements made by plaintiff respecting the stock in question. As already suggested, there was absolutely nothing in the evidence from which the jury could legitimately have inferred a general plan or scheme to defraud, and hence the court did not err in refusing to so charge. Nor are the criticisms upon the court's charge, in that it restricted the jury in certain particulars, tenable. The charge was full and fair and covered every feature of the case. All the points that were properly covered by appellant's requests were fully covered in the court's charge. The request that is especially relied on by appellant, and which was refused by the court, was properly refused if for no other reason than that it was merely an argument on particular portions of the evidence.

[8] Finally, it is contended that the court erred in not awarding appellant the costs claimed by him. It appears that both parties to the action filed their cost bills. The court, however, did not include the costs of either party in the judgment. As we have seen, the action was originally one merely to recover a money judgment. If the plaintiff had prevailed in the action as originally commenced, he, under Comp. Laws 1907, § 3339, would have been entitled to a judgment for costs as a matter of course. There were, however, various defenses set up, including a counterclaim. Under the pleadings the action was finally tried as one to rescind a contract of purchase and to recover back certain money paid on the contract, and to place the parties in statu quo respecting the subject-matter of the contract. The plaintiff succeeded in part and the defendant succeeded in part. The case therefore, falls within Comp. Laws 1907, § 3341, where the matter of allowing costs is remitted to the sound discretion of the trial court. We, therefore, can only review the court's action in refusing to allow costs in case the court has abused its discretion in that regard. There is nothing in this record from which we can say that the court has abused its discretion, and hence this assignment cannot prevail.

While we have not specifically referred to each one of counsel's assignments, yet we have considered all of them. Notwithstanding the fact that appellant's counsel has vigorously assailed the rulings of the trial court and the final judgment, we are

thoroughly convinced that, in view of the whole record, much of counsel's complaint must be attributed to his zeal, and that he has no legal cause for complaint. We are further convinced that both the court and jury have awarded to the appellant all that he was entitled to under the law and the evidence.

The judgment is therefore affirmed. Respondent to recover costs.

MCCARTY and CORFMAN, JJ., concur.

UTAH ASS'N OF CREDIT MEN v. JONES. (No. 2963.)

(Supreme Court of Utah. April 23, 1917.)

1. CHATTEL MORTGAGES §136—WAIVER OF LIEN—CONFESSION OF JUDGMENT.

Although Comp. Laws 1907, § 3498, provides that there can be but one action for the recovery of any debt or enforcement of any right secured by mortgage, which action must be in accordance with the chapter, a chattel mortgagee did not waive his right to a lien by selling the property under a power in the mortgage after confession of judgment in his favor by the mortgagor, though the confession was not in all things regular.¹

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 220-226.]

2. BANKRUPTCY §188(1)—WAIVER OF CHATTEL MORTGAGE LIEN—CONFESSION OF JUDGMENT.

Neither the trustee in bankruptcy nor any of the mortgagor's creditors could complain, the mortgagor having consented to the confession, although it was made less than four months prior to the bankruptcy, since it was in accordance with the mortgagee's right under the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-289, 291, 293, 294.]

3. BANKRUPTCY §196—PREFERENCES—WHAT CONSTITUTES.

Nor would such confession of judgment and sale of the property constitute a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316.]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by the Utah Association of Credit Men, trustee in bankruptcy for A. F. Engberg, against Thomas B. Jones. Judgment dismissing the complaint, and plaintiff appeals. Affirmed.

Stephens & Smith, of Salt Lake City, for appellant. Elias Hansen, of Spanish Fork, for respondent.

FRICK, C. J. This action was commenced by the plaintiff, as trustee in bankruptcy of the bankrupt estate of one A. F. Engberg, to recover certain personal property claimed by, and in the possession of, the defendant Jones. The facts are not in dispute. The

¹ Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; Boucofaki v. Jacobsen, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 886.

findings of the court, which fairly reflect the pleadings and the evidence, in substance are:

That on the 27th day of June, 1914, the A. F. Engberg aforesaid was duly adjudged a bankrupt, and that thereafter the plaintiff was duly appointed trustee in bankruptcy of said bankrupt's estate. That the trustee is entitled to the property belonging to said bankrupt's estate. "That on the 2d day of January, 1914, said A. F. Engberg was indebted to said Thomas B. Jones, defendant herein, in the sum of \$1,100, with interest thereon at 10 per cent. per annum since March 12, 1913, said indebtedness being evidenced by a promissory note and secured by a chattel mortgage on a certain stock of goods and certain fixtures owned by said Engberg in what was known as the Mission Drug Store at Spanish Fork, Utah county, Utah; said note and mortgage being set out in full in Exhibit A to defendant's answer herein. That said mortgage was duly recorded in the office of the county recorder of Utah county, state of Utah, on October 9, 1913, in volume 92, p. 220, of Chattel Mortgages. That no part of the principal of said note, or any interest thereon, had been paid on said 2d day of January, 1914. That Engberg was in default in his payment upon said note. That defendant duly demanded of said Engberg the payment of said note, and it was thereupon agreed between said Engberg and defendant that it would be cheaper for said Engberg to confess judgment for said debt and permit judgment to be entered and execution to issue thereon, rather than to foreclose the chattel mortgage which secured said debt. That on said 2d day of January, 1914, said Engberg confessed judgment in the district court in and for Utah county, state of Utah, in favor of defendant, for the sum then due on said debt which was secured by said note and mortgage, a true copy of said confession of judgment is attached to defendant's answer herein as Exhibit A. That thereafter execution was regularly issued upon said judgment, that a levy of execution was made by the sheriff of Utah county upon the very goods and fixtures owned by said Engberg in what was known as the Mission Drug Store at Spanish Fork, Utah, being the same goods and fixtures as were covered by the lien of said chattel mortgage. That the sale of said merchandise and fixtures under said execution was noticed regularly for January 15, 1915, and the said merchandise and fixtures were upon said day sold under said execution, for the use and benefit of defendant, and that defendant received, as the proceeds of said sale, the sum of \$500. That said confession of judgment and the judgment thereon has never been vacated or discharged, and that the said A. F. Engberg, defendant herein, did not, at least 5 days before such sale, vacate or discharge said judgment. That on said 15th day of January, 1914, and within four months before the filing of the petition in bankruptcy, above set forth, the said A. F. Engberg was insolvent, and that said defendant then had reasonable cause of belief that the enforcement of said judgment, by said sale, would enable the defendant to receive a greater percentage of his debt than any other creditors of said A. F. Engberg of the said class. That the assets of said estate are insufficient to pay creditors in full. That previous to the commencement of this action plaintiff duly demanded of the defendant the payment of said sum of \$500, which the defendant has refused and neglected to do. That at the trial of said cause, after the introduction of evidence on the part of plaintiff, and after plaintiff had rested its case, it was stipulated by and between the plaintiff and the defendant herein that if the court decided that the confession of judgment, as filed by said Engberg, and as set out in the pleadings herein, was a waiver of the security under the chattel mortgage described above in the fourth finding of fact and set out in full in Exhibit A to defend-

ant's answer herein, then in that event judgment in this cause should be entered for the plaintiff, but if the court decided contrarywise, then judgment should be entered for the defendant."

As conclusions of law the court found as follows:

"That said confession of judgment hereinbefore particularly described did not constitute a waiver of the lien under the chattel mortgage held by defendant as above described. That defendant is entitled to judgment against the plaintiff of dismissal of said cause, and defendant is entitled to its costs herein incurred or expended."

The confession of judgment, so far as material here, reads as follows:

"I, A. F. Engberg, of Spanish Fork, Utah county, state of Utah, do hereby confess judgment herein in favor of Thomas B. Jones, of Spanish Fork, Utah county, state of Utah, for the sum of \$1,100, lawful money of the United States of America, and authorize judgment to be entered therefor against me with interest thereon from and after July 1, 1913, and for all costs of docketing, filing, and satisfying said judgment. This confession of judgment is for a debt justly due and owing to the said Thomas B. Jones, arising upon the following facts, to wit: On March 12, 1913, I, the said A. F. Engberg, borrowed the sum of \$1,100 from Thomas B. Jones, and gave as evidence of said indebtedness my promissory note secured by a chattel mortgage, of which the following is a copy, and the said mortgage also contained a copy of the promissory note which I made, executed, and delivered to said Thomas B. Jones, the same being as follows, to wit: [A copy of the chattel mortgage and a copy of the note secured thereby are set forth in full in the confession of judgment. The mortgage is dated September 25, 1913, and the note March 12, 1913. The mortgagee was given the power to sell the mortgaged property upon default of payment at public auction]."

The confession of judgment concludes as follows:

"Said chattel mortgage aforesaid was duly executed and acknowledged so as to entitle the same to be recorded and the same was duly recorded in the office of the county recorder of Utah county, state of Utah, on October 9, 1913, in volume 92, p. 220, of Chattel Mortgages. That the interest on said note has been paid up to July 1, 1913, but not thereafter. That the said Thomas B. Jones has demanded the interest paid which is due, and the same has not been paid and the said Thomas B. Jones thereafter and heretofore has declared that because the said interest was not paid as agreed the whole sum, both principal and interest, should be paid. It is understood by said A. F. Engberg that this confession of judgment does not cause said Thomas B. Jones to waive any rights that he may have under his said mortgage and mortgages aforesaid, but said Thomas B. Jones shall retain all of the said rights he would have had if he had brought a proceeding in foreclosure or other action authorized in said chattel mortgage aforesaid. A. F. Engberg further says that no part of said \$1,100, or the interest thereon from and after July 1, 1913, has been paid, and the same is now due and payable."

The confession was duly verified. The district court entered judgment dismissing the complaint, and the plaintiff appeals.

Counsel for appellant, in their brief, state the propositions to be decided thus:

"Did the defendant and respondent, by taking the confession of judgment of Engberg,

waive the lien of the mortgage? Did the defendant, by the levy of an execution upon and sale of the property described in the chattel mortgage, waive the lien of the chattel mortgage? We submit that both questions should be answered in the affirmative."

We have a statute (Comp. Laws 1907, § 3498) which provides:

"There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter."

[1] It is contended, therefore, that, inasmuch as the confession of judgment was made within four months of the time that the petition in bankruptcy was filed, upon which Engberg was adjudged a bankrupt, Jones not only did not gain anything from the confession, but lost his rights under the chattel mortgage by selling the property as appears in the foregoing statement. California has a statute from which ours was taken, and it has been held by the Supreme Court of California in the following cases that only one action is permitted upon any debt secured by mortgage under that statute: *Merced Bank v. Casaccia*, 108 Cal. 641, 37 Pac. 648; *Commercial Bank v. Kershner*, 120 Cal. 495, 52 Pac. 848. Other California cases are referred to in those cases. The Territorial Supreme Court of Utah, in *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510, followed the California rule. This court has also recognized the doctrine in the case of *Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898. The record in this case, however, shows beyond dispute (if we may call the confession of judgment an action, as appellant's counsel insist it is) that the defendant commenced but one action. Counsel, however, contend that the confession of judgment was not the action contemplated by section 3498, supra. No claim of fraud or want of good faith is made. If we treat the confession of judgment as an action, as counsel do, what was the nature of the action? True, the confession of judgment does not contain all that is usually found in a complaint and judgment to foreclose a mortgage. Yet, in view that the chattel mortgage and the note secured thereby, together with other facts were fully set forth, it was made clear that all that was sought to be accomplished by the action was to obtain legal authority to sell the mortgaged property for the sole purpose of satisfying the debt evidenced by the note to secure which the chattel mortgage was executed. It would seem, therefore, that about all that could have been accomplished by any action was actually accomplished by the confession of judgment. In this connection it must be remembered that our Constitution (article 8, § 19) provides:

"There shall be but one form of civil action, and law and equity may be administered in the same action."

While it is quite true that legal relief must always be distinguished from purely equitable relief, yet no particular form of action or proceeding is either necessary or required in order to obtain relief from the courts of this state in case they have jurisdiction of the subject-matter. What we mean is, that it is the substance and not the form of things that controls. While, therefore, the proceedings relating to the confession of judgment did not conform to the ordinary action in equity to foreclose a mortgage, yet, in what way does the fact that they did not so conform affect appellant's rights in the premises? It is conceded that the defendant had a valid chattel mortgage which was a first lien on the personal property in question. It cannot be disputed that the defendant Jones, under our statute (Comp. Laws 1907, § 152), had a right either to foreclose his mortgage by an action in equity or to advertise and sell the mortgaged property at public auction as provided by our statute in all cases where, as in the case at bar, power to sell is given in the mortgage. If the mortgage thus had been regularly foreclosed in equity the property would have been sold either upon an order of sale made by the court or as upon execution, and in either event it would have been sold precisely in the manner it was sold under the confession of judgment. Wherein is the appellant harmed, therefore, because the defendant did not commence and prosecute a more formal action and obtain the same result or relief in a more formal manner? No doubt the mortgagor could have prevented the mortgagee from proceeding in the manner he did, but in this case the mortgagor consented to the very method pursued by the mortgagee. The mortgagor and the mortgagee could agree upon the manner of sale, and, if the property was sold pursuant to the agreement at a fair price, no one, not even one who claimed a subsequent lien upon the property, could legally object. Jones on *Chattel Mortgages* (5th Ed.) §§ 456-709.

[2] Nor has the plaintiff any right to complain unless the provisions of the Bankruptcy Act, under which it claims, have in some way been violated by the mortgagor and mortgagee. The question, therefore, recurs, In what way has either Jones or Engberg violated any of the provisions of section 3498, supra, or of the federal Bankruptcy Act? True, the confession of judgment may have been very informal, as well as grossly irregular, when viewed as a foreclosure proceeding; but in view that the only one who had a right to complain consented to the proceeding in that form, and also consented to the sale of the mortgaged property in the manner it was sold, we cannot see how the appellant can complain. Moreover, section 3498, as pointed out by the Supreme Court of California, was adopted for the protection of the mortgagor. It may also have been, in a measure at least, for the protection of

those who have, or claim, some specific lien upon the mortgaged property; but the statute certainly was not intended to give those who neither have nor claim to have any specific rights in or to the property the right to object. In the case of *Merced Bank v. Casaccia*, supra, the Supreme Court of California, in referring to the purposes of the statute, says:

"The obvious purpose of section 728 * * * is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor."

In a subsequent case (*Commercial Bank v. Kershner*, 120 Cal. 495, 52 Pac. 848), in answering an argument of counsel, the court said:

"The simple answer is found in the statute and in its reason and policy, which are to prevent multiplicity of suits and the attendant annoyance and additional cost to the debtor."

Now, in what way have the policy and purpose of section 3498, as explained by the California Supreme Court, been transgressed in this case? In view that there were no other liens on the property in question, why should not Mr. Jones, the mortgagee, and Mr. Engberg, the mortgagor, agree on some method of sale whereby all unnecessary costs and expenses should be eliminated? That is just what was done by the confession of judgment and the sale of the mortgaged property.

[3] Counsel for appellant, however, insist that, in selling the mortgaged property under execution, the defendant waived his rights under the mortgage, and, in view that the confession of judgment was made less than four months before the filing of the petition in bankruptcy, the confession constituted a preference which is prohibited by the Bankruptcy Act. In support of the contention that the defendant Jones waived his rights under the mortgage, counsel, among other cases, cite *Evans v. Warren*, 122 Mass. 303, *Dix v. Smith*, 9 Okl. 124, 60 Pac. 303, 50 L. R. A. 714, *Whitney v. Farrar*, 51 Me. 418, and *Dyckman v. Severson*, 39 Minn. 132, 39 N. W. 73. *Evans v. Warren*, supra, is, perhaps, the leading case upon the subject. At all events that case is referred to not only by the courts which support the Massachusetts doctrine, but also by those who refuse to follow the same. The decision in the Massachusetts case is squarely based upon the doctrine that at common law the title to the chattels passed to the mortgagee with the right of the mortgagor to redeem. In view of that fact it is held there was no interest in the property remaining in the mortgagor upon which to levy an execution, and hence the mortgagee, in levying the execution, was necessarily required to recognize the title of the property as being in the mortgagor, and hence the mortgagor necessa-

rily waived his rights under the mortgage. As is well said by the Supreme Court of Indiana in the case of *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687, in referring to the authorities which follow the Massachusetts rule, "These authorities, however, depend upon a mere technicality, and not upon any principle of equity." Moreover, our statute (Comp. Laws 1907, § 157) expressly provides that both attachments and executions may be levied on property covered by chattel mortgages, subject, however, to the lien of the mortgagee. Under our statute all that the mortgagee acquires is a lien. Where statutes like ours are in force courts have uniformly refused to follow the doctrine laid down by the Massachusetts court in *Evans v. Warren*, supra, and it is universally held that the mortgagee does not waive his rights under the mortgage by either attaching or levying an execution on the mortgaged property. The following well-considered cases will be found directly in point: *Byram v. Stout*, supra; *First National Bank v. Johnson*, 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485; *Thurber v. Jewett*, 8 Mich. 295; *Cottingham v. Springer*, 88 Ill. 90; *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; *Howard & Co. v. Parks*, 1 Tex. Civ. App. 608, 21 S. W. 269. In the case of *First National Bank v. Johnson*, supra, the mortgagee caused an attachment to be levied on the mortgaged property, and the trustee in bankruptcy then brought an action to recover the mortgaged property, as in the case at bar, claiming that the rights under the mortgage had been waived by levying the attachment. The Supreme Court of Nebraska, however, held that the mortgage lien was not waived, and that the mortgagee's rights were superior to those of the trustee in bankruptcy. The holdings in the other cases cited are to the same effect.

Neither can we see any good reason for holding that a valid and subsisting lien created by mortgage is waived by a sale of the property upon execution; and especially where, as here, the right to the lien is expressly reserved and the property is sold to satisfy the mortgage lien and nothing else. True, the mortgagor might, perhaps, have objected; but why could he not also waive his right of objection and consent to the method pursued? And so long as no other lien, or rights in the property are prejudicially affected, why should any one be permitted to object upon purely technical grounds?

In our opinion the judgment dismissing the complaint is clearly right, and should be affirmed. Such is the order. Defendant to recover costs.

McCARTY and CORFMAN, JJ., concur.

BOARD OF EDUCATION OF SALT LAKE CITY v. WRIGHT-OSBORN CO. et al. (JOSEPH NELSON SUPPLY CO., Intervener). (No. 2930.)

(Supreme Court of Utah. April 19, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨85—CONSTRUCTION CONTRACTS—ARCHITECT'S CERTIFICATE.

Under a contract for the construction of a school building authorizing the school board to terminate the contract on certificate of the architects, where two architects who were partners were named, but one of them was a mere silent partner, and the other did all of the work of preparing the plans and specifications and superintending and overseeing the erection of the building, a certificate on which the board terminated the contract was not insufficient because it represented the judgment of only the active architect.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 202.]

2. SCHOOLS AND SCHOOL DISTRICTS ⇨85—CONSTRUCTION CONTRACTS—TERMINATION—NOTICE—"AND"—"AT ONCE."

Under a contract for the construction of a school building which provided that, if the contractor should fail to supply sufficient labor or materials, or in the performance of any of the agreements therein, such failure being certified by the architects, the school board should be at liberty after three days' written notice to the contractor to provide any such labor or materials, and deduct the cost from moneys due the contractor, "and" that, if the architects should certify that such action be taken, the board should also be at liberty "at once" to terminate the employment of the contractor and complete the work, the board was entitled, upon the architects certifying that the contract should be terminated, to terminate it immediately without notice, as "at once" meant immediately and without delay, while "and" meant in addition to or something added to what preceded it.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 202.

For other definitions, see Words and Phrases, First and Second Series, And; At Once.]

3. CONTRACTS ⇨152—CONSTRUCTION—MEANING OF LANGUAGE.

All the words used in a contract must, if possible, be given their usual and ordinary meaning and effect; as it will not be assumed that the parties did not intend what their language implies.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738.]

4. SCHOOLS AND SCHOOL DISTRICTS ⇨81(2)—BUILDING CONTRACTS—LIABILITY OF SURETY.

A school board, having terminated a contract for the construction of a school building as authorized by the contract, advertised for bids for the completion of the work, and required contractors to state in their bid a guaranteed maximum cost for completion of the work, and the percentage for which they would perform the work, but provided that payment would be based only on the actual cost of labor and material, and that the contractor's percentage would be based thereon. *Held* that, assuming that the board was required to advertise for bids to complete the work, and that the original contractor's surety was entitled to insist on this being done, there was nothing in the requirement that bidders include a guaranteed maximum cost preventing competitive bidding, and

the surety was liable where the cost of completion exceeded the original contract price.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196.]

5. SCHOOLS AND SCHOOL DISTRICTS ⇨81(2)—BUILDING CONTRACTS—CONTRACTOR'S SURETY—LIABILITY.

Assuming that a provision in such contract requiring a bond which should expire two years from the date of the contract controlled the construction of the bond, though not contained therein, the surety was nevertheless liable where the contractor defaulted within two years, though suit was not brought and the amount expended by the obligee in completing the work was not ascertained within the two years.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196.]

6. SCHOOLS AND SCHOOL DISTRICTS ⇨81(2)—CONTRACTOR'S SURETY—EVIDENCE—ARCHITECT'S CERTIFICATE.

Where a contract for the construction of a school building provided that, if the board completed the work upon the contractor's default, the expense of completing the work should be audited and certified by the architects, and that the decision of the board thereon should be final and conclusive, the architects' audit and certificate was admissible against the contractor's surety in an action on the bond.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196.]

7. APPEAL AND ERROR ⇨1002, 1011(1)—REVIEW—CONFLICTING FINDINGS—SEPARATE TRIALS OF ISSUES.

Under a contract for the construction of a school building, the school board terminated the contract and completed the work pursuant to an architect's certificate stating that the contractor had defaulted in certain particulars, and among other matters was installing boilers not in compliance with the specifications. In an action against the surety for the difference between the cost of the work and the contract price, the party which sold the boilers to the contractor intervened and sought judgment against the surety for the purchase price. The issues between plaintiff and the surety were tried before a jury, which found for plaintiff, and found that the specifications adopted by the architect were those known as specifications No. 1, with which the boilers did not comply. The issue between the intervener and the surety was then tried without a jury, and the court found that specifications No. 2 were those adopted, and that the boilers complied therewith. *Held* that, while these findings were in direct conflict, as they were based on conflicting evidence, it was the exclusive province of the jury in one case and of the judge in the other to determine the weight of the evidence and the credibility of the witnesses, and the Supreme Court could not interfere with the findings, but must treat them as though they constituted the result in two separate and distinct cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937, 3983-3988.]

8. SCHOOLS AND SCHOOL DISTRICTS ⇨81(2)—CONSTRUCTION CONTRACTS—CONTRACTOR'S BOND—LIABILITY.

Under the bond of a contractor for the construction of a school building conditioned for the payment of labor and materials, the surety was liable for the purchase price of boilers and other materials sold the contractor for use in the construction of the building and fully complying with all specifications, though the school board in completing the work after the contractor's default removed the boilers and part of

the other materials and substituted different boilers.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 195, 196.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by the Board of Education of Salt Lake City against the Wright-Osborn Company and the Fidelity & Deposit Company of Maryland, in which the Joseph Nelson Supply Company intervened. From judgments in favor of plaintiff and the intervener, the Fidelity & Deposit Company appeals. Affirmed.

Stephens & Smith and Dey, Hoppaugh & Fabian, all of Salt Lake City, and Guy Le Roy Stevick, of San Francisco, Cal., for appellant. James Ingebretsen, of Salt Lake City, for respondent Joseph Nelson Supply Co. M. E. Wilson and Walton & Walton, all of Salt Lake City, for respondent Board of Education.

FRICK, C. J. The plaintiff, hereinafter designated respondent, commenced this action against the Wright-Osborn Company as contractor, hereinafter styled contractor, and against the Fidelity & Deposit Company of Maryland, hereinafter called appellant, in the district court of Salt Lake county, to recover on an indemnity bond made and delivered by the appellant to the respondent wherein the former agreed to indemnify the latter for any loss or damage it should sustain in case the contractor failed, neglected, or refused to comply with the provisions and conditions of its contract. The Joseph Nelson Supply Company, hereinafter called intervener, intervened in the action and set up a claim for material sold and delivered to the contractor which it alleged it had delivered to the contractor to be used in the school building being erected by the respondent, and which had not been paid for by the contractor.

The respondent alleged that it entered into a contract with the contractor whereby the latter agreed to furnish all the material and labor necessary to complete a heating and ventilating plant or system in a high school building which respondent was then erecting at Salt Lake City, Utah, that the contractor was required to furnish a bond for the faithful performance of its contract, and that it would promptly pay for all labor and material. The contract is set forth in full as an exhibit and is made a part of the complaint. The terms and conditions of the contract are numerous and specific. It is not necessary, except in one particular, to set forth the many conditions and provisions contained in the contract, since those that are deemed material will be specifically referred to in the course of the opinion. Since the action, however, is more particularly based upon article 13 of the contract, and in view that one of the controlling questions involved on this appeal depends upon the construction of certain provisions contained therein, we quote said article in full. It reads as follows:

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architects, the said second party shall be at liberty after three days' written notice to the contractor or to any of his agents to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and such certificates of the architects, together with the action of the board thereon, shall be final and conclusive; and if the architects shall certify that such action be taken, the said second party shall also be at liberty at once to terminate the employment of the contractor for the said work, and immediately to enter upon the premises and to take possession of all materials thereon, together with all tools, machinery, apparatus, and conveniences, and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the said second party in finishing the work, such excess shall be paid by the said second party to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the said second party. The expense incurred by the said second party, as herein provided, either for furnishing materials, or for finishing the work and any damages incurred through such default, together with the value of the use of tools, machinery, materials, and conveniences that may be taken by the said second party, shall be audited and certified by the architects, and the decision of the said second party thereon shall be final and conclusive. And this shall be construed to mean not only the completion of the heating and ventilating system for the buildings, but the removal of all rubbish from the same, as well as from the grounds."

The respondent, after alleging that the contractor had entered into the contract as aforesaid, also further alleged:

That the appellant had made and delivered to the respondent a certain bond in which appellant had agreed to indemnify the respondent in case said contractor should fail to comply with the conditions of its contract in completing and installing said heating and ventilating plant; that the contractor had failed to comply with the provisions of its contract in the following particulars, namely: That the contractor had "attempted to furnish material of a poor and inferior and improper quality, * * * and not of the quality required by the specifications and contract, and furnished and delivered at said building and attempted to put in place therein inferior and improper boilers not in accordance with the contract and insufficient for the purpose for which they were used, and * * * wholly neglected to supply a sufficiency of properly skilled workmen and failed to prosecute the work with promptness and diligence; that on the 17th day of January, 1913, the architect mentioned and referred to in said building contract, 'Exhibit 1,' certified in writing that said contractor had refused and neglected to supply a sufficiency of properly skilled workmen, and had refused and neglected to supply a sufficiency of material of the proper quality, and had failed to prosecute the work with promptness and diligence, and had failed generally in the performance of the agreements on said contractor's part to be performed, and further certified in writing to the plaintiff that it was necessary for the plaintiff to terminate

the employment of the said Wright-Osborn Company in respect of and arising from said contract, and that such action of termination of said employment should be taken by the plaintiff, and thereupon, and on the same day, the said plaintiff did, by resolution, at once terminate the said employment, and thereupon notified each of the defendants of said action; that the contractor furnished material of inferior quality for hangers for the air ducts and that said hangers were improperly placed; that the contractor failed "to do skilled workmanship in making the joints" in certain pipes and failed to "properly ream said pipes"; that said contractor "wholly failed and refused to proceed in the execution and performance of its said contract, so that agreeably to the provisions of said contract the further employment of the said * * * [contractor] was by plaintiff terminated."

Respondent then alleged that it had completed the work the contractor had agreed to do, specifically stating the cost thereof, and demanded judgment for the amount it had expended in excess of the contract price. A copy of the indemnity bond made and delivered by the appellant was also attached to and made a part of the complaint. The special provisions of the bond that are material to this controversy will be referred to in the course of the opinion. In view that the sufficiency of the architect's certificate is assailed, we append the same in full. It reads as follows:

"We have made an exhaustive investigation of the facts and circumstances relative to the performance of the contract existing between your board and the Wright-Osborn Company, dated July 1, A. D. 1912, and with great particularity have examined into the facts relative to the performance by that company of said contract, and we desire to report and certify as follows:

"That said company acting as said contractor, has failed and neglected to perform said contract in many particulars, some of which failures and neglects we will particularly refer to.

"In the first place, the said contractor has brought upon the ground and delivered at the building certain galvanized iron for the air ducts to be constructed by said contractor in the building, which galvanized iron is of poor quality and not of the quality required by the specifications furnished by us to the contractor, and we have refused to accept said iron.

"In the second place, the contractor has delivered at the building and is now engaged in putting in place three Kewanee boilers. The boilers tendered by the said contractor are not such as are called for by the specifications, and said boilers are insufficient for the purposes sought to be accomplished by them. After a thorough investigation, we are satisfied that these boilers tendered by said contractor will not sustain a pressure to exceed 110 pounds, and that you will be unable to insure said boilers for a greater pressure than 110 pounds and the boilers required by the specifications call for a pressure of 125 pounds. And then the tubing of the boilers is $3\frac{1}{2}$ inches in diameter, whereas the specifications call for tubing 4 inches in diameter. And we are reliably informed that the boilers tendered by the contractor are of less value than the boilers called for by the specifications.

"Furthermore, the contractor has neglected to supply a sufficiency of properly skilled workmen, and from the situation that now exists it appears that said contractor will be unable during the continuance of this contract to supply a sufficiency of properly skilled workmen, and the said contractor has failed and is still failing to prosecute the work with promptness

and diligence, and that the contractor indicates a disposition in the handling of this work that convinces us that said contractor will be unable to carry on the work with that degree of expedition contemplated by the contract; in fact, the contractor indicates so little capacity that it is difficult under all the existing conditions to prophesy a date when said contractor will complete the contract in accord with the plans and specifications.

"On account of certain labor union difficulties which have arisen between this contractor and the labor unions of this city, it seems that the entire work in the building, not only that contemplated by the contract with the Wright-Osborn Company, but that required from other contractors working upon said building, will be so delayed and hampered that we are quite discouraged and cannot come to any other conclusion than to say that, if the high school building is to be erected within the time contemplated by your honorable board and by the contracts which your board has entered into, and in accord with the plans and specifications, no other course of action can be followed than for your honorable board to terminate the employment of the said contractor, which employment arises by virtue of that certain contract existing between your board and the Wright-Osborn Company.

"The above statement while not intended to be exclusive, contains the important reasons for the certificate and recommendation which follows, and we believe your honorable board will deem it sufficient to justify said certificate and recommendation.

"We therefore certify that it is necessary for your honorable board to terminate the employment of the said Wright-Osborn Company, which employment arises by reason of that certain contract existing between your board and the said Wright-Osborn Company, said contract bearing date July 1, A. D. 1912, and we certify that said action shall be taken by you, and we recommend that said employment of said Wright-Osborn Company existing by reason of said contract shall immediately be terminated."

The contractor did not answer the complaint nor appear in the action. The appellant filed its answer, in which, after making specific admissions and denials, it set up various defenses, all of which are sufficiently reflected in the points its counsel have raised and which are hereinafter discussed.

The case was tried to a jury, which returned a verdict in favor of the respondent, from which this appeal is prosecuted.

Counsel for appellant in their brief have grouped all of their assignments of error under the following heads: (1) and (2) That the certificate of the architect on which the employment of the contractor was terminated is void; (3) that the employment of the contractor was terminated without notice, and is therefore void; (4) that the appellant is not liable in this action because the respondent was not legally damaged; (5) that no recovery can be had on the indemnity bond because it ceased to be in force before the cause of action arose; (6) that the respondent was itself in default, and hence could not legally enforce a forfeiture against, and therefore terminate, the employment of the contractor; (7) that the court erred in restricting the cross-examination of the architect; (8) that the court erred in permitting respondent to amend its complaint in certain particulars;

and (9) that the court erred in withdrawing certain issues from the jury.

Counsel state their first objection to the architect's certificate in the following words:

"This suit is brought under the contract; and plaintiff must therefore show the performance of conditions on its part, one of which is the issuance of a valid architects' certificate authorizing termination. The certificate here is void because based upon a finding of fact not submitted to the architect and which he had no authority to decide."

We have read the evidence and the charge of the court with care. We cannot perceive in what respect the architect failed to comply with the provisions of the contract in making the certificate. True, counsel argue that the architect did not act upon his own judgment, and, further, that he did not act in good faith in making the certificate. The court submitted those questions to the jury, and in doing so adopted some of the requests offered by appellant's counsel. The contention that the architect based his judgment on matters outside of the contract was also fully covered by the court's charge to the jury. The court charged the jury that, if they should find that the architect's certificate was based on facts, or on alleged defaults outside of the contract, their finding must be in favor of the appellant. The jury found against appellant's contention on that issue, and there certainly is sufficient evidence to sustain such a finding.

The same is true with respect to the contention that the architect did not act in good faith in making the certificate. That issue was also fully covered by the court's charge, and the jury also found against that contention.

The first point raised by counsel must therefore fail.

[1] We fail to perceive any merit to counsel's second point. The objection to the certificate is that it reflects the judgment of only one of the named architects, and is, for that reason void. No doubt, under certain circumstances the objection might not only be of force, but it might be fatal to the certificate. The undisputed evidence is to the effect, however, that in preparing all of the plans and specifications upon which the high school building was constructed, including the contract in question, James L. Chesebro acted alone, that Eldredge was a mere nominal partner, that is, a silent partner, so to speak, and at no time took any part in any of the matters pertaining to the making of the plans and specifications for the high school building or in superintending or overseeing the erection thereof, and that Chesebro acted alone in that regard. Indeed, it was shown that Eldredge did not know anything whatever respecting the matters pertaining to the execution of the contract in question. Counsel's contention, therefore, that the contractor was entitled to the judgment of both architects named in passing upon whether the provisions of the contract were being disregarded or not, under the facts and cir-

cumstances, is of little, if any, importance. No doubt if the two architects had acted in the matter, then, both upon principle and under the authorities, the contractor would have been entitled to the judgment of both. The architects, in one sense, would then have been arbitrators, and either party would have been entitled to their combined judgment. In this case, however, only one acted; and while the business was done in the name of Eldredge & Chesebro, yet Eldredge was a mere silent partner, and Chesebro did all that was done in the matter precisely as though Eldredge was not nominally connected with the business. In view that Eldredge knew nothing about the matters, his judgment could have been of no aid to any one, and in view that Chesebro acted alone, and was, as the record discloses, by all regarded as the sole architect on the building, his act must be deemed as the act of the architects named in the contract. Any other view would merely enforce the letter and entirely ignore the essence of the provisions of the contract covering the powers and duties of the architects.

In making this contention counsel seem somewhat inconsistent. They strenuously insist that the architect in making the certificate must act only upon personal observation and knowledge. If that contention be sound, how can they consistently contend that Eldredge, who had absolutely no knowledge respecting the matters contained in the certificate, should participate therein? For him to have done so would have been the same as though a stranger had been called in to act. That certainly is not what is contemplated by the provisions of the contract.

This objection must therefore likewise fail.

[2] The third point raised by counsel, in our judgment, presents the serious question on this appeal. By referring to article 13 of the contract, which we have set forth in full, it will be seen that, if the contractor shall fail, refuse, or neglect to do the things therein enumerated and such failure, refusal, or neglect—

"being certified by the architects, the said second party [respondent] shall be at liberty, after three days' written notice to the contractor, * * * to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and such certificate of the architects, together with the action of the board thereon, shall be final and conclusive; and if the architects shall certify that such action be taken, the said second party shall also be at liberty at once to terminate the employment of the contractor, * * * and immediately enter upon the premises," etc. (Italics ours.)

Appellant's counsel vigorously insist that, in view that in this case the employment was terminated upon the certificate of the architect without giving three days' notice to the contractor, therefore the termination was void and of no effect. In support of the contention counsel, among other cases, cite *McClellan v. McLamore* (Tex. Civ. App.) 70 S. W. 224; *George A. Fuller & Co. v. Doyle* (C. C.)

87 Fed. 687; *American, etc., Co. v. Butler*, 165 Cal. 497, 138 Pac. 280, Ann. Cas. 1916C, 44; and *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769. It is not necessary to refer to the other cases cited by counsel upon that point, since they really have no application. Indeed, all of the foregoing cases, except the one from Texas, were disposed of on other grounds. While it is true that in all of the cases cited the questions arose out of contracts containing provisions similar to the one in question here, and while in the course of the opinions the provisions in the contracts providing for notice and the termination of the employment of the contractor are either discussed or referred to, yet the provisions of the contracts in question in those cases were not only different from the provisions of the contract in question here, but the decisions were based on other grounds. In the Texas case, however, the court directly passed upon the provision with regard to the termination of the employment, and held that the employment of the contractor could not legally be terminated without giving the three days' notice provided for in the contract. The provisions of the contract respecting the giving of notice passed on by the Texas court, in our judgment, was, however, materially different from the provisions upon that subject in the contract in question here. In the Texas contract it was provided that in case the contractor shall fail, refuse, or neglect to provide the labor or material, etc.—

"such refusal, neglect, or failure being certified by the architect the owner shall be at liberty, after three days' notice to the contractor, to provide any of such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action the owner shall also be at liberty to terminate the employment of the contractor," etc. (Italics ours.)

Notwithstanding that the foregoing language, to our minds, is much more favorable to counsel's contention, the Texas Court of Civil Appeals expressed some doubt with regard to whether the three days' notice is required or not in case the contract is terminated upon broader grounds. The provision in the contract here which gave the respondent the right to terminate the employment reads quite differently from the provision in the Texas case. After providing that after giving three days' notice to the contractor respecting the latter's failure to comply with the provisions of the contract there enumerated the owner may supply the defects and recover all costs thereof from the contractor, the contract further provides:

"And if the architects shall certify that such action be taken, the said second party shall also be at liberty at once to terminate the employment of the contractor," etc.

[3] It is a cardinal rule of construction that all the words used by the parties must, if possible, be given their usual and ordinary meaning and effect. It will not be assumed that the parties to the contract did not in-

tend what their language implies. Again, if it be true that it was the intention of the parties that three days' notice be required before the employment under the contract in question can be terminated under all circumstances, then it is equally true that the parties did not use apt words to express that intention or to convey their meaning. While it is true that the owner is required to give three days' notice before he can supply the defects in the material, etc., it is, however, also true that if the architect shall certify that "such action be taken," that is, if the architect shall certify that the employment be terminated, then the owner may do that "at once," that is, forthwith. Why say "at once" if three days' notice is required? In view of the subject-matter, "at once" can only mean what the term implies, namely, immediately and without delay. If the three days' notice must precede the termination of the employment under the circumstances, then it was wholly unnecessary to use the term "at once," since after the three days had elapsed the owner, upon the receipt of the architect's certificate to that effect, could terminate the employment without further delay, and hence without further notice of any kind. Moreover, the word "and" in the provision in the contract in question is also of peculiar significance. It is there used in the sense of "in addition to," "something added to what precedes it." In addition to the right given the owner, after giving the three days' notice, to supply the things enumerated therein it is given an additional right, namely, at once to terminate the employment of the contractor if the architects shall certify that such be done. That is just what the parties stipulated might be done, and, having done so, courts have no alternative save to enforce the terms of the contract. While it is quite true that an argument could also be presented in favor of the contention made by counsel for the appellant, yet in making that argument something must always be interpolated into the contract that is not found therein either in express or by necessary implication, and under such a construction it is impossible to give all of the words used in the contract their usual and ordinary meaning and effect. Moreover, the certificate of the architect in this case covers defects which, it would seem, no amount of notice could have obviated or cured, and that such conditions might arise must necessarily have been contemplated by the parties, and that such is the case is clearly indicated in the contract. True, as counsel contend, there are also matters stated in the certificate for which a termination of the employment was not provided for in the contract, but that question was thoroughly gone over at the trial, and the matters in that regard were all properly submitted to the jury, and were found in favor of respondent. While we have arrived at the foregoing conclusions with some hesitation, yet we are firmly of the opinion that this objection cannot prevail.

boilers to be furnished by the intervener, and thereupon said defendant Wright-Osborn Company placed its order for said boilers with the intervener.

"That this intervener received the specifications for said boilers through the Utah state agent of the Kewanee Boiler Company, who in turn made up said order from specifications relating to said boilers prepared by the architect for the plaintiff and furnished to the defendant Wright-Osborn Company, and in its hands at the time said order was placed.

"That the said state agent for the Kewanee Boiler Company and the defendant Wright-Osborn Company and the intervener made up said order in good faith, believing that it conformed exactly to the specifications adopted for the same by the plaintiff, and the intervener filled said order in good faith, and the said boilers so as aforesaid furnished conformed in every particular with the order so placed with the intervener.

"That all of the other material furnished by the intervener conformed to the order placed by said defendant Wright-Osborn Company with the intervener, and conformed to said contract and the specifications thereto attached.

"That the boilers were received upon the high school premises during the month of October, 1912, and were shortly thereafter placed in the permanent positions designed for them in the boiler room, and prior to the 17th day of January, 1913, were partly bricked in.

"That said boilers were thereafter, and subsequent to the 17th day of January, 1913, removed from their positions in said boiler room by the plaintiff, and other boilers were substituted.

"That said boilers were not in any particular defective in workmanship, design or material, and were fully capable of discharging the function required of boilers in connection with the heating and ventilating system of said high school building, and could have been insured up to 125 pounds' pressure by the Hartford Fire Insurance Company.

"That all of the materials sold and delivered by the intervener as aforesaid, excepting only the said three tubular boilers, and not exceeding 10 per cent. of the pipe and fittings, entered into and became a part of the finished high school structure.

"That the stack and breeching were ordered and sold in connection with and as a part of said three boilers, and entered into and became and still is a part of said finished high school structure.

"That the three boilers, while removed from the boiler room, were not removed and were not ordered removed from the premises, and were not returned by the plaintiff to the defendant Wright-Osborn Company, or to this intervener, and all of the materials so, as aforesaid, sold by the intervener, were, and still are, held and retained by plaintiff upon the high school premises, and were all used in the prosecution of the work provided for in said contract. * * *

"That by virtue of an order made by this court in this cause the defendant Fidelity & Deposit Company of Maryland has been subrogated to all of the right, title, and interest of the plaintiff in and to any and all of said materials which did not become a part of the finished structure, subject to the payment of the judgment in favor of plaintiff."

The court also found that there was a balance due intervener for said material amounting to \$3,113.71, for which sum, with interest, judgment was entered in its favor.

Appellant contends that the findings are not supported by the evidence.

[7] The principal controversy arises with respect to the boilers which are referred to in the foregoing findings, and which are the same

boilers that were in controversy on the appeal against the respondent, and to which reference is made in the course of the opinion on that appeal. The evidence discloses that there were two sets of specifications prepared affecting the boilers to be used in the heating plant, which, for convenience, we shall designate as specifications No. 1 and specifications No. 2. The difference in the two specifications is important in some particulars.

One of the questions submitted to the jury in the respondent's case was whether specifications No. 1, or specifications No. 2, to which the boilers had to conform, had been adopted by the architect. The jury found that specifications No. 1 had been adopted by the architect, and that the boilers purchased by the contractor did not comply with those specifications, and hence the contractor had failed to comply with the terms of his contract, in that he had failed to furnish boilers in accordance with the specifications. Upon the other hand, the judge who tried the intervener's case, and who also presided at the trial of respondent's case, found that specifications No. 2 were the ones that had been adopted by the architect, and that the boilers in question which were purchased by the contractor from the intervener were in all respects as required by the specifications. The findings of the jury in respondent's case and the findings of the court in the intervener's case are therefore in direct conflict. The findings of the jury and those of the court are, however, based upon conflicting evidence. It was the exclusive province of the jury to determine the weight of the evidence and the credibility of the witnesses in respondent's case and such was the exclusive province of the judge in the intervener's case. The verdict of the jury upon the issues presented in respondent's case and the findings of the court in the intervener's case must, therefore be considered as entirely independent, and as though they constituted the result in two separate and distinct cases. We, under our Constitution, are powerless to interfere upon a question of fact in case there is some substantial evidence in support of any fact which is in dispute and which is material to the controversy. Nor, under the evidence, are the verdict of the jury and the findings of the court so inconsistent that we can say as matter of law that both cannot stand. It may be conceded that there are several conclusions of law interspersed among the findings of fact which, perhaps, in some respects, might be said to go beyond the evidence; but those conclusions can be given no effect. The findings are therefore not vulnerable to the objections made against them by counsel.

[8] Counsel, however, urge that appellant is not liable for the unpaid purchase price of the boilers because they ultimately did not become an integral part of the heating plant. Under the facts and circumstances of this case, and

in view of the provisions of the bond, counsel's argument should not prevail. Under the findings of fact, all of which are supported by sufficient evidence, the boilers were purchased and sold in good faith. They were purchased and delivered pursuant to, and for the very purpose contemplated by, the contract entered into between the respondent and the contractor. They fully complied with all the specifications, and, upon delivery, ceased to be the property of the intervener. To all intents and purposes the boilers were purchased and used in the prosecution of the work, and hence the contractor became liable to the intervener for the unpaid purchase price thereof. If that be true, then why, under the foregoing facts and circumstances, is not the appellant also liable on its bond? The Supreme Court of Washington has held that an indemnitor is liable under circumstances which, in principle, do not differ from the circumstances in this case, in the case of *Crane Co. v. United States, etc., Co.*, 74 Wash. 91, 132 Pac. 872.

Suppose in this case the school building and the boilers had been destroyed immediately after they had been placed in the building, but before they became a part of the heating plant. They then would not, and could not, have become an integral part of the plant, and yet would any one seriously contend that, under the facts and circumstances before stated, the contractor and his indemnitor would not be liable to the intervener for the unpaid purchase price? Again, suppose that the boilers had been purchased and delivered in good faith, and pursuant to the contract, and for the purpose contemplated therein, and that they in all respects had conformed to the specifications, and the title thereto had passed to the contractor, but were destroyed before they actually became a part of the plant. Who would then be liable? There is, there can be, but one answer to the question. It must be conceded that the facts and circumstances of this case in many respects stamp it as one that is unusual and extraordinary. That, standing alone, however, cannot change legal principles. In our opinion neither the contractor nor the indemnitor can, upon legal grounds, escape liability.

It is not necessary to review or to refer to the many cases that are cited by counsel in their briefs. The questions decided in the cases referred to by appellant's counsel in nearly every instance arose under mechanic's lien statutes. It is general knowledge that those statutes differ in the different states. For that and for other reasons which appear in the decisions, those cases can be given no controlling effect in this case, and hence need no further consideration.

It is further contended that the trial court erred in applying the payments made by the contractor to the intervener on account for

materials sold and delivered. We have already held that the three boilers were furnished pursuant to the contract and were covered by the indemnity bond. If that conclusion is sound, and we think it is, then, as a matter of course, the question of the application of payments is not material in this case so far as that question affects the purchase price of the boilers. What is true of the boilers is, however, also true of the 10 per cent. of the pipe and other materials that were sold and delivered by the intervener to the contractor, but which did not actually become a part of the heating plant. All of the materials sold and delivered by the intervener were sold and delivered pursuant to the contract entered into by the contractor with the respondent, and while not quite all of the material actually became a part of the heating plant, nevertheless all came within the rule announced by the Supreme Court of Washington in the case of *Crane Co. v. United States, etc., Co.*, supra. The question of the application of payments is therefore also not applicable to those materials. It therefore is not necessary for us to determine the important question respecting the rule governing the application of payments, as that question may arise between a materialman and a surety upon the contractor's bond where the contractor defaults in paying for all of the material, but has made payments on account, which payments are sought to be applied by the materialman on material not covered by the surety bond. That question is left open until it legitimately arises.

The judgment in favor of the respondent and the judgment in favor of the intervener are therefore affirmed, with costs to respondent on the appeal from the judgment in its favor and with costs to the intervener on the appeal from the judgment in its favor.

McCARTY and CORFMAN, JJ., concur.

SOUTH HIGH SCHOOL DIST. OF SUMMIT COUNTY v. McMILLAN PAPER & SUPPLY CO. et al. (No. 3041.)

(Supreme Court of Utah. April 19, 1917.)

1. ASSIGNMENTS ~~§~~90—RIGHTS ACQUIRED BY ASSIGNMENT.

An assignee of a mere chose in action takes only the rights the assignor had therein.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 156.]

2. SCHOOLS AND SCHOOL DISTRICTS ~~§~~86(2)—RIGHTS OF LABORERS AND MATERIALMEN — ASSIGNMENTS—"LIEN."

Comp. Laws 1907, § 1400x, provides that any person who has done work or furnished materials to any principal contractor for the construction or repair of any public work for any school district, etc., may sue the contractor and the school district, and that the court may render judgment against the school district for the amount due from it to the contractor or for a sufficient amount to pay the judgment recov-

ered against the contractor. *Held* that, while the statute does not use the word "lien" and does not require any notice or affidavit to perfect the lien, it gives a preferential right against the contract price to laborers and materialmen bringing an action or intervening in some other action while such price remains in the hands of the school district, and an assignee of moneys due or to become due under the contract take subject to such preferential right (quoting Words and Phrases, *Lien*).

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 203-205.]

3. SCHOOLS AND SCHOOL DISTRICTS — 86(2) — RIGHTS OF LABORERS AND MATERIALMEN.

To enforce their preferential right to moneys due a contractor from a school district under Comp. Laws 1907, § 1400x, it is not necessary for laborers and materialmen to bring separate actions, and they may set up their claims in any pending action in which the fund is in question or intervene in any action brought by one of their number.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 203-205.]

4. SCHOOLS AND SCHOOL DISTRICTS — 86(2) — CONSTRUCTION CONTRACTS — FAILURE TO TAKE BOND—LIABILITY.

Under Laws 1909, c. 68, providing that any person contracting with any school district, etc., for the construction of any public building or public work shall be required to execute a bond for the performance of the work and with the additional obligation that the contractor shall pay all persons supplying labor and material, the failure of a school district to require such a bond from a contractor did not render it liable to one to whom the contractor assigned moneys due under the contract and whose right to such moneys was made subordinate to claims for labor and materials; as the bond provided for was not intended for its benefit.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 203-205.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by the South High School District of Summit County against the McMillan Paper & Supply Company and others. From the judgment, the defendant Kamas State Bank appeals. Affirmed.

Stewart, Stewart & Alexander, of Salt Lake City, for appellant. Smith & McBroom, of Salt Lake City, for respondent South High School Dist. James A. Stump, Stephens, Smith & Porter, James Ingebretson, Stewart, Bowman, Morris & Callister, Van Cott, Allison & Ritter, Geo. H. Smith, and A. B. Robertson, all of Salt Lake City, for respondents McMillan Paper & Supply Co. and others.

FRICK, C. J. The real controversy in this action is between the Kamas State Bank, hereinafter called appellant, and the claimants who assert claims against the South high school district of Summit county, hereinafter designated plaintiff, for labor performed and material furnished to Mortensen & King, a copartnership, hereinafter styled contractors, who had entered into a contract to construct a high school building for the plaintiff.

The pleadings cover 115 pages of the printed abstract, and hence are too voluminous to

be inserted here, even in condensed form. The findings of the court are, however, quite full and sufficiently reflect the issues covered by the pleadings. We shall, however, supplement the findings in the course of the opinion on such matters as may require further elucidation to give the reader a clear understanding of the points decided.

After the Rio Grande Lumber Company, which claimed a balance due it for materials furnished the contractors for said high school building, had commenced an action pursuant to Comp. Laws 1907, § 1400x, to which we shall more particularly refer hereinafter, the plaintiff commenced this action in which it prayed that all of those who asserted claims for labor performed and materials furnished said contractors, or who claimed some interest in the money due to the contractors, be required to appear in the action and set forth their claims. Accordingly all of those who asserted claims against the contractors, including said Rio Grande Lumber Company and the appellant, interpleaded in this action and set forth their claims.

The appellant, who claimed to be the assignee of the contractors, as will hereinafter more fully appear, appeared and set forth its claim against the contractors and against the plaintiff to recover so much of the contract price as it alleged was owing by said contractors to the appellant.

The cause was tried to the court without the intervention of a jury, and there is practically no dispute with regard to the salient facts, which are reflected in the findings, and which, in substance, are: That on the 6th day of August, 1914, the plaintiff entered into a written contract with said contractors in which they agreed to furnish all the labor and materials necessary to construct and complete a certain high school building for the plaintiff at Kamas, Summit county, Utah, for the sum of \$20,913; that the plaintiff, in addition to certain moneys paid out to complete the high school building, paid on said contract the sum of \$16,391.15, leaving a balance due and unpaid thereon of \$4,551.85, which sum had been earned and became due on said contract "on or about the 1st day of December, 1914"; that said contractors, at the time of entering into said contract, also delivered to the plaintiff an undertaking, or bond, conditioned for the faithful performance of the terms and conditions of said contract, but that said contractors did not furnish the statutory bond to promptly pay for all labor and materials furnished for said high school building; that said contractors have not paid, and they are wholly unable to pay, and have no means with which to satisfy, said claims for labor and materials furnished for the construction of said high school building, nor to pay the claim asserted by appellant under its assignment, which is hereinafter referred to, except from said sum of \$4,551.85, due on said

contract; that the several claimants who are parties to this action performed labor or furnished materials, or both, at the special instance and request of said contractors, all of which were used in the construction of said high school building; that the value of the labor performed and the materials furnished as aforesaid (stating the amount due each claimant) in the aggregate amounted to the sum of \$3,699.69; that no part thereof has been paid; that the claimant the Rio Grande Lumber Company commenced its action pursuant to Comp. Laws 1907, § 1400x, and all the other labor and material claimants also base their claims upon said section; that on the 7th day of August, the day after entering into the contract to erect the high school building, the contractors, in order to obtain credit and a checking account at the appellant bank, executed and delivered to said bank two promissory notes, one for \$3,000, and one for \$500, and to secure the payment thereof executed and delivered to the appellant bank an assignment of all moneys due or to become due under the contract aforesaid, which contract was made a part of said assignment; that in reliance upon said assignment appellant placed to the credit of said contractors in its bank the sum of \$3,500, evidenced by said promissory notes; that notice of said assignment was duly given to the clerk of the plaintiff, but no notice thereof was ever given to the labor and material claimants; that in addition to said \$3,500 the contractors also, from time to time, received payments on said contract aggregating the sum of \$16,249.67, all of which, together with said \$3,500, was paid by appellant on checks drawn by said contractors, or by one of them; that the sum of \$2,900 of said amount was checked out and paid on the personal account of one of said contractors; "that said bank did not supervise, direct or control the said Mortensen & King, J. P. Mortensen and C. E. King, in drawing the funds in said bank account, but said parties and each of them, were allowed to draw upon said account at their pleasure;" that the promissory notes executed by said contractors to appellants are due, and that on or about December 1, 1914, it demanded payment of the amount due from plaintiff to the contractors out of said \$4,551.85, all of which was in plaintiff's possession at said time; that about the time that "the balance as earned by the contractors upon said construction contract was ascertained by the plaintiff, and before the same was payable, the plaintiff received notice from the American Surety Company, the surety upon the undertaking furnished by said contractors, that the said several accounts for labor and material specified in paragraph 5 of the findings of fact herein were unpaid, and that any sum remaining in the hands of the plaintiff should be withheld pending the payment of said accounts or to

be used in the payment thereof, and at the same time the plaintiff became advised that claims might be asserted that the plaintiff was liable to the said several laborers and materialmen on account of the failure of the plaintiff to exact an undertaking from the contractors expressly conditioned for the payment of persons supplying labor and materials to be used in the prosecution of the work provided for in said contract; that on account of receiving notice of said unpaid claims and of claims to which the plaintiff might become liable, the plaintiff at once set aside the said balance remaining of the said contract price, to wit, the sum of \$4,551.85, and has ever since retained the same for judicial determination as to the rights of the respective parties to this suit to payment thereof or therefrom; that in open court the plaintiff through and by its attorneys represented to the court that the plaintiff was willing and believed it would be in the interest of justice and conform to the terms of the construction contract, and accord with the rights and equities of the parties to apply the balance of the contract price to the payment of the claims of the laborers and materialmen as specified in paragraph 5 of these findings, provided this could be done without subjecting the plaintiff to any individual liability to any of the other parties to the suit; that the sum of \$3,500 advanced by said bank to said Mortensen & King, evidenced by said promissory notes, was placed by said bank to the credit of said Mortensen & King, in said bank, and that said bank did not supervise, direct, or control the paying out of said \$3,500 by said Mortensen & King; that this court is unable to determine from the evidence how much of said sum of \$3,500 was paid out by said Mortensen & King for labor performed and materials actually used in the construction of said high school building."

Upon those findings the court made conclusions of law wherein it found that the claims of those who had performed labor or furnished materials, or both, were superior to the claims of the appellant as assignee, and entered judgment in favor of the claimants authorizing payment of their claims in full out of the balance found due on said contract as aforesaid, and also entered judgment in favor of appellant for the amount due it on said promissory notes, but made that judgment subject to the claims of those who performed labor or furnished materials, or both, to said contractors for said high school building. -

The assignment from the contractors to appellant reads as follows:

"Know all men by these presents that we, J. P. Mortensen and C. E. King, copartners doing business under the firm name and style of Mortensen & King, for value received, do hereby sell, assign, transfer, and set over to the Kamas State Bank all payments and sums now earned or due or that may hereafter be earned or become due

to us under the provisions of a certain contract bearing date August 6, 1914, between the undersigned and South high school district, Summit county, Utah, a copy of which said contract is hereto attached and marked Exhibit 'A,' wherein and whereby the said undersigned agree to furnish and pay for all materials and labor required in the erection and completion of the proposed high school building to be erected at Kamas, Utah, according to plans, drawings, details, and specifications made and prepared by Scott & Welch, architects and engineers. And we hereby authorize and direct the said South high school district to pay all amounts and sums to said Kamas State Bank as rapidly as the same become due under the provisions of said contract.

"This assignment is made as collateral to secure the ——— payment of all sums now due by us or either of us, as well as by the partnership of Mortensen & King, and also to secure all indebtedness which we or either of us or said partnership may hereafter owe Kamas State Bank for money hereafter advanced by it to us or said partnership, as well also as by reason of any matter of thing whatsoever."

The portions of the contract which are deemed material to this controversy are as follows:

"The contractors shall and will provide all the materials and perform all the work for the erection and completion of a two-story high school building, except plumbing, heating, located at Kamas, Utah, as shown on the drawings and described in the specifications. * * * It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractors for said work and materials shall be twenty thousand nine hundred thirteen dollars (\$20,913), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractors, in current funds, and only upon certificates of the architect, as follows: Payment to be made upon eighty per cent. (80%) of the work in place on September 5, 1914, October 5, 1914, and November 5, 1914, upon receipt of receipted bills in duplicate for materials and signed pay rolls for labor. The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued. If at any time there shall be evidence of any lien or claim for which, if established, the owners of the said premises might become liable, and which is chargeable to the contractors, the owners shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractors shall refund to the owners all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractors' default."

In view that the claims of those who performed labor or furnished materials for the construction of the high school building are based upon Comp. Laws 1907, § 1400x, we append that section in full:

"Any person, partnership, or corporation who has done work or labor or furnished materials to any principal contractor for the construction or repair of any public work of any character for any county, town, city, village, or school district, may maintain an action therefor in the county in which such work, labor, or materials were done or furnished, against such principal contractor and such county, town, city, village, or school district, jointly, for the recovery thereof; but no judgment shall be rendered against

any defendant therein, other than such principal contractor, for any amount greater than the amount due from it to such principal contractor at the time of the commencement of such action. Such county, town, city, village, or school district, when served with the summons in any such action, may give notice thereof to such principal contractor, and on so doing need not further defend such action. On rendition of judgment in such action against such principal contractor, the court may also render judgment against such county, town, city, village, or school district for the amount due from it to such principal contractor at the time of the commencement of such action, or for a sufficient amount to pay the judgment recovered against the principal contractor, and payment thereof shall discharge its indebtedness to such principal contractor, to the amount so paid: Provided, that costs shall not be taxed against such county, town, city, village, or school district. Such principal contractor may, in such action, file in the court in which such action is commenced a bond, in such sum and with such sureties as the judge of such court shall approve, conditioned for the payment of any judgment that may be recovered in such action, and thereupon the liability of such county, town, city, village, or school district hereunder shall cease, and the action as to it shall be discontinued without costs to it."

There is another statute (chapter 68, Laws Utah 1909, p. 115) which is discussed by counsel, and in view that it has a bearing on some of the phases of this controversy we copy the material parts, which are as follows:

"Any person or persons entering into a formal contract with the state, any state institution, county, city, town, village, or school district, for the construction of any public building, or the prosecution and completion of any public work or improvements, or for repairs upon any public building, public work or improvement, shall be required before commencing such work to execute a penal bond, with good and sufficient surety or sureties, for the faithful performance of said contract, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in such contract; and any person, company, association or corporation who has furnished labor or material used in the construction or repair of any public building, public work or improvement, payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the obligee on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon subject, however, to the priority of the claim and judgment of the obligee therein."

Appellant assails some of the findings of the court as not being supported by the evidence. As before stated, there is little, if any, dispute concerning the salient facts, and the findings of fact made by the court are all supported by the evidence. Appellant's counsel in their assignments of error, however, also vigorously assail the conclusions of law and judgment, and the real questions for decision arise upon those assignments.

As already pointed out, notwithstanding the fact that appellant had obtained an assignment of the contract price from the contractors, the district court nevertheless held that the claims of those who performed labor or furnished material to the contractors to complete the high school building were

superior to the claims of appellant and its assignees. It is contended by appellant's counsel that the holding of the court in that regard is clearly erroneous. They contend that appellant's assignment takes precedence over all other claims due the contractors upon the contract with the plaintiff. Upon the other hand, counsel representing those who performed labor or furnished material to the contractors to complete the high school building insist that, in view of section 1400x, supra, and of chapter 68, aforesaid, when considered in connection with the provisions of the contract between the plaintiff and the contractors and the terms of the assignment from the latter to appellant, the rights of their clients to the balance due the contractors are paramount, and that therefore the judgment of the district court should be affirmed. The question to be determined therefore is: Which view should prevail?

[1] It is elementary that the assignee of a mere chose in action takes precisely what rights the assignor had therein, no more, no less. The law upon that subject is well stated in 5 C. J. 962, in the following words:

"The assignee acquires by reason of the assignment no greater rights against the debtor than those of the assignor against the debtor at the time of notice to him. The rights of the assignee are subject to the performance of the conditions by which the assignor was bound, even where the assignment was with the consent of the debtor, or was accepted by him."

[2] It is likewise elementary that the assignment is subject to any statutory provision which may affect the thing assigned, or which creates rights therein to third persons, and in that way may affect the right of the assignor to assign, and of the assignor to receive the subject-matter of the assignment. In other words, the existing law must always be considered in determining the rights of both the assignor and the assignee. In the case at bar the provisions of section 1400x must therefore be considered in determining the right of the assignor to make the assignment of the contract price or the money due or to become due him upon the contract for the erection of the building or structure mentioned in said section 1400x. This court, in referring to section 1400x, has said that:

It is "highly remedial, and must thus, in furtherance of justice, receive a liberal construction and application so as to accomplish its real object and purpose." *Mellen v. Vondor-Horst Bros.*, 44 Utah, 300, 140 Pac. 130.

It was there further held that:

Under section 1400x "any person who has furnished any materials or has performed any labor for such contractor for the construction of such building may, at any time before the contract price has been fully paid, bring an action setting forth the foregoing facts, and, if anything is due from such contractor to such person for such materials or labor, the latter may obtain pay directly from the fund held by the public corporation for which the building is constructed to the extent that there is anything in the hands of such corporation which is due on the contract. Under the statute, where the contract is

conceded, the only two questions to be determined are: (1) Is there anything due by the contractor to the claimant for materials furnished or labor performed for the construction of the public building or structure? and (2) Was there any part of the contract price in the hands of the public corporation at the commencement of such action which is to be paid on the contract?"

Notwithstanding what we said in the *Mellen* Case, counsel nevertheless contend that, in view that a lien is not expressly mentioned in section 1400x, therefore none exists in favor of those who have performed labor or furnished material for a public building. While it is true that the word "lien" is not expressly mentioned in that section, yet it is equally true that a preferential right is there given which is tantamount to a lien. Speaking of legal liens the author in 1 *Jones on Liens* (2d Ed.) § 4, says:

"A lien at law is an implied obligation whereby property is bound for the discharge of some debt or acknowledgment. It is not the result of an express contract; it is given by implication of law."

See, also, same volume, §§ 104, 105.

In 5 *Words and Phrases*, 4145, it is said:

"The word 'lien' is of the same origin as the word 'liable,' and the right of a lien expresses the liability of certain property for a certain legal debt, or a right to resort to it in order to enforce the debt."

It is not necessary to multiply definitions, since it is manifest that by section 1400x a preferential right (the equivalent of a lien) to a certain fund while it remains in the hands of a public corporation is clearly intended for, and is as clearly given to, all laborers who have performed labor and all materialmen who furnished material for a contractor who constructs a public building. The mere fact that no preliminary notice or affidavit is required to be given and filed in some public office in order to perfect the lien constitutes no objection to the lien or preferential right there given. No such notice or affidavit is required in order to enforce the preferential rights given in Comp. Laws 1907, § 1844, as amended by chapter 24, Laws Utah 1913, p. 26, by which the claims for wages due laborers are given preference over all other claims. The same is true of Comp. Laws 1907, § 85, as amended by chapter 23, Laws Utah 1913, p. 26, where wages are preferred in case of general assignments. All of said claims are in the nature of special preferred rights or liens and may be enforced as indicated in the statutes creating them. Under section 1400x preferential rights exist by virtue of the statute, and nothing is required from the laborer or materialman, except to bring the action mentioned in said section to enforce the right. It is not the action, however, that creates the preferential right. The right exists independently of the action. The action is merely to enforce the right; that is, to compel payment of the fund and to discharge the public corporation from liability to the contractor to the extent that the fund is appropriated for the

payment of laborers' and materialmen's claims. The only requirement imposed by the statute is that the action be commenced while the contract price, or a part thereof, remains in the hands of the public corporation. In some states having similar provisions the action is required to be brought within a certain limited time. Where, therefore, preferential rights are so plainly given by the statute as is the case in section 1400x, those rights should not be frittered away by the courts by placing needless restrictions upon the enforcement thereof. In case an action is commenced pursuant to section 1400x, or whether the claim is preferred in some other action, as before stated, the contractor may obtain the money by giving the bond provided for in that section; and while the question is not directly presented, and for that reason we do not decide it, yet it is probably also true that the contractor may also relieve the fund from the operation of section 1400x by executing the bond for the benefit of laborers and materialmen that is provided for in chapter 68, supra. Moreover, if section 1400x is not given the meaning and effect hereinbefore stated, it would afford those who perform labor or furnish material for a public building no remedy beyond what they already had when that section was adopted under Comp. Laws 1907, § 3090, as both those who performed labor for or furnished material to the contractor always had the right to commence an action against him whether he had a contract to construct a public or a private building, and could attach the contract price by process of garnishment while in the hands of the owner of the building, or, in case of a public building, could attach the same while in the hands of the public corporation, and thus compel the garnishee to pay them instead of the contractor. Under those statutes, however, the contractor could always prevent the laborer or materialman from enforcing his claim by that method by assigning the proceeds arising from the contract to third persons, as was done in this case. We must therefore assume that section 1400x was enacted for some salutary purpose. Its obvious purpose, and one that is thoroughly just and practical, is to give laborers and materialmen who are not permitted by our statute to acquire mechanics' liens against public buildings an adequate and speedy remedy against a contractor who has agreed to construct a public building and has obligated himself to furnish and pay for all labor and material necessary to complete such building. Moreover, if it was not the purpose of the Legislature in adopting section 1400x to prevent the assignment of the contract price as against the claims of laborers and materialmen, then, for the reasons before stated, it has no apparent purpose, since, if a contractor may still assign or dispose of the contract price at any time at will, nothing was accomplished by its adoption. If, how-

ever, section 1400x is given the meaning and effect we have given it in the Mellen Case, supra, and are giving it here, then it accomplishes precisely what, in our judgment, the Legislature intended it should accomplish, namely, to prevent the contractor from disposing of, or from in any way incumbering, the contract price to the prejudice of those who have performed labor or furnished material to complete the contract while all, or any part of, said contract price remains in the hands of the public corporation for which the building or structure was erected. True, as pointed out, the contractor may, by giving the bond before suggested, release the money so that he may dispose of it at will, but unless he complies with the law in that regard, he may not dispose of the contract price so long as it remains in the hands of the public corporation. Such, therefore, was the law when the assignment in question was made by the contractor to appellant. Both appellant and the contractors were bound by the law, and the assignment was given and received subject thereto.

As against the claims of the laborers and materialmen, the contractors, therefore, could not assign the contract price while it remained in the hands of the plaintiff, except such portion as might be in excess of the claims of the laborers and materialmen, or unless the contractors executed the bond we have referred to.

As we have seen from the quotation from 5 C. J. supra, the appellant, as assignee, could acquire no greater rights in or to the contract price than the contractors had, and in view that they could not assign the same to the prejudice of the laborers and materialmen, then appellant, as against their claims, acquired no right in or to the contract price except to the excess after the claims aforesaid are fully satisfied. No doubt, if the laborers and materialmen had not commenced the action provided for in section 1400x, or had intervened in some other action and had claimed the contract price, while the same, or a part thereof, remained in the hands of the plaintiff, they would be deemed to have waived their rights to the fund, and appellant would then have been entitled to the same. An assignment from the contractor to a third person is therefore not void as between the parties; nor is it void as against the laborers and materialmen unless they commence the action contemplated by section 1400x, and then the assignment is without force only to the extent of the amount necessary to satisfy the claims of the laborers and materialmen. Such an assignment is therefore not void, but, by reason of the provisions of section 1400x, it is merely subject to the claims of laborers and materialmen in case such claims are sought to be enforced as provided in said section.

[3] While in this case not all of the labor and material claimants commenced separate actions, yet they all have set forth their

claims pursuant to section 1400x in plaintiff's action, and did so before the contract price was paid to the contractors by the plaintiff. As we construe that section, it is not absolutely essential that each claimant bring a separate action, and thus fritter away a large portion of the fund in court costs. We think that he may appear in any pending action in which the fund is in question, and may therein set up his claim, or one of the claimants may bring an action, and all or any number of them may intervene in that action and enforce their rights. In pursuing either method the provisions of the statute are substantially complied with, and no prejudice can result to any one.

We have refrained from discussing the other reasons, equitable and otherwise, argued by counsel, why the assignment in this case should not prevail as against the laborers and materialmen for the reason that we prefer to base this decision squarely upon the statutes of this state as we understand them, and thus avoid any misunderstanding respecting the scope and effect of this decision respecting the claims of laborers and materialmen against contractors who have bound themselves to construct public buildings and to furnish and pay for all the labor and material required to complete such buildings. While counsel have not cited any case precisely in point, and by an independent search we have been unable to find any such case, yet the following cases will be found to fully sustain the principles we have invoked in arriving at the foregoing conclusions: *Burr v. Massachusetts School for Feeble-Minded*, 197 Mass. 357, 83 N. E. 883; *Union Pacific Ry. Co. v. Douglas County Bank*, 42 Neb. 469, 60 N. W. 886; *Mechanics', etc., Bank v. Mayor*, 58 How. Prac. (N. Y.) 207; *Independent School District v. Mardis*, 106 Iowa, 295, 76 N. W. 794. While many more cases are cited by counsel, and no doubt in at least some of them the decisions are based upon the same principles, yet the foregoing are ample to illustrate the principle we have attempted to apply in this case. In *Union Pac. Ry. Co. v. Douglas County Bank*, supra, the Supreme Court of Nebraska applied the doctrine we have herein announced respecting the rights of the contractor to assign the proceeds arising from a contract wherein he had agreed to pay for the labor necessary to perform the same. The court there held, purely upon equitable grounds, that, entirely independent of the statute, the assignee, who had had knowledge of the provisions of the contract that the contractor was bound to pay the laborers, took the assignment subject to the stipulations of the contract and subject to the rights of the labor claimants. We need not go to that extent here, since the provisions of section 1400x make such assignments subject to the rights of both the laborers and materialmen who have performed labor or furnished material, or both, to the

contractor, to complete his contract to erect a public building.

[4] Appellant's counsel, however, also insist that the district court erred in not holding the plaintiff liable upon the ground that it had failed to require the contractors to execute the bond provided for in chapter 68, supra. It is manifest, however, that the bond there provided for was not intended for the benefit of the appellant, and hence it cannot complain that it was not given. That such is the law is clearly held in *United States, etc., Co. v. Rundle*, 107 Fed. 227, 46 C. A. 251, 52 L. R. A. 505.

It is further contended that, inasmuch as the appellant advanced money to the contractors with which to pay for labor performed and material furnished in the construction of plaintiff's school building, for that reason appellant should be subrogated to the rights of the laborers and materialmen to the extent that the fund provided by it paid for labor and material. The district court ruled that the rights of subrogation did not apply in this case. In that ruling we fully concur with the district court. Under the facts and circumstances of this case the doctrine of subrogation cannot be given application. We have held that appellant's assignment was subject to the rights of the claimants for labor and material. If it were now held that it should nevertheless obtain the fund under the doctrine of subrogation it would merely nullify the holding that the claims for labor and material were paramount to the rights of the assignee. There are other reasons why the doctrine of subrogation cannot be applied in this case, but it is not necessary to enlarge upon them. The foregoing sufficiently covers all the assignments.

The judgment of the district court is therefore affirmed, with costs.

MCCARTY and CORFMAN, JJ., concur.

JOSEPH NELSON SUPPLY CO. v. LEARY
et al. (No. 2987.)

(Supreme Court of Utah. April 19, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS ~~§~~86(2)—
CONSTRUCTION CONTRACTS—RIGHTS OF LA-
BORERS AND MATERIALMEN.

Under Comp. Laws 1907, § 1400x, authorizing persons furnishing labor or materials to any principal contractor for the construction of any public work for any school district, etc., to sue the contractor and the school district and to have judgment against the district for any amount due from it to the contractor, an assignee of the contract price in whole or in part takes his assignment subject to claims for labor and materials.¹

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 203-205.]

2. SCHOOLS AND SCHOOL DISTRICTS ~~§~~86(2)—
CONSTRUCTION CONTRACTS—RIGHTS OF LA-
BORERS AND MATERIALMEN.

Under Comp. Laws 1907, § 1400x, one furnishing labor or materials to a contractor for the

¹ South High School District of Summit County v. McMillan Paper & Supply Co., 184 Pac. 1041.

construction of a school building acquired a preferential right against the contract price so far as necessary to satisfy its claim.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205.]

3. BANKRUPTCY — 215 — ENFORCEMENT OF LIENS—JURISDICTION OF STATE COURTS.

Though actions by materialmen to enforce their preferential right against moneys due a contractor from a school district under Comp. Laws 1907, § 1400x, were commenced within four months before the contractor's bankruptcy, the state court would retain jurisdiction as such a preferential right or lien is not superseded or affected by an adjudication in bankruptcy.²

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 324-326.]

4. BANKRUPTCY — 363—PROOF OF CLAIMS—EFFECT.

The materialmen did not waive their right to prosecute their actions in the state court by filing their claims with the referee in bankruptcy where they did so without prejudice to their rights to prosecute such actions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554.]

5. SCHOOLS AND SCHOOL DISTRICTS — 86(2)—BUILDINGS—CONTRACTS—FAILURE TO TAKE BOND—LIABILITY.

Under Laws 1909, c. 68, providing that any person contracting with any school district, etc., for the construction of any public building or public work shall be required to execute a bond for the performance of the contract and with the additional obligation that the contractor shall promptly make payment for labor and materials, the failure of a school district to require a bond conditioned for the payment of labor and materials did not make defendant liable for claims of that character, even assuming that the statute imposes on the school district the duty of requiring such bond.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205.]

6. PARTIES — 83—NONJOINDER OF PARTIES—RIGHT TO OBJECT.

That in an action by materialmen to enforce their preferential right against money due the contractor from a school district other laborers and materialmen were not before the court was not an objection of which the contractor's trustee in bankruptcy could avail himself, as those not in court had merely waived their right.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 183.]

7. SCHOOLS AND SCHOOL DISTRICTS — 86(2)—CONSTRUCTION CONTRACTS—RIGHTS OF LABORERS AND MATERIALMEN.

Under Comp. Laws 1907, § 1400x, all parties furnishing labor or materials to a contractor for the construction of a school building have equal rights against moneys due the contractor from the school district, and no party acquires any right to priority by being the first to furnish labor or material or to commence an action.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205.]

Appeal from District Court, Carbon County; A. H. Christensen, Judge.

Consolidated actions by the Joseph Nelson Supply Company and others against the Carbon County High School District and others, in which William H. Leary trustee intervened. From the judgment, the plaintiff named and the Merchants' Bank appeal. Reversed and remanded, with directions.

James Ingebretsen, of Salt Lake City, for appellant Joseph Nelson Supply Co. Edwards & Wasson, of Salt Lake City, for appellant Merchants' Bank. Hon. J. A. Howell, of Ogden, and Skeen & Skeen, of Salt Lake City, for respondent Leary. M. P. Braffet and Ferdinand Ericksen, both of Salt Lake City, for respondent Carbon County High School Dist.

FRICK, C. J. This action is a consolidation of several actions, all of which were commenced in the district court of Carbon county, Utah.

The first one was commenced by Chauncey P. Overfield, the second by the Joseph Nelson Supply Company, hereafter called supply company. Both of those actions were commenced against the Wright-Osborn Company, hereinafter styled contractor, and the Carbon county high school district, hereinafter designated school district, to recover for material furnished to said contractor for the construction of a high school building at Price, Utah, for said school district. The Merchants' Bank, hereinafter called assignee, also commenced an action against the school district to recover as the assignee of said contractor the contract price in the hands of said school district. Wm. H. Leary intervened in the consolidated action as the trustee in bankruptcy of the estate of said contractor, which, pending the action, was declared a bankrupt, and as such trustee claims all of the funds arising out of said contract and in the hands of said school district for the general creditors of said bankrupt.

The parties who appeared in the action joined in a statement of facts upon which the district court made conclusions of law and entered judgment. The trustee prevailed in the district court as against all of the other claimants. The supply company appeals. It is stipulated, however, that whatever result is reached with regard to the claim of the supply company shall also apply to the claim of Chauncey P. Overfield. The assignee has taken a separate appeal which will be separately considered.

While the statement of facts goes into great detail, yet the facts material to this decision are, we think, fairly reflected in the following statement: On the 4th day of May, 1912, the contractor entered into a contract with the school district to construct a high school building. Said contract was completed on the 3d day of January, 1913, and the whole contract price was then earned and there is due on said contract the sum of \$2,362.63, which sum said school district has offered to pay into court, and which, by agreement of the interested parties to this action, has been deposited in a certain bank to await the final determination of this action. The contractor furnished a bond "for the faithful performance of said contract," but no other bond was furnished

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

² In re Bombino, 44 Utah, 141, 138 Pac. 1155, distinguished.

by or accepted from it. Prior to October 2, 1912, the supply company sold and delivered to the contractor at its instance and request certain material and supplies of the aggregate value of \$2,249.47, all of which were sold and purchased for and were actually used in the construction of said high school building, and no part thereof has been paid. On the 20th day of February, 1913, the supply company duly commenced an action in the district court of Carbon county against the contractor and against said school district pursuant to the provisions of Comp. Laws 1907, § 1400x, to obtain so much of the funds in the hands of said school district as might be necessary to satisfy the amount due for material furnished by the supply company to said contractor for said high school building. Chauncey P. Overfield sold and delivered to said contractor a stoker equipment for the aggregate price of \$1,168 which was used in and became a part of said high school building, and no part of said sum has been paid. On the 24th day of March, 1913, said Overfield, in order to recover said sum of \$1,168 and an additional sum of \$171.45, assigned to him by another claimant who furnished material for said high school, commenced an action pursuant to said section 1400x against the contractor and said school district. On the 5th day of August, 1912, the contractor made an assignment in writing whereby it assigned to the assignee "all moneys due us or that may hereafter become due to us for material or labor furnished, or services rendered, under and by virtue of a certain contract * * * for the furnishing of the plumbing and heating plant required in the construction of the Carbon county high school building." Said assignment was on the 26th day of October, 1912, by the assignee, duly delivered to said school district, and said school district at a duly convened meeting on the said date duly accepted said assignment. "By reason" of said assignment and the acceptance thereof the assignee advanced to said contractor large sums of money, which advances, excepting certain overdrafts, were evidenced by certain promissory notes executed by the contractor, and the payment of said notes and overdrafts was intended to be secured by the assignment aforesaid. No part of the amount evidenced by said promissory notes, nor of said overdrafts, has been paid to the assignee. None of those who furnished material for said high school building, nor said trustee in bankruptcy, nor any of the creditors of said contractor, "had actual notice or knowledge of said assignment" to the assignee, and all of said material claimants "advanced credit and performed work and furnished material believing their accounts would be secured by and paid from the contract price provided in said contract." The total amount of claims that have been filed with the referee in bankruptcy against the

bankrupt estate exceeds the sum of \$28,000. It is also found that both the supply company and said Overfield filed their claims with the referee in bankruptcy. Those claims were, however, filed subject to the pending actions, and, as appears from the claims, were "filed without prejudice to the right of claimants to proceed with said actions and to obtain the relief therein demanded."

We have aimed to eliminate all matters from the foregoing statement of facts which, in our judgment, are immaterial to the right of the materialmen to recover under section 1400x, and by reason of which a recovery is sought on other grounds. We have done so because we prefer to rest the recovery of the laborers and materialmen squarely upon the provisions of section 1400x.

As before stated, the court, in its conclusions of law, in effect, held that the labor and material claimants had acquired no lien under section 1400x; that the assignee had acquired no rights by the assignment; that the said court was without jurisdiction, and that the whole fund in litigation, which is the unpaid portion of the contract price for the erection of said high school building, should be awarded to the trustee in bankruptcy to be administered by him under the direction of the bankruptcy court. The claimants who furnished material to the contractor for said high school building, as well as the assignee, assail the conclusions of law and judgment and insist that both are erroneous.

[1] It is more convenient to dispose of the assignee's appeal first. For the reasons stated in the case of South High School District of Summit County v. McMillan P. & S. Co. et al., just decided, 184 Pac. 1041, the appeal of the assignee cannot prevail. In that case we expressly held that a person who claims the contract price, in whole or in part, which is due to the contractor for the erection of a public building has been assigned to him, takes the assignment subject to the claims for labor performed and material furnished to the contractor, which was by him used in the performance of his contract, and which contract was entered into pursuant to Comp. Laws 1907, § 1400x, which section we there copied in full, and to which we shall merely refer in this opinion. In view, therefore, that the fund in question is insufficient to satisfy the preferred claims for labor performed and material furnished to the contractor, there is but one conclusion permissible, and that is that the district court committed no error as against the assignee in denying its claim against the fund in litigation.

[2, 3] With respect to the appeal of the supply company the case is different. In so far as the question of preferential right to, or lien against, the unpaid contract price here in question is concerned, the case we

have just referred to also determines that question in favor of the supply company. For the reasons there stated, the supply company, in common with all other claimants for labor performed or material furnished to the contractor in this case, acquired a preferential right against the contract price so far as that was necessary to satisfy its claim against the contractor for material furnished to it for the high school building. The trustee in bankruptcy, however, contends that, in view that the actions of the supply company and of Mr. Overfield were commenced within four months of the filing of the petition in bankruptcy pursuant to which the contractor was adjudicated a bankrupt, for that reason the state court is without jurisdiction to determine the question of liens or preferential claims against said fund, and that the whole matter should be transferred to the bankruptcy court, and the bankrupt's estate should be there administered. If the preferential rights or so-called liens of those who performed labor for or furnished material to the contractor in this case had been created by contract within four months, or if the liens were created by court proceedings, like attachments or kindred liens, or where, as in the case of *In re Bombino*, 44 Utah, 141, 138 Pac. 1155, the act which creates the alleged lien in itself constitutes an act of bankruptcy like a preferential assignment in state insolvency proceedings, then the contention of the trustee in bankruptcy would have much force. A mechanic's lien, however, or a preferential right or lien which is created by section 1400x, supra, is not superseded or affected by an adjudication in bankruptcy in case an action is pending to enforce such lien or preferential right in the state court when the bankruptcy proceedings are instituted. In such event a state court that has acquired jurisdiction usually retains it. The parties may, however, by agreement, transfer the matter to the bankruptcy court if they choose to do so. The whole question is fully discussed by the author in 2 Remington on Bankruptcy (2d Ed.) § 1599 et seq. In section 1165 of the same volume it is said:

"Without consent of the parties, the state court is the proper forum, *where it is not the owner, but the contractor or subcontractor, who is the bankrupt, and where third parties claim interests.*" (Italics ours.)

In Collier on Bankruptcy (9th Ed.) p. 945, the author says:

"A laborer's or materialman's lien for labor performed for or materials furnished to a subcontractor is not affected by the bankruptcy of the subcontractor."

In *re Kerby-Dennis Co.*, 95 Fed. 116, 36 C. C. A. 677, the law is stated in the third headnote in the following words:

"A statutory lien for the wages of labor is not dissolved or annulled by proceedings in bankruptcy against the employer merely because such liens are not expressly preserved by the Bankruptcy Act. On the contrary, the intention of

the Bankruptcy Act is to protect all liens, whether arising by contract or by statute, except only such as are expressly declared to be annulled or invalidated."

In *Henderson v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, Mr. Justice Lamar, in speaking for the United States Supreme Court, after referring to the liens that are superseded or affected by bankruptcy proceedings, in the course of the opinion says:

"But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent. Liens in favor of laborers, mechanics, and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings.'"

To the same effect are *South End, etc., Co. v. Harben* (N. J.) 52 Atl. 1127; *In re Grissler*, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; *Savings Bank v. Jewelry Co.*, 123 Iowa, 432, 99 N. W. 121, 12 Am. Bankr. Rep. 781; *In re Horton*, 102 Fed. 986, 43 C. C. A. 87; *Moreau Lumber Co. v. Johnson*, 29 N. D. 113, 150 N. W. 563, L. R. A. 1915F, 1132.

As pointed out in the case of *South High School District of Summit County v. McMillan P. & S. Co.*, supra, the preferential right or lien in this case exists by virtue of our statute (section 1400x) and hence comes within the doctrine of the authorities to which we have just referred. Moreover, the sole question respecting the claimants' rights to the fund in question arises by virtue of the laws of this state, and there is no good reason, either legal or otherwise, why the state courts should not be permitted to pass upon and adjudicate the questions that are involved.

In view that we are constrained to hold that all of the fund in question here must be distributed among the claimants who are parties to this action, there will be nothing to administer upon by the trustee in bankruptcy. But, even if the fund exceeded the claims of the materialmen, still the state court could determine the questions involved and order those claims satisfied out of the fund and turn the remainder, if any, over to the bankruptcy court to be there administered.

[4] The trustee in bankruptcy, however, also contends that the supply company and Mr. Overfield have waived their rights to have the questions involved here adjudicated by the state court, for the reason that they filed their claims with the referee in bankruptcy as hereinbefore stated. In filing the claims with the referee the claimants, however, did so without prejudice to their rights to prosecute their actions in the state court. In the case of *American Woolen Co. v. Maag-et*, 86 Conn. 234, 85 Atl. 583, Ann. Cas. 1913E,

889, it is expressly held that where, as in the case at bar, a claim is filed with the referee without prejudice, the claimant does not waive his right to proceed with the action pending in the state court. That case is decisive of this question.

[8] It is next contended by the trustee in bankruptcy that in failing to require the contractor to execute the bond required by chapter 68, Laws Utah 1909, p. 115, the school district is liable for all unpaid claims of that character. Chapter 68, aforesaid, so far as material here, provides:

"Any person or persons entering into a formal contract with the state, any state institution, county, city, town, village or school district, for the construction of any public building, or the prosecution and completion of any public work or improvements, or for repairs upon any public building, public work or improvement, shall be required before commencing such work to execute a penal bond, with good and sufficient surety or sureties, for the faithful performance of said contract, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in such contract; and any person, company, association or corporation who has furnished labor or material used in the construction or repair of any public building, public work or improvement, payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the obligee on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon subject, however, to the priority of the claim and judgment of the obligee therein."

While a number of cases from different states are cited by counsel, yet there is only one case in which, under a statute like ours, it has directly been held that the school district is liable for failing to exact such a bond from the contractor. *Northwest Steel Co. v. School District*, 76 Or. 321, 148 Pac. 1134, L. R. A. 1915F, 629. While in the case just cited the case of *Owen v. Hill*, 67 Mich. 43, 34 N. W. 649, is referred to, yet the statute passed on by the Michigan court was much stronger than ours, and in that case the question discussed was whether the individual members composing the board of trustees were liable for negligence in failing to require the contractor to execute such a bond. They were held liable by a divided court. In *Plummer v. Kennedy*, 72 Mich. 298, 40 N. W. 433, the same question was again before the Supreme Court of Michigan, and in that case the statute was held constitutional, and there again, by a divided court, the individuals were held liable for negligence. The Michigan statute passed on in that case reads as follows:

"That when public buildings or other public works are about to be built, repaired, or ornamented under contract, at the expense of this state, or of any county, city, village, township, or school district thereof, upon which buildings or works liens might attach for labor or materials if belonging to private persons, it shall be the duty of the board, officers, or agents contracting on behalf of the state, county, city, village, township, or school district to require sufficient security by bond for the payment by

the contractor, and all subcontractors, for all labor performed or materials furnished in the erection, repairing, or ornamenting of such building." Pub. Acts 1883, No. 94, as amended by Pub. Acts 1885, No. 45.

A contrary conclusion was, however, reached under statutes similar to the Michigan statute by the Supreme Court of Minnesota in *Ihk v. Duluth City*, 58 Minn. 182, 59 N. W. 960, and in *Kansas in Freeman v. City of Ohanute*, 63 Kan. 573, 66 Pac. 647. In the following cases similar statutes have been discussed: *Pressed Brick Co. v. School District*, 79 Mo. App. 665; *Plumbing Supply Co. v. Board of Education*, 32 S. D. 270, 142 N. W. 1131; *Monnier v. Godbold*, 116 La. 165, 40 South. 604, 5 L. R. A. (N. S.) 463, 7 Ann. Cas. 768; *Blanchard v. Burns*, 110 Ark. 515, 162 S. W. 63, 49 L. R. A. (N. S.) 1199. In all of those cases what is decided is that the members composing the school boards were not individually liable. It is not held, however, that the school districts were liable. In the case at bar the question of whether the individual members are or are not liable is not before us. They are not parties to the action and did not join in the statement of facts, and hence have not had their day in court. The question then is: Is the school district liable under our statute? It would seem that a mere cursory reading of chapter 68, supra, would convince any one that it was not the intention of the Legislature to penalize the taxpayers because the trustees may fail or overlook the necessity of requiring the contractor to execute the statutory bond to secure the payment of those who have supplied either labor or material, or both, to the contractor to complete the school building that is being constructed. Indeed, the statute does not in express terms impose the duty either upon the school district or upon the trustees to exact the bond. What is said is that any person entering into a contract "with the state, any state institution, * * * or school district * * * shall be required before commencing such work to execute a penal bond * * * that such contractor or contractors shall promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in said contract." No special duty is thus imposed on any one save the person entering into the contract. He shall be required to execute a bond, no one else. The phrase "shall be required" is no stronger than if the phrase "is hereby required" had been used.

Again, the state is included with all the other subdivisions, and the state cannot, without its consent, be sued. All the other subdivisions are merely arms of the state government, and it cannot be reasonably assumed that it was intended that those should become liable for failure to take a bond while the state itself remains immune. Moreover, there is absolutely nothing contained in the

statute from which one may deduce by unavoidable inference that the Legislature intended to impose the drastic consequences contended for by the trustee in bankruptcy. The innocent taxpayers should not be doubly penalized unless the statute in clear and express terms, or at least by unavoidable implication, has imposed such consequences. Although it were held that "shall be required" refers to the school district rather than to the person contracting, yet that, standing alone, cannot be construed so as to make the district liable. To so construe the statute we must import something into it. Nor, in view of the construction and effect that we have placed on section 1400x in the case of *South High School District of Summit County v. McMillan P. & S. Co.*, supra, and again in this case, is such a drastic construction and result necessary. Under our statute any one interested may demand that a bond be executed or required, and if, after demand, the school trustees should still refuse to act, then, as pointed out in the case cited from Kansas, the refusal would be wilful, and a different result might follow. No reason is given by the Oregon Supreme Court why the statute should receive the construction placed upon it by that court. We are therefore unable to concur in the conclusions reached by that court. Upon the other hand, we are clearly of the opinion that it was not the intention of the Legislature to impose a liability upon the school districts of this state for the mere failure to exact the bond provided for in chapter 68, supra, unless, as suggested, the failure is a wilful one.

[6] It is next suggested by the trustee in bankruptcy that those who performed labor and furnished material for the high school building are not all before the court. There is absolutely nothing in the record indicating that they are not all before the court. If it were true, however, that not all of that class availed themselves of their rights, that, standing alone, would hardly be a reason why those who did so should be deprived of theirs. If there are some who did not go into court pursuant to section 1400x, they have merely waived something they could waive, and the trustee in bankruptcy cannot avail himself of their failure to act.

[7] Another question argued was whether there is any priority as between or among those who have claims for labor performed or material furnished to the contractor who constructs a public building and where the claims are based upon section 1400x. We are clearly of the opinion that there can be no priority between or among those who present claims under said section. The provisions of that section clearly imply that all in the same class shall be equally protected in their rights, and not that the first comer should be first served. It is just as neces-

sary and quite as important to perform the last labor or to furnish the last material for a building as it is to perform the first labor and to furnish the first material. The rights of all are therefore equal. And, as we have seen, the action that may be commenced by any one or more merely is commenced to enforce, and not to create, the right; therefore any action that may be commenced does not give priority. All may intervene in one action or may bring separate actions. It would be preferable, however, to save the fund that all should intervene in one action. We think, therefore, that no priority was intended and none can be given by the courts. Where the fund in the hands of the public corporation is insufficient, therefore, to satisfy all claims for labor performed and material furnished to the contractor, the court should distribute the fund among those who are in court claiming their rights under section 1400x in the proportion that their claims bear to the whole fund that is in the hands of the public corporation.

The judgment is therefore reversed, and the cause is remanded to the district court of Carbon county, with directions to set aside the conclusions of law and to make conclusions of law in conformity with this opinion, and to enter judgment in favor of the appellant supply company, and in favor of Chauncey P. Overfield, in accordance with the stipulation of the parties governing his claim; the supply company to recover its costs on appeal; all the other parties to pay the costs incurred by each.

MCCARTY and OORFMAN, JJ., concur.

GEORGE A. LOWE & CO. et al. v. LEARY et al. (No. 2986.)

(Supreme Court of Utah. April 19, 1917.)

1. BANKRUPTCY ~~§~~192 — MATERIALMEN'S LIENS—PRIORITY.

Under Comp. Laws 1907, § 1400x, authorizing any person furnishing materials to any principal contractor for the construction of any public work; for a school district, etc., to sue the contractor and the school district and recover judgment against the district for the amount due from it to the contractor, or a sufficient amount thereof to pay the judgment against the contractor, the rights of materialmen to a fund due the contractor from a school district are superior to the rights of the contractor's trustee in bankruptcy.¹

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294.]

2. APPEAL AND ERROR ~~§~~1119 — RELIEF TO PARTIES NOT APPEALING.

Where, in consolidated actions by materialmen against a contractor and a school district, the trial court rendered judgment in favor of the contractor's trustee in bankruptcy for the fund due the contractor from the school district, and part only of the materialmen appealed, those not appealing waived their rights to participate in

¹ *South High School Dist. of Summit County v. McMillan P. & S. Co.*, 164 Pac. 1041; *Joseph Nelson Supply Co. v. Leary*, 164 Pac. 1047.

the fund, and were not entitled to relief on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3294, 3295, 4415, 4416.]

8. SCHOOLS AND SCHOOL DISTRICTS — 86(2)—RIGHTS OF LABORERS AND MATERIALMEN—PRIORITIES.

Under Comp. Laws 1907, § 1400x, there can be no preferences as between materialmen claiming a fund due a contractor from a school district by reason of priority in commencing action to enforce rights against such fund, as the preferential right to the fund is given by the statute, and the action is merely to enforce the right.²

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203–205.]

Appeal from District Court, Juab County; Joshua Greenwood, Judge.

Consolidated actions by George A. Lowe & Co. and others against the Wright-Osborn Company and others, in which William H. Leary, trustee, intervened. From an adverse judgment, certain of the plaintiffs appeal. Reversed and remanded, with directions.

Marionaux, Stott & Beck, of Salt Lake City, for appellant George A. Lowe & Co. Dey, Hoppaugh & Fabian, of Salt Lake City, for appellant Improved Press Brick Co. Howat, Marshall, Macmillan & Nebeker, of Salt Lake City, for appellants Morrison, Merrill & Co. and another. J. A. Howell, of Ogden, and Skeen & Skeen, of Salt Lake City, for respondent Leary. Jas. D. Pardee, of Salt Lake City, for respondent Tintic High School Dist.

FRICK, C. J. This action involves precisely the same questions of law that are involved in the two actions South High School District of Summit County v. McMillan P. & S. Co., 164 Pac. 1041, and Joseph Nelson Supply Co. v. Leary et al., 164 Pac. 1047, just decided. In this case the same Wright-Osborn Company named in those cases, hereinafter called contractor, entered into a contract with the Tintic high school district of Juab county, hereinafter styled school district, to construct a high school building for said school district. The plaintiffs, George A. Lowe & Co., Morrison, Merrill & Co., Illinois Engineering Company, Joseph Nelson Supply Company, and Improved Brick Company, sold and delivered material to said contractor which was used in the construction of said high school building. The contractor failed to pay for said material in the amounts hereinafter stated, and the five plaintiffs commenced actions against said contractor and said school district under Comp. Laws 1907, § 1400x. When those actions were commenced the school district had in its hands as part of the contract price which was owing to the contractor on said contract the sum of \$7,000. Pending the plaintiffs' actions, all of which have been consolidated, the contractor was adjudicated a bankrupt, and Wm. H. Leary, as trustee in bankruptcy, intervened in the action and claimed said \$7,000 as assets of said bankrupt estate, and which he contends should be administered for the benefit of all the creditors of said estate. It is not necessary to

enter upon a detailed statement of facts in this case, since the legal questions involved, with perhaps one or two exceptions hereinafter to be noticed, are the same as those in the preceding cases before referred to.

The district court found that there was due for material furnished as aforesaid to George A. Lowe & Co. the sum of \$977.60; to Morrison, Merrill & Co. the sum of \$3,801.74; to the Illinois Engineering Company the sum of \$575; to Improved Brick Company the sum of \$822.84; and to Joseph Nelson Supply Company the sum of \$2,417.21—making a total due to the five plaintiffs of \$8,594.39, or \$1,594.39 in excess of the amount due the contractor on its contract. The court, after finding the facts, which, barring parties and dates, are practically the same as those stated in the preceding cases, made conclusions of law which, in effect, are like those in Joseph Nelson Supply Co. v. Leary et al., supra, and entered judgment awarding the whole of said \$7,000 to the trustee in bankruptcy to be administered by him under the directions of the bankruptcy court for the benefit of all of the creditors of said bankrupt.

The five plaintiffs aforesaid appeal from the judgment and insist that the conclusions of law and judgment are erroneous for the same reasons urged in the Nelson Case.

[1] The conclusions of law and judgment in this case cannot prevail for the reasons stated in the Nelson and in the South High School District Cases. In view of the decision in those cases it is not necessary to restate or to add to the reasons there stated why the conclusions of law and judgment entered in this case cannot prevail. Under those decisions the rights of the plaintiff to the fund remaining in the hands of the school district are superior to the rights of the trustee in bankruptcy.

[2] It is, however, suggested by the trustee in bankruptcy that there were others who preferred claims against the contractor for labor performed and material furnished for said high school building, and who had also brought actions or intervened in actions brought against the contractor and the school district. While it is true that there were other claimants, yet when the district court rendered a decision adversely to their claims, that is, when the said court decided that the claim of the trustee in bankruptcy was superior to their claims, then, instead of appealing to this court as the plaintiffs have done, those claimants acquiesced in the decision of the district court. All of those claimants thus have adopted the decision of the district court as the law of the case, and hence have waived their rights to participate in the fund left in the hands of the school district. We can only help those who have attempted to help themselves. Nor is the trustee in bankruptcy in a position to help those claimants out of the dilemma in which they have placed themselves by ac-

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

² Joseph Nelson Supply Co. v. Leary, 164 Pac. 1047.

quiescing in the decision of the district court. So far as they are concerned, therefore, that court's decision is the law of this case.

[3] It is also contended that, inasmuch as one or two of the actions were commenced more than four months prior to the time that the contractor was adjudicated a bankrupt, for that reason the rights of the claimants in those actions are paramount to the rights of those claimants whose actions were commenced within the four months period of that adjudication. As pointed out in the Nelson Case, however, it is not the action that gives the preferential right to the fund, but that right exists by virtue of the statute, and all that the action is for is to enforce the right. There can be no preferences, therefore, as between or among those who base their claims on section 1400x for labor performed or material furnished for a public building. The claim of preference can therefore not prevail.

It follows, therefore, that the district court erred in its conclusions of law and judgment. The judgment is therefore reversed, and the cause is remanded to the district court of Juab county, with directions to make conclusions of law and enter judgment in favor of the five plaintiffs and to distribute said \$7,000 among those plaintiffs in the proportion that their respective claims bear to said fund of \$7,000; plaintiffs to recover costs.

MCCARTY and CORFMAN, JJ., concur.

FIRST NAT. BANK OF GARDEN CITY v. STROUP. (No. 20879.)

(Supreme Court of Kansas. March 10, 1917.
On Rehearing, May 12, 1917.)

(Syllabus by the Court.)

1. TRIAL \S 359(1)—SPECIAL FINDINGS—GENERAL VERDICT—INCONSISTENCY.

Judgment may not be rendered contrary to the general verdict sustaining several defenses to an action, on special findings of fact, unless the special findings defeat each defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 857-860, 875, 878.]

2. BILLS AND NOTES \S 539—GENERAL VERDICT—REPUGNANCY OF SPECIAL FINDINGS.

Special findings of fact considered, and held to be in harmony with the general verdict.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1911-1918, 1984; Trial, Cent. Dig. \S 859.]

Appeal from District Court, Saline County.

Action by the First National Bank of Garden City, Kan., against E. S. Stroup. Judgment for plaintiff notwithstanding a verdict, and defendant appeals. Reversed, and cause remanded, with directions to enter judgment for defendant on the general verdict.

J. O. Wilson, Z. C. Millikin, and J. H. Wilson, all of Salina, for appellant. W. E. Hutchison and C. E. Vance, both of Garden City, and Thomas L. Bond, of Salina, for appellee.

BURCH, J. The action was one to recover on a promissory note. The defenses were that the note was procured by fraudulent representations, was without consideration, and was given for accommodation. With a verdict for the defendant, the jury returned special findings of fact on which the court rendered judgment for the plaintiff. The defendant appeals, and assigns as error the rendering of judgment on the findings of fact.

On April 15, 1909, the plaintiff gave his negotiable promissory note to the Kansas Railway Construction Company for \$5,200, payable on October 15, 1909. In due course this note came into the hands of the Central National Bank of Topeka, and at maturity was sent to the plaintiff for collection. It bore the indorsement, "Demand and notice of protest waived," signed by the construction company. The defendant gave the plaintiff a note for \$5,200, dated October 15, 1909, and maturing on January 15, 1910. The old note was marked, "Paid by new note to 1st Nat'l Bank," and surrendered. The second note was renewed from time to time, and the note sued on, dated October 15, 1913, was the last of the series of renewals.

The answer alleged that the note maturing October 15, 1909, was given at the instance of the plaintiff, without consideration, and because of the following representations:

"That said construction company was then and there engaged in the construction of a certain railway, and then had on deposit with said plaintiff bank certain funds and securities out of which it would receive, upon the completion of a short section of said railway, funds sufficient to meet all its obligations, including the said promissory note; that said railway construction company was solvent and had sufficient assets to meet all of its obligations, and that the signing of said promissory note by this defendant was only intended to enable said plaintiff to advance sums of money at interest to said construction company until the completion of said portions of said line of railway."

The note dated October 15, 1909, was given without consideration moving from the plaintiff to the defendant, and was intended as an extension of time on the construction company note. It was procured by representations as follows:

"That it was necessary, expedient and advantageous to plaintiff that the note given to said construction company and indorsed to plaintiff should be renewed by defendant and given to plaintiff directly in plaintiff's own name; but that nevertheless said construction company was still solvent and would pay the said note upon the completion of the aforementioned section of railway and the realization upon its securities on deposit with said bank, the plaintiff herein; and that at all events plaintiff would hold and save this defendant harmless at all times upon the note then to be given."

Each subsequent renewal, including the note sued on, was given under like circumstances, and the representations relating to the deposit of funds and securities of the construction company, its solvency, and its assets, were false.

The reply, besides containing a general denial, stated that the note maturing October 15, 1909, was given by the defendant for bonds of the railway company; that the defendant knew all about the business and finances of the construction company; that when the note came to the plaintiff from the Central National Bank the defendant applied to the plaintiff for a loan of money to take it up; that the plaintiff loaned the defendant \$5,200 to take it up; that the note given on October 15, 1909, was given for this loan; and that the note sued on was a renewal of such note.

By instruction No. 3 the court advised the jury that if the note dated October 15, 1909, was intended as an extension of time on the note to the construction company, and the representations alleged to have been made were made and relied on, and were false, the verdict must be for the defendant. Instructions numbered 4 and 5 read as follows:

"4. If you find that defendant signed and delivered his note for \$5,200 to the Kansas Railway Construction Company as an accommodation note to said company for its use in obtaining funds or credit, and that plaintiff knew that fact, and that on or about the maturity of said note the plaintiff decided to arrange to carry the indebtedness represented by said note for said railway construction company and thereby to aid said company in the prosecution of its business, and proposed to defendant that if he would give his new note to said bank for the same sum as an accommodation note to the bank to better enable said bank to carry such indebtedness for the railway company, then your verdict should be for the defendant.

"5. The jury are instructed that an accommodation note is a note given not for value received, but as an accommodation or favor in the course of business to the party to whom it was given."

The jury were advised in instructions numbered 8 and 9 that if the plaintiff loaned the defendant the amount necessary to pay the note maturing on October 15, 1909, held by the Central National Bank, the loan would be a sufficient consideration for the note given October 15, 1909, and the verdict should be for the plaintiff.

The jury returned the following special findings of fact:

"1. Did the Central National Bank of Topeka, Kan., purchase from the railroad company the note given said company by defendant? Ans. Yes.

"2. Did the Central National Bank of Topeka, Kan., send said note to the plaintiff bank for collection? Ans. Yes.

"3. Did the plaintiff advance the money to pay said note? Ans. Yes.

"4. If you answer the preceding question in the affirmative, then did defendant execute and deliver to plaintiff his note for the money so advanced? Ans. By accommodation note as per instruction 5.

"5. When the defendant signed the note sued on in this action, did he have knowledge that the railway construction company was financially irresponsible? Ans. No.

"6. If you answer the preceding question in the negative, then could the defendant, prior to the signing of the note sued on, with ordinary diligence learn the financial condition of the railway construction company? Ans. No."

The instructions to the jury and the findings of fact are accepted as correct by both parties.

[1] The general verdict found all the elements of every issue submitted to the jury in favor of the defendant, except so far as irreconcilable facts were stated in special findings. In determining the question whether or not the general verdict is controlled by special findings, all doubts as to the meaning of any finding are to be resolved in favor of consistency in the jury's work. Special findings must be interpreted to harmonize with the general verdict if it be possible to do so. Should special findings be opposed to a general verdict which sustains several defenses, judgment contrary to the verdict cannot be rendered unless the fact or facts found specially defeat each defense.

In this case there were two defenses pleaded: Fraud and accommodation of the plaintiff without consideration. Either defense was sufficient to defeat liability, and each one was submitted to the jury separately from the other. Under instruction No. 3, it made no difference whether or not the note was given for the advantage of the plaintiff in financing the railway company, and no difference whether or not, in a legal sense, the defendant received some consideration by having his liability to the Topeka bank discharged by the plaintiff's advancement of money to take up the note which that bank held. If as a matter of fact the note given on October 15, 1909, was intended as an extension of time on the note maturing on that day, was procured by false statements concerning the construction company's finances, etc., and the successive renewals were procured by repetitions of those statements, the defendant was not liable. This defense was not impaired by the special findings. Findings Nos. 5 and 6 relate to the defense of fraud, but they are in favor of the defendant. The other findings relate to the subject of accommodation paper and value received. There is no inconsistency between them and the finding of fraud contained in the general verdict, and judgment should have been rendered on the general verdict, instead of on the special findings.

The plaintiff has little to say in its brief concerning the defense of fraud. In discussing the character of the issues, the plaintiff takes the position that while fraud and misrepresentation were pleaded, the answer contained no allegation that either the note maturing on October 15, 1909, or the note dated that day, was an accommodation note. The district court properly interpreted the answer otherwise, and submitted the issue of accommodation paper to the jury. The plaintiff then proceeds to say that the defense of accommodation paper and the defense of fraudulent representations are very dissimilar, and proof of one cannot be made under allegations of the other. This is true. In one case there is no liability because the

note was given as a favor and not for value received, while in the other case there is no liability because, whatever the character of the paper, it was wrongfully obtained. The plaintiff concludes its discussion of the subject of fraud with the following:

"Renewal of a note waives fraud. * * * We maintain that there was no fraud whatever in this case, but if the imagination of any one should be so great as to perceive there might have been in the first instance, no one can conceive of it recurring by the making of false statements every ninety days during a period of four years to an active business man living and doing business in the same small town where the railroad was to have been built, and where the bank was doing business. We do not take issue with appellant on the question that the instructions of the court are the law of the case by which the jury is to be governed, even if they should be erroneous, and there is no suggestion here of their being erroneous."

Successive renewals of a note procured by fraud do not waive the fraud, if the fraud also be renewed each time. That was the charge made in the answer. There must have been sufficient evidence to support the charge, or the very clear and definite instruction on the subject of fraud would not have been given. In any event, the instruction was given and is not complained of. So far as the jury were interrogated specially with reference to the subject of fraud, they found for the defendant. The general verdict found everything else submitted by the instruction in favor of the defendant. The court could not render judgment against a verdict sustaining the defense of fraud merely because a different defense, supported by different evidence, the defense of accommodation paper, was negatived by special findings.

[2] There can be no doubt that the jury intended to sustain the defense of accommodation paper, both by the general verdict and by the special findings. The defendant's theory of the character of the paper was clearly presented in the fourth instruction, the term "accommodation note" used in the instruction being elucidated by the fifth instruction. The reply to this theory was that the defendant applied to the plaintiff for a loan of money, received a loan of money, and gave the note dated October 15, 1909, for a loan of money, to take up the note maturing on that day. This reply was presented in the eighth and ninth instructions, and the jury were told that if they found the facts accordingly, the verdict should be for the plaintiff. The general verdict found the facts against the reply, and in favor of the defendant. Strangely enough, the language of the reply and the language of instructions 8 and 9 was abandoned in framing the special interrogatories, and the jury were not asked anything about a loan of money from the plaintiff to the defendant. They were not even asked if the money referred to in the third and fourth interrogatories as "advanced" was advanced to the defendant or for the defendant. The note to the construc-

tion company was a pure lending of credit. When it reached the hands of an innocent purchaser, of course the defendant was liable to the holder. But the note bore the indorsement of the construction company, and the construction company was also liable to the holder. The advancement of money by the plaintiff was not by way of a loan to the defendant to discharge his liability, but by way of carrying the indebtedness of the construction company, to aid it in the prosecution of its business. The new note, for the same sum as before, was given, not to secure a loan to the defendant, but to accommodate the plaintiff by better enabling it to carry the construction company's indebtedness.

The form of every question propounded to the jury permitted an answer of "yes" or "no." Every question was answered by "yes" or "no," except the fourth. Consequently the jury refused to answer the question unqualifiedly in the affirmative, and framed its own answer according to its estimate of the facts. The answer, read in connection with those preceding it, was that the defendant executed and delivered to the plaintiff an accommodation note, as per instruction No. 5, for the money advanced by the plaintiff to pay the note purchased by the Central National Bank and sent to the plaintiff for collection. The court told the jury in instruction No. 5 that an accommodation note was a note given as an accommodation or favor in the course of business to the party to whom it was given. This was exactly the kind of note referred to in instruction No. 4, which presented the defendant's theory. But the court also stated in the fifth instruction that an accommodation note was one given "not for value received." The subject of value received was presented to the jury in instructions 8 and 9, under the equivalent term, "consideration." But the only kind of consideration mentioned there was consideration by virtue of a loan of money to the defendant of the amount necessary to pay the Topeka bank. Indirect release of the defendant's liability to the Topeka bank by means of the plaintiff taking up and carrying the construction company's indebtedness for the construction company was not presented to the jury as a form of consideration or value received. While a lawyer might know about it, that kind of value received was not in the jury's mind, and there was no reason why it should be. In this aspect of the case, which is the only one left open to discussion, in view of the instructions, the note given on October 15, 1909, was given without consideration, as a favor to the plaintiff, and was an accommodation note. This conclusion, necessitated by the character of the instructions, is not decisive of the case as a matter of law, but is important as a perfectly natural and legitimate deduction bearing on the proper interpretation of the finding.

The term "value received," as used in the fifth instruction, and imported into the finding by reference to the instruction, might have had one of two meanings. First, consideration resulting from a loan to the defendant to pay the Topeka bank. Second, consideration resulting from discharge of the defendant's liability to the Topeka bank, consequent upon the plaintiff's decision to take care of the construction company's indebtedness. Value received, or consideration, was not defined or explained to the jury, except in accordance with the plaintiff's theory of the case—a loan of money made by the plaintiff to the defendant to take up his obligation to the Topeka bank. There was no loan to him for such purpose. The plaintiff neither loaned nor advanced any money to him on the security of his note. The plaintiff knew the indebtedness represented by the note held by the Topeka bank was in fact the indebtedness of the construction company, and that the defendant was merely an accommodation maker. The plaintiff undertook to finance the construction company, not the defendant. When it decided to carry the indebtedness for the construction company, it took the defendant's note, not because in financing the construction company it incidentally procured his release from liability to the Topeka bank, but to better enable it to assist the construction company. If the jury understood "not for value received" to mean "not for a loan of money," the answer to question No. 4 is in harmony with the general verdict. If this were not the most natural and obvious meaning, considering the pleadings and the instructions, it would be chosen to make the answer conform to the general verdict.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant on the general verdict. All the Justices concurring.

On Rehearing.

In a petition for rehearing, the statement contained in the opinion, to the effect that, if the plaintiff procured the note sued on by fraud, the fraud would constitute a defense to the action, is criticized. The statement was a virtual approval of the third instruction to the jury, and was correct. Other grounds of the petition for a rehearing are without merit, and the petition is denied.

In a motion for modification of the judgment of this court, the plaintiff advises the court that in due time it filed in the district court a motion for a new trial, which has not been acted on because the plaintiff's motion for judgment on the special findings was sustained. Under these circumstances, the judgment of this court, remanding the cause for judgment in favor of the defendant, will

be modified, to read that the cause is remanded for further proceedings. All the Justices concurring.

BRUINGTON et al. v. WAGONER et al. (No. 20336.)

(Supreme Court of Kansas. March 10, 1917.
On Petition for Rehearing, May 12,
1917.)

(Syllabus by the Court.)

1. ASSIGNMENTS \Leftrightarrow 137—DEEDS \Leftrightarrow 211(1)— MENTAL CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to sustain the findings of the trial court that the grantor of instruments conveying his real property and assigning his bank stock to defendants was mentally incompetent and incapable of making them at the time of their execution and delivery.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. \S 234; Deeds, Cent. Dig. \S 637-640, 642, 647.]

2. WITNESSES \Leftrightarrow 219(4)—PRIVILEGE OF PHYSICIAN—WAIVER.

"The heirs at law of one who has been treated by a physician may waive the provisions of the statute making a physician incompetent to testify to any knowledge obtained in his professional capacity from the patient," following *Fish v. Poorman*, 85 Kan. 237, 238, 116 Pac. 898.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 769, 781.]

On Petition for Rehearing.

3. APPEAL AND ERROR \Leftrightarrow 1010(1)—FINDINGS OF FACT—CONCLUSIVENESS.

The Supreme Court accepts as true the trial court's findings of fact when they are based upon competent evidence; and on appeal it is of no consequence that there may have been much contradictory evidence adduced at the trial, which, if believed by the trial court, would have compelled entirely different findings of fact and an entirely different judgment. *Bayer v. Cockerill*, 3 Kan. 282, syl. par. 6; *Wideman v. Faivre*, 100 Kan. 102, 163 Pac. 619, syl. pars. 2, 5.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3979-3981, 4024.]

4. APPEAL AND ERROR \Leftrightarrow 1010(1)—QUESTION OF FACT—FINDINGS AND JUDGMENT.

When the error assigned is that the findings and judgment are contrary to the evidence, it is only necessary on appeal to consider whether there is some competent and sufficient evidence upon which the judgment is based; and a consideration or recital of the contradictory evidence cannot aid in correctly determining that question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3979-3981, 4024.]

Appeal from District Court, Morris County.

Action by George F. Bruington and others against George F. Wagoner and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. B. Harsh, of Creston, Iowa, and M. B. Nicholson and W. J. Pirtle, both of Council Grove, for appellants. C. G. Saunders and David E. Stuart, both of Council Bluffs, Iowa, and D. H. Brown, of Council Grove, for appellees.

DAWSON, J. The plaintiffs are the children of a deceased brother and the defendants are the children of a living sister of the late Dr. George W. Bruington, who was for many years a resident of Morris county, Kan.; and this lawsuit concerns Dr. Bruington's disposition of his property when he was about 75 years old, some 2 years before his death.

Dr. George W. Bruington came to Kansas in 1880, and resided on a Morris county farm for over 20 years. He and his wife accumulated some property, and about 1902 they removed to Council Grove. In 1912 his wife died there, and a few days thereafter he left Council Grove for Creston, Iowa, in company with the defendants and their mother. Four days after he left Council Grove Dr. Bruington executed deeds conveying his Morris county land and town property to the defendants, and assigned to them his bank stock. He died in Rosedale, Kan., in 1914, and the plaintiffs' action is to set aside the deeds, to cancel the assignment and transfer of the bank stock, and for an accounting of the rents and profits, and for judgment for their proportion thereof as heirs of Dr. Bruington. The grounds upon which the relief is sought are:

"That in the month of September, 1912, one Geo. W. Bruington, an uncle of the plaintiffs and said defendants, then residing at Council Grove, Kan., and who was then about 75 years of age, was of feeble and unsound mind and impaired in health; that at the time, and for some years prior thereto and thereafter until the death of the said Geo. W. Bruington, in the month of August, 1914, he was of unsound mind and incapable of transacting business or managing his own affairs, and because of the impaired and feeble condition of his mind, and lack of understanding, was incapable both in law and in fact of executing any conveyance or otherwise making any intelligent, legal, or valid disposition of his property.

"That on or about the 2d day of September, A. D. 1912, the wife of the said Geo. W. Bruington, also aged in years, died at Council Grove, Kan., and on which said occasion the defendants came to the home of the said Geo. W. Bruington, where they remained with him and kept themselves constantly in his company, and, because of his recent bereavement and his childlike and simple-minded condition, acquired an excessive and undue influence over him.

"That in the course of two or three weeks they coerced and persuaded the said Geo. W. Bruington to accompany them to the state of Iowa, where on the 26th day of September, A. D. 1912, taking advantage of the impaired and enfeebled condition of his mind and of the undue influence which they had acquired over the said Geo. W. Bruington, and without any consideration therefor whatever, the said defendants wrongfully, unlawfully, and fraudulently persuaded, coerced, and induced the said Geo. W. Bruington to sign and deliver to them a certain purported deed under and by which he purported to transfer and convey to said defendants the following described real estate, * * * and coerced the said Geo. W. Bruington to transfer and assign to them without consideration therefor three certain certificates, aggregating 20 shares, of the capital stock of the Council Grove National Bank which he then owned and held in his own name; * * * that the said defendants obtained said purported deed from the said Geo. W. Bruington and the said purported

assignment of the said bank stock and other property for the sole and only purpose of cheating, wronging, and defrauding these plaintiffs out of any and all right, title, or interest therein or which they might inherit therein at the death of the said George W. Bruington, as his legal heirs.

"That the said Geo. W. Bruington left no debts against his estate, and that no administration of his estate has ever been appointed.

"That said defendants have been wrongfully receiving and converting to their own use all the rents and profits arising from said real estate and the dividends upon said bank stock since the 26th day of September, 1912," etc.

The pertinent part of the trial court's judgment reads:

"And the court, having heard said evidence and being fully advised in the premises, does find generally for the plaintiffs and against the defendants, and that the allegations of plaintiffs' petition are true. The court further finds that the deed and assignment of bank stock mentioned in plaintiffs' petition are illegal and void, and that the said George W. Bruington, deceased, was incompetent and mentally incapable of making the same, and that said deed and assignment should be set aside and canceled."

The defendants assign error:

"First, the findings and judgment of the court are contrary to the evidence; and, second, the court admitted incompetent testimony on behalf of the plaintiffs."

The abstract and counter abstract setting out the evidence are unusually voluminous. Part of this evidence tended to show that for some years prior to the execution of the deeds and the assignment of the bank stock Dr. Bruington's mental powers had declined; that his wife had largely supervised his business; that he was absent-minded, listless, and forgetful of old acquaintances. He spent part of his time picking up stones, filling his pockets with cigar stumps, rusty nails, pieces of iron, pieces of dishes and glass bottles—such things as a child might do. Some years before his death he held the office of secretary of the Odd Fellows' Lodge, but was unable to keep its accounts and was removed for incompetency. A day or two after Dr. Bruington's wife's death the defendant Wagoner called on a local attorney to arrange with him for the making of a will by Dr. Bruington which would bequeath the doctor's property to the defendants. This evidence reads:

"I suggested to him probably it was not necessary to make a will, that Dr. Bruington's property would go to his [Wagoner's] mother, Dr. Bruington's sister. He said with reference to that he had some other relatives. He said the doctor had a brother Tom. [Tom was the father of the plaintiffs.] He said Dr. Bruington didn't like his brother Tom and he didn't want him to acquire any of the property, and he wanted to fix this will so they would get it. I told him that I was not quite sure in my mind whether Dr. Bruington could make a will; that I had heard some few things about him since the funeral. And I knew in a general way what shape he was in. I told him I would not undertake to draw the will without first seeing him and talking with him, and I asked him whether he would bring Dr. Bruington up to my office, and he said he would. He brought him up in the afternoon about 5 o'clock. When Dr. Bruington came in there and I spoke to him, he says, 'How do you do?' I asked him if he knew

me. He said he did not. I told him who I was and invited him to have a seat. I had been practicing law all the time Dr. Bruington had been in town, and I knew him before he moved to town and after he moved to town. I lived near him and passed his house several times a day. I lived a block farther north. * * * I said to Dr. Bruington then, 'Dr. Bruington, Mr. Wagoner has been talking about drawing a will for you.' He made no response. I asked him if he had talked the matter over with Mr. Wagoner, about what he wanted to do with his property. He still made no answer. I remember at that time in answer to that question that Dr. Bruington just turned around. He had a sort of a drawn expression to his face. He then turned back immediately and continued his gaze to the back part of the office. I then asked him directly if he wanted to fix this property so his brother Tom would not get any of it at his death, and he said, 'Tom—Tom lives'—he mentioned some town in Iowa. I don't remember the name of the town. He mentioned how long it had been since he had seen him. It was a number of years, I don't remember now, but he did mention the number, something like ten years. He said something about that he might go back there on a visit after he got his potatoes dug, and I just looked at Mr. Wagoner, and Wagoner said, 'Well, he isn't himself to-night,' or 'He is off to-night,' or something of that kind, and 'I will take him home.' * * *

"There is one other matter—I don't know whether I ought to state it or not, I just recollect it now—but I can't recollect whether it was when Dr. Wagoner came back the next morning or the first morning I talked with him. I said something to him about doubting Dr. Bruington's capacity. He said, 'Well, I had always supposed that Mrs. Bruington owned this property, but I found out she did not.' He said that Mrs. Bruington was very anxious that he and Mrs. Ellis have this property, and he thought for that reason we would be justified in straining a point. It was Dr. Wagoner that suggested that a point be strained in drawing the will. I think he used that exact language as I recollect it."

In company with the defendants and their mother, Dr. Bruington left for Iowa a day or two later, and the deeds assailed in this action were executed shortly thereafter. Aside from this there was expert evidence by physicians that Dr. Bruington was afflicted with arteriosclerosis and senile dementia, and totally incapacitated for managing his business affairs or disposing of his property at or about the time he executed the instruments conveying his property to the defendants. That there was other and contradictory evidence is of no consequence in a court of appeal, which is bound by the trial court's findings of fact so long as there is competent and sufficient evidence which would justify such findings, and in this case there was no trouble on that account.

The evidence which is assigned as incompetent and erroneous relates to the testimony of Dr. Miller. That testimony narrated the fact:

That a few months before Mrs. Bruington's death she and Dr. Bruington consulted Dr. Miller about Dr. Bruington's health. "Q. Now, I will ask you, Doctor, if from the examination you made of him, and the observation you had of him, do you know whether or not Dr. Bruington was afflicted with any kind of disease? (To which counsel for the defendants objects because incompetent, for the reason that the relation of physician and patient existed, and he cannot

testify in regard to it unless with the consent of the patient, under our statute. Objection by the court overruled, to which ruling of the court the defendants except.")

[1] The abstract of Dr. Miller's evidence reads:

"The witness then testified that Dr. Bruington was mentally deficient at the time he examined him, as well as he had hardening of the arteries, arteriosclerosis, which is a hardening of the inside of the arteries, an incurable chronic condition which interfered with the circulation and predisposes degeneration of the brain cells, and as a result of said examination he was of the opinion that Dr. Bruington was suffering from dementia of old age; that such condition had existed ever since he knew him, gradually grew worse; often when he met Dr. Bruington he wouldn't recognize him; at other times he would. Witness attended Mrs. Bruington on the day she died, and saw Dr. Bruington. Talked with Dr. Bruington some three or four hours after Mrs. Bruington died. Doctor Bruington first shed a few tears, and then acted more like a child; spoke as though his wife was out of doors and would be in shortly. That from his observation he would not judge Dr. Bruington mentally capable of transacting business or engaging in business intelligently back to the time he examined him. His wife seemed to be doing the business for him. That he did not think it possible for Dr. Bruington to improve sufficiently to make an intelligent disposition of his property inside of the three weeks following his wife's death. The condition was progressing, and the longer time lapsed the more unable he would be to dispose of property of that kind. That the doctor died in August, 1914, from hemiplegia that would corroborate his opinion that the doctor was afflicted with arteriosclerosis at the time of Mrs. Bruington's death."

To sustain their objection to this evidence defendants cite Civ. Code, § 321 (Gen. St. 1909, § 5915); A., T. & S. F. R. Co. v. Frazier, 27 Kan. 463, syl. par. 2; Patterson v. Cole, 67 Kan. 441, syl. par. 3, 73 Pac. 54; Insurance Co. v. Brubaker, 79 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267; Arizona & New Mexico Ry. Co. v. Clark, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834.

The pertinent clause of section 321 of the Civil Code reads:

"The following persons shall be incompetent to testify: * * *

"Sixth, a physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, defect, or injury, or the time, manner or circumstances under which the ailment was incurred, or concerning any knowledge obtained by a personal examination of any such patient, without the consent of the patient.

"But if a person without objection on his part testifies concerning any such communication, the attorney, clergyman, priest or physician communicated with may also be required to testify on the same subject as though consent had been given within the meaning of the last three subdivisions."

[2] Conceding the correctness of the general rule and that the evidence of Dr. Miller was a disclosure of professional communications from his patient and of knowledge of his patient obtained in a professional way, and therefore privileged, it has been held in this state that not only may the patient himself waive this privilege (*Armstrong v. Street Railway Co.*, 93 Kan. 493, 144 Pac. 847), but

after the patient's death the privilege may be waived by his heirs at law (*Fish v. Poorman*, 85 Kan. 237, syl. par. 6, 116 Pac. 898). This is in accord with the best judicial thought in this country on this subject, and takes nothing from the effect of defendants' citations. *Winters v. Winters*, 102 Iowa, 53, 71 N. W. 184, 63 Am. St. Rep. 428, and note; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; note in 32 L. R. A. 73; 40 Cyc. 2397; 4 Wigmore on Evidence, §§ 2388, 2391.

In *Fraser v. Jennison*, 42 Mich. 206, 224, 225, 3 N. W. 882, 895, Judge Cooley said:

"The court did not err in permitting Dr. Klein to be examined by the proponents to show the condition of the decedent while he was treating him as a physician. The statute provides that: 'No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' Comp. Laws, § 5943. This statute, as we have held, covers information acquired by observation while the physician is in attendance upon his patient, as well as communications made by the patient to him (*Briggs v. Briggs*, 20 Mich. 34); but the rule it establishes is one of privilege for the protection of the patient, and he may waive it if he sees fit (*Scripps v. Foster*, 41 Mich. 742 [3 N. W. 216]); and what he may do in his lifetime those who represent him after his death may also do for the protection of the interests they claim under him."

Here the plaintiffs were the heirs at law of the deceased, and they were within their rights when they waived this statutory privilege. But an argument is made as if the defendants were also his heirs at law. Not so. Their mother was alive and a witness at the trial. She was a coheir at law with the plaintiffs. It would technically be to her interest to agree with plaintiffs that the privilege be waived, but perhaps she cared more for the interest of her children, the defendants, than for her own. At all events the only heirs at law in court as litigants waived the privilege. It should not be forgotten either that defendants were in court merely in their capacity as defendant grantees of deeds and assignments whose validity was being challenged by the heirs at law. *Shuman v. Supreme L. K. H.*, 110 Iowa, 480, 81 N. W. 717. If we had a lawsuit here between heirs at law and it should present a situation where some of them, claiming as heirs at law, desired to waive the privilege and some of them, likewise as heirs at law, objected to waiving it, the matter might present some difficulty, although this court is rather positively committed against any interpretation of rules of evidence which limits judicial inquiry in the ascertainment of the truth. *Armstrong v. Street Railway Co.*, 93 Kan. 493, 503, 144 Pac. 847. These observations are only relevant now, however, as tending to show that the trial court did not err in admitting the evidence of Dr. Brington's physician on the waiver of his heirs at law.

The judgment is affirmed. All the Justices concurring.

On Petition for Rehearing.

A petition for a rehearing filed herein discloses that its author does not understand the functions of an appellate court. The petition chides us for incorporating part of plaintiffs' evidence in our opinion and omitting defendants' evidence to the contrary. Our purpose in quoting part of the plaintiffs' evidence was to show that there was no merit in defendants' contention that the findings and judgment of the trial court were contrary to the evidence. On that point, the defendants' evidence, although there was much of it, was of no consequence.

[3] The Supreme Court is not charged with the duty of ascertaining the facts. We do not see the witnesses; we do not know whom to believe. We cannot determine the probative weight of the evidence introduced pro and con in the trial court. We must accept as true the trial court's findings of fact, when there is some tangible and competent evidence to support those findings. Those who desire to investigate this phase of the law of appeals may begin their studies with *Bayer v. Cockerill*, 3 Kan. 282, syl. par. 6, and follow the many similar decisions of this court down to *Wideman v. Faivre*, 100 Kan. 102, 163 Pac. 619, syl. pars. 2, 5. Although this principle of the law governing appeals has been stated times without number in the half century's history of this court, it is perhaps too much to hope that the court will ever be relieved from the necessity of restating it. We realize, of course, that lawyers must conform, to a certain extent, to the wishes of their clients in the presentation of their appeals. It should not be difficult, however, for a lawyer to make his client understand that an appellate court cannot weigh conflicting evidence—that it must accept the facts as determined by the trial court.

[4] Ordinarily it is sheer waste of a client's money to print endless pages of conflicting testimony for presentation on appeal. On appeal the questions touching the findings of fact and the evidence relating thereto are mainly these: Was there any evidence to support the findings and judgment? Was any incompetent evidence admitted? Was any competent evidence excluded? Was the verdict or judgment wholly unsupported by any competent evidence? The determination of these questions necessitates a careful review of a summary of the evidence. With these matters a Supreme Court can deal, and it does invariably deal with them with the most laborious thoroughness. But whatever errors of law may be committed by the trial court in the admission or exclusion of evidence, or concerning the existence or nonexistence of any competent evidence, which will entitle an appellant to relief by the Supreme

Court, the appellant should be made to understand that his dispute with his rival litigant as to the facts is a matter to be settled by his neighbors, who are duly summoned as a jury convened at the courthouse in his own county seat; that they and the trial judge hear what he and his fellow witnesses have to say, hear what his opponent and the opposing witnesses have to say, and when the facts are found by the jury and approved by the court, or by the trial court alone if a jury is waived, or if it is not a case triable by a jury, the controversy over the facts is ended.

A little reflection on the foregoing will make it clear that no purpose would have been served by incorporating in our opinion any part of the defendants' evidence which was discounted or discredited by the trial court.

The petition for a rehearing is denied. All the Justices concurring.

SCOTT v. SHEWELL. (No. 20619.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. PLEADING \S 387(2)—MOTION TO MAKE PETITION MORE DEFINITE.

Where the only purpose of a motion to make the petition more definite and certain is to require plaintiff to plead his evidence, it should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 64, 1174.]

2. PARTNERSHIP \S 327(6) — SUIT FOR ACCOUNTING—VARIANCE.

In a suit for an accounting between partners, held there was no variance between the petition and the evidence, which changed the cause of action to one to recover damages for defendant's failure to carry out the terms of a settlement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 776, 777.]

3. FINDINGS AND CONCLUSIONS.

The findings of fact and conclusions of law are found to be sustained by sufficient evidence.

Appeal from District Court, Woodson County.

Action by S. R. Scott against J. E. Shewell, for a partnership accounting, with cross-petition by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Oyler, of Iola, for appellant. S. O. Holmes, of Yates Center, for appellee.

PORTER, J. The action was for an accounting between partners. The answer alleged payment to plaintiff of \$400 and his acceptance thereof in full settlement of all claims. In a cross-petition defendant alleged that plaintiff was indebted to him for goods and merchandise received, for moneys paid upon shares owned by plaintiff in a building and loan association, and for moneys loaned to him. The reply admitted receiving groceries and living expenses out of the partner-

ship business for plaintiff's family, and alleged that this was by agreement of the partners, and that defendant provided for himself and family out of the partnership stock, and had received thereby a sum in excess of that received by plaintiff. It denied a full settlement, though admitting the payment of \$400, and alleged that defendant refused to comply with the agreement at the time plaintiff withdrew from the business. The claims set up in defendant's cross-petition were denied. The case was tried by the court, and findings of fact made, from which the court adjudged that there was due from defendant to plaintiff the sum of \$348.29, for which judgment was rendered in plaintiff's favor. The defendant appeals.

[1, 3] We are unable to find anything substantial in the contention that the court committed error in the trial of the cause. There was a motion to require the petition made more definite and certain, based upon a number of grounds. The court sustained three of the grounds and overruled the rest. It is seriously argued that it was error to refuse to require the petition to state how much capital defendant invested in the business, and to allege in what manner and from what source plaintiff obtained the money he invested. The defendant presumably had the best information as to his own business affairs, and he was not concerned as to the source from which plaintiff's capital was acquired. Other grounds of the motion merely sought to compel plaintiff to plead the evidence upon which he intended to rely.

The record does not disclose what the opening statement of counsel for plaintiff was, but the court was right in overruling an objection to proceeding further based upon the contention of a variance between the statement and the petition.

The plaintiff is the son-in-law of the defendant. For years the defendant had conducted a produce business at Neosho Falls. He desired to have his daughter, wife of the defendant, near him, and finally induced his son-in-law to give up his position in Texas, where he then resided, and to return to Kansas and take an interest in the business. The partnership continued from June, 1912, until August, 1914, when the plaintiff, on account of differences with other members of defendant's family, withdrew from the business. In attempting to settle the partnership affairs a family quarrel developed. We cannot concur in the statement that "there was no testimony whatever to sustain the findings of fact made by the court." Each of the facts found by the court appears to be well sustained by proof. It would serve no useful purpose to quote the evidence.

[2] The principal complaint of the defendant is that the petition contained no averment of any attempted settlement, and that the cause was therefore not one for an ac-

counting, but an action to recover damages for defendant's failure to comply with the terms of a settlement. The court properly took the view that it was an action for an accounting between partners, and the fact that a tentative agreement was entered into for a settlement and afterwards fell through did not change the nature of the action.

We find no error in the record, and the judgment is affirmed. All the Justices concurring.

NORDMAN et al. v. NORDMARK (two cases).
(Nos. 20833, 20834.)*

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

WILLS §§55(1), 166(1), 334—**SPECIAL FINDINGS**—**TESTAMENTARY CAPACITY**—**UNDUE INFLUENCE**.

An attack is made upon a will upon the grounds of lack of testamentary capacity in the testator, and that its execution was procured by undue influence, and upon an examination of the record it is held that the special findings made by the trial court are sufficiently specific and complete, and also that the findings which in effect uphold the validity of the will are supported by the evidence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-140, 148-150, 161, 421, 790.]

Appeals from District Court, Republic County.

Actions by Ida Nordman and others against Sarah Bertha Nordmark to annul a marriage, and to set aside a deed, etc., and action by the same plaintiffs to set aside the will of Charles Nordmark, deceased. Judgments for defendant, and plaintiffs in each case appeal. Judgment in each case affirmed.

N. J. Ward, of Belleville, for appellant. J. M. Livingood, of Belleville, for appellee.

JOHNSTON, C. J. In 1906 and when he was 81 years old, Charles Nordmark married Sarah Bertha Johnson, and they lived together until his death in 1912. His first wife died in 1904, and four children had been born of that marriage. A few days before his death he executed a will giving all of his property to his wife, except a gift of \$1 to each of his children. After his death actions were brought by the children against the widow, Sarah Bertha Nordmark, one to annul the marriage contract with their father, and to set aside a deed executed by him before his death, and also to compel the defendant to turn over the proceeds of certain certificates of deposit that had been given to her, upon the ground that Nordmark was incapable and mentally irresponsible when these transactions were had. The other action was brought to set aside the will executed by Nordmark, and it was alleged that he was mentally incapable of making a will at the time it was made, and also that it was procured through duress and undue in-

fluence exercised over him by the defendant. Trials of the cases resulted in judgments in favor of the defendant. On appeal the judgment upholding the validity of the marriage contract was affirmed, but the remaining parts of the judgment were reversed because of the refusal of the court to make fuller findings of fact upon the testimony in the case. It was ruled, however, that retrials of the cases were not necessary, but that the court should make the additional findings upon the evidence already taken, and the cases were remanded for that purpose. *Nordman v. Johnson*, 94 Kan. 409, 146 Pac. 1125. Upon the return of the cases to the trial court additional findings were made along the line indicated in the opinion of this court, and the plaintiffs still complaining say that the findings are incomplete and insufficient, especially as to the testamentary capacity, and there is a contention that the additional findings made are not supported by the evidence.

An examination of the special findings made by the court shows them to be sufficiently specific and complete. Among other things it was found that while the testator was advanced in years and feeble in health when the will was executed he was able to be up and about the house, and was not mentally weak. It is true that another wrote his name while he held the pen as the mark was being made. This method of signing, it appears, was adopted partly because of physical weakness in guiding the pen, but also because he was unaccustomed to writing the English name Charles, as he had usually written it Carl after the manner of people of his nationality.

On the question of undue influence alleged to have been exercised upon him by the defendant it was found that Nordmark and his wife had lived happily together, that she was a good and faithful wife and possessed his confidence and while she assisted him in some business affairs, particularly when his advanced age or the state of the weather made it more suitable for her to do the work, he always controlled his business affairs and was never controlled nor unduly influenced by his wife. It was specifically found that the will was the free act of the testator, that it was not made at her instance or dictation, nor because of any influence exerted by her. It was found, too, that she had done nothing to estrange him from his children, nor to induce him to believe that they cared nothing for him, that she did not forbid them to visit their father, nor induce him to believe that they did not wish to see him, and also that she did not by any representations endeavor to get control of his property. There was a finding that the certificates were transferred to the defendant with the testator's consent on the consideration of love and affection, and that this and the other transactions were brought about without any misrepresentation,

fraud, or undue influence on the part of the defendant.

The special findings being sufficiently complete and specific on the issues involved, the only question remaining is the sufficiency of the evidence upon which the findings were based. In view of the evidence in the record this can hardly be regarded as a serious question. While there is some conflict in the testimony there is abundant proof tending to show the testamentary capacity of Nordmark. There is testimony enough that he was capable of transacting ordinary business and had the memory and the mind essential to the making of a valid will. Nor is there any lack of proof to support the finding that at the time the will was executed the testator was free from any restraint or undue influence exerted upon him. The relations between him and his wife, as we have seen, were confidential and harmonious, but the fact that they were tied together in love and confidence during the marriage as well as by the marriage contract does not raise a presumption that undue influence was exercised upon him, nor does the fact that there was an opportunity and a motive to exercise undue influence in the making of the will warrant the inference that it had been exercised. *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024. The testator had the right to dispose of his property as he pleased. Apparently he understood the extent of his estate and the claims of his wife and children upon his bounty, and he deliberately made a disposition of his property, giving the most of it to his wife. The testimony is abundant to show that the instrument was an expression of his own will and purpose, and that it was executed free from any improper influence or control by the defendant or by any one else.

The judgment in each case is affirmed. All the Justices concurring.

STATE v. MIDLAND AERIE NO. 412, FRATERNAL ORDER OF EAGLES.
(Nos. 20669, 20670, 20671, 20672.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. ABATEMENT OF LIQUOR NUISANCE.

Rule of law announced in the syllabus of *State v. Order of Eagles*, 98 Kan. 793, 161 Pac. 903, adhered to.

2. APPEAL AND ERROR ~~§~~1170(8)—HARMLESS ERROR—SUSTAINING DEMURRER TO PLEADINGS.

Where the plaintiff's evidence does not show that it sufficiently established the facts alleged in its petition to entitle it to judgment, and tends to show that the defendants are entitled to judgment, it is not prejudicial error to sustain a demurrer to the plaintiff's evidence instead of rendering judgment for defendants on that evidence, and section 581 of the Civil Code (Gen. St. 1915, § 7485) forbids the reversal of

a judgment which is only affected by nonprejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4036, 4543.]

Marshall, J., dissenting.

Appeal from District Court, Montgomery County.

On rehearing. Affirmed.

For former opinion, see 98 Kan. 793, 161 Pac. 903.

S. M. Brewster, Atty. Gen., J. P. Coleman, of Topeka, Charles D. Ise, of Coffeyville, and Thurman Hill, of Independence, for the State. T. E. Wagstaff, of Independence, Geo. H. Wark, of Caney, and J. B. Tomlinson and C. D. Shukers, both of Independence, for appellees.

DAWSON, J. This is a rehearing of the cases decided in *State v. Order of Eagles*, 98 Kan. 793, 161 Pac. 903. The rehearing was granted to consider the Attorney General's criticism of the syllabus of our original opinion, and to determine a question undisposed of in the first hearing because this court believed it could not disturb the net result arrived at by the trial court.

[1] All that the Attorney General has had to say anent the syllabus of our original opinion has been duly considered, and its text has been critically reviewed; but we are satisfied that it is a precise and pertinent statement of the law governing the cases presented.

[2] The question which we did not determine and which the Attorney General insists is important relates to the trial court's ruling on the demurrer to the state's evidence. Perhaps the trial court did err in sustaining defendants' demurrer to the evidence. There was evidence that liquors had been sold and drank on the defendants' premises not long before the state filed these suits to enjoin those practices. There was no evidence that defendants were violating the law at the time the actions were filed. Formerly that alone would have defeated the injunctions. We think we properly widened that narrow view in the doctrine announced in the syllabus, but we cannot see our way to further extend it. It would have been better—perhaps it would have been the correct way to end those lawsuits—if the trial court had overruled the demurrer to the state's evidence and had rendered judgment for the defendants on that evidence. But what should this court now do about the matter? The state did not prove to the satisfaction of the trial court that nuisances were being maintained on the premises of the defendants at or about the time the state's suits were filed. It sought to maintain its causes against these several defendant by witnesses who testified that nuisances had theretofore existed on defendants' premises, but that those nuisances had been abated apparently in good faith under threats of prosecution if they were not abated. This

was effected prior to the time the state's suits were filed. By producing the witnesses who testified that the nuisances had been abated, the state vouched, in some measure at least, for their credibility. Surely the state did not intend to ask the trial court implicitly to believe its witnesses on the first part of their testimony and utterly to disbelieve them as to the latter part.

Conceding, then, that it was error to sustain the demurrer to the state's evidence, we may not disregard the provisions of the Civil Code in a liquor case any more than in any other case. The pertinent paragraph reads:

"The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court." Civ. Code, par. 581 (Gen. St. 1915, § 7485).

See, also, Crim. Code, § 293 (Gen. St. 1915, § 8215).

On the pleadings and on all the evidence produced by the state, considered in their most favorable light, we cannot say that the trial court should have issued the injunctions, or that the state was entitled to judgment; and this, under the Code section just quoted, forbids us to disturb the judgments in the present cases, and they are therefore again affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and WEST, JJ., concurring.
MARSHALL, J., dissenting.

RUTH v. WITHERSPOON-ENGLER CO.

(No. 21152.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. TRIAL § 260(1)—REQUESTED INSTRUCTION—GIVEN INSTRUCTION.

It is not reversible error to refuse to give an instruction stating in detail the law covering an issue submitted to the jury, where the court clearly states the same rule in general language in the instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

2. APPEAL AND ERROR § 1049(6)—HARMLESS ERROR—CROSS-EXAMINATION.

The refusal of the court to permit the cross-examination of a witness to establish a defense will not cause a reversal of the judgment, where the witness, who was a party to the action, could have been produced by the party seeking to cross-examine him, and where the evidence sought to be introduced by cross-examination was shown by records introduced in evidence by the party cross-examining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145.]

3. JURY § 25(2)—MASTER AND SERVANT § 408—WORKMEN'S COMPENSATION ACT—JURY TRIAL.

Under the Workmen's Compensation Act (Gen. St. 1915, § 5960) a jury trial is waived unless demanded, and where it is not demanded, a court may call a jury to find the facts, and may render judgment on the findings of the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 155.]

Appeal from District Court, Wyandotte County.

Action under the Workmen's Compensation Act by James H. Ruth against the Witherspoon-Engler Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McAnany & Alden, of Kansas City, Kan., Frank L. Barry, of Kansas City, Mo., and Samuel Maher, of Kansas City, Kan., for appellant. McFadden & Chaffin, of Kansas City, Kan., for appellee.

MARSHALL, J. The defendant appeals from a judgment rendered against it under the Workmen's Compensation Act.

This is the second time this case has been before this court. *Ruth v. Witherspoon-Engler Co.*, 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E, 1201. The former judgment was in favor of the plaintiff for the same amount as the present one.

The plaintiff pleaded total incapacity caused by the breaking of his right leg while in the defendant's employ. After the broken bone of the plaintiff's leg had been set and had healed, his injured leg was two inches shorter than the other one. The plaintiff commenced an action against W. F. Fairbanks and H. B. Lemmon, the physicians who had treated him, and against the defendant, for negligence and malpractice in setting the bone. That action was pending and undetermined at the time the present action was tried.

[1] 1. The defendant insists that the court erred in refusing to give the following instructions:

"You are instructed that the plaintiff is entitled to recover compensation in this cause for his disability, total or partial, that resulted from the injury received in the course of his work, without the intervention of an independent agency.

"If you believe from the evidence that his total or partial inability to work has been caused or increased by improper surgical treatment, or want of proper medical or surgical care, then he cannot recover in this cause for any total or partial incapacity due to improper medical care or want of proper medical treatment."

The court gave the following instruction:

"In determining the compensation to which plaintiff is entitled, you will be careful to ascertain what length of time the plaintiff is necessarily incapacitated from work as the natural and probable result of his injury, excluding therefrom any loss occasioned by any act of the plaintiff himself, or occasioned from the acts of others occurring since the time of the injury."

There is no substantial difference between the instructions requested and the one given by the court. The instructions asked by the defendant were specific, while the one given by the court was general. It was clear, and there was not enough difference between it and those requested to justify a reversal of the judgment.

[2] 2. The defendant contends that:

"The court committed error in refusing to permit appellant to cross-examine appellee with reference to the filing of the malpractice suit."

Neither in his petition nor in his evidence in chief did the plaintiff say anything about that suit. The defendant's answer pleaded the pendency of that action as a defense; and on the cross-examination of the plaintiff the defendant attempted to show that the action had been filed, and that the plaintiff had claimed that a part of his disability was caused by the negligence of the doctors in setting the broken bone in his leg. The defendant was not permitted to thus cross-examine the plaintiff. That cross-examination may have been proper, but the exclusion of that evidence on cross-examination did not preclude the defendant from introducing it to establish the facts pleaded in the answer. The plaintiff did introduce in evidence the plaintiff's petition in the malpractice suit, and the plaintiff introduced the defendant's answer thereto. If the defendant had so desired, it could have used the plaintiff as a witness and could then have questioned him concerning the matters that were excluded on cross-examination. If there was error in refusing to permit the defendant to cross-examine the plaintiff concerning those matters, the error was not sufficient to justify this court in reversing the judgment. In addition to this, the evidence sought to be introduced by cross-examination was not produced on the hearing of the motion for a new trial.

[3] 3. The cause was tried by a jury. A general verdict was not rendered, but three special questions were submitted to the jury, and these questions were answered as follows:

"Question 1. The date of the injury to plaintiff being admitted to be the 5th day of March, 1914, for how many weeks do you find, beginning 2 weeks after the date of said injury, the plaintiff will be totally incapacitated for labor? Answer. 414 weeks.

"Question 2. For how many weeks, if any, beginning at the end of the period of total incapacity, as fixed by your answer to question No. 1, do you find that the plaintiff has been, or will be, partially incapacitated to perform labor? Answer. For rest of life.

"Question 3. What average amount per week has plaintiff been, or will the plaintiff in all probability be, able to earn in some suitable employment or business after the date of the accident and in the future? Answer. None."

The defendant says that it was error for the court to submit this case to the jury upon the three special questions, and con-

tends that the jury should, in addition, have been required to render a general verdict. To support its contention, the defendant cites section 295 of the Code of Civil Procedure (Gen. St. 1915, § 7195) and a number of decisions by this court in actions for the recovery of money. The abstract does not disclose that either party demanded a jury trial. That section of the Workmen's Compensation Act providing for a trial to determine the amount of compensation is section 5930 of the General Statutes of 1915, and in part reads:

"A workman's right to compensation under this act may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar, demand a jury trial. The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award."

The right to have the jury assess the amount of recovery in workmen's compensation cases is inconsistent with the powers of the trial judge under the statute quoted. So far as the abstract shows, the parties to this action waived a jury trial. The court must have called the jury for the purpose of having it find the facts on particular issues. Those facts were found. The court rendered judgment accordingly. No error is shown.

The judgment is affirmed. All the Justices concurring.

ALBACH et al. v. FRATERNAL AID UNION. (No. 20806.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MERGER OF BENEFICIAL SOCIETIES.

Chapter 210 of the Session Laws of 1913 (Gen. St. 1915, §§ 5418-5420) authorizes the consolidation or merger of fraternal beneficiary corporations under the supervision of the superintendent of insurance and with his approval.

2. INSURANCE — 706 — FRATERNAL BENEFICIARY ASSOCIATION — MERGER — ACTION FOR SEGREGATION — PARTY PLAINTIFF.

A fraternal insurance corporation of Kansas and a fraternal insurance corporation of Colorado effected a merger pursuant to the statutes of Kansas and Colorado under the supervision of the insurance departments of both states and with their approval. Certain members and insurance certificate holders of the Kansas corporation filed an action charging irregularities, fraud, etc., in bringing about the merger, praying for the appointment of a receiver, and for a segregation of the assets and affairs of the merged corporations, and to restore the independence of the Kansas corporation. *Held*, that where there is no powerful and peculiar equity involved, an action of such gravity can only be commenced in the name of the state on the relation of its responsible legal representative.

and that the plaintiffs as private individuals cannot maintain it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1840.]

Appeal from District Court, Wyandotte County.

Action by John Henry Albach and others against the Fraternal Aid Union. Demurrer to petition overruled, and defendant appeals. Reversed, and cause remanded, with instructions to sustain the demurrer to plaintiffs' petition.

George R. Allen, of Kansas City, for appellant. Arthur J. Stanley and Guy E. Stanley, both of Kansas City, for appellees.

DAWSON, J. This action was begun to challenge the legality of a merger of two defendant corporations, the Fraternal Aid Association, a Kansas corporation, and the Supreme Lodge of the Fraternal Union of America, a Colorado corporation. Both of these organizations were typical fraternal insurance associations, having a large membership enrolled in local bodies or lodges with the usual ritualistic ceremonies of instruction and discipline, and governed by Supreme Councils composed of the general officials and representatives chosen directly or indirectly from their corporate memberships. The five plaintiffs who seek to maintain the action are members of the Fraternal Aid Association, and hold fraternal insurance policies in that organization.

The merger was effected in 1914 according to an agreed plan, parts of which read:

"Whereas, the Fraternal Aid Association of Lawrence, Kansas, has about forty thousand (40,000) members and the Supreme Lodge of the Fraternal Union of America of Denver, Colorado, has about forty thousand (40,000) members, and that both of said organizations are fraternal beneficiary insurance associations duly organized under the laws of said states and have a lodge system and representative form of government;

"And whereas, it is a self-evident proposition that the cost per capita of conducting the business and administering the affairs of a small association is proportionately greater than the cost per capita of conducting the business and administering the affairs of a larger one;

"And whereas, competition between fraternal beneficiary societies has caused the expense of procuring new members to be greatly increased, and the merger of two societies of the membership of the Fraternal Aid Association and Fraternal Union of America will make the combined societies more attractive to the general public, thus enabling them to better carry on promotion work;

"And whereas, a large saving in expenses of salaries, rent, clerk hire, stationery and advertising may be made and thus the aggregate cost of operating and conducting the business of said associations may be materially reduced and the growth of membership be more rapidly increased and promoted by merging and consolidating said organizations into one:

"Now, therefore, it is proposed by and with the supervision and approval of the superintendent of insurance of the state of Kansas and the insurance commissioner of the state of Colorado under the statutes of said states to merge and consolidate the Fraternal Aid Association and the Supreme Lodge of the Fraternal Union

of America and unite the membership of the Fraternal Aid Association and the membership of the Supreme Lodge of the Fraternal Union of America in accordance with the following plan, to wit: * * *

"The charter and articles of incorporation of the Supreme Lodge of the Fraternal Union of America when amended shall be the charter and articles of incorporation of the consolidated society, and it shall have and enjoy all of the benefits and privileges now possessed by the Fraternal Aid Association under its articles of incorporation, and shall have and enjoy all of the benefits and privileges now possessed by the Supreme Lodge of the Fraternal Union of America under its articles of incorporation. * * *

"Fourth. The membership of the Fraternal Aid Association shall, on the adoption of this contract, as provided herein, and its approval by the insurance departments of Kansas and Colorado, ipso facto become members of the Fraternal Aid Union, and be entitled to all the rights, privileges and benefits of the membership of the Fraternal Aid Union to the same extent and purpose as the present membership of the Fraternal Union of America are permitted to receive and enjoy, and shall pay the same rates of assessment, per capita tax and dues under the same conditions and be entitled to the same benefits as were provided by the certificates and laws of the Fraternal Aid Association in force at the date of the taking effect of this agreement. * * *

"Fourteenth. Provided, that all of the provisions of this contract relating to the rights, duties, benefits, privileges and burdens of the membership of the Fraternal Aid Association shall apply with equal force to the membership of the Supreme Lodge of the Fraternal Aid Union of America.

"Fifteenth. This agreement shall be and become in full force and effect only when it shall have received:

"1. The approval and indorsement of the superintendent of insurance of the state of Kansas and the insurance commissioner of the state of Colorado to the proposed plan.

"2. This agreement shall have received the approval and be adopted by the members of the General Council of the Fraternal Aid Association in accordance with the laws of Kansas, and by the Supreme Lodge of the Fraternal Union of America at a special session thereof, called for that purpose by at least the number of votes required by the statutes of the state of Colorado relating to merger and reinsurance of fraternal beneficiary societies."

Plaintiffs' petition recites all the pertinent facts, and alleges certain irregularities in bringing about this merger; that large sums of the Colorado corporation were expended to accomplish it; that the members of the Kansas corporation were not apprised of the details of the merger, and that certain matters pertaining thereto were fraudulently kept secret; that it was not effected in conformity to the by-laws of the order; that the merger is a bad bargain for the Kansas corporation; and that the result will be an increase in the insurance rates to the membership, including the plaintiffs. The prayer is for a receiver of the property of the Kansas corporation, that he be authorized to conduct its business, collect the membership dues and assessments, that an accounting be had with the Colorado corporation and the affairs of the merged corporations be disentangled, and that the Kansas corporation be restored to its independence, etc. The defendant, the Fraternal Aid Union, which is

the amended corporate name of the merged corporations, filed a demurrer to this petition, setting up the usual grounds, "no legal capacity to sue, no cause of action stated," etc. To obtain a decision of this court, the cause was halted below on the trial court's ruling on the demurrer and appealed.

[1] This merger was effected pursuant to chapter 210 of the Session Laws of Kansas of 1913 (Gen. Stat. 1915, §§ 5418-5420), which provides for the consolidation or merger of fraternal beneficiary societies, subject to the approval of the superintendent of insurance. In specific terms the act provides that such merger may be effected with a similar lawful corporation of another state. Colorado's legislation is to the same general effect. 3 Colorado Statutes Annotated (Morrison & De Soto's Edition) § 31600. There is no infirmity in such legislation. Const. of Kansas, art. 12, § 1; Atchison, C. & P. R. Co. v. County of Phillips, 25 Kan. 261; C., K. & W. Rd. Co. v. Com'rs of Stafford County, 36 Kan. 121, 12 Pac. 593; H. & S. Rd. Co. v. Com'rs of Kingman County, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401, 30 Am. St. Rep. 273; West v. Bank, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385; Illinois Life Ins. Co. v. Tully, 174 Fed. 355, 98 C. C. A. 259; Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Hale v. Cheshire Railroad, 161 Mass. 443, 37 N. E. 307; 10 Cyc. 288, 293; 22 Cyc. 1403, 1419; 29 Cyc. 22; Noyes on Intercorporate Relations, §§ 43, 101; 7 R. C. L. §§ 131-135.

[2] The appellants contend that the plaintiffs have no right to maintain this action. It is familiar law that unless there is specific statutory authority authorizing a private person to challenge the regularity of official or corporate action, or unless such person suffers some peculiar injury thereby, he cannot maintain such action. In certain matters relating to the imposition of taxes (Gen. Stat. 1915, § 7163 [Code Civ. Proc. § 265]), and to abate nuisances (Gen. Stat. 1915, § 5525), such special statutory authority has been granted.

The general rule is that the legality of corporation action or of the exercise of corporate powers can only be questioned in a direct proceeding in the name of the state by a public officer authorized to represent the state in court. Thus in an early case (Miller v. Town of Palermo, 12 Kan. 14) certain private citizens, who resided on a tract of land which some of their fellow inhabitants had undertaken more or less regularly to erect into a municipality, brought an action challenging the validity of the projected corporation. The defendant trustees of the town demurred on the ground that the plaintiffs had no legal capacity to sue in the action. The court sustained the demurrer, and on appeal this court, speaking by Mr. Justice Brewer, said:

"Can private individuals, having no other interest than that of citizens, residents and tax-

payers of a supposed municipal corporation, maintain an action of quo warranto in their own names against such corporation, or must such action be brought in the name of the state, and by the Attorney General, or the county attorney? The district court decided that the action must be in the name of the state, and in that opinion we concur. This court has had occasion in two or three cases to consider under what circumstances grievances of a public character can be investigated at the suit of a private individual, and the rule has been thus laid down: 'If the injury is one that peculiarly affects a person, he has his right of action; if it affects the whole community alike, their remedy is by proceedings by the state, through its appointed agencies.' Craft v. Jackson County, 5 Kan. 521. That case was one of an application for an injunction to restrain the issue of some county warrants; but the rule thus enunciated is of general application. It was followed by this court in two mandamus cases: Bobbett v. Dresher, 10 Kan. 9; Turner v. Jefferson County Com'rs, 10 Kan. 16. And we see no reason why it should not be applied to cases like the one at bar. The reasons for the rule are as imperative in this as in any class of cases. * * * The plaintiffs here show no interest adverse to the corporation defendant peculiar to themselves, or different from those of the community in general. Hence if they are authorized to maintain this action, any taxpayer and citizen of that community can summon the corporation into court to try the validity of its existence, and that too when the state which created the corporation is content to let it live." 12 Kan. 16, 17.

In McMillen v. Butler, 15 Kan. 63, 64, 65, which was an action begun by a private citizen, "resident, elector, and taxpayer," to enjoin public officers from moving their offices to a newly chosen county seat, this court said:

"It is difficult to understand upon what principle it is supposed that this action may be maintained. There is no statute authorizing such an action; and we do not think that it can be maintained under any general principles of law or equity. * * * The plaintiff is not a public officer, prosecuting for the benefit of the public; and he does not show that he has any special or private interest in the subject-matter of the action which calls for any special interposition of the courts of justice for his particular benefit. Merely being a resident, a citizen, an elector, or a taxpayer, or all combined, does not authorize a private individual to summon the public officers into the courts of justice to answer for their official conduct. Bridge Co. v. Wyandotte County, 10 Kan. 326, 331, and cases there cited; Miller v. Town of Palermo, 12 Kan. 14. His interest must be private and special in order to invoke the special intervention of the courts in his favor."

This doctrine runs through all the later Kansas cases: In re Short, Petitioner, 47 Kan. 250, 27 Pac. 1005; A., T. & S. F. Rd. Co. v. Com'rs of Sumner County, 51 Kan. 617, 33 Pac. 312; State v. Shufford, 77 Kan. 263, 267, and citations, 94 Pac. 137; 10 Cyc. 256-261.

That the Legislature was awake to the gravity of permitting fraternal insurance organizations to be subjected to injudicious or ill-founded lawsuits attacking their corporate structure or conduct is evidenced by the precautions taken in the statute vesting in the superintendent of insurance supervisory powers over them, and while broad and suf-

ficient powers are vested in that officer and in the Attorney General (Gen. Stat. 1915, § 5413) to insure correct corporate conduct on the part of these institutions, other litigiously disposed persons are largely forbidden to meddle with them. The statute in part reads:

"No injunction shall be granted by any court in this state against any association authorized to do business under this act, except upon application of the Attorney General, at the request of the superintendent of insurance."

The wisdom of this legislation is obvious. Where the rights of many thousands of members and beneficiaries are involved, as in this case, where the public officers authorized and charged with the duty of supervising their corporate conduct and of scrutinizing their financial affairs have approved what has been undertaken and consummated, where the assets have been commingled and the fraternal structure and internal economy of the associations have been readjusted to their new conditions, where neither the state of Kansas nor the state of Colorado has seen fit to question what has been done pursuant to their respective laws and pursuant to their official supervision, a private citizen would need to present a case showing some powerful and special equity on his side before he should be permitted to raise a judicial inquiry touching their corporate conduct.

In the facts alleged and the relief prayed for in this action, the proceeding in effect is quo warranto. Except in most unusual cases, such an action can only be maintained in the name of the state by its proper legal representative, the Attorney General, or, perhaps, by the county attorney. And even if so maintained, the relief to be given is to some extent discretionary with the court. *City of Topeka v. Water Co.*, 58 Kan. 349, 353, 49 Pac. 79. Where, as most likely in the case at bar, the result would be to wreck an institution that is doing a beneficial and humanitarian work notwithstanding some possible defects in its financial or economic structure, the state's responsible legal representative should consider well whether such action should be instituted (*State v. Bowden*, 80 Kan. 49, 56, 57, 101 Pac. 654), and the court would consider with profound solicitude whether the remedy prayed for was not worse than the evil complained of. At all events, it is clear that the plaintiffs cannot maintain this action. The petition did not state a cause of action redressable at the instance of the plaintiffs in their individual capacity. 31 Cyc. 296.

The exhaustive brief for the answering defendant, the Fraternal Aid Union, which is the appellant here, covers many matters which need not be considered.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to plaintiffs' petition. All the Justices concurring.

SALINA NORTHERN R. CO. v. ALLISON.
(No. 20642)*

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. EMINENT DOMAIN §186 — RAILROAD RIGHT OF WAY—NOTICE—STATUTES.

In condemning land for the right of way of a railroad, the notice authorized by section 2192 of the General Statutes of 1915 is sufficient, even though no map or profile has been filed, or notice given as required by sections 2330 and 2331, following *Missouri River, F. S. & G. R. Co. v. Shepard*, 9 Kan. 647.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 500-504.]

2. EMINENT DOMAIN §181—CONDEMNATION PROCEEDING—NOTICE—RIGHTS OF LESSEE.

The notice provided for by section 2192 of the General Statutes of 1915 binds the lessee of the real property condemned, although no compensation is given to him, following *C. K. & W. R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. 779.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 488, 490-492.]

3. EMINENT DOMAIN §181—CONDEMNATION PROCEEDING—NOTICE—RIGHTS OF LESSEE.

Such a notice is binding on the lessee, even though he is in the open and notorious possession of the real property.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 488, 490-492.]

Appeal from District Court, Saline County.

Proceeding by the Salina Northern Railroad Company against H. H. Allison. Judgment awarding plaintiff possession of certain real property condemned for plaintiff's right of way purposes, and defendant appeals. Affirmed.

J. H. Wilson and Knittle & Knittle, all of Salina, for appellant. David Ritchie, of Salina, for appellee.

MARSHALL, J. The defendant appeals from a judgment rendered against him, awarding the plaintiff possession of certain real property which had been condemned for the use of the plaintiff for railroad right of way purposes.

The defendant was in possession of the real property under a lease from the owner for one year, renewable from year to year at the defendant's option.

[1] 1. The defendant contends that the condemnation proceedings were void because he had no notice thereof. Notice was published as required by section 2192 of the General Statutes of 1915 for the required length of time. The defendant's specific objection is that the designation of the route of the plaintiff's right of way was so indefinite and uncertain that it gave the defendant no notice that his property would be appropriated. So much of the notice as is material for the consideration of this question is as follows:

"Notice is hereby given that the Salina Northern Railroad Company * * * did * * * apply by petition * * * to Dallas Grover, judge of the thirtieth judicial district embrac-

ing Saline county, in the state of Kansas, representing that it proposed to construct and operate a railroad in and through Saline county, Kan., beginning at or near the west end of Elm street, in the city of Salina, Saline county, Kan., to and through the townships of Smoky Hill, Pleasant Valley, Ohio, and Glendale, in said Saline county, Kan., and that the general line, route, and right of way of said railroad shall be from said point above described to a point on the west line of said Glendale township south of the northwest corner of section No. 19 therein."

The real property occupied by the defendant was two blocks east and one-half block north of the west end of Elm street. The defendant attempted to prove that the chief engineer of the plaintiff had told him, at the time the engineers were surveying and laying out the plaintiff's right of way, that it would miss the defendant's property by at least 20 feet. That evidence was excluded. The condemnation commissioners assessed the damage to the property occupied by the defendant at \$25, and awarded it to the holder of the record title, the defendant's lessor. The plaintiff deposited the condemnation money with the county treasurer. The defendant testified that his improvements on the property were worth \$800. There was nothing in the answer nor in the evidence to indicate that the plaintiff had not located a route for the proposed railroad. The notice contained all that was required by the statute, and the objections presented by the defendant are disposed of by *Missouri River, F. S. & G. R. Co. v. Shepard*, 9 Kan. 647, where this court said:

"The notice authorized by section 86 of said chapter 23 [Gen. Stat. 1915, § 2192] is sufficient, even though no map, profile, or notice has been filed or given as required by sections 48 and 49 of said act. [Gen. Stat. 1915, §§ 2330, 2381.]" Syl. par. 2.

"But it is insisted that, unless the map and profile are filed before the notice is given, no owner can tell whether his land is to be taken, or whether he is one of the parties affected by the notice. The notice therefore, it is claimed, is so indefinite as to be void. The Legislature has provided for this notice. Whether we think a fuller and more specific one ought to be provided or not, we must sustain this unless it conflicts with the Constitution and is void. The line of the road must be located before application is made for a condemnation of the right of way. See section 81. The filing of the map and profile only makes more public what has been already previously done, though it may be noticed here that the location of the line does not involve the making of a profile. It is enough that the general course of the road through the county is indicated and settled." 9 Kan. 655.

[2] 2. The defendant insists that the condemnation proceedings were void because no compensation whatever was given to him. The answer to this contention is contained in *C., K. & W. R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. 779, where this court said:

"A failure of the condemnation commissioners to ascertain and designate the owners of the lots or parcels of land taken, or the fact that they name the wrong person as the probable owner in their report, whether it occurs from

ignorance or mistake, will not prevent the real owner of any lot or parcel of real estate or interest therein from availing himself of the remedy of appeal." Syl. par. 2.

See, also, *C., K. & W. R. Co. v. Anderson*, 42 Kan. 297, 301, 302, 21 Pac. 1059; *C., K. & N. Ry. Co. v. Griesser*, 48 Kan. 663, 666, 29 Pac. 1082; *Phipps v. Railway Co.*, 58 Kan. 142, 145, 48 Pac. 573; and *Brown County v. Burkhalter*, 75 Kan. 321, 324, 89 Pac. 655.

[3] 3. The defendant insists that he was in the open possession of the property at the time the condemnation proceedings were had. Under the decisions last cited, it is immaterial that the party complaining was in the open and notorious possession of the property condemned. The plaintiff was bound to take notice under the publication notice and protect his rights accordingly.

The judgment is affirmed. All the Justices concurring.

BOUTROSS et al. v. PALATINE INS. CO., LIMITED, OF LONDON, ENGLAND. SAME v. CONTINENTAL INS. CO. OF NEW YORK. SAME v. FIDELITY-PHENIX FIRE INS. CO. OF NEW YORK. (Nos. 20869, 20870, 20871.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. INSURANCE — §574(1)—FIRE INSURANCE—AWARD OF APPRAISERS—VALIDITY.

In an action upon an award of appraisers appointed to determine a loss under policies of fire insurance, *held*, upon the facts stated in the opinion, that the award was not void because the appraisers failed to comply strictly with a provision in the agreement of submission that "the appraisers shall then determine the actual cash value of each article and place the damages on each at a definite sum per yard, pound, bushel, or gallon, etc., as the case may require in their proper columns."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1430.]

2. INSURANCE — §572—FIRE INSURANCE—APPRAISAL AND AWARD.

The agreement for submission provided for the appointment of two appraisers who shall appoint an umpire, and that an award signed by any two of the three should be binding upon the parties. *Held*, that one of the appraisers could not by withdrawing from the appraisal prevent the other two from completing the award.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429.]

3. INSURANCE — §550 — FIRE INSURANCE — PROOFS OF LOSS—AMOUNT OF LOSS.

The amount claimed in the proof of loss will not preclude the assured from showing a greater loss, where the insurer has not been misled or induced to change its position by the statements in such preliminary proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1337, 1359-1361.]

4. APPEAL AND ERROR — §1046(3) — INSURANCE — §574(7) — HARMLESS ERROR — INSTRUCTIONS—BURDEN OF PROOF.

In such an action, where the answer pleads that the award was false and fraudulent, the defendant has the burden of proof, but, on the facts stated in the opinion, it is *held* that a ruling placing the burden of proof on the plaintiff

and depriving defendant of the right to open and close cannot be regarded as error which justifies a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4130; Insurance, Cent. Dig. §§ 1433, 1434.]

Appeal from District Court, Wyandotte County.

Separate actions by John A. Boutross and R. A. Boutross, partners doing business under the firm name and style of Boutross Bros. against the Palatine Insurance Company, Limited, of London, England, the Continental Insurance Company of New York, and the Fidelity-Phenix Fire Insurance Company of New York upon appraisal and award by arbitrators appointed under provisions of policies issued by the defendant companies. Judgment for plaintiffs, and the defendant companies appeal. Affirmed.

McAnany & Alden, of Kansas City, Kan., Geo. L. Boyle and L. C. Boyle, both of Kansas City, Mo., and T. M. Van Cleave and Samuel Maher, both of Kansas City, Kan., for appellants. Bruce Barnett, of Kansas City, Mo., J. K. Cubblison, of Kansas City, Kan., and Myron Witten, for appellees.

PORTER, J. These are actions upon an appraisal and award by arbitrators appointed under the provisions of insurance policies issued by the defendants covering loss by fire on plaintiff's stock of merchandise. The assured and the insurance companies having disagreed on the amount of loss, an agreement was signed submitting the loss to two appraisers, A. M. Smith being named by the assured, and H. W. Potts by the defendants. In accordance with the provision in the policies the two appraisers duly appointed John C. Dieckman as umpire. The petitions alleged these facts and that the appraisers and umpire had viewed the premises and estimated and appraised the loss, the appraisers submitting their differences to the umpire, and that on a certain day the loss was ascertained by a written award signed by Smith and the umpire, Dieckman. It set forth the amount awarded, and alleged that by reason thereof the defendants were liable for the proportionate amount of the loss sued for.

The answer alleged that the appraisal and estimate was false and fraudulent, and in equity and conscience should be set aside. The reply in each case was a general denial. The plaintiff recovered judgments, from which the insurance companies appeal.

The evidence tended to show that the two appraisers, on a certain Sunday, agreed upon an amount which they would award, but postponed signing the award because they thought it would be invalid if signed on Sunday, and therefore arranged to sign the papers the following day. Afterwards Smith, the appraiser representing the assured, refused to sign, stating as his reason that it

was his understanding the value of the goods totally destroyed was to be added to the amount agreed upon. Potts insisted the estimate included the entire loss. The plaintiff's evidence showed that after this disagreement Potts refused to return to the place or to have anything more to do with the appraisal, and that, after several attempts to induce him to proceed with the award, Smith notified him that if he did not appear in a reasonable time the umpire would be called in to complete the appraisal, and that Potts told him to do just as he pleased. Smith then called in the umpire who had been going over the stock while the appraisers were at work and had made himself familiar with the stock and the loss. The umpire and Smith completed the appraisal and signed the award. Potts was a witness and testified that after the conversation with Smith in which he was notified that the umpire would be called in to complete the appraisal he considered that he was out of it and dropped the matter.

[1] The first contention is that the award is absolutely void because of the failure to determine and report in separate columns the actual cash value of each article at a definite sum per yard, pound, bushel, or gallon. The agreement for submitting the loss to appraisers contained this provision:

"The appraisers shall then determine the actual cash value of each article and place the damages on each at a definite sum per yard, pound, bushel, or gallon, etc., as the case may require in their proper columns."

It is claimed no attempt was made to comply with this provision. On the other hand, it is said the defense was not pleaded, and that the evidence showed a substantial compliance with the provision except the requirement that each item be set out in separate columns. As to this, it is claimed the printed blank furnished by the insurance companies and upon which the appraisal was intended to be made did not contain the "proper columns" referred to in the agreement for setting down the items of damage in detail. The failure to comply in every particular with this provision as to procedure would not of itself render the appraisal void. Besides, it was required only in so far as deemed necessary by the appraisers. If in good faith they had made their award and wholly ignored the provision, an answer to an action on the award alleging in general terms that the award was false and fraudulent would not raise the issue. The answer did not plead the failure of the appraisers to comply with this provision. Moreover, if it had, the evidence would not justify a court in setting aside the appraisal on that ground. Besides, the evidence tended to show that as to something like 25 lots of the merchandise Smith and Potts substantially complied with the provision requiring them to determine the actual cash value at a definite sum per yard, etc., and that Dieckman, the

umpire, substantially followed the requirement in appraising the portion of the stock not totally destroyed. The award is prima facie conclusive between the assured and the insurance companies as to all matters submitted to the appraisers. *Insurance Co. v. Payne*, 57 Kan. 291, 46 Pac. 815.

Another ground upon which it is claimed the award is void is that the appraisers allowed \$1,600 for that portion of the stock totally destroyed, although the umpire and appraisers "neither asked nor received any statement or evidence of the character or value of the goods wholly destroyed." In two of the cases the question appears to have been gone into quite thoroughly, and the umpire and appraiser who made the award testified they examined remnants or pieces of goods found in the ashes, were shown inventory bills and invoices of the stock, and made their estimate from these. Some of the stock, although included in the portion totally destroyed as to value, was not entirely consumed.

The burden rested upon defendant in each case to show that the award was false and fraudulent. In the two cases where the evidence established the manner in which the value of the goods totally destroyed was arrived at, the claim that the appraisers neither called for nor received any evidence upon the subject was disproved. In the one case where no evidence was offered on this question the prima facie effect of the award must be held sufficient.

[2] It is claimed that the award is void because one appraiser called in the umpire and in the absence of the other appraiser they made the award. It is insisted that the insurance companies had a right to a representative who would participate in all the steps leading to the award notwithstanding the provisions in the agreement that any two of the three may make the award. Cases are cited which go to the extent of holding that where one of the appraisers withdraws before a determination is reached the award is of no effect, but the cases are not in accord with the weight of authority or sound reason. In one case cited *Franklin v. Insurance Co.*, 70 N. H. 251, 47 Atl. 91, the agreement for submission did not contain the provision that after the umpire has been called in the award in writing of any two shall determine the loss. The companies were entitled to be represented by an appraiser they selected, but there was evidence showing the abandonment of the appraisal by Potts because of the failure of himself and Smith to agree upon the amount of the loss. The umpire had been appointed, had already acted in some matters where differences had arisen, and by the express provision in the policies and the agreement for submission an award by one of the appraisers acting with the umpire is binding upon the defendants. One ap-

praiser cannot by withdrawing from the appraisal prevent the other two from completing the award. 19 Cyc. 878.

[3] While plaintiff's proof of loss offered by defendants might have been admitted in evidence, since it stated the amount of the loss at a sum less than that found by the appraisers, we think the exclusion of it was not prejudicial. If it had been admitted, there was not sufficient evidence to sustain the claim of a fraudulent award. The amount claimed in the preliminary proof of loss submitted as a condition precedent and in compliance with one of the conditions in the policy did not preclude the assured from showing a greater loss, unless the insurer was misled by, or changed its position in reliance on, the statements in the proof of loss, and there was no claim to this effect. 19 Cyc. 854.

[4] The answer in each case alleged that the award was false and fraudulent and admitted the other allegations in the petition. The defendant had the burden of proof. The court therefore erred in ruling to the contrary and in denying defendant the right to open and close. We have held that this error is seldom of sufficient importance to justify a reversal where both sides have every opportunity to introduce their testimony. *Bank v. Brechelsen*, 98 Kan. 193, 196, 157 Pac. 259, and cases cited in the opinion.

In view of the failure of the answers to allege that the amount of the award was greater than the actual loss, the failure to offer something substantial in the way of evidence to that effect, or to establish anything false or fraudulent in connection with the award, we think the ruling as to the burden of proof cannot be regarded as prejudicial error.

The judgment is affirmed. All the Justices concurring.

JENSEN v. FINNUP et al. (No. 20555.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

PUBLIC LANDS §54(5) — SCHOOL LANDS — AFFIDAVIT OF SETTLEMENT — DESCRIPTION.

In a proceeding by a settler under chapter 206 of the Laws of 1913 to acquire title to a tract of island land, the survey which he caused to be made, the affidavit of settlement which he filed, and the notice of the proceeding given by the county clerk described land other than that settled upon, and which constituted no part of an island, and no statement was made by the surveyor as to the nature and flow of the water in the stream which surrounds the lands sought to be appropriated. *Held*, that the noncompliance of the settler with the statutory requirements justified the court in dismissing the proceeding.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 159, 160.]

Appeal from District Court, Kearny County.

Robert T. Jensen filed an affidavit of settlement of designated island land, and sought to acquire title thereunder as school land, and E. G. Finnup and William Wonn filed a protest, alleging their ownership of the land, and the case was certified to the district court on appeal. From the denial of his application to amend the field notes of the survey, and the dismissal of the proceeding, Jensen appeals. Affirmed.

Edgar Foster, of Garden City, for appellant. E. R. Thorpe, of Lakin, and F. Robertson and Wm. H. Thompson, both of Kansas City, for appellees.

JOHNSTON, C. J. Robert T. Jensen settled upon what he designated as island land, and undertook to acquire title to it as school land, under the provisions of chapter 295 of the Laws of 1913. He had a survey made, but the field notes and report of the survey did not describe the land upon which settlement had been made. In his affidavit of settlement he described the land as it had been described in the field notes of the surveyor, which he filed with the affidavit. A bond was given by Jensen, conditioned that he would pay costs and damages which might be awarded against him, and in it the land was erroneously described. A notice was published by the county clerk, describing land which had not been settled upon, and which formed a part of the land originally surveyed by the government, and never had been island land. E. G. Finnup and William Wonn subsequently filed a protest, alleging, among other things, that they were the owners of the land claimed by Jensen, and that the state had no interest in it. They further alleged that the land had never been an island, but was contained within the original government survey, and they further alleged that, if any part of it was not so included, it had become a part of their land by reason of relictions and accretions along the south bank of the river. The case was then certified to the district court on appeal, and when called for trial the fact was brought out that the land which Jensen was claiming in his settlement had not been described in his affidavit of settlement, nor in the notes of the survey filed with it, nor even in the publication notice required by statute. The land described in these preliminary papers, upon which the proceeding was founded, described a tract of land some distance away from the river, and constituted a part of the original government survey, and was confessedly not open to settlement as school land. Jensen then, as plaintiff, asked leave to amend the field notes of the survey and the inaccurate descriptions, but the court denied the application and on motion of defendants dismissed the proceeding. This was done on the ground that the failure to describe the land in the notice and other papers rendered the proceeding invalid, and

deprived the court of jurisdiction and power to proceed farther.

The proceeding is statutory, and the steps by which a settler might acquire school land were prescribed by the Legislature in chapter 295 of the Laws of 1913, which was in force when this proceeding was begun, but which was repealed by chapter 322, p. 420, of the Laws of 1915. Under the act the settler might acquire land as against a protestant, who claimed an interest in it, or as against the state. Proceedings of this character are viewed with some strictness, and any one initiating a proceeding must closely conform to the statutory requirements. The statute required that an accurate survey be made, that the surveyor state the facts relating to the boundaries and location of the land, the character of the soil, and the nature and flow of the water in the stream surrounding the land, and that the plat and statement be filed with the affidavit of settlement. Instead of describing island land, which the plaintiff claimed, the surveyor gave the boundaries and location of a tract of land some distance from the river. The publication notice, as well as the personal notices, which are jurisdictional and very essential steps in a proceeding of this character, did not even mention the land sought to be appropriated. While the plat filed covered the tract claimed by plaintiff, it was nullified by the particular description given in the survey, affidavit, and notice. There was no attempt to comply with the provision requiring a statement as to the nature and flow of the water in the stream around the land. In fact, the land which was described was not near the river, and had never been surrounded by the water of the stream. The failure to describe the land sought to be acquired in the survey and affidavit, the fact that it was not mentioned or described in the notices required by the statute, and the absence of any statement as to the nature and flow of the water in the streams surrounding the land, was so wide a departure from the statutory requirements as to render the proceeding absolutely void. *Wilson v. Zutavern*, 98 Kan. 315, 158 Pac. 231. It is a general rule that proceedings of this character must follow with some strictness the steps prescribed by the statute, and noncompliance with the requirements avoids the proceeding. *Com'rs of Wabaunsee Co. v. Muhlenbacker*, 18 Kan. 129; *State v. Budgett*, 35 Kan. 600, 11 Pac. 910; *Furniture Co. v. Spencer*, 59 Kan. 168, 52 Pac. 425.

The contention that the defendants waived or cured the invalidity by their appearance or protest cannot be upheld. There was an appearance by the defendants, which gave the court jurisdiction of their persons; but personal appearance in court did not supply the statutory steps, which were essential to be taken before the case reached the court. The initiatory proceedings were fatally defective, not open to amendment in court, and

no error was committed in dismissing the proceeding.

Judgment affirmed. All the Justices concurring.

In re MOSELEY'S ESTATE. STATE v. NAGLE. NAGLE v. STATE.
(Nos. 20748, 20860.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. TAXATION — 862 — INHERITANCE TAX LAWS—REPEAL—DUTY OF EXECUTOR.

The repeal of the inheritance tax act of 1909 (Laws 1909, c. 248; Gen. Stat. 1909, §§ 9285-9291) by chapter 330 of the Laws of 1913 did not relieve the executor of an estate nor the probate court of any unperformed duties imposed upon them by the act.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1677.]

2. STATES — 201—INHERITANCE TAX—RIGHTS—LACHES.

Rule followed that no inaction, procrastination, or delay on the part of public officers will prevent the state from recovering its due, nor bar the state's right thereto.

[Ed. Note.—For other cases, see States, Cent. Dig. § 193.]

3. STATES — 201—COLLECTION OF MONEYS—LIMITATIONS.

A statute requiring certain public officials within six months to commence proceedings to collect a sum of money due the state is a mere legislative direction to those officers; and it is not a statute of limitations in favor of the debtor, by the invocation of which he can defeat the state's claim.

[Ed. Note.—For other cases, see States, Cent. Dig. § 193.]

4. TAXATION — 890 — INHERITANCE TAX — NONPAYMENT—DISCHARGE OF EXECUTOR.

Where the inheritance tax under the act of 1909 was not paid by an executor of an estate having ample funds with which to pay the tax, an order of a probate court approving his final account and discharging the executor before he had paid the tax is invalid, and should be set aside on motion of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1711.]

5. STATUTES — 224 — REPEAL BY IMPLICATION.

Rule followed that older statutes must be read in the light of later legislative enactments, and are subordinated thereto and must be harmonized therewith. Otherwise the older statutes must give way to the later enactments and by implication are repealed thereby.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302, 306.]

Appeal from District Court, Stafford County.

From a judgment of the probate and district courts, overruling a motion to set aside the probate court's order finally discharging Paul R. Nagle, executor of the estate of T. W. Moseley, deceased, notwithstanding his failure to perform his duty under the inheritance tax law, the State appeals. Reversed, with instructions to the District Court.

Robert Garvin, of St. John, S. M. Brewster, Atty. Gen., and John L. Hunt, of Topeka, for the State. Paul R. Nagle, of St. John, for appellee.

DAWSON, J. The state appeals from a judgment of the probate and district courts of Stafford county overruling a motion to set aside the probate court's order finally discharging an executor notwithstanding he had failed to perform his duty under the inheritance tax law of 1909.

The pertinent circumstances may be briefly stated: In 1912, T. W. Moseley, a Stafford county citizen, died. By his will he left his property to his sister. The defendant, Paul Nagle, was appointed executor, and he qualified. In February, 1914, Nagle, who had discharged all the duties of his executorship except those prescribed by the inheritance tax act, received his final discharge. The omitted duties of the executor under the act of 1909 were to file an inventory and appraisal of the testator's estate within three months after his appointment (Gen. Stat. 1909, § 9276), and to provide the funds out of the estate or procure them from the heirs or legatees with which to pay the inheritance tax, and to pay that tax (Gen. Stat. 1909, § 9272), and the probate court was forbidden (Gen. Stat. 1909, § 9285) to allow and approve the executor's account and to finally discharge him until the tax was paid.

[1] The executor was discharged on February 7, 1914, after the inheritance tax act of 1909 was repealed by chapter 30 of the Laws of 1913. But the repeal of that statute did not affect the state's right to the tax, nor did it relieve the executor and the probate court from their duties imposed by the act of 1909. Gen. Stat. 1909, § 9087; Gen. Stat. 1915, § 10973; State ex rel. v. Railway Co., 99 Kan. 831, 163 Pac. 157.

[2, 3] The state was not estopped to demand the payment of the tax, notwithstanding the delay of the state's prosecuting officers in commencing proceedings to collect it. Nor is it of any present consequence that the county attorney in some collateral or independent private litigation, as a private lawyer or otherwise, was fully apprised of the matters here involved. The provision in the statute (section 22) that the county attorney or the Attorney General shall commence proceedings for the collection of the tax "within six months after the same becomes payable" is a statutory direction to those officers—nothing more. *Howe v. Howe*, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626. Their compliance or noncompliance therewith is no concern of the defendant as a litigant, although as a free citizen of a free state he may say or do anything proper in fair criticism of what he honestly considers to be negligence of duty on the part of public officers.

In the absence of positive statutes clearly covering the subject, no inaction, procrastination, or delay on the part of public officials is ever permitted to prejudice the rights of the state. *State v. School District*, 34 Kan. 237, 8 Pac. 208; *State v. Dixon*, 90 Kan. 594, 135 Pac. 568, 47 L. R. A. (N. S.) 905; *State ex rel. v. Gerhards*, 99 Kan. 462, 162 Pac. 1149; *Pulaski County v. State*, 42 Ark. 118; *Dement et al. v. Rokker et al.*, 126 Ill. 174, 19 N. E. 33; *Terre Haute, etc., R. Co. v. State ex rel.*, 159 Ind. 438, 65 N. E. 401; *Haehnlen v. Commonwealth*, 13 Pa. 617, 53 Am. Dec. 502; *State v. Mayor, etc., of City of Columbia* (Tenn. Ch. App.) 52 S. W. 511.

In the early case of *United States v. Kirkpatrick*, 9 Wheat. 724, 735-737, 6 L. Ed. 199, in which it was urged that sureties on the official bond of a federal collector of revenues were discharged because of delay in bringing an action on the bond, the Supreme Court, speaking by Mr. Justice Story, said:

"Then, as to the point of laches, we are of opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained as law. The general principle is that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. * * * It is admitted that mere laches, unaccompanied with fraud forms no discharge of a contract of this nature between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government—a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said that the laws require that settlements should be made at short and stated periods, and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. * * * Without going more at large into this question, we are of opinion that the mere laches of the public officers constitutes no ground of discharge in the present case."

In *People v. Brown et al.*, 67 Ill. 435, 438, it is said:

"It is a familiar doctrine that the state is not embraced within the statute of limitations, unless specially named, and by analogy would not fall within the doctrine of estoppel. Its rights, revenues, and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues, and property from injury and loss by the negligence of public officers forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not

be affected by the negligence or even willfulness of any one of its officials."

In *Josselyn v. Stone & Matthews*, 28 Miss. 753, 763, the rule is thus stated:

"It is a universally recognized rule that no laches is to be imputed to the state and against her; that no time runs so as to bar her rights. This is a great principle of public policy, intended to secure the rights and property of the public against loss or injury by the negligence of public officers and agents. And upon the same reason it is the settled doctrine that the general words of a statute do not include the state, or affect her rights, unless she be specially named, or it be clear and indisputable from the act that it was intended to include the state. *People v. Gilbert*, 18 Johns. (N. Y.) 228; *United States v. Hoar*, 2 Mason, 314 [Fed. Cas. No. 15,373]; *Inhabitants of State of Maryland v. Bank of Maryland*, 6 Gill & J. 205-226 [26 Am. Dec. 561]. * * * The rights of the state are simply unaffected by such statutes, and of this all the world are bound to take notice."

In *State ex rel. Lott v. Brewer*, 64 Ala. 287, it was declared:

"Estoppels against the state cannot be favored. They * * * cannot arise from the laches of its officers; not on the notion of extraordinary prerogative, but upon a great public policy. *U. S. v. Kirkpatrick*, 9 Wheat. 735 [6 L. Ed. 199]."

[4] Since the statute forbade the approval of the executor's final account, and therefore necessarily forbade his final discharge until the inheritance tax was paid, the order of the probate court discharging him was not binding on the state. *Attorney General v. Stone*, 209 Mass. 186, 192, 95 N. E. 895; *Attorney General v. Rafferty*, 209 Mass. 321, 95 N. E. 747.

[5] We note the various older statutes and decisions cited by appellee touching procedure and practice in the probate court, relating to the administration and settlement of estates, governing executors, etc. These provisions are all subordinated to the later enactments of the Legislature—subordinated to the last expression of the legislative will—and must be harmonized therewith. Wherever older enactments cannot be harmonized with later enactments, the latter supersede, repeal, or supplant them.

It is suggested that the procedure which the state has pursued to have this matter corrected and to recover its due is irregular; that it should have been done in some other way. It would not help the executor, nor conserve the estate of Moseley, if some more formal and elaborated proceeding had been instituted against the executor, the probate court, Paul Nagle individually, and the beneficiary. There were various avenues of procedure open to the state, which it might have pursued to recover its due, and, if one had failed, it might still try another. Indeed, the state's officials are bound to exhaust all the legal remedies available before their efforts to collect this sum due the state may be discontinued. The method looking toward that end adopted here was simple, practical, and inexpensive, and it must be held that the

probate court should have sustained the state's motion, and this cause is reversed, with instructions to the district court to make the proper order to the probate court, directing it to set aside its former judgment on the state's motion, and to set aside its order discharging the executor. All the Justices concurring.

NELSON et al. v. SCHOOL DIST. NO. 3
et al. (No. 21165.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. EMINENT DOMAIN §169 — SCHOOLHOUSE SITE—RECORD OF ORDER—STATUTE.

Under section 9409, Gen. St. 1915, a record of a school board meeting, showing an order by the board describing certain land and declaring that the appropriation of such land is necessary for the purposes of a schoolhouse site and playgrounds, is sufficient to authorize a proceeding for the condemnation of the land, where it appears that a survey of the land has been made and a plat has been filed with the clerk.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461.]

2. EMINENT DOMAIN §169 — SCHOOLHOUSE SITE—CONDEMNATION—STATUTE.

Where a school district, in which is situated a city of the third class, has voted to change its schoolhouse site under section 8915, Gen. St. 1915, the school board may then proceed, under sections 9408-9414, Gen. St. 1915, to condemn the new site.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461.]

3. EMINENT DOMAIN §58 — SCHOOLHOUSE SITE—CONDEMNATION—AREA OF LAND.

A school board, acting under sections 9408-9414, Gen. St. 1915, may condemn more than 1½ acres for a schoolhouse site and playgrounds.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160.]

4. EMINENT DOMAIN §170 — SCHOOLHOUSE SITE—ATTEMPT TO PURCHASE.

Where land has been selected for a schoolhouse site, it is not necessary for the school board to try to purchase the land at a reasonable price or procure it by donation or otherwise, before instituting condemnation proceedings, if the owner of the land refuses to convey or donate the land to the school district.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 462-467.]

Appeal from District Court, Ottawa County.

Action by E. H. Nelson and another for an injunction against School District No. 3 and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Burch, Litowich & Royce, of Salina, for appellants. F. D. Boyce, of Minneapolis, Kan., A. E. Crane, of Atchison, R. F. Hayden, of Topeka, Oscar Raines, of Oskaloosa, and Robert S. Helzer, of Osage City, for appellees.

MARSHALL, J. In this action, the plaintiffs seek to enjoin the defendants from condemning 4½ acres of the plaintiffs' land for

a schoolhouse site and playgrounds. Bennington, a city of the third class, is situated in the school district. Judgment was rendered in favor of the defendants, and the plaintiffs appeal.

[1] 1. The defendants proceeded under sections 9408-9414 of the General Statutes of 1915. The records of the school district show that the land sought to be appropriated was selected for a schoolhouse site by a special district meeting on March 4, 1916. These records also show that the school board, at a meeting held on March 8th, made an order declaring that the appropriation of the land in controversy was necessary for the purpose of a schoolhouse site and playgrounds. The land selected was described in the record of the meeting of the school board, and a plat appears to have been filed.

Objecting to the legality of the proceedings by which the schoolhouse site was changed, the plaintiffs insist that the board abandoned the vote concerning the selection of the new site, and proceeded under the order made by the board on March 8, 1916, which order declared that the appropriation of the land in controversy was necessary for the purpose of a schoolhouse site and playgrounds. The plaintiffs insist that this record was insufficient because there is nothing in the statute under which the board was proceeding (section 9409 of the General Statutes of 1915) which permits the board to act in that manner, or to appropriate land under the order made. The statute provides that the school board shall make an order declaring that the appropriation of such land is necessary, and setting forth for what purposes the same is to be used. The order declared that:

"The appropriation of the land herein described is necessary for the purpose of a schoolhouse site and playgrounds."

The order follows the statute literally. The plaintiffs' criticism is that the record of the school board does not show that the board deemed it necessary that the land be appropriated. The opening statement of the statute reads:

"Whenever it shall be deemed necessary by any school district," etc.

The statute does not require that the school board make a record stating that the board deems it necessary to appropriate the land. The school board did all that was necessary under the statute.

[2] 2. The plaintiffs argue that the proceedings authorizing the change of the schoolhouse site were illegal and did not follow the statute authorizing the change. The plaintiffs do not point out wherein the proceedings were illegal, or wherein they did not follow the statute. An examination of the record of the proceedings as introduced in evidence and as set out in the pleadings fails to disclose any substantial irregularity in the proceedings. Under *Stevenson v. Shawnee County*, 98 Kan. 671, 159 Pac. 5, the findings of

the district board concerning the result of the election are binding and conclusive on the plaintiffs, in the absence of fraud. No fraud on the part of the school board was alleged or proved.

[3] 3. The plaintiffs contend that the defendants were proceeding under sections 8913, 8915, and 8917 of the General Statutes of 1915, and that, under these statutes, not more than $1\frac{1}{2}$ acres can be condemned for a schoolhouse site. The specific declaration of the school board is that it was proceeding under "sections 110 and 111, of article 2 of the 1915 school laws of the state of Kansas, being section 7860 of the General Statutes of 1909." Sections 110 and 111 of article 2 of the school laws are sections 9408 and 9409 of the General Statutes of 1915. The order made by the school board complies with section 9409. The entire condemnation proceeding of the school board appears to have been had under sections 9408-9414 of the General Statutes of 1915.

The plaintiffs invoke the principle of statutory construction that statutes in pari materia must be construed together, and therefore argue that the school board, although proceeding under section 9409, cannot condemn more than $1\frac{1}{2}$ acres of land, as is provided by section 8917. The last-named section applies to school districts and boards of education of cities of the second class. Sections 9408-9414 apply to county high schools, to boards of education of cities of the first and second classes, and to school districts in which are located cities of the third class, and prescribes a complete general law for the condemnation of lands for schoolhouse sites and for playgrounds. Section 8917 was enacted in 1874 and amended in 1885. That statute says nothing about playgrounds. Sections 9408-9414 were enacted in 1909, and constitute chapter 86 of the Laws of 1909, the repealing section of which is as follows:

"That section 3, chapter 122, Laws of 1874, as amended by section 1, chapter 174, Laws of 1885, so far as the same relate to cities of the second class, and all other acts or parts of acts in conflict herewith, are hereby repealed." Gen. Stat. 1915, § 9414.

The old statute stands as to school districts in which there is not a city of the third class. There would be no difficulty in construing the new act, were it not for its repealing clause. The old statute is expressly repealed as to cities of the second class. They must proceed under the new statute. As to them, there is no limitation on the amount of land that can be condemned for a schoolhouse site or for playgrounds. When a school district proceeds under the new statute, it must proceed the same as a city of the second class; it has the same rights and powers and is subjected to the same restrictions as such cities. If such a city may condemn more than $1\frac{1}{2}$ acres of land, a school district may do the same. By any

other construction, the statute would permit cities to condemn the amount of land necessary and prohibit school districts from doing the same, although both act under the same statute. Such a construction would render the act nugatory as to school districts. So far as school districts in which are located cities of the third class are concerned, there is room for both laws to operate, and such districts may proceed under either of the statutes. If they proceed under the old statute, they cannot condemn more than $1\frac{1}{2}$ acres of land; if they proceed under the new statute, they can condemn the amount deemed necessary.

[4] 4. The plaintiffs make another objection to the proceedings. They insist that the school board sought to appropriate this land without trying to purchase it at a reasonable price or to procure it by donation or otherwise. The evidence shows that the plaintiffs stated positively that they would not sell the land unless compelled so to do. Invoking the principle often announced in the law of tender—that where it is useless to make a tender none is required—it was not necessary for the defendants to attempt to purchase this land or to secure it by donation or otherwise, before instituting condemnation proceedings.

The judgment of the district court is affirmed. All the Justices concurring.

BRIGHAM v. UNION TRACTION CO.* (No. 20090.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

CARRIERS §318(1)—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

The evidence considered, and held insufficient to establish actionable negligence on the part of an interurban railway company toward a passenger who was injured by coming in contact with a trolley pole at the side of the track, while riding on the bottom step of a car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

Appeal from District Court, Montgomery County.

Action by Arthur Brigham, by Cella Brigham, his mother and next friend, against the Union Traction Company. Judgment for defendant, on sustaining demurrer to plaintiff's evidence, and plaintiff appeals. Affirmed.

Hal R. Clark, of Independence, for appellant. Chester Stevens, of Independence, and J. J. Jones, of Chanute, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained by a passenger on an electric interurban car by coming in contact with a trolley pole at the side of the track. A demurrer to the plaintiff's evidence was sustained, and he appeals.

The plaintiff boarded the car at the interurban station in Independence for the purpose of attending a Fourth of July celebration at Cherryvale. The entrance of the car was at the rear and on the right side. The rear of the car was inclosed, except that the windows were not in. There were handholds on each side of the steps, two in number. The plaintiff took a position on the lower step, facing the inside of the car, and while riding there was struck by the trolley pole and injured. The charges of negligence contained in the petition were that the track was not kept in proper condition, that the plaintiff was not afforded a safe place in which to ride, and that the defendant, knowing the plaintiff was in a position of peril, propelled its car forward to the inevitable catastrophe. At the conclusion of the plaintiff's evidence the petition was amended to include a charge of negligence in maintaining the trolley pole too near the track.

There was no evidence to sustain the charge that the track was out of repair. Witnesses testified that the car swayed from side to side and dipped and rocked. A witness who stood, not inside the car, but on the second step and who was facing outward, said he had to hold with one hand to stand up. It required no witnesses to inform the court that the lateral motion of an interurban car is limited absolutely by the flanges on the wheels, and the list of a car, caused by even considerable difference in level of the rails, computed mathematically, is comparatively inconsiderable, although it may disturb the equilibrium of a standing passenger. There was no contention that the plaintiff was pitched outward by the swaying of the car at the time he was injured. There was no evidence that the motion of the car was unusual or extraordinary at the time the plaintiff was injured. There was no evidence that the car leaned toward the trolley pole when opposite the pole. There was no evidence that the track was not level at that point.

There was no evidence that the trolley pole was negligently placed too near the track. One witness said the pole was from 6 to 15 inches closer to the track than the next five or six poles. This estimate, which on its face was a guess, proved nothing, because there was no evidence of the distance of the pole from the track, or evidence of what the minimum distance compatible with safety may be.

The principal contention was that the plaintiff was not afforded a safe place to ride because of the crowded condition of the car. The evidence was that the plaintiff, two companions, Edwards and Alexander, and an acquaintance, Burns, were the last to board the car before it left the station. The plaintiff and his companions were "feeling good and having a good time." The plaintiff and one of his companions went to the front of the car and asked admission there, which

the conductor denied, and then went to the rear and boarded the car. Edwards reached the platform; Alexander stood on the second step. Burns and the plaintiff stood on the bottom step. After the car had proceeded some distance, and before the plaintiff was injured, Burns climbed back on the bumper. The evidence contains many statements that the car was crowded, that the platform was badly crowded, that it looked impossible to get on, and that the car was so crowded that the plaintiff and his friends could not get on the platform. The undisputed evidence of the plaintiff and of Alexander was that there was room in the forward end of the car. The plaintiff testified as follows:

"Q. Why did you want to get up in the front end of the car?"

"A. Why, I thought we would just get up there; there was some friends up there I knew; I don't recollect their names at present."

"Q. Was there room in there for you?"

"A. Yes, sir."

"Q. The reason you wanted to get in there was because you had friends and there was room for you to get in there?"

"A. Yes, sir."

Alexander testified that he did not know how much room there was in the front end of the car, but he did know that there was a good bit of standing room there. Besides this, after the car started on its journey it stopped at a street crossing and took aboard three more passengers, two women and a man, who secured safe places on the car without difficulty. The plaintiff and Burns alighted to allow these passengers to get on. There was no evidence that the plaintiff or either of his friends exerted any effort whatever to get inside the car, or even on the platform. Knowing of space in front, they made no request upon occupants of the platform to let them through, or used the slightest diligence to secure themselves from the peril of riding on the car steps. It is idle to contend that the car was overcrowded when the plaintiff reached it. Every person aboard had a safe place, and there was room for more in front. Likewise it is idle to contend that it was impossible for the plaintiff to get beyond the first step of the car, when he made no attempt to do so, indicated no desire to do so, and when he stepped down to allow three other passengers to enter the car. This is not a case of substantial conflict in the evidence, to be resolved by the jury. It is a case in which facts not controverted by any one and admitted by the plaintiff to be true preclude him from denying that he voluntarily chose to ride on the car step instead of inside the car.

The plaintiff cites many cases involving injuries suffered by persons on overcrowded street cars, but they need not be reviewed. For example, the case of *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754, is cited as a parallel case. In that case the facts were that a great con-

course of people assembled in the city of Topeka on the occasion of a sham battle at the fair grounds during a soldiers' reunion. As a car filled with people from the city approached the usual stopping place at the fair grounds, a crowd of people desiring to return to the city surged on the car and occupied the seats as fast as they were vacated. Higgs, who was crippled, was unable to secure a seat, although he had waited until probably 25 cars had started, hoping that he might do so. He took a position on the footboard of the car, which was an open one, and held to one of the posts which supported the roof of the car. He was accepted as a passenger and paid his fare. Many others occupied the footboards of the car, and on occasions when the capacity of the railway company was overtaxed it was the usage and practice to carry passengers on the footboards. While the car thus loaded was on a switch, the motorman propelled it so near to the intersection of the switch with the main line that a closed car passing on the main line squeezed Higgs against the post to which he was clinging and injured him. Because the car was handled in such a way as to imperil passengers on the footboards, it was held the railway company was guilty of negligence. Because of the usage and practice of the company to carry passengers on the footboards during rush times, it was held that Higgs was not guilty of contributory negligence. The distinction between the two cases is obvious.

There was no evidence that the conductor knew the plaintiff remained on the bottom step after the car left the interurban station or after the journey was resumed at the street crossing. Consequently there was no basis for a charge of wantonness on the part of the conductor in not preventing the plaintiff from riding on the car steps. The plaintiff cites the case of *Harbert v. Street Railway Co.*, 91 Kan. 605, 138 Pac. 641, 50 L. R. A. (N. S.) 850. The court regards the two cases as quite dissimilar.

Because actionable negligence on the part of the defendant was not established, the demurrer to the plaintiff's evidence was properly sustained, and the judgment of the district court is affirmed. All the Justices concurring.

HILL et al. v. SWEET et al. (No. 20842.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR § 82(3)—DECISIONS REVIEWABLE—SETTING ASIDE DEFAULT JUDGMENTS.

An order setting aside a judgment rendered by default upon service by publication and permitting defendants to answer in the action is not reviewable while the action is still pending in the district court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 379, 380, 414, 418, 421.]

Appeal from District Court, Douglas County.

Action by Irving Hill and others against Lou D. Sweet and others. From an order, plaintiffs appeal. Dismissed.

S. D. Bishop, of Lawrence, for appellants.
Fred S. Jackson, of Topeka, and Wm. H. Dickson, of Denver, Colo., for appellees.

PER CURIAM. This is an appeal from an order setting aside a judgment rendered by default upon service by publication, and permitting defendants to answer in the action. It has been repeatedly held that such an order is not one which can be reviewed while the action is still pending in the district court. *McCulloch v. Dodge*, 8 Kan. *476; *Flint v. Noyes*, 27 Kan. 351, 353; *List v. Jockheck*, 45 Kan. 349, 748, 27 Pac. 184; *Shurtleff v. Chase County*, 63 Kan. 645, 652, 66 Pac. 654; *Vall v. School District*, 86 Kan. 808, 811, 122 Pac. 885.

The appeal is dismissed.

ROLL v. MONARCH CEMENT CO.
(No. 21219.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. **MASTER AND SERVANT** § 408—**WORKMEN'S COMPENSATION**—**SPECIAL FINDINGS**—**CONSTRUCTION**.

In an action under the Workmen's Compensation Act, the jury returned an affirmative answer to the question whether the plaintiff was at the time of the trial totally incapacitated from performing labor, and a negative answer to the question whether he was at that time partially incapacitated. Held, that in accordance with the rule that special findings must be given such reasonable construction as will harmonize them with each other and with the general verdict, the latter answer should be interpreted to mean that the plaintiff was not partially incapacitated because he was still totally incapacitated.

2. **MASTER AND SERVANT** § 412—**WORKMEN'S COMPENSATION**—**SPECIAL FINDINGS**—**GENERAL VERDICT**—**HARMLESS ERROR**.

Where the amount of a general verdict is substantially what might be arrived at consistently with the special findings, and no motion for a new trial is filed, a reversal will not be ordered because of a slight discrepancy that might be the result of an inaccurate computation.

Appeal from District Court, Allen County.

Action by W. E. Roll, employé, against the Monarch Cement Company, employer. From a judgment based upon the allowance of \$2,249.52 as the total compensation under the Workmen's Compensation Act (Laws 1911, c. 218, Amend. Laws 1913, c. 216), the defendant employer appeals. Affirmed.

Sherman & Landon, of Kansas City, Mo., and Altes H. Campbell, of Iola, for appellant.
F. J. Oyler, of Iola, for appellee.

MASON, J. W. E. Roll was injured on May 26, 1915, while in the employ of the Monarch Cement Company, and recovered a

an judgment for \$1,838.39, under the en's Compensation Act, from which peal is taken. A payment of \$411.13 own, and the judgment was therefore upon the allowance of \$2,249.52 (the ant's brief says \$2,249.57) as the plain-tal compensation. A verdict was re-

December 1, 1916. A motion for a rial was filed on December 11th, but ithdrawn on December 23d. On De- r 13th the defendant filed a motion to ide the general verdict because it was sed on the evidence, and was inconsis- ith the special findings, and to enter ent upon the findings. The part of notion relating to the general verdict from its language be regarded as con- ing in itself a motion for a new trial, ; was filed too late to be given consid- m as such. The sole question present- therefore whether the trial court erred fusing to render a different judgment the special findings. They read:

- a) For what period of time, in months, has laintiff been totally incapacitated from per- g labor? Answer: 18 months.
- b) Is the plaintiff now totally incapacitated performing labor? Answer: Yes.
- c) If you answer the preceding question No. the affirmative then state whether such in- capacity is permanent. Answer: No.
- d) If you answer either of questions Nos. 2 in the negative, then state whether the tiff has been and now is partially incapaci- i from performing labor in some suitable ness or employment. Answer: No.
- e) What was the weekly average wage the ntiff was receiving for the 52 weeks prior to accident in which he was injured? Answer: 36.
- f) What average wage will plaintiff be most ably able to earn in some suitable business employment, since the injury? Answer: i't know."

l] 1. The defendant insists that the an- er to the fourth question amounts to a ling that at the time of the trial the plain- had fully recovered from the effects of , injury, and was no longer under any dis- ability whatever, and was consequently en- led to no allowance for any later period. is entirely obvious that the jury did not fact mean this, for they had just found at the plaintiff was still totally incapacitat- from performing labor. The findings must read as a whole, and given such reasona- e construction as will harmonize them with e general verdict and with each other. ansas City v. Slangstrom, 53 Kan. 431, 36 ac. 706. The interpretation of the fourth nding most readily suggested is that the ry meant to say that the plaintiff was ot partially incapacitated from performing bor because he was totally incapacitated. o construed the answer to the question was omewhat literal, but was not an unnatural ne in view of the distinction which was nec- ssarily present in the minds of the jury be- tween partial and total incapacity. This in- terpretation reconciles the second and fourth ndings, and does away with any necessary

conflict between the fourth finding and the general verdict.

[2] 2. The defendant asserts that the ver- dict is one that cannot be arrived at by any computation consistent with the findings. If this be true the error would seem to be one that could be corrected only by a motion for a new trial. But it is not true unless in the sense that the precise figures reached cannot be arrived at by data afforded by the find- ings. The parties agree that the jury allow- ed \$494.40 for permanent disability for 80 weeks, at \$6.18 a week, thus leaving \$1,755.- 12 to be accounted for, distributed in some way over the remainder of the 8-year period, or 334 weeks (no allowance being made for the first 2 weeks). The jury may have estimated that the plaintiff's total incapacity would last 237 weeks longer, and that for the re- maining 97 weeks, he would be able to earn something, but would not be fully restored to his former wage-earning capacity. In that situation they would properly allow fur- ther compensation at \$6.18 a week for 237 weeks, making \$1,464.66, and being unable to determine what amount he would be able to earn from that time on they would naturally allow the statutory minimum of \$3 a week for the remainder of the period, or 97 weeks, making \$291 additional. This would result in a total allowance of \$2,250.06, calling for a verdict of \$1,838.93, or 54 cents more than that actually returned. The difference might readily be accounted for by a slight error in computation, or by the inversion of the fig- ures representing the dimes and cents. The result may have been reached by some other process, but it is sufficient for present pur- poses that it could have been arrived at by any reasonable method consistent with the findings. To require a reversal upon the findings, where no motion for a new trial is presented, it is not enough that they do not compel the judgment rendered, or even that they are inconsistent with each other, they must be necessarily in conflict with it. Anderson v. Pierce, 62 Kan. 756, 64 Pac. 633; Sheat v. Lusk, 98 Kan. 614, 159 Pac. 407, L. R. A. 1916F, 1021.

It seems probable that in saying they did not know what average wage the plaintiff would be able to earn in some suitable em- ployment since the injury, the jury meant that they were not able to estimate what his earning capacity would be at such time in the future as his disability should be reduced from total to partial. That is a reasonable construction which would harmonize with the other findings. Possibly the finding might be held to mean that the plaintiff would not be able to earn anything. But in any event it does not require a construction that would vitiate the verdict. Mere indef- initeness would of course not have that effect.

The judgment is affirmed. All the Justices concurring.

REESE v. ABILES. (No. 20832.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE §44—CONDITION OF PREMISES—MERCHANT'S STOREROOM.

A merchant is bound to maintain his storeroom in a reasonably safe condition for customers who come into it for the purpose of transacting business with him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59.]

2. NEGLIGENCE §52 — CONDITION OF MERCHANT'S STOREROOM — LIABILITY AND DAMAGES.

The proprietor of a store is liable in damages to a customer who falls into an open stairway in the floor, which is partially obscured in semidarkness, caused by piles of merchandise stacked thereabout, when the customer went into the vicinity of the stairway to inspect certain shelf goods near by in response to a special invitation of the proprietor, who at the same time failed to give her a warning of the presence of the stairway.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 65.]

3. NEGLIGENCE §44, 70 — CONDITION OF PREMISES — MERCHANT'S STOREROOM — CONTRIBUTORY NEGLIGENCE.

The plaintiff was present in the defendant's store as a customer. Her attention was attracted to some goods on the shelves, and she talked with the defendant about them. He said: "Just step around there and look, and you may find what you want back there; if you do, pick it out and I will make the price right." The place indicated was dark, owing to stacks of goods near by. As the plaintiff walked in the direction indicated, she fell through an open stairway in the floor, partially obscured by the darkness, and was injured. *Held*, that under the circumstances the plaintiff was not guilty of contributory negligence, and that the defendant was negligent in failing to warn the plaintiff of the presence of the open stairway.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 59, 97.]

Appeal from District Court, Leavenworth County.

Action by Susan E. Reese against Julius Abiles. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Endres, of Leavenworth, and Harry Friedberg and J. Francis O'Sullivan, both of Kansas City, Mo., for appellant. J. J. Schenck, of Topeka, and A. E. Dempsey and Humphrey Biddle, both of Leavenworth, for appellee.

DAWSON, J. The plaintiff, while transacting business as a customer in the furniture store of the defendant in Leavenworth, fell down an open stairway in the floor and was injured. She brought an action for damages, and recovered judgment against the defendant. He appeals, contending that he was entitled to judgment on the jury's special findings. These read:

"Question 2. Could any person, whose eyesight was in reasonably good condition, and particularly plaintiff, have seen the stairway in question by merely looking toward the floor of said

storeroom, while approaching said stairway? Answer: Yes.

"Question 3. Does the jury find that the plaintiff and her daughters spent at least one hour, walking about the defendant's storeroom, just prior to the time that plaintiff met with the fall down the stairway, that resulted in her injury? Answer: Yes.

"Question 4. While the plaintiff and the daughters of plaintiff were walking about the defendant's store, for an hour or more, prior to the injury to the plaintiff, did the defendant accompany them, and assist the plaintiff as she walked from the balcony in said store after having gone there to look at a writing desk or other piece of furniture? Answer: Yes.

"Question 6. As the plaintiff went to the passageway leading to the top of the stairway, did she at once perceive that it was very dark therein? Answer: Yes.

"Question 7. If you answer question 6 in the affirmative, then state if, after entering said passageway, leading to the stairway in question, and realizing the darkness thereof, did the plaintiff stop to consider her surroundings, and did she continue on with her eyes fixed on some cooking utensils that were on a shelf on the west wall of said storeroom, over said stairway, at an elevation of about 4½ feet, or more, above the top of the stairway? Answer: Her mind was fixed on kitchen utensils, but she did not stop to consider her surroundings. * * *

"Question 9. State clearly, fully, and distinctly the negligence of which you find the defendant guilty, at the time of the alleged injury to the plaintiff. Answer: Defendant failed to notify the plaintiff of the presence of the stairway.

"Question 10. After said plaintiff entered said passageway leading to the top of the stairway, could she have seen said stairway by looking towards the floor and thus avoid injury to herself. Answer: No."

[1-3] The defendant contends that the case is governed by that principle of law which requires normal persons of mature age to exercise their faculties for their own protection before entering dark places or passageways with which they are unfamiliar, and that the jury's findings in response to questions 2, 6, and 7 show that the plaintiff was guilty of contributory negligence. We think not. The plaintiff had no reason to suppose there was a mantrap in the floor of the storeroom, obscured by the darkness caused by piles of goods stacked thereabout. The plaintiff's attention was attracted to some tinware and kitchen utensils on a shelf at one side of the storeroom, and she and the defendant had some conversation about these things. The defendant said to her:

"Just right around the end [of a pile of goods]; just step around in there and look, and you may find what you want back there; if you do, pick it out, and I will make the price right."

With such an invitation, and no warning of danger, it could not be said that the plaintiff was negligent in not looking toward the floor, and the invitation as given would be bound to lead the plaintiff to believe that no danger to her lurked in the semidarkness behind the stacks of goods. A merchant who invites customers into his establishment is bound to maintain his premises in a reasonably safe condition, and he is liable to those who without their own fault are injured by

his failure to so maintain them. If there is a dangerous place on his premises, he must safeguard those who come lawfully thereon by proper warning and otherwise. True it is that mature and normal persons must exercise their faculties for their own protection, but where they are lulled into security by the acts of one on whose premises they are lawfully present, they cannot, in all cases, be said to be guilty of negligence when an accident overtakes them. The responsibility of the owner or person in charge of the premises will vary according to the circumstances. Here we agree with the jury that the negligence of the defendant brought about the injury to the plaintiff. He should have warned her of danger when he invited her to step around into the semidarkness where the open stairway was located. But for his failure so to do the plaintiff would not have been injured.

Curiously enough, this precise question is new in Kansas, although *Lewis v. Shows Co.*, 98 Kan. 145, 157 Pac. 397, is somewhat analogous. But the pertinent principles of law have been thoroughly settled in other jurisdictions. *J. G. Christopher Co. v. Russell*, 63 Fla. 191, 58 South. 45, Ann. Cas. 1913C, 564, and note; *McDermott v. Sallaway*, 198 Mass. 517, 85 N. E. 422, 21 L. R. A. (N. S.) 456, and note; *Smith v. Johnson*, 219 Mass. 142, 106 N. E. 604, L. R. A. 1915F, 572, Ann. Cas. 1916D, 1234. In 2 *Cooley on Torts* (3d Ed.) 1258-1263, it is said:

"It has been stated on a preceding page that one is under no obligation to keep his premises in safe condition for the visits of trespassers. On the other hand, when he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. Many cases illustrate this rule. Thus individuals holding a fair and erecting structures for the purpose are liable for injuries to their patrons caused by the breaking down of these structures through such defects in construction as the exercise of proper care would have avoided. And, generally, where a person invites the public to a place or grounds for a fair or public exhibition of any kind, he is bound to use due care to protect those who come from injury, not only from defects in the premises, but also from other dangers arising from the use of the premises by himself or his licensees. * * * So one who keeps a bathing resort, to which the public are invited, must use due diligence to protect his patrons from injury from broken glass or dangerous holes. * * * A railroad company is liable to a hackman doing business with it, who steps without fault into a cavity negligently left by it in its platform, whereby he is injured. So a railroad company is liable to one who is injured in attempting to cross its track, invited to cross by a signal indicating that it is safe to do so, and to people who, coming to the station to welcome an arrival, are injured by the giving way of the platform. So a brewer is liable to one who, coming on his premises to do business with him, without fault of his own, falls through an unguarded trapdoor. And, generally, the keeper of a store or other place of business to which the

public are invited is bound to exercise due care to keep his premises and the approaches thereto in a reasonably safe condition, and will be liable for injuries sustained in consequence of a failure so to do."

The judgment is affirmed. All the Justices concurring.

RALPH v. BALL, et al. (No. 20578.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

INFANTS \S 31(1) — LIMITATION OF ACTIONS
 \S 44(6)—DEED—TIME IN WHICH TO DISAFFIRM.

The devisee in a will probated in 1894 was given real property, provided a life tenant under the will died without leaving issue surviving her. In April, 1898, the devisee, who was then a minor, executed a deed of the property to the life tenant, without consideration. In December, 1898, the devisee attained her majority. In April, 1900, the life tenant died without issue surviving her. In December, 1901, the devisee disaffirmed the deed. In July, 1914, she commenced an action to recover the property from the husband of the life tenant, who claimed adverse possession from April, 1898. *Held*, the action was not barred by either section 15 or section 16 of Code Civ. Proc. (Gen. St. 1915, \S 6905, 6906), and section 16 does not apply by analogy in determining whether or not the deed was disaffirmed within a reasonable time.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. \S 54; *Limitation of Actions*, Cent. Dig. \S 230.]

Appeal from District Court, Butler County.

Action for ejectment and for partition by Maude Ralph against Milo E. Ball and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hamilton & Leydig and Atkman & Atkman, all of El Dorado, for appellants. C. L. Harris, of El Dorado, for appellee.

BURCH, J. The action was one of ejectment and for partition. The plaintiff recovered, and the defendant appeals. The principal question involved is whether or not the action was barred by the statute of limitations.

Waltman F. Joseph died testate in March, 1894, leaving 24 living grandchildren, including Grace Ball, who was the defendant's wife, and the plaintiff. The will gave Grace Ball a life estate in the land in controversy, but provided that, should she survive the testator and then die without issue surviving her, the land should become the property of all the grandchildren, share and share alike. The will was duly probated in July, 1894. Grace Ball bore children, but none of them survived her. Her last child died in the winter of 1899, and she died on April 20, 1900. Grace Ball procured deeds from the grandchildren of the testator, who would take should she die without issue surviving her. The plaintiff gave her a deed, without consideration. There was evidence that the deed was executed in April, 1898. The notary's certificate of acknowledgment was at-

tached in September, 1898, and the deed was filed for record in July, 1899. The plaintiff did not attain her majority until December 9, 1898. At some time not earlier than December, 1901, and not later than February 20, 1902, the plaintiff disaffirmed the deed. Under the statute of descents and distributions, Grace Ball's property passed to her husband, the defendant, upon her death in April, 1900. The action was commenced on July 6, 1914.

The statute reads as follows:

"Actions for the recovery of real property, or for the determination of any adverse claim or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter: * * * Fourth. An action for the recovery of real property not hereinbefore provided for, within fifteen years." Civ. Code, § 15 (Gen. St. 1915, § 6906).

Whether or not the plaintiff would ever have an interest in the land depended on the contingency stated in the will. No estate conferring right of possession or right to partition vested in the plaintiff until Grace Ball's death. A cause of action to recover and partition the land did not accrue until the occurrence of that event. The action having been commenced within 15 years after the occurrence of that event, it was not barred.

The defendant claims the plaintiff had but two years after attaining majority in which to commence her action, because of section 16 of the Civil Code (Gen. St. 1915, § 6906), which reads as follows:

"Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed."

The plaintiff had no cause of action for recovery of this real property until March 20, 1900. The plaintiff was then of full age, and consequently the section does not apply. Besides this, section 16 extends instead of shortens the period within which an action may be brought by a person who was under disability at the time the cause of action accrued. See *Beeler v. Sims*, 98 Kan. 213, 216, 144 Pac. 237.

The defendant says that his wife and himself claimed and held adverse possession of the land from the time the plaintiff's deed was given in 1898, or for more than 16 years before the action was commenced. The plaintiff had no cause of action for recovery of the land until the contingency occurred in April, 1900, which gave her something to recover. Section 15, quoted above, conditions the remedy upon commencement of action within a prescribed period after the cause of action shall have accrued. Action was commenced within 15 years after the plaintiff's cause of action accrued.

The statute relating to disaffirmance of contracts by minors reads as follows:

"A minor is bound not only by contracts necessary, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract and remains within his control at any time after his attaining his majority." Gen. Stat. 1915, § 6358.

The plaintiff disaffirmed about the time she was 21 years old, the age of majority for females established by the Legislature in its 1917 session. The court found that she disaffirmed within a reasonable time. The question was one of fact, and the conduct of the trial court was abundantly sustained by the evidence, which need not be recited. The defendant says, however, that section 16 of the Civil Code, quoted above, should be taken as a guide in determining what is a reasonable time. Under the section invoked, one who, upon arriving at majority, possesses a previously accrued cause of action for recovery of real property, has two years within which to bring his action. In this instance the plaintiff did not know she could not know that she had any interest to be promoted by disaffirmance until the death of Grace Ball on April 20, 1900. If the section were to be applied by analogy, she should have two years after that time within which to disaffirm, and she acted within a shorter period. The section has no application, however, because the Legislature chose to limit the time within which disaffirmance may take place, not by counted years, but by reasonableness under all the circumstances. Circumstances may readily be imagined which would warrant disaffirmance five years, and more than five years, after majority.

The judgment of the district court is affirmed. All the Justices concurring.

MOREHEAD MFG. CO. v. WESTERN STRAW PRODUCTS CO. et al. (No. 20877.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

SALES — 267(6) — **PROVISION FOR RETURN — WAIVER — RECOVERY.**

The plaintiff sold a vacuum trap, "to be returned to us at our expense at the end of 60 days from date of invoice if it does not do its work properly, if installed as per our directions." Complaint of its failure to work was made within the 60 days, and for several months the plaintiff intended and attempted, but unsuccessfully, to make the trap work properly, thus in effect waiving return within the specified time. *Held*, that the plaintiff is not entitled to recover.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 816.]

Appeal from District Court, Reno County. Action by the Morehead Manufacturing Company against the Western Straw Products Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

sons & Simmons, of Hutchinson, for
nt. C. M. Williams and D. C. Martin-
th of Hutchinson, for appellees.

T, J. The Western Straw Products
ny bought of the plaintiff a vacuum
the contract reciting that the price,
was to be paid "60 days net from the
f invoice, or 2 per cent. for cash 10
from date of invoice. Machine to be
ed to us at our expense at the end of
s from date of invoice if it does not do
ork properly, if installed as per our
ions." The shipment was made March
13. This action was brought to re-
the purchase price. The plaintiff fail-
d appeals.

position is that the trap was sold on
val, and that when the purchaser let
0 days go by without returning it the
ase price became due, relying on *Fil-
o. v. Bottling Co.*, 89 Kan. 645, 132 Pac.

From the abstract, findings, and tran-
t, however, it appears that on May 5th,
h was well within the 60 days, the de-
ant wrote the plaintiff of trouble in the
ation of the machine and requested cer-
instructions or recommendations. On

9th the defendant's secretary wrote the
attf that the machine had failed to per-
its duties. On the 12th the plaintiff
te, acknowledging receipt of the letters
he 5th and 9th, and stating that the plain-
was awaiting the receipt of certain in-
nation. Early in June a representative of
plaintiff called and examined the trap

l claimed to have put it in workable con-
on. The defendant's manager testified
t after this visit the trap did not work
uccessfully, that the directions as to in-
lling the machinery and using certain
ghts were carried out, but that the trap
so ineffective that the machine could
rdly be run at all. The court found that
e purchaser put in certain valves as di-
cted, and that the trap's failure to work
is not due to the failure of the defendant

follow the instructions of the plaintiff in
e installation; that as late as November
h the plaintiff was still giving directions
to how to make the trap work properly,
ad that up to that time it was the purpose
ad intention of the plaintiff to continue ef-
orts to make it work properly, but that it
ld not work properly as warranted.

In the Filter Company Case a filter was
hipped, with the understanding that it was
o be returned within 35 days if the results
btained were not satisfactory. Within a
ew days after it was received the purchaser
rote that it was found upon examination
ot to be adapted to the purchaser's needs,
out that he would try to find a way in which
t could be used, and if successful would give
the machine a trial. Plaintiff immediately
rote, suggesting a certain sort of connection
to be used, and heard nothing further until
more than 60 days after the shipment, when

the defendant wrote that the filter was held
subject to the plaintiff's order. It was said
in the opinion that:

"The question of a reasonable time in which
to test the filter is therefore taken out of the
case by the express contract of the parties,
which fixed the time when the sale was to be-
come absolute if the filter had not been return-
ed." 89 Kan. 650, 132 Pac. 182.

Here the court expressly found that time
was not the essence of the contract, and that
the defendant did not waive its rights under
the warranty, on account of not returning the
machine, "owing to the correspondence and
negotiations that were taking place between
the parties." Indeed, it is difficult to see how
the plaintiff could stand on the letter of
a 60-day contract and its right to the return
of the trap within the time specified, after
having kept up a correspondence with the
purchaser through several months, showing
an intent on its part not to rely on the ques-
tion of time, but to cause the trap to work,
and thereby become entitled to the purchase
price. The facts bring the case somewhat
in line with *Implement Co. v. Haley*, 77 Kan.
72, 98 Pac. 579, and *Hull v. Manufacturing
Co.*, 92 Kan. 533, 141 Pac. 592. See, also,
Crabtree v. Potts, 108 Ill. App. 627; *Phelps
v. Whitaker*, 37 Mich. 72; *Mechem on Sales*,
§§ 657-661; *Telephone Co. v. Telephone Co.*,
83 Kan. 64, 109 Pac. 780.

"The effect of the use of the article may, how-
ever, be modified by the circumstances surround-
ing such use, as where the use is for the pur-
pose of trial, especially when the seller repre-
sents that the machine on trial can and will
be made to work properly." 35 Cyc. 259.

Counsel say:

"There is no evidence in the whole transac-
tion under consideration to indicate that this
was anything but a sale upon approval."

Their theory that at the expiration of the
60 days' time the sale became absolute would
doubtless be true, had there been no fur-
ther negotiations or recognition of the inabil-
ity of the machine to do its work, or attempt
or intention to make it work satisfactorily,
but in view of these elements, which entered
into the transaction, the conclusion of law
found by the trial court is correct. In all
these questions of sale an essential element is
the passing of the title. In a bargain on sale
and return the title passes, subject to being
divested on ascertaining that the thing sold
is not up to the contract quality. A sale on
approval means that the title will pass when
the thing bought is approved by the buyer.
In this case the title was expressly retained
by the seller and the language, "Machine to
be returned to us at our expense at the end
of 60 days, * * * if it does not do the
work properly, if installed as per our direc-
tions," is the same in effect as an express
warranty that, upon being so installed, it
would do the work properly. When the 60
days' time was up the defendant claimed, and
the court finds, that the trap had not done its
work properly, that the seller had been noti-
fied to that effect, and was attempting to

make the machine work as it should, which attempt and intent continued for a long time thereafter. The plaintiff was notified that the trap was subject to its order, no claim thereto being made by the defendant.

It is but natural that the seller of a machine, instead of relying upon the letter of his contract as to time, should prefer, as the plaintiff seems to have done, to waive the element of time and try to satisfy his customer before seeking to hold him for the purchase price. The plaintiff having attempted and failed in this case to make the trap work, no just complaint can arise because it was not paid for.

The judgment is affirmed. All the Justices concurring.

BENNETT v. MISSOURI PAC. RY. CO.*
(No. 20849.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. CARRIERS ⇨174—CARRIAGE OF GOODS — BREACH OF CONTRACT—LIABILITY.

A railroad company undertook by a stipulation in a bill of lading to carry grain to a certain point and there deliver it to another carrier by which it was to be transported to destination; but the company failed to transport and deliver the grain to the connecting carrier as it had agreed to do. It forwarded the grain in another way which occasioned loss to the shipper. *Held*, in an action brought by the shipper against the railroad company for breach of contract, that the company is liable for the loss resulting from its failure to comply with the agreement stipulated in the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 747-765.]

2. CARRIERS ⇨185(3)—CARRIAGE OF GOODS — BREACH OF CONTRACT—EVIDENCE.

The evidence is *held* to be sufficient to sustain the findings and judgment of the trial court.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 848-850.]

Mason, Porter, and Marshall, JJ., dissenting.

Appeal from District Court, Shawnee County.

Action by A. S. Bennett against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Waggener and J. M. Challiss, both of Atchison, and W. A. S. Bird, of Topeka, for appellant. E. S. Quinton, of Topeka, for appellee.

JOHNSTON, C. J. This was an action by A. S. Bennett against the Missouri Pacific Railway Company to recover damages arising from the breach of a contract for the shipment of grain. From the judgment in plaintiff's favor the defendant appeals.

It appears that plaintiff contracted to sell 19 cars of grain to the Loughry Bros. Milling & Grain Company to be shipped from various points in Kansas and delivered at Chicago, Ill., to the Panhandle Railway Company to

be carried by that company to Monticello, Ind. Upon delivery at Chicago, plaintiff was to recover 82½ cents a bushel for the wheat, less the freight from the point of shipment to Chicago. Instructions were given to the defendant to ship by way of Chicago, and there to deliver the shipment to the Panhandle Railroad, a notation to that effect appearing on the bills of lading. The shipment was not routed according to direction and contract, and it was never delivered to the Panhandle Railroad at Chicago. Before Loughry Bros. could obtain possession of the grain they were required to pay a higher charge than they would have had to pay under the routing contracted and Loughry Bros. in making their remittance to plaintiff retained therefrom the amount of the extra charges they had paid. Plaintiff brought this action to recover the amount lost by reason of the extra charge, on the ground that the defendant had converted the shipment by not delivering it according to instructions. The defendant admitted an indebtedness in the sum of \$238.70 on account of certain overcharges and tender of that amount was made. Further answering, it was alleged that the overcharges giving rise to the action were based upon certain milling in transit privileges provided by the Panhandle Railroad; that the plaintiff was not entitled to the benefits of such privileges, and was in no way injured by the loss of such privileges; that the Loughry Bros. Milling Company was not entitled to that privilege, as the conditions and regulations permitting its exercise had not been complied with, and that the deductions made by the milling company in their settlement with the plaintiff were unauthorized and illegal. It was further alleged that by virtue of the contract contained in the bill of lading of the defendant the latter was not responsible for the safe carriage or proper routing of the shipment after delivery by it to a connecting carrier. The trial court upheld the contentions of plaintiff and gave judgment against defendant for \$1,270.60.

[1] It is insisted by defendant that this is a companion of the case of McCullough v. Railway Co., 98 Kan. 710, 160 Pac. 214, and that the rule of that case was not followed by the trial court in this one. The present case was not brought to recover for the loss of the milling in transit privilege, nor was that privilege involved in the action brought by the plaintiff. His action was brought to recover damages for the breach of a contract by which the defendant undertook to deliver the wheat to another carrier in Chicago. Plaintiff had contracted with Loughry Bros. Milling & Grain Company that he would cause the wheat to be shipped and delivered to the Panhandle Railroad at Chicago, and he was to receive from the

milling company for the grain 82½ cents a bushel, less the freight from the point of shipment to Chicago, and the wheat was to be forwarded by the company to which it was delivered, from Chicago to Monticello, Ind. The forwarding of the grain from Chicago was not a matter of concern to the plaintiff, as his part in the performance was completed when delivery was made to the connecting carrier in Chicago. The matter of securing a milling in transit privilege in the transportation beyond Chicago was no part of his contract with defendant, and the plaintiff testified that he never heard nor knew of any milling in transit privilege until after his claim for damages had been presented to the defendant. His action is simply one to recover damages for breach of contract; for the failure of defendant to deliver the wheat to the carrier in Chicago as it had undertaken to do. The parties having agreed that the wheat was to be carried to Chicago and delivered to another carrier with directions that the latter should forward it to a particular point, the failure of the defendant to comply with the directions and undertaking made it liable for the resulting loss to the plaintiff. The defendant was not justified in shipping it in any other way and delivering it at another place, although the course taken and the delivery made may have seemed to it to have been more practicable than the one stipulated for in the contract of carriage. There was an averment in the answer and statements in the brief indicating that the wheat was delivered to the Wabash Railway Company at St. Louis, Mo., which company did not make a delivery at Chicago, but if this be the fact, it would not relieve the defendant of liability for a breach of the stipulation in the bill of lading even if its own road does not reach Chicago.

In *Goodrich v. Thompson*, 44 N. Y. 324, the carrier undertook to transport goods by a particular boat, but, instead of doing so, shipped them in another boat, and they were lost. It was decided that:

"A specific agreement to do an act in a certain manner is not satisfied by an attempt to do it in another and a failure to accomplish the object." 44 N. Y. 334.

It was further said in that case that:

"The forwarding of the goods by another steamer than that agreed upon without the assent of the plaintiffs, or any notice to them of their intention so to forward them, was clearly not an execution of the agreement the defendants entered into, and they were chargeable with the consequences of the unauthorized act." 44 N. Y. 334.

In *Kemendo v. Fruit Dispatch Co.*, 61 Tex. Civ. App. 631, 131 S. W. 73, the initial carrier delivered a shipment to another carrier than the one stipulated in the bill of lading which it had issued, and it was held that the wrongful act made the initial carrier liable as though for a conversion of the goods when

not delivered or when delivered in a damaged condition.

A case quite closely in point with this one is *Brown & Haywood Co. v. Pennsylvania Co.*, 63 Minn. 546, 65 N. W. 961. A carload of glass was delivered to the defendant company, and it issued a bill of lading under which the glass was to be shipped to Snohomish, in the state of Washington, by way of the Chicago, St. Paul & Kansas City Railroad and the Northern Pacific Railroad. Instead of delivering the glass as contracted, the defendant delivered it to the Union Pacific Railroad. The shipper had arranged with the Northern Pacific Railroad to stop the car at two points on the route where parts of the shipment were to be unloaded and delivered. As the glass had been shipped over the Union Pacific Railroad, this could not be done, and considerable loss resulted from the failure to follow the directions in making the delivery to a connecting carrier. It was held and in fact conceded that the act of the defendant in delivering the goods to a carrier other than the one agreed upon made itself liable as for a conversion. There was a contention that as the defendant had no knowledge of the contract with the Northern Pacific Railroad as to the distribution of the glass at different points on the way, the defendant was released from liability; that it was enough if the goods were delivered at Snohomish, the final destination in the shipment. In response to these claims the court said:

"The fallacy of counsel's position consists in assuming that there was, in fact, any contract between the plaintiff and defendant to carry the goods to Snohomish. Defendant made no such contract. It merely agreed to carry the goods over its own line, and deliver them to the next designated carrier, with proper directions for their further carriage. There its contract and its duties ended. But this contract, made with defendant, was not the whole of plaintiff's contract. It had made another contract with the Northern Pacific Railroad Company to distribute the goods at the three points aforesaid. It is true that defendant had no knowledge of the latter contract, but the latter contract did not concern defendant, or in any manner increase its liability, if it had rightfully performed its own contract; and we cannot see that plaintiff was under any obligation to inform defendant of a matter which did not concern it." 63 Minn. 550, 65 N. W. 962.

See, also, *Georgia Railroad Co. v. Cole & Co.*, 68 Ga. 623; *Johnson v. N. Y. Central R. Co.*, 33 N. Y. 610, 88 Am. Dec. 416; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Phila.*, etc., *R. Co. v. Beck*, 125 Pa. 620, 17 Atl. 505, 11 Am. St. Rep. 924.

So here, the defendant undertook to transport the goods to Chicago and deliver them to the Panhandle Railroad. There its contract with the plaintiff ended. If it had observed the obligation of its agreement, no liability to plaintiff would have been incurred. It is immaterial what arrangement the purchaser of the wheat had with the Panhandle Railroad Company. Whatever it may have been, it constituted no part of the contract between plaintiff and defendant. When

it failed to carry out the contract, and when it delivered the grain at a place other than that agreed upon, it became liable as for conversion, and is responsible for the loss occasioned to plaintiff by the violation of the contract.

[2] There is a challenge of the sufficiency of the proof of loss. Plaintiff offered testimony, enough at least to make a prima facie case, of the added charges that had to be paid in order to obtain possession of the wheat and of the loss occasioned by the breach of the contract. The defendant did not refute this evidence, but appeared to devote most of its attention to the loss of the milling in transit privilege and in showing that the plaintiff was not entitled to this privilege; but that privilege, as we have seen, is not involved in this action.

We find no error in the rulings of the trial court, and its judgment is therefore affirmed.

BURCH, WEST, and DAWSON, JJ., concur. MASON, PORTER, and MARSHALL, JJ., dissent.

SAUVAIN v. BATTELLE (No. 20623.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §405(6)—WORKMEN'S COMPENSATION ACT—EVIDENCE—DISABILITY FOR ONE YEAR.

The evidence examined, and held to support the findings.

2. MASTER AND SERVANT §385(1)—WORKMEN'S COMPENSATION ACT—TOTAL INCAPACITY—COMPENSATION.

On the theory of total incapacity as found, the conclusion of law as to the sum allowed was correct.

3. MASTER AND SERVANT §411 — WORKMEN'S COMPENSATION ACT—FINDINGS—INCAPACITY.

The cause was tried by the court, and the findings are convincing that the judgment rested on the theory of total incapacity. Held, that an expression in one of the findings indicating partial capacity only does not, in the situation presented by the record, work such inconsistency as to require reversal.

4. MASTER AND SERVANT §385(17)—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION—OTHER WORK.

Rule followed that a workman partially or totally incapacitated is not to be denied compensation on account of obtaining work even more remunerative, which he has the physical ability to do.

Appeal from District Court, Franklin County.

Action by William E. Sauvain against A. C. Battelle. Judgment for plaintiff awarding compensation in a certain amount, and defendant appeals. Affirmed.

Sherman & Landon, of Kansas City, Mo., and F. M. Harris, of Ottawa, for appellant. H. M. Funston, of Ottawa, for appellee.

WEST, J. The plaintiff, while working for the defendant in his car works, engaged in

rebuilding and repairing cars, fell from a scaffold and hurt his back. He sued for compensation, and recovered \$281, being \$312, for 52 weeks, at \$6 a week, less credit for payments, \$30.96. The defendant appeals, reciting 11 specifications of error, only 5 of which are presented in the brief, and only 2 of which have any merit. These have reference to the testimony in support of the findings and to the allowance made.

[1] The evidence shows clearly enough that the plaintiff received a severe wrench to his back, and the proof was abundantly sufficient to justify the court in finding, as it did, that it would be at least a year from the time he was injured before he could do hard work. Because some physicians, in addition to certain X-ray examinations, went through with mechanical series of tests and found good responses, and failed to find enough traumatic signs on the outside of the back to convince them of material injury to the inside, it is argued that his injury was imaginary; but the testimony of the plaintiff, three fellow workmen, the foreman of the car works, three physicians, and others convinced the trial court, and convinces us, that he was not feigning pain or inventing proof.

[2] Some time after the injury he secured employment as foreman of a section gang, his duties being that of boss and requiring no manual labor or much physical exertion. This was a job of uncertain duration, although while it lasted it was more remunerative than the work in which he got hurt. When injured, he was earning \$10.50 a week. In the fourth finding, after referring to plaintiff's temporary employment as foreman, the court said:

"However, as above stated, he can perform such work, although he cannot do a hard day's work at hard labor on account of his injuries, and it will be at least a year from the time of his injuries before he can do hard work. In his efforts to do the work of a section foreman he has suffered physical pain."

Then follows the conclusion of law:

"The plaintiff is entitled to recover in this case from the defendant the sum of \$281.00 and his costs, the above being the amount of compensation to which he would be entitled for one year. The court allows no interest, and does not discount the future payments, as the year will expire in about six weeks. The amount arrived at is as follows:

52 weeks at \$6.00.....	\$312.00
Credit by cash.....	30.96

\$281.00"

The statute (section 5905 of General Statutes of 1915) provides:

"Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to fifty per cent. of his average weekly earnings computed as provided in section 12, but in no case less than six dollars per week, nor more than fifteen dollars per week."

The section further prescribes that in case of partial incapacity the payments shall not

be less than 25 or more than 50 per cent. of the average weekly earnings, but in no case less than \$3 a week. At the time of his injury the plaintiff was engaged in hard manual labor. The court found that it would be at least a year before he could return to that kind of work, the meaning of which is that, while he might be able to get employment involving no hard manual labor, he would for at least a year be totally incapacitated from performing the kind of work he was doing when injured. Without attempting to estimate to what extent his partial incapacity might go beyond a year, the trial court let the matter end with the expiration of that time, and relieved the defendant from any further liability, and denied the plaintiff any further compensation.

[3] The trouble with this result arises from a statement in finding No. 2:

"The plaintiff was employed by the defendant to work at his car works on the first Monday of June, 1914, and was injured in the line of his employment on January 18, 1915. He was but partially disabled from performing manual labor. He was confined to his room for three weeks, a part of the time in bed. * * *

Plaintiff's counsel say in their brief that this expression means that the plaintiff was not totally disabled for the entire period fixed by the statute—eight years. One physician, testifying for the defendant, said:

"Prognosis as to injured backs is a pretty subject. He may have a stiff back five years, and he may have one for twenty."

The findings must be reconciled, if possible, and it is plain from the entire journal entry that the court believed and allowed for total incapacity for one year and awarded him compensation on that basis. It is quite apparent that he did not regard him as merely partially incapacitated for that length of time, although it may well have been believed that such partial incapacity might cover considerable time after the expiration of the year. Section 5906 provides that in case of partial incapacity the payments shall equal as nearly as possible 50 per cent. of the difference between the average earnings before the accident and the average amount which the workman is most probably able to earn in some suitable employment or business after the accident, subject to certain limitations. It will be observed that the court found that plaintiff had been employed as foreman at a salary of \$60 a month, which was considerably more than his former earnings, but that there was nothing found as to the length of time he might be employed; hence the court did not make, and does not appear to have been requested to make, any finding as to the probable earnings in some other suitable business or employment, and, had he done so, and taken the temporary earnings as foreman as a basis, he could not have allowed the plaintiff anything. The facts that an allowance was made for total incapacity, and an express finding of total incapacity for a year

was made, lead to the conclusion that the expression in finding No. 2 could not have been intended as contradictory to finding No. 4.

[4] It is settled that, when one is totally or partially incapacitated for hard manual labor, he is not to be denied compensation because he obtains employment even at better wages at a task which he is physically able to perform. *Galley v. Manufacturing Co.*, 98 Kan. 53, 157 Pac. 431; *Dennis v. Cafferty*, 99 Kan. 810, 163 Pac. 461.

The judgment is affirmed. All the Justices concurring.

ASH GROVE LIME & PORTLAND CEMENT CO. v. CHANUTE BRICK & TILE CO. (No. 20854.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MINES AND MINERALS ¶75—EXTENSION OF LEASE—EVIDENCE.

Where a mineral lease by its terms expires within a definite period unless oil or gas is discovered, in which event it is to be extended so long as either can be produced in paying quantities, the fact that after the expiration of the period named the lessor executed a deed purporting to be subject to the lease, and the lease itself was assigned, constitutes no evidence, in an action for rent, of the extension of the life of the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 200.]

2. MINES AND MINERALS ¶73½ — LEASE — RELEASE OF RECORD—EFFECT.

The fact that such a lease has not been released of record is no evidence of its being still in force; the matter not being affected by the statute requiring the lessee to discharge an oil and gas lease that has become forfeited.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 200.]

3. MINES AND MINERALS ¶73½ — POSSESSION OF LESSEE—PRESUMPTION.

The execution of an ordinary oil and gas lease creates no presumption of subsequent possession by the lessee.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 200.]

Appeal from District Court, Neosho County.

Action by the Ash Grove Lime & Portland Cement Company against the Chanutte Brick & Tile Company. Demurrer to plaintiff's evidence sustained, and it appeals. Affirmed.

Farrelly & Evans, of Chanute, for appellant. Jones & Allen, of Chanute, for appellee.

MASON, J. The Ash Grove Lime & Portland Cement Company, the owner of a tract of land containing 30.44 acres which had been conveyed to it by a deed reciting the existence of an oil and gas lease covering an 80-acre tract of which this formed a part, brought an action against the Chanute Brick & Tile Company as the assignee of such lease to recover the rent for nine years. A demur-

rer to the plaintiff's evidence was sustained, and it appeals.

The lease was executed on November 26, 1902, to W. E. Barker. On November 23, 1903, Barker assigned it to H. M. McIntosh. On November 30, 1906, McIntosh executed an assignment of the lease to William S. Oochrane, trustee, who on July 5, 1907, executed an assignment thereof to the defendant. No evidence was introduced excepting the deed to the plaintiff, the lease, and the various assignments referred to. The ruling sustaining the demurrer was based upon the proposition that prior to the purchase of the land by the plaintiff the lease had expired by its own terms, unless it had been extended by the discovery of oil and gas, and that no such discovery had been shown. So much of the lease as is material to the question presented reads as follows, the portions deemed of especial importance being italicized:

"The party of the first part, in consideration of one dollar, the receipt whereof is hereby acknowledged, and the covenants hereinafter contained on the part of the said party of the second part, does hereby lease unto the party of the second part the exclusive right for *three years from date hereof* to enter upon, operate for and procure oil and gas upon the following premises. * * * The party of the second part agrees to deliver to the party of the first part one-eighth of the oil realized from these premises, in tanks, at the wells, without cost, or pay the market price therefor in cash at the option of the first party. *If oil or gas be found on these premises, all rights, benefits and obligations, secured hereby, shall continue so long as either can be procured in paying quantities.* * * * Second party agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the premises, and pay all damages by reason of its operations. * * * In case no well for oil or gas be drilled on said premises within three years of date hereof, all rights and obligations secured under this contract shall cease: * * * Provided, however, that the second party shall have the right at any time to terminate this lease by surrendering this lease and paying one dollar consideration therefor, and shall thereafter be released from all obligations and liabilities under the same. * * * Rental of one dollar per acre, payable in advance semiannually, to continue until exceeded by royalty."

[1] 1. The obligation to pay rent was absolute for three years, but did not extend beyond that period unless oil or gas should be found, in which event it was to continue as

long as either could be procured in paying quantities. The plaintiff contends that the recital in its own deed making it subject to the lease, and the various assignments executed more than three years after the date of the lease, constitute some evidence that it was still in force; that they at least furnished a basis for a reasonable inference that oil and gas had been found in paying quantities. These documents might show that the parties supposed that the lease had, or might have, some vitality and effect, but we do not regard them as having a substantial tendency to show the existence of the conditions necessary to extend its life beyond the three-year period. It was incumbent upon the plaintiff to show affirmatively that oil or gas had been discovered, rather than upon the defendant to prove the negative. In the absence of such a showing the court properly sustained the demurrer.

[2] 2. The suggestion is made in the plaintiff's brief that if the lease was at an end the statute imposed upon the defendant the duty of releasing it upon the record. Stat. 1915, § 4902. The section cited relates to oil and gas leases that have "become defunct." That it is not intended to apply to a lease which has expired, but which may have been extended by certain conditions if they had arisen, seems apparent from the succeeding section, which provides that the record of an oil and gas lease shall imperceptibly notice of its continuance only for the definite period therein expressed, unless an affidavit is filed with the register of deeds showing the happening of the contingency effecting an extension. Section 4903. But in any event the failure to comply with the statute, without subjecting the lessee to a penalty, would not extend the duration of the lease.

[3] 3. Cases are cited to the effect that a lessee must pay rent so long as he holds possession, although the lease by its terms may be at an end. There was, however, no showing of possession on the part of the defendant, and the execution of a lease of this character creates no presumption of subsequent possession by the lessee.

The judgment is affirmed. All the Justices concurring.

TISS v. REAUME. (No. 20844.)
e Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

TRICITY \S 19(5)—ACTION FOR DEATH
DINGS—EVIDENCE.

usal to set aside certain findings com-
of held proper.

Note.—For other cases, see Electricity,
fig. \S 11.]

TRICITY \S 19(13)—ACTION FOR DEATH
DINGS—JUDGMENT.

refusal to render judgment for the do-
on the special findings was not error.

Note.—For other cases, see Electricity,
fig. \S 11.]

USAL OF REQUESTED INSTRUCTIONS.

e instructions given fully and correctly
l the law of the case, and the trial court
ted no error in the refusal of those re-
by the defendant.

REAL AND ERROR \S 1005(3)—VERDICT—
ROVAL—CONCLUSIVENESS.

e plaintiff's right to recover rested on the
stances shown; the defense, on the testi-
of one youthful witness naturally and
edly frightened by the tragedy out of
this case arose. Held, that the verdict,
was manifestly reached by force of the
stances shown, having been approved by
ial court, cannot be disturbed.

. Note.—For other cases, see Appeal and
, Cent. Dig. \S 3860-3876, 3949.]

ENIAL OF MOTION FOR NEW TRIAL.

o error appearing to have been committed
g the trial, the motion for a new trial
properly denied.

ter, J., dissenting.

peal from District Court, Ellsworth
ity.

tion by Sarah Curtiss against Emma L.
me, doing business under the name and
e of the People's Light & Ice Plant. Judg-
t for plaintiff, and defendant appeals.
med.

a E. Lloyd and N. F. Nourse, both of
worth, for appellant. Thomas L. Bond,
Salina, and Samuel E. Bartlett, of Ells-
th, for appellee.

VEST, J. The widow of John M. Curtiss
ught this action to recover for his death
used by contact with one of the defendant's
ctric wires. The essential charge was
at the defendant, who owns and operates
e electric light plant at Ellsworth, negli-
gently failed to protect and insulate the
res, and carelessly failed to guard them
ere they crossed the street and sidewalks
d to insulate and protect them at points
contact with trees and branches; that a
ire became burned, broken, and disconnect-
about 30 feet north of the sidewalk on
hich the deceased was walking and fell to
e ground along and upon the sidewalk, and
s he was passing he came in contact with
e wire, and thereby received a shock caus-
g his death. The answer alleged:

That John M. Curtiss was a laborer whose
uties had been near the electric lines, that he
well knew it was dangerous to touch or handle

the wires, "and, well knowing that he should
not touch said wire, the said John M. Curtiss
did, carelessly and negligently, or knowingly
and intentionally, touch, seize, and handle said
wire after it fell and after he had seen it fall,
and after and at the time he heard and should
have heard said loud buzzing and sizzling sound
which said wire made on account of emitting
electricity, and after and at the time he
saw said wire emitting electricity and
sparks. * * *

Thus the issue was a direct one between
death caused by the defendant's negligence
and death caused by the negligence of the
deceased himself. The jury found:

That Mr. Curtiss had been informed that the
wires were dangerous and that it would be fatal
to any one who took hold of them or touched
them; that he was told before the injury that
it would kill him or be very dangerous to get
tangled up in electric wires or handle them, and
to report in case he saw any down; that preced-
ing the injury his attention was called to the
wire burning in the tree or the branches; and
that he saw the wire burning in the tree.

"(5) Q. If you answer the preceding question
'Yes,' then did he see the wire fall to the
ground after he saw it burning in the tree? A.
Don't know.

"(6) Q. If you answer questions numbered 3
and 4 'Yes,' then state whether said Curtiss
remarked that the wire burning in the tree was
what caused the wire to break, and that it
would have to be fixed, or words to that effect.
A. Yes.

"(7) Q. If you answer questions numbered 4
and 5 'Yes,' then after seeing the wire fall and
making the remark that it would have to be
fixed, or words to that effect, did he pick up
the wire? A. No."

The defendant moved to strike out the
answer to finding No. 5, and also to strike
out the answer to finding No. 7, as being con-
trary to the evidence, which motions were
overruled. Motions for judgment on the find-
ings and for new trial were overruled, and
the defendant appeals.

[1, 2] The errors relied on in the brief are
the denial of motions for judgment and to
strike out findings 5 and 7, refusal to give
requested instructions, and refusal to grant
a new trial.

While the findings indicate considerable
knowledge of the situation by the deceased
before the shock was received, they contain
nothing substantiating the defendant's claim
of contributory negligence. Knowledge of the
danger of contact with electric wires and
knowledge that one of the company's wires
was emitting sparks in a tree near the walk
and the remark that the wire burning in the
tree was what caused it to break and that it
would have to be fixed fall far short of show-
ing that contact with the wires by the de-
ceased came about by his own procurement or
negligence. It was the theory of the defense
that Mr. Curtiss actually grasped the wire,
thereby causing his death, but this was ex-
pressly negated by the answer to question
No. 7. Hence the court did not err in refus-
ing to render judgment on the findings.

As to the assertion that the answer to find-
ing No. 5 was contrary to the evidence, the

record shows that Mr. Klingensmith, the county clerk, saw the deceased working in the afternoon on the north side of the street. The next time he saw him where the alley comes down from the north. He was lying down with his face up and in a dying condition. The wire "was wrapped around his hand, and ran across his arm, and across his breast and body." The body was lying with the head south and the feet on the sidewalk. The witness heard the buzzing sound, looked across the street, saw a blaze near the light pole on the north side of the street, went out of the west door of the courthouse, and, crossing the street to the blaze, there saw the man on the ground with his face up. This was about 2½ or 3 minutes after he first heard the buzzing sound. All the injuries, so far as the witness could see, were on the front part of the body, "and he had one hand wrapped with the electric wire. The shovel was on the left, in the left arm, and the handle extended right across the breast."

Dr. Mayer testified that the wire was down across the front of the body inside of the fingers of both hands, across the left arm, underneath and over the top of the right arm, up across the body, coming in contact with the chest, and from there it went on up towards the other wires above. The fingers of the right hand were burned down to the third phalange between the second and third joints, seared down that distance, and the left arm was burned almost in two, hanging by one tendon, and the right arm about the middle was burned down through the bony tissue. The chest was burned through the chest wall. The hand was burned from the inside. The hands were clenched over the wire and drawn up towards the breast. Alfred Obermowe, a boy about 14 years old, testified:

That he was with Mr. Curtiss, who was standing on the sidewalk and picking around in the grass with his shovel. "A. I went up and talked to him, and the wire fell, and he said something, and then he took hold of the wire and uttered a scream and fell over." "A. He said— Then the wire fell, and he said, 'That is what made the wire break, and it would have to be fixed.' Q. After he said that what did he do? A. He stooped over and took hold of it. Q. Then what happened? A. He took hold of it with one hand, and then with the other, and then he uttered a scream and fell over. Q. Tell the jury whether or not he had at that time any spade or shovel in his hand? A. He had a shovel in his hand, but as he took hold of the wire he leaned it against his arm."

The witness testified:

That he saw a wire burning in the tree and called the attention of the deceased to it, who could see it burning in the tree. "It hung a minute in the branches and then fell into the grass. It made quite a loud noise as it was sizzling in the grass. Q. Did you see the light of it burning when he picked it up in the grass? A. Yes, sir. Q. How much did it burn in the grass? A. I don't know if it burned in the grass, but I could see the sparks flying. Q. Was there anything to prevent Mr. Curtiss seeing the sparks flying? A. No, sir. Q. How long did you stay there before you went away,

after Mr. Curtiss took hold of the wire? A. I didn't stay there but a few seconds. Q. Were you frightened? A. Yes, sir. Q. Did you holler, or anything of that kind? A. No, sir."

From this testimony, which is substantially all upon this point, the jury might have believed that the deceased saw the wire fall to the ground after he saw it burning in the tree or that he did not. Their answer indicates that they were not satisfied from the evidence that he did. No request was made for a more definite answer, and it was not error to refuse to set aside the answer returned.

[3, 4] As to finding No. 7, the jury had to choose between the evidence of Alfred Obermowe and the facts and circumstances shown. If the boy was not mistaken through excitement or imperfect vision, and his version of the matter is to be accepted, then it is clear that the deceased not only grasped the wire, but grasped it with one hand and then grasped it again with the other hand. In other words, he stooped over (forward), took hold of the wire with one hand, and then took hold of it with the other, and then uttered a scream and fell over. It is plausibly argued that when stooping over forward and grasping so deadly a thing as a highly charged electric wire which must mean almost instantaneous death he would fall forward; yet the testimony seems all to the effect that he was found lying on his back. There is further pressed the seeming impossibility that one could grasp such a wire with one hand and have life and consciousness enough then to grasp it with the other hand unless the latter action was purely spasmodic or involuntary. From the occurrence as described by the witness or the situation as detailed by those who found and examined the body, the jury had to determine the fact. The circumstances seem to have had the greater convincing weight. *Roediger v. Railway Co.*, 95 Kan. 146, 147 Pac. 837. Dr. Mayer testified that upon his observation of the contact of the wire with the body Mr. Curtiss was unconscious instantaneously, and that death occurred in a minute or a minute and a half, and that his death occurred within a few feet of the place where his hands came in contact with the wire. The conclusion of the jury therefore that the deceased did not pick up the wire after seeing it fall and making the remark that it would have to be fixed could not be set aside save by the trial court's resolve to regard the circumstances less probative and convincing than the testimony of the boy who so fortunately escaped death and whose natural and admitted fright may have unconsciously affected his sight and memory; and it is not for us to say that the jury and the court were wrong in their deduction from the entire evidence, direct and circumstantial.

There was a considerable showing that

the deceased was not as much impressed with the danger of electric wires as other people are or as he should have been, and the defendant complains of the refusal of numerous requested instructions touching his duty to look out for himself in the presence of such wires, his knowledge and information as to their real character, and the effect of negligence on his part. But a careful perusal of the instructions given as well as those refused leads to the conviction that the matter was fairly explained to the jury by the charge given. Instructions 9, 11, 12, 13, and 15 sufficiently and correctly covered the matter of the defendant's contributory negligence.

[5] The facts surrounding the most regrettable affair are such that each party naturally and somewhat justifiably views the situation from her own standpoint and feels convinced that she ought to prevail. The issues were sharply drawn and fairly tried, and the jury under proper instructions reached a conclusion which met the approval of the trial court. Finding no material error in the progress of the litigation, the result must stand.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concurring. PORTER, J., dissenting.

RATLIFFE v. CEASE. (No. 20406.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

BROKERS \S 34, 65(2)—RIGHT TO COMMISSION—FRAUD—LIABILITY.

The plaintiff contracted with the defendant for \$100 to procure for her an exchange of her property for that of another and \$1,500 to boot. He arranged with the other party to pay the plaintiff \$500, and the defendant \$1,000, but reported to the defendant that \$1,000 was the most boot he could get such party to pay, assuring her that he was working for her interest. The defendant contracted to exchange for \$1,000. Before final delivery of the papers she learned that this party was to pay the plaintiff the \$500, but went ahead with the trade. The plaintiff sued for his commission of \$100. The defendant set up the fraud, and counterclaimed for \$500 damages. Held, that by his conduct the plaintiff lost all right to his commission, and became liable to the defendant for the \$500.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 26, 48.]

West, J., dissenting.

Appeal from District Court, Sedgwick County.

Action by C. T. Ratliffe against Bertha A. Cease, with counterclaim for damages. Judgment for defendant without damages, and she appeals. Remanded, with directions to render judgment for defendant for \$500.

Blake, Ayres & McCorkle, of Wichita, for appellant. P. Dudley Gardiner and H. C. Castor, both of Wichita, for appellee.

WEST, J. Briefly stated, the facts of this case are that the defendant employed the plaintiff to procure an exchange of her property for that of one T. J. Crook, and \$1,500 to boot. Crook was interviewed by the plaintiff, and agreed to pay the defendant \$1,000 boot, and to pay the plaintiff the other \$500. Plaintiff reported to his client that \$1,000 was the most he could get Crook to give. After assuring the defendant that he was acting for her best interests, she completed the transaction, and received the \$1,000; the plaintiff's services for acting as her agent to be \$100. After the contract had been entered into between the defendant and Crook, and after the papers had been deposited for final delivery upon completion of the preliminaries, she learned that the plaintiff was to receive \$500 from Crook, but nevertheless went ahead with the deal. Crook sued to recover his \$100. The defendant counterclaimed for \$500 damages for the fraudulent action of her agent. The jury found the facts as indicated, but did not allow her any damages. The defendant moved for judgment for \$500 on the findings, which was refused. Neither recovered anything except the defendant, who recovered her costs. The court and the jury left the parties where they found them. The defendant appeals. It goes without saying that the plaintiff by his conduct forfeited any right to remuneration. Had he been faithful to his client she would have received \$1,500 instead of \$1,000 in addition to the property.

When Mrs. Cease found out about the \$500 transaction between her agent and Mr. Crook, she was already under contract with the latter to exchange properties. It does not lie in the mouth of the plaintiff to say that it was her duty to repudiate the deal with Crook on account of the plaintiff's fraud. Jeffries v. Robbins, 68 Kan. 427, 71 Pac. 852; Kershaw v. Schafer, 88 Kan. 691, 129 Pac. 1137; Rinebarger v. Weesner, 91 Kan. 303, 137 Pac. 969; 2 C. J. \S 356, p. 697, and cases cited; 31 Cyc. 1434.

The plaintiff wronged the defendant out of \$500. If he had been honest with her she could and would have received \$1,500 instead of \$1,000 boot money. Whether or not he received this sum from the purchaser, and it seems that he did not, he caused the defendant to lose it, and is liable therefor.

The cause is therefore remanded, with directions to render judgment for the defendant for \$500.

JOHNSTON, C. J., and BURCH, MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring.

WEST, J. (dissenting). In the case chiefly relied on (Kershaw v. Schafer, 88 Kan. 691, 129 Pac. 1137), the defendant profited in a large amount by his own fraud. Such

were the facts in the other cases cited by the defendant. Our attention is called to no authority holding the plaintiff liable beyond the loss of his commission. When the defendant became fully advised that her vendee, instead of paying her the \$500, had agreed to pay it to her agent, she—

"wanted the deal to go through." "Q. You knew you had been swindled out of your \$500? A. We trusted to luck to get it; thought that maybe— Q. You still wanted the deal to go through? A. We were very anxious the deal to go through, or wouldn't have accepted the \$1,000. We hesitated a while; we didn't take it up on the \$1,000; I said, 'I couldn't do it,' yet after I talked of it a while, we thought maybe we had better do it. Q. After you found out you had been swindled out of \$500, you went on and got your contracts exchanged on July 1st? A. Yes, sir. Q. And accepted your \$1,000? A. Yes, sir. Q. A month after you found that out? A. Yes, sir."

As Crook made plaintiff his agent in fixing the terms of the trade, he could hardly have held Mrs. Cease to the contract had she desired to be released therefrom. It is not shown that her property would not have brought as good terms from some other purchaser as from Crook, and it is only by adding the machinations of the plaintiff to take advantage of his client to his success in finding a purchaser that it can be said that he caused the defendant the damage claimed. For the latter efforts he would have been entitled to his commission had they not been coupled with the disloyalty to his client. His entire part in the matter, however, left the defendant with her property without any indebtedness to him for commission, and with full knowledge of the situation she voluntarily carried out the deal with Crook on the terms which the plaintiff had negotiated as between the parties thereto, and she having in that sense lost nothing, and the plaintiff having gained nothing, the trial court correctly left the parties where it found them.

BROWN v. WALKER et al. (No. 20852.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MECHANICS' LIENS §=72—CONTRACT WITH OWNERS' AGENT—STATUTE.

The terms of the lease of a building considered, and held, the lessee was the agent of the owners for the alteration and repair of the building, within the meaning of the mechanic's lien statute (Gen. St. 1915, § 7557).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 86.]

2. MECHANICS' LIENS §=135—STATEMENT OF LIEN—SUFFICIENCY—STATUTE.

Mechanic's lien statements otherwise sufficient which named the owners, named the lessee as contractor, and named the persons who furnished labor and material for the alteration and repair of the building as claimants considered, and held to be sufficient to furnish the basis for mechanics' liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 200.]

3. MECHANICS' LIENS §=134—STATEMENT OF LIEN—SUFFICIENCY—STATUTE.

A mechanic's lien statement which named the owners and claimants and recited that the owners employed the lessee to make improvements on the property, and that the lessee, being in possession and control of the property, employed the claimant to furnish labor and material for the purpose, considered, and held to be sufficient to furnish the basis for a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 206.]

4. MECHANICS' LIENS §=135—STATEMENT OF LIEN—SUFFICIENCY—STATUTE.

A mechanic's lien statement naming the owners, naming the lessee as contractor, and naming the claimant considered, and held to be sufficient, although the statement used expressions indicating that the claimant was a sub-contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 200.]

5. MECHANICS' LIENS §=158—ACTION TO ENFORCE—LIEN STATEMENTS—AMENDMENT.

At the close of the evidence in an action to enforce the liens, amendments were properly allowed correcting informalities in the lien statements and conforming the pleadings to the amended statements, no changes being made in the names of the owners, the name of the contractor, or the names of the lien claimants.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278.]

Appeal from District Court, Sedgwick County.

Action by Elmer Brown to foreclose a mechanic's lien against J. Shannon Nave and T. Ried Zeigler, owners, in which J. Walker and other lien claimants were made parties defendant. Judgment of foreclosure, and the owners appeal. Affirmed.

E. V. Long, L. R. Fulton, R. S. Elder, and O. V. Ferguson, all of Wichita, for appellants. J. N. Haymaker, W. D. Jochems, and A. V. Roberts, all of Wichita, for appellees.

BURCH, J. The plaintiff sought to foreclose a mechanic's lien. Several other lien claimants were made parties defendant. The liens were sustained and foreclosed, and the owners of the property appeal. The two principal questions in the case are whether or not the person who contracted with the various lien claimants for labor and material was the agent of the owners and whether or not certain of the lien statements furnished sufficient foundations for liens.

[1] Nave and Zeigler were owners of the property. They leased the property to Sproul. The lease authorized Sproul to make two classes of improvements: First, certain special improvements in the basement of the building, involving the installation of toilets, bathtubs, and appendages, which were not to become a part of the building, but were to be the property of the tenant, removable at the end of the lease; second, general changes, improvements, and betterments. These improvements were to be made at the

tenant's own expense, but were not removable, and the lease provided:

That, should the property be sold, the tenant would surrender possession "after sixty days" notice in writing and the payment of one-half the amount expended on improvements or betterments in the way of plumbing, plastering, painting, papering and carpenter work, or hardware or other material used in repairing said building other than repairs or betterments to be made in the basement of said building as it now exists, the whole of said expense in this respect to be made by lessee not to exceed \$600."

Liens were claimed for labor and material furnished for improvements of the second class only.

The statute provides that any person who shall, under contract with the owner of land, or with the trustee, agent, husband, or wife of the owner, perform labor or furnish material for the erection, alteration, or repair of any building, structure, or improvement, shall have a lien for the amount due for such labor or material. Gen. Stat. 1915, § 7557. In this instance the tenant was the agent of the owners for the alteration and repair of their building, and was authorized to contract for labor and material for those purposes. *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608; *Lumber Co. v. Band Co.*, 89 Kan. 788, 132 Pac. 992.

[2-4] The lien statements were in various forms. Brown's statement named Nave and Zeigler as owners and named himself as claimant. The statement further recited that the owners employed Sproul to make improvements upon the property, and that Sproul, being in possession and control of the premises, employed the claimant to furnish lumber and material. Walker's statement named Nave and Zeigler as owners, Sproul as contractor, and Walker as claimant. The statement further recited that the claimant did, under contract with Sproul for the owner of the property, perform labor, etc. Rowland's statement was like Walker's. Turner's statement named Nave and Zeigler as owners, Sproul as contractor, and Turner as claimant. The statement, however, elsewhere referred to Turner as a subcontractor who, under subcontract with the contractor, furnished material, and a lien was claimed for Turner as subcontractor and claimant. The lien statements of other claimants are not criticized.

The statute relating to the contents of the lien statement to be filed by one furnishing labor or material under contract with the owner or his agent reads as follows:

"Any person claiming a lien as aforesaid shall file in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed and the items thereof, as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property subject to the lien, verified by affidavit." Gen. Stat. 1915, § 7558.

The statute relating to perfecting the lien of a subcontractor reads as follows:

"Any person who shall furnish any such material or perform such labor under a subcontract with the contractor * * * may obtain a lien upon such land from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor * * * by filing with the clerk of the district court of the county in which the land is situated within sixty days after the date upon which material was last furnished or labor last performed under such subcontract a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed; and by serving a notice in writing of the filing of such lien upon the owner of the land." Gen. Stat. 1915, § 7559.

When the lien claimant contracts with the owner, there are but two parties to the transaction and but two persons interested in the lien. There is no "contractor," in the ordinary business sense of the term, to be named in the lien statement. There are the owner and the claimant, and nobody else. Some force may be given to the requirement of section 7558 that the name of the contractor be stated when the claimant has dealt with the trustee, agent, husband, or wife of the owner. The owner's agent who contracted for the claimant's labor or material may well be regarded as a "contractor," and he may well be named in the lien statement as contractor. The statute, however, does not require any other designation, and the relation of trustee, agent, etc., need not be stated. The owner knows his agent. When the agent is named by name as having contracted for the claimant's material or labor, the owner has all the information necessary. At least he has all the information which the statute requires, and it is elementary law that nothing need be inserted in the lien statement which the statute does not require. This being true, the lien statements of Walker and Rowland were clearly sufficient. Brown's statement was sufficient because Nave and Zeigler were named as owners, Sproul was named as the person who employed Brown to furnish lumber and material, and the relation between Sproul and the owners was tolerably, although not accurately, described.

Turner conceived himself to be a subcontractor, and framed his statement accordingly. When the claimant is a subcontractor who contracts with the original contractor, the claimant is required by section 7559 to name the contractor. The owner knows his contractor, knows the nature of his relation with the contractor, knows the state of his accounts with the contractor, and can act accordingly. The statute does not require the claimant to describe himself as a subcontractor, or as other than the claimant who furnished material and labor to the person named as contractor. When the person contacting with the claimant for labor or material is named as contractor, the owner knows whether he was in fact a contractor

or was in fact the owner's alter ego. The true relation to the owner of the person named as contractor being known to the owner, the owner knows the true status of the claimant, and the surplus description of the claimant as subcontractor should be ignored. The result is that Turner's statement fulfilled every requirement essential to a lien under sections 7557 and 7558.

Under section 7559 the relation of original and subcontractor is important as a fact, because a subcontractor can have no lien unless that relation exists. Section 7559, however, does not require that the word "original" or other descriptive addition be inserted in connection with the designation of the contractor. In this respect the form of statement is identical with that prescribed by section 7558. Neither section requires that the capacity of the contractor, whether agent of the owner or original contractor with the owner, be stated. What the statute requires is that the name of the owner of the property, the name of the person who contracted for the material, and the name of the claimant who furnished the material shall be stated; and that which the statute does not require to be set out need not be set out. If the facts warrant a lien under sections 7557 and 7558, and the lien statement be formally sufficient under section 7558, the claimant's misconception of the true relation of the contractor to the owner and his wrong description of himself as subcontractor will not defeat his lien. The owner cannot be misled or prejudiced by the wrong description, and, the statute having been fulfilled in every respect, the lien is valid.

[5] At the close of the evidence the informalities of the lien statements were corrected by amendment, and the pleadings were amended accordingly. This was entirely proper. No change was made in the statement of the names of the owners, the name of the contractor, or the names of the lien claimants.

The argument that the lien statements were insufficient is extended to the pleadings setting them forth. The statements being sufficient, the pleadings stated causes of action.

The judgment of the district court is affirmed. All the Justices concurring.

GRIFFITH v. ATCHISON, T. & S. F. RY. CO. (No. 20647.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. RELEASE \S 58(6)—QUESTION FOR JURY.

The facts touching the settlement and satisfaction of a claim for damages by an injured railway passenger examined, and held to present a fair question for a jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. \S 114.]

2. CARRIERS \S 287(1)—PERSONAL INJURY—NEGLIGENCE—STATUTE.

Where a person is traveling on a freight train and it is necessary for him to walk between railroad tracks in a switchyard to change trains and to reach the caboose in which he is to continue his journey, it is not negligence for the yardmaster to direct him to go alone down through the switchyard at night.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1154, 1162.]

3. CARRIERS \S 318(8)—PERSONAL INJURY—NEGLIGENCE—EVIDENCE.

Where a person is walking between the tracks of a switchyard under the circumstances outlined in section 2 of the syllabus, and is injured by an engine coming up behind him, it is sufficient to sustain a jury's finding of the railway company's negligence when it is shown that the engine crew did not keep a sufficient lookout, and were not even aware of his presence, although he was carrying a lighted lantern as he met and passed close by the engine.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1313.]

Burch, Porter, and Dawson, JJ., dissenting.

Appeal from District Court, Wyandotte County.

Action by D. R. Griffith against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. David F. Carson, of Kansas City, and J. E. Crawford, of Eskridge, for appellee.

DAWSON, J. The plaintiff recovered judgment against the defendant for injuries sustained by him in the Santa Fé Railway switchyard at Atchison. He was en route from Hiawatha to Eskridge, traveling by a freight train on a shipper's pass and accompanying a carload of his live stock and household goods. He and his car journeyed to Atchison over the Missouri Pacific, where it was necessary to change to the Santa Fé. As the freight train which was to take him and his car to Eskridge was coming into the yards at Atchison from the east, about 10 o'clock at night, he was directed by the yardmaster to walk eastward between the track on which the freight train was approaching and another parallel track about 8 or 9 feet distant on the north. The purpose of sending the plaintiff in that direction was that he might reach the caboose in which he was to ride. As he walked eastward he passed an engine standing on the track at his left, and the freight train was moving westward on his right. The plaintiff was carrying a lantern, and was keeping some distance from the moving freight train passing him on his right, and he was somewhat too close to the track on his left, when, without any warning heard by the plaintiff, the engine which he had passed on his left was started eastward; it overtook and struck him, knocked him down, and dragged him for some distance. He was bruised severely and various-

ly. He was assisted into the caboose by the defendant's employes, and later taken to an Atchison hospital. Next day he came to the defendant's hospital in Topeka in company with the defendant's claim agent. There he signed certain papers, settling and releasing any claim which he might have against the railroad company, for the sum of \$15, after which he departed for his home, and some months later he brought and successfully maintained this action.

[1] The defendant contended below, and still contends, that he was injured through his own negligence and without the fault of the defendant, and that he had settled and released any claim which he might have had against the railroad company, and had been paid in full therefor. To overcome the plea of satisfaction and release, the plaintiff alleged that the defendant's claim agent deceived him, falsely and fraudulently representing to him that he would not be permitted to leave the hospital nor to go home until he had signed the papers, and represented that the papers related to his release from the hospital; that the plaintiff at the time was suffering great agony in body and mind from his injuries, and incapable of transacting business, all of which the claim agent well knew, and that the claim agent told him that the \$15 was merely to pay his way home, and that the receipt which he was induced to sign was merely an acknowledgment of the money furnished by the company for that purpose; and that he never had possession of the papers, and did not read them, and that their true import was never explained to him. The plaintiff's evidence touching the execution of the papers and the payment of the \$15 was in harmony with his pleading, and the jury chose to believe him, although the contract of settlement and release for his damages sustained and the acknowledgment of receipt of \$15 in full satisfaction thereof contained a recital written by the plaintiff himself, in clear, legible, businesslike handwriting:

"I have read the above voucher, receipt and release and fully understand the same.

"D. R. Griffith."

The special findings harmonize with the plaintiff's evidence on this phase of the lawsuit. Appellant argues with considerable force that the settlement and release were valid and binding; but a majority of the court are not disposed to attach much weight to these "hurry-up" settlements of damage claims for trifling considerations, and are of opinion that all the facts surrounding the transaction of settlement and satisfaction presented a fair question for the jury, and that its determination may not be disturbed.

[2] Turning, then, to appellant's contention that the plaintiff's injuries were caused solely by his own negligence, the jury found:

"(10) If you find that the defendant was guilty of any negligence that caused the injury to the plaintiff, then state fully of what that negligence consisted. Answer: First, in that the yardmas-

ter directed plaintiff to go alone down through the yard at night; second, that the engine crew did not keep sufficient lookout."

The court inclines to the opinion that the first proposition upon which the jury based the defendant's negligence is not good, but that the latter, "that the engine crew did not keep a sufficient lookout," may pass muster. There was no negligence on the part of the yardmaster in directing the plaintiff to go alone down through the yard at night. Freight trains must run at night, and they must stop where their work is to be done, and this may be anywhere throughout the wide areas of a modern railroad switchyard. They cannot be expected to stop at station platforms, and our statute specifically excuses them from stopping thereat, even to permit passengers to get aboard. It reads:

"That all freight trains to which a caboose is attached shall be obliged to transport, upon the same terms and conditions as passenger trains, all passengers who desire to travel thereon and who are above the age of fifteen years, or who, if under fifteen years, are accompanied by a parent or guardian or other competent person, but no freight train shall be required to stop to receive or discharge any passenger at any other point other than where such freight train may stop; nor shall it be necessary to stop the caboose of such trains at the depot to receive and discharge passengers: Provided, that on such trains the railroad companies shall only be liable for their gross negligence: And provided further, that this act shall not be construed to apply to freight trains on main lines, the most of which trains shall be composed of cars loaded with live stock." Gen. Stat. 1915, § 8536.

[3] The path down which the yardmaster directed the plaintiff was about 5 feet wide in the clear between the engine and the freight train after allowing the maximum estimate for the projection of the vehicles on each side of the tracks. There was plenty of safe space between the tracks and between the engine and the freight train for one familiar with railroad freightyards, and a man who is traveling by freight trains where a change of railroads in a switchyard at night must be made is necessarily assumed to have sufficient familiarity with such circumstances and surroundings that he will not lose his presence of mind and thereby get into danger and be injured, and this verdict could not stand on the first ground of negligence named by the jury. But the second finding of negligence, "that the engine crew did not keep sufficient lookout," seems sufficient to sustain the verdict. The plaintiff testified:

"I had a lighted lantern in my arm. I proceeded east. * * * The engine pulling the train that I was to board was coming. * * * The engine to this train passed me west bound. * * * It is between 8 and 9 feet between the rails. I passed another engine on the way down before I was hurt. It was the switch engine. There was a man on the side next to me looking out of the cab. The engine was headed west in a direction opposite to that which I was going. The man was looking west. I passed right under him. The engine was standing still. * * * When I passed this man there I had a lantern on my left arm. I had it about 54 feet or steps past that engine before I was hurt. Q. What happened when you got about that point, 54 or

56 steps down there? A. I know I was hit down by something. Q. What was that something that hit you down? A. That switch engine. * * * When I passed this engine it was right behind. I did not hear any bell rung or whistle blown. * * * The engine was standing at a water crane when I passed it. I saw one man looking down from the cab when I passed the engine. He was looking west the opposite direction from which I was going."

Part of defendant's evidence logically harmonizes with plaintiff's evidence and with the jury's second finding of negligence. The engineer and fireman of the engine which struck the plaintiff testified that they did not see the plaintiff, not even as he came towards them carrying a lantern. The fireman testified:

"When we were standing there I was sitting on the left side of the engine, the south side. I did not see the plaintiff or anybody with a lantern pass my engine going east. I was looking west. As we got ready to start east I was ringing the bell and looking back east the direction we were going. I did not see anybody on or near the track."

As the engine men without the slightest effort could have discovered the plaintiff as he came towards them and passed them with his lighted lantern, the court cannot disturb the jury's finding that the engine crew did not keep a sufficient lookout. This finding fairly implies that the engine crew did not warn the plaintiff. A majority of the court hold that there was a duty to keep this lookout, and to warn the plaintiff, and the judgment is affirmed.

JOHNSTON, C. J., and MASON, WEST, and MAKSHALL, JJ., concurring. BURCH, J., dissents.

DAWSON, J. I am of the opinion that the plaintiff's injuries were caused almost entirely by his own negligence; I think the statute quoted in the opinion governs the company's duty to a passenger traveling by freight trains, and that the defendant was not guilty of gross negligence. I, therefore, dissent.

PORTER, J., concurs in this dissent.

PETTIJOHN v. ST. PAUL FIRE & MARINE INS. CO. (No. 20674.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. INSURANCE — 336(2) — FIRE INSURANCE — AVOIDANCE—ADDITIONAL INSURANCE.

A provision in a fire insurance policy that the taking of other insurance without the consent of the secretary and general agent of the insurer shall avoid the entire policy is binding on the parties, and the taking of additional insurance without such consent defeats a recovery under the policy, unless the condition has been waived or abrogated by an authorized officer or agent of the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 857, 858.]

2. INSURANCE — 73, 378(3), 388(3)—"GENERAL AGENT"—KNOWLEDGE OF AGENT—WAIVER OF CONDITION.

A local soliciting agent without authority to write or issue policies, but who merely procures applications, collects premiums and sometimes delivers policies when payments are made, is not a general agent of the insurer, and his knowledge that other insurance had been subsequently taken is not chargeable to the insurer; nor did the insurer herein in any way waive or abrogate the condition which was violated by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100, 969, 971, 973, 974, 977-997, 1027.]

For other definitions, see Words and Phrases, First and Second Series, General Agency or Agent.]

Johnston, C. J., and West, J., dissenting.

Appeal from District Court, Norton County.

Action by B. W. Pettijohn against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Robert W. Hemphill, of Norton, and Foulke, Matson & Wall, of Wichita, for appellant. L. H. Wilder, of Norton, for appellee.

JOHNSTON, C. J. In an action brought by B. W. Pettijohn against the St. Paul Fire & Marine Insurance Company upon a policy of first insurance upon plaintiff's farm property, the latter recovered judgment, and the defendant appeals. The trial was by the court alone, a jury having been waived.

Defendant refused to pay the loss on the ground that plaintiff had violated a provision of the policy that it should be—

"void at the election of the company, if without the consent of the secretary or general agent of the company indorsed hereon, any other insurance is now or shall hereafter be taken out on any of the property above described."

Another provision stated in the policy was:

"This policy is granted upon and with reference to the above conditions, limitations and requirements; and no local or soliciting agent of this company shall have power to change, modify or waive any of the same."

Van Arsdale & Osborne were the general agents of the company at Wichita, and William Welkert was the representative of defendant at Norton, through whom plaintiff had procured his policy. On January 24, 1910, the policy was issued, and the fire causing a total loss occurred December 3, 1914. In August, 1911, plaintiff took out a policy on the same property in the Springfield Fire & Marine Insurance Company, providing \$1,000 additional insurance, and after the fire the full amount of that policy was paid. Plaintiff testified that before he secured the Springfield policy Welkert had told plaintiff he could carry more insurance on his property, and asked him for the business; that plaintiff informed him that he de-

sired the additional insurance to be in some other company; and that after the Springfield policy was obtained he informed Welkert of the fact and the latter expressed regret in not getting the additional business. Welkert testified to the contrary, stating that he first heard of the Springfield policy after the fire while making his investigations to adjust the loss. The policy issued by defendant covered losses by storms as well as from fires. At the trial a proof of loss under that part of the policy dated April 24, 1913, was introduced, wherein it was recited that there was no other insurance on the property. It appears that Welkert had been the agent of defendant at Norton for 12 or 13 years, that he took applications for insurance and adjusted losses on farm property, and he had authority to issue certain kinds of policies on city property. His territory extended from Salina to the Colorado line. Estimates as to the value of the property destroyed varied. In his application for the policy in controversy plaintiff placed the value at \$1,800; in his application to the Springfield company he valued it at \$3,000, and he testified that the property cost him from \$2,500 to \$3,000. Other witnesses made estimates varying from \$1,165 to \$2,285. After the refusal to pay the loss the defendant tendered to plaintiff the amount, with interest, which he had paid in premiums, and this plaintiff refused.

[1] It is contended that the taking out of additional insurance without the consent of the company and in violation of the conditions of the policy defeats a recovery. As overinsurance might lead to carelessness or fraud, such limitations in contracts of insurance are not unreasonable nor invalid. It has been held that provisions of the character in question are enforceable where they have not been waived or otherwise abrogated. *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529. The questions then arise: Has consent been given, or has the limitation in the policy been waived or abrogated by the company? It is conceded that consent for other insurance was not indorsed on the policy, but stipulations of this character may be waived or changed even by parol if done by authorized agents. *Insurance Co. v. Munger*, 49 Kan. 178, 30 Pac. 120.

[2] The plaintiff relied on the knowledge and action of the agent Welkert, and it is insisted that he should be treated as a general agent, and that waiver by him is in effect a waiver by the company. There is testimony to the effect that Welkert was a soliciting agent, taking applications for insurance on farm property, forwarding them to the company which issued the policies, and he collected the premiums and generally delivered the policies to the insured. He was recording agent for the insurance of city property, and for a number of years had acted for the company in adjusting losses in a large district which extended from Salina to

the Colorado line, almost one-third of the state, but the losses adjusted were largely losses from hail. It appears from plaintiff's testimony that he talked with Welkert about taking additional insurance about the time that the policy in question was issued, and Welkert then told plaintiff that more insurance could be carried on the property, and he suggested to plaintiff that he would like to have the business. Plaintiff told him that he would feel safer to have the insurance in two companies. About ten days after taking out the additional insurance plaintiff told Welkert that it had been issued, and the latter's only response was that he was sorry to lose the business. The additional insurance was taken out more than three years before the fire occurred. In his testimony Welkert stated that he did not remember such conversations, and that he really did not know about the additional insurance until after the fire occurred. As the findings and verdict were in favor of the plaintiff, the plaintiff's version of the matters in dispute must be accepted as true.

There still remains the question whether Welkert can be regarded as a general agent of the company with authority to accept notices, make agreements, and waive provisions in the contract of insurance. The insurance, as we have seen, was upon farm property, and the policies were not written or issued by Welkert. As to that class of property he was merely a soliciting agent. He had wider authority as to city property upon which he wrote and issued policies. He did adjust losses on farm property, and had done so for a period of about four years prior to the fire. In the policy it was stipulated that a local or soliciting agent could not change, modify, or waive any of the conditions or limitations of the contract, and the court is of opinion that neither the knowledge nor action of Welkert operated as a waiver of the limitation against the taking of additional insurance. The stipulation as to additional insurance was an essential condition of the contract which had been accepted by the insured, and he could not reject or defeat it by a notice to or the knowledge of one who was without authority to issue policies or to cancel and make contracts. *Insurance Co. v. Gibbons*, 43 Kan. 15, 22 Pac. 1010; *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Assurance Co. v. Building Association*, 133 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; 3 Cooley's Briefs on Law of Insurance, p. 2484.

It has been held that a company may be bound by the knowledge and acts of a local soliciting agent as to past or present conditions (*Insurance Co. v. Weeks*, 45 Kan. 751, 26 Pac. 410; *Cue v. Insurance Co.*, 89 Kan. 90, 130 Pac. 664, 44 L. R. A. [N. S.] 1218); but such local agent is without power to waive future conditions, and the company cannot be estopped by the knowledge of the agent that the assured intended thereafter to take other insurance. The conclusion of the

court is that the restriction on additional insurance without the consent of the insurer was a material part of the contract, and granting that Welkert, the agent, had knowledge that added insurance had been taken out, his knowledge did not bind the company. It does not appear that the notice given to him was communicated to the officers of the company, and the mere fact that after the fire the adjuster conferred with him as to the value of the building destroyed or the amount necessary to restore it did not waive the violated condition. In view of the decision reached, the other questions presented are not material.

The judgment is reversed, and the cause remanded, with directions to enter judgment in favor of the defendant.

BURCH, MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). In my opinion the notice to Welkert should be regarded as a notice to the company. He was more than a local soliciting agent of the company. In addition to soliciting insurance, he collected premiums, delivered policies, and was intrusted with broad powers in the adjustment of losses. Forfeitures are repugnant to a sense of justice, and courts should resort to any reasonable rule of interpretation that will avoid them. In view of the powers vested in and exercised by Welkert, and the fact that he sought to place additional insurance on the property and had knowledge of it for more than three years before the fire occurred, the condition should be deemed to be waived and the company estopped to insist on a forfeiture. Insurance Co. v. Gray, 43 Kan. 497, 23 Pac. 637; Hulén v. Insurance Co., 80 Kan. 127, 102 Pac. 52; Cue v. Insurance Co., 89 Kan. 90, 130 Pac. 664, 44 L. R. A. (N. S.) 1218. After learning of the fire Welkert sent for plaintiff to meet the adjuster of the company and fix up the loss. The meeting occurred, and the company obtained information from plaintiff respecting the property destroyed, the extent and value of his loss, and they conferred together as to the cost of rebuilding the house. This action by the company is of itself sufficient to constitute a waiver of the forfeiture. Assurance Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Despain v. Insurance Co., 81 Kan. 722, 106 Pac. 1027.

WEST, J., joins in this dissent.

EVERHART v. WELCH. (No. 20836.)*
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. ANIMALS \S 20 $\frac{1}{2}$, New, vol. 20 Key-No. Series—BREEDING ANIMALS—REGISTRATION. In this state registration of breeding animals is registration conformably to the statute,

which adopts ~~the~~ the standard the stud books of the various horse pedigree registry associations recognized by the United States Department of Agriculture, and none others.

2. FRAUD \S 27—FRAUDULENT REPRESENTATIONS—REGISTRATION OF ANIMAL—CONSTRUCTION.

A representation, made to induce the sale of a stallion, that he was a registered Percheron, was a representation that he was a Percheron regularly registered conformably to the statutory standard.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 8.]

3. FRAUD \S 65(1)—FRAUDULENT REPRESENTATIONS—REGISTRATION OF ANIMAL—INSTRUCTION.

Criticisms of instructions to the jury considered, and held to be without substantial merit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 72-74.]

Appeal from District Court, Pottawatomie County.

Action by A. M. Everhart against Clint Welch. Judgment for plaintiff, and defendant appeals. Affirmed.

Maurice Murphy, of St. Marys, A. E. Crane, of Atchison, Oscar Raines, of Osaka, R. F. Hayden and Geo. P. Hayden, both of Topeka, and Robert S. Helzer, of Osage City, for appellant. C. B. Daughters, of Manhattan, and E. M. Brunner, of Wamego, for appellee.

BURCH, J. The action was one for damages for false representations made by the defendant to induce the plaintiff to purchase a stallion. The plaintiff recovered and the defendant appeals.

The petition alleged that the defendant represented the animal was a regularly registered Percheron stallion and the certificate of registration was all right except a mistake as to the date of foaling, which the defendant would have corrected. Relying on the representations, the plaintiff purchased the stallion near the beginning of the season for use, and advertised him as a regularly registered Percheron. The representations were false, and the plaintiff was obliged to withdraw the stallion from service.

[1, 2] At the time the stallion was purchased, the state law required every person standing a stallion to cause the name, description, and pedigree of the stallion to be enrolled with the state live stock registry board, and to procure a certificate of such enrollment, designated in some sections of the statute as a license certificate. The license certificate for a pure-bred stallion contained the following, besides other information: Certificate number, registration number, breed, and pedigree. A copy of the certificate was required to be posted over the main door of the barn where the stallion was kept, and to be inserted in all bills, posters, and advertisements. Gen. Stat. 1909, \S 9075, 9078—

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 15, 1917.

9080. The statute also contained the following provision:

"The officers of the live stock registry board, whose duty it shall be to examine and pass upon the merits of each pedigree submitted, shall use as their standard the stud books and signatures of the duly authorized presidents and secretaries respectively of the various horse pedigree registry associations, societies or companies recognized by the United States Department of Agriculture, Washington, D. C., and shall accept as pure bred, and entitled to a license certificate as such, each stallion for which a correct pedigree registry certificate is furnished bearing the signature of the president and secretary of a government recognized and approved stud book." Section 9077.

The proof was that the stallion was a three-quarter bred Percheron, was ineligible to registration in standard stud books, and was ineligible to certification by the state live stock registry board as other than grade. The stallion was registered in the American Horse Registry Association of Des Moines, Iowa, an association which the state board cannot recognize, and which, whatever the purpose of its organization, readily lends itself to the perpetration of fraud in the sale of breeding animals. Here are some of the qualifications for registration:

"6. All stallions or mares that are 15½ hands high or over and will weigh 1,500 pounds or more and can walk a mile in 15 minutes or better.

"7. Any stallion that can start and draw a load of 3 tons one rod on a 4 wheeled wagon on a level dirt road, provided the horse is a three-fourth blood or better of any recognized draft breed.

"8. Any stallion or mare that has taken any premium in draft classes at any fair, provided the animal will weigh 1,500 pounds or over and is up to standard in other requirements."

Certificates of registration of stallions may be obtained from this association for ten dollars. By joining the association you can get certificates at half price. The defendant, who has been in the horse business all his life, testified on cross-examination as follows:

"Q. You knew their terms?

"A. Yes, sir.

"Q. You know that they claimed to register all kinds of horses under heaven?

"A. Yes, sir.

"Q. Do they register the breed?

"A. They register as to the conformation.

"Q. Do you say that you believed that was a regularly recognized registration when you turned that certificate over to Everhart?

"A. That is where I had him registered, and that is the way I traded him off."

The evasion of the last question by the last answer is significant. The defendant testified he told the plaintiff the stallion was registered in the Iowa horse registry association; papers could not be given because there was a mistake as to the stallion's age. He said nothing else about registration, and he said nothing about the stallion being a full-blood Percheron or a regularly registered Percheron. The plaintiff's testimony indicated that the talk was about breed and pedigree. He told the defendant he wanted a horse with a good pedigree; that was what he was

needing him for. The defendant said the stallion was a registered Percheron, a registered Percheron which the state would back. He had such papers. The paper was the pedigree of the horse. The pedigree needed correction, however, and it would be sent in to be corrected. The American Horse Registry Association of Des Moines, Iowa, was not mentioned. The plaintiff testified further as follows:

"Q. Anything said about the state registration?

"A. I asked him whether he had had him examined by the state man, and he said he had. I wanted to see the certificate that he had from the state man, and he said that he would not get it until he got the matter straightened up with the registration company."

In the instructions to the jury the court stated the defendant's claims, and told the jury they should return a verdict for the defendant if they found the facts to be as he testified. In stating the plaintiff's claims to the jury the court said:

"That for the purpose of inducing the plaintiff to accept the stallion at the agreed price the defendant falsely represented to the plaintiff that the said stallion was a Percheron stallion regularly registered under the requirements of the laws of the state of Kansas; that the plaintiff believed the representations of the defendant to be true, and relied thereon and purchased the stallion at the agreed price, but that in truth and in fact the said stallion was not so registered, and was not eligible to registration in the state of Kansas as claimed and warranted by the defendant; and that the defendant so knew at the time of his misrepresentations."

The court further instructed the jury as follows:

"If you find from the evidence in the case that at the time the defendant sold the stallion to the plaintiff he warranted such stallion to be regularly registered under the laws of the state of Kansas as a Percheron stallion, and that such warranty was not true, and that by reason thereof the plaintiff was damaged thereby, then you will return a verdict for the plaintiff."

The defendant contends that the allegation of the petition that the stallion was a "regularly registered Percheron" was not proved, that the court was not authorized to bring into the case registration under the requirements of the laws of the state of Kansas, and that the court transformed the cause from one for false representations to one for breach of warranty. Judging from the record alone, and not from experience, the court is inclined to the opinion that points like these would be fine points in a horse trade. However this may be, the affair between the plaintiff and the defendant has now lapsed into a common court proceeding, and the crude and callous standard of substantial justice will have to be applied.

[3] The issue was fraud, and clear proof of the substance of the issue was sufficient. There is registration of breeding animals, or there is not. Fake registration of the kind dealt in by the defendant cannot be recognized as registration. A registered stallion is a stallion regularly registered conformably to the statutory standard. While the in-

struction stating the plaintiff's claim might have been more carefully phrased, the meaning was clear, and the court added nothing to the force of the pleaded representation which the law did not attach to it. Proof that the stallion was represented to be a "registered Percheron," and a "registered Percheron which the state would back," sustained the charge that the stallion was represented to be a regularly registered Percheron. The issues were clearly placed within the grasp of the jury, and the inadvertent use of the words "warranted" and "warranty" for "represented" and "representation" was quite inconsequential.

The judgment of the district court is affirmed. All the Justices concurring.

STROM et al. v. WOOD, Sheriff, et al.
(No. 20856.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. WILLS §630(2), 634(9)—CONSTRUCTION—LIFE ESTATE—REMAINDER.

A will gave certain property to the widow of the testator "so long as she shall live or retain her capacity for such business, or shall not become remarried, and when either of such contingencies shall happen, then I direct that all said property, both real and personal shall at once be distributed among my children and heirs at law, the issue of myself and by said wife, and my said wife, Charsto Strom, as the laws of descent and distribution of the state of Kansas provide and direct." Held, that such will vested in the widow a life estate to be enlarged to a one-half interest in fee by remarriage or disability, and vested in the children the remainder in all, subject to being diminished to a vested remainder in one-half by the disability or remarriage of their mother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1468, 1470, 1497.]

2. WILLS §717—DEVISE—PRESUMPTION OF ACCEPTANCE.

A devisee is presumed to accept a devise favorable to him, and if he desire to renounce he should do so within a reasonable time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1711-1716.]

3. WILLS §717—DEVISE—RENUNCIATION.

A timely renunciation relates back to the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1711-1716.]

4. WILLS §717—DEVISE—DISCLAIMER.

A judgment was recovered in Morris county against the devisee April 7, 1910. The testator died, and his will giving the devisee an interest in certain land in the same county was probated May 16, 1911. Executions on the judgment were issued January 6, 1915, and later. March 13, 1916, levy was made on the devisee's interest in the land. April 25, 1916, the sheriff began to advertise a sale to enjoin which this suit was begun. April 24, 1916, the devisee filed a disclaimer. Held, that the judgment had already been for years a lien on his interest which by lapse of time and nonaction he is presumed to have accepted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1711-1716.]

5. EXECUTORS AND ADMINISTRATORS §343—SALE OF LAND TO PAY DEBTS—PRESUMPTION.

The amended petition alleged that the estate had not reached final settlement, but averred that the executrix had been appointed more than five years. There was no allegation of unpaid claims. Held, that it will not be presumed that the sale of land was necessary for the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1439-1441.]

Appeal from District Court, Morris County.

Action by Charsto Strom and others against R. A. Wood, as sheriff of Morris county, Kan., and another. Demurrer to amended petition sustained, and plaintiffs appeal. Affirmed.

Anderson & Lindquist, of Council Grove, for appellants. Nicholson & Pirtle, of Council Grove, for appellees.

WEST, J. [1] The amended petition alleged in substance that Oscar Strom in 1896 willed certain property, giving a life estate to his widow so long as she remained such and capable of looking after the property, and in case she should remarry or become disqualified the property to be distributed according to the law of descents and distributions. May 2, 1911, the testator died, leaving his widow and four children, including H. C. Strom. Two weeks later the will was probated, and the widow filed her election to take thereunder. January 6, 1915, execution was issued on a judgment recovered April 7, 1910, by Anna Jenner against H. C. Strom, in Morris county, where the land is situated. February 8, 1916, a second execution was issued, and March 13, 1916, levy was made on H. C. Strom's interest in the land, "being the undivided one-fourth interest. * * * April 25, 1916, the execution was returned unsatisfied, and a new execution issued, and the sheriff without a new appraisal began to advertise a sale to be halted by this suit. April 24, 1916, H. C. Strom filed in the office of probate judge a formal disclaimer stating that he "does hereby decline to accept any interest in and to" the real estate involved. This was acknowledged before a notary public. The trial court sustained a demurrer to the amended petition, and the plaintiffs appeal. Their contention is that the devisee had a legal right to disclaim or refuse to accept the devise so far as his one-eighth interest in the land is concerned, and that the other eighth interest is contingent upon the widow remarrying or becoming unable to conduct the farm, and is vested in her subject only to be divested by the happening of one of the contingencies named in the will. It is also argued that H. C. Strom's one-eighth interest is contingent. but under the rule announced in Bunting v. Speck, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690, and in McLaughlin v. Penney, 65 Kan. 523, 70 Pac. 341, this interest is vested.

It is suggested that the disclaimer was filed before the execution under which the sale sought to be made was issued. The first execution, however, was issued several months before.

The defendants present the theory that ordinarily a devise of property is presumed to be beneficial and its acceptance is also presumed; that the devise in this case vesting in H. C. Strom an interest in real estate, such interest by virtue of the statute (Gen. Stat. 1915, § 7320) became a lien thereon from the first day of the term at which the judgment was rendered. The will gave the widow a life estate subject to enlargement to a one-half interest in fee by remarriage or disability, and left to the children a vested remainder in all subject to being diminished to a vested remainder in one-half only by the remarriage or disability of their mother. The defendants cite authorities to sustain their theory that the devisee had a right to renounce, and that such renunciation related back to the date of the testator's death. Besides numerous text-books we have examined many decisions, and the general rule derived from all is well stated in 40 Cyc. 1898, as follows:

"As already shown, a beneficiary under a will is not bound to accept a legacy or devise therein provided for, but may disclaim or renounce his right under the will. However, in order to be effective, the disclaimer or renunciation must be express, clear, and unequivocal, and with knowledge of the existence of the will, so as to prevent all future cavil, and operate as a quasi estoppel. It may be by matter of record or by deed, and it has been held that a disclaimer or renunciation by parole is insufficient; but the decided weight of authority is that unequivocal acts on the part of the devisee may amount to a sufficient renunciation. Where a beneficiary disclaims or renounces his interest under the will, it becomes inoperative as to him. He takes nothing by it; and on the other hand is thereby released from all obligations which an acceptance would have imposed on him."

In *Stebbins v. Lathrop*, 4 Pick. (Mass.) 35, 42, the Supreme Judicial Court of Massachusetts said:

"Until the legatees shall actually renounce their legacies, their assent to the provisions of the will, which are apparently beneficial to them, will be presumed."

It was said in *Farnum v. Bryant*, 34 N. H. 9, 19:

"This right it was competent for them to renounce or waive. It was no greater or more indefeasible than the right of a devisee or legatee to the devise or legacy given to him under a will; and it is well settled that such devise or legacy may be waived or renounced by some unequivocal act."

In *Albany Hospital v. Albany Guardian Society*, 214 N. Y. 435, 108 N. E. 812, Ann. Cas. 1916D, 1195, in a most informing opinion going back to the early decisions, it was held that:

"A devise of real estate is an offer to the proposed beneficiary, and while the presumption is that he will accept it when he has an opportunity, there is no presumption of immediate acceptance; if acceptance does occur, the title will relate back to the time of the devise at least

in the absence of intervening rights; if refusal results the devise will never take effect and title never vest." Syl. 2.

The Supreme Court of Iowa in *Mohn v. Mohn*, 148 Iowa, 288, 300, 126 N. W. 1127, 1131, lays down the rule that while assent of the devisee to an apparently beneficial devise will be presumed—

"he may withhold such assent and renounce the provision made for him, and in such case no interest passes to him. A beneficiary is presumed, however, to assent to the provisions made on his behalf, especially where they are beneficial in character." In *re Estate of Stone*, 132 Iowa, 136, 140, 109 N. W. 455, 10 Ann. Cas. 1083; *Mohn v. Mohn*, 148 Iowa, 288, 300, 126 N. W. 1127.

In *Bradford v. Leake*, 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140, it was held that:

"A beneficial devise is always presumed to be accepted, and, in the absence of anything to the contrary, the gift begins at the moment of testator's death; but such a devise may be renounced, and where the renunciation is made, it relates to the moment of the gift, and prevents it ever taking effect." Syl. 2.

In *Bradford v. Calhoun*, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N. S.) 595, the facts were in some respects similar to those before us. Mrs. Sneed died January 13, 1906, leaving a will giving to her husband, Thomas H. Sneed, a life estate in certain land with the remainder to her sister and niece. The will was admitted to probate four days later, on which date the husband executed a formal disclaimer duly acknowledged and registered. Prior to the death of Mrs. Sneed suit had been brought against the husband, and on January 27th, ten days after the probate and renunciation, a judgment was recovered against him. Execution was issued on February 3, 1916, and levied on the estate devised to him. The remaindermen and surviving heirs sued to enjoin the sale of the property. The Civil Court of Appeals held that the renunciation had to be by deed of record, but the Supreme Court reversed this ruling, and held the renunciation made by Sneed sufficient. The true rule founded upon principle was said to be that:

"It is optional with a devisee to accept the devise, however beneficial it may be to him, and that when he elects to renounce before any act on his part indicating an acceptance, the renunciation will relate back, and will be held to have been made at the time of the gift, and will displace any levy of creditors that may in the meantime have been made." 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N. S.) 595.

It was further held that the motive in making the renunciation was nothing the creditors could complain of so long as there was no collusion with the remaindermen or residuary devisees for which he apparently received a benefit for his renunciation, of which there was no proof.

"The renunciation is not a voluntary conveyance, void as against existing creditors, because, when he has properly renounced, the renunciation relates back to the date of the gift, and, as he has never accepted the gift, he has had nothing that could be made the subject of a volun-

tary conveyance." 120 Tenn. 60, 109 S. W. 504, 19 L. R. A. (N. S.) 595.

In *Welch v. Sackett et al.*, 12 Wis. 243, in discussing the effect of certain mortgages made in ignorance of the mortgagee, the court, through Dixon, C. J., discussed at considerable length a certain English authority holding that title to property could pass into a party without his knowledge or consent and out of him without any motion or act of his signifying his willingness, a discussion most entertaining and admirable. Small patience was shown with the notion that assent which is an act of the mind can be presumed in case of one who has no knowledge by means of which he can in fact exercise his choice, the learned Chief Justice remarking that it is an impossibility "that a person has consented to that of which he knows nothing. * * *"

[2, 3] The settled doctrine, however, is that a devise is presumed to accept a devise favorable to him. This comports with common sense, and is consistent with what we know of human nature. A gift or devise by which one's estate is materially increased naturally carries a material benefit, and it is not human nature to refuse or reject such visitations of the fickle goddess of fortune, and the law does not require such an absurd result to be inferred or presumed. This being the sensible and practical presumption, it would naturally be expected that if the devisee should desire to renounce he would do so at least within a reasonable time.

[4] Here he waited more than six years, and did not move until repeated executions had been issued and until proceedings for an actual sale by the sheriff had begun. In the Tennessee case the judgment was not obtained until ten days after the renunciation was executed, acknowledged, and registered. In that state the judgment becomes a lien for twelve months from the date it was entered, and does not relate back to the first day of the term as here. Section 7320 of the General Statutes of 1915 makes judgments a lien on the real estate of the debtor. By virtue of section 10973, subdivision 8, "real estate" includes lands and all rights there-to and interest therein, equitable as well as legal. *Kiser v. Sawyer*, 4 Kan. 503; *Kirkwood v. Koester*, 11 Kan. 471; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197. In *Bank v. Murray*, 86 Kan. 768, 121 Pac. 1117, 39 L. R. A. (N. S.) 817, it was held that real estate devised to several persons followed by direction that it be sold and the proceeds divided equally among them was subject to the lien of a judgment against one of the devisees existing at the time of the testator's death. This was approved in *Ward v. Benner*, 89 Kan. 369, 372, 131 Pac. 609, and followed in *Smith v. Hensen*, 89 Kan. 792, 132 Pac. 997.

The devise being beneficial, the presumption of acceptance having existed for more

than six years, the interest being the present vested estate belonging to the debtor, it could not be maintained had he died during this time without renouncing or disclaiming that this estate did not descend and pass like other property owned by him. It therefore follows that it was and is subject to the lien of the judgment on which the executions were issued.

[5] It was alleged that the administration of the estate of the testator had not reached final settlement. But it was also alleged that the executrix was appointed May 16, 1911, which would be five years and six days before the petition was filed, and there was no allegation of any unpaid claims, and it cannot be presumed that the estate which had been in probate court more than five years was in a condition requiring the sale of land to pay any debts not mentioned by the pleadings.

The interest sold should be described as the interest of H. O. Strom under the will of Oscar Strom. Assuming that this will be corrected, the judgment sustaining the demurrer to the amended petition is sustained. All the Justices concurring.

PINSON et al. v. YOUNG et al. (No. 20516.)
(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. EXPLOSIVES \Leftrightarrow 8—NEGLIGENT STORAGE OF DYNAMITE—LIABILITY—EVIDENCE.

Evidence examined, and held sufficient to fix responsibility for the negligent storage of dynamite.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5.]

2. EXPLOSIVES \Leftrightarrow 8—STORAGE OF DYNAMITE—DEATH OF FIREMAN—PROXIMATE CAUSE.

Where dynamite is stored in a building in violation of a city ordinance and the dynamite is exploded by a fire in the building, and a fireman on duty at the building is killed thereby, such negligent storage of the dynamite is a proximate cause of the death of the fireman.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5.]

3. EXPLOSIVES \Leftrightarrow 8—ACTION FOR DEATH—INSTRUCTIONS.

Requested instructions examined, and held properly refused, and appellant's rights duly recognized in those given.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5.]

Appeal from District Court, Cherokee County.

Action by William Pinson and Emma Pinson against William Young and John Young, partners, etc., and Independent Powder Company and others. Judgment for plaintiffs, and the named defendants appeal. Affirmed.

Wm. F. Sapp and A. S. Wilson, both of Galena, and J. W. McAntire, of Joplin, Mo., for appellants. Charles Stephens, of Columbus, and A. D. Schreiner, of Galena, for appellees.

DAWSON, J. The plaintiffs are the father and mother of John Pinson, a Galena fireman, who was killed by an explosion while he was extinguishing a fire in a building containing dynamite. The deceased was a single man and his parents were partly dependent upon him for support, and they brought this action against the defendants for damages for the wrongful death of their son.

The defendants, Young Bros., were engaged in mining operations in and about the city of Galena and were tenants of the building. In one corner of it they had constructed a small room for the storage of explosives. There is a city ordinance in Galena regulating the keeping of explosives, making it unlawful to store over 200 pounds of powder in any building within the city except "in a perfectly constructed powder house, subject to the approval of the mayor and council." The Independent Powder Company, another defendant, is a corporation engaged in the manufacture, sale and distribution of explosives in and about the Galena mining district. Still another defendant was the owner of the building, but its relation to this lawsuit needs no attention. The plaintiffs charged that Young Bros. and the Independent Powder Company brought about the death of their son by negligently storing large quantities of dynamite and other explosives in the building in violation of the city ordinances, and that the explosives thus stored were a dangerous nuisance—

"that said deceased, acting in the line of his duty and in the exercise of ordinary care, not knowing of the existence in said building of any of said explosives herein described, was standing on the regularly traveled sidewalk just north of said building, where he and all others had, at all times, a right to be, near the north end of said brick building, holding in his hands a large rubber fire hose, through which he was directing water on to said flames, when, because of the recklessness, gross and wanton carelessness and negligence of said defendants, their agents and employes, and each of them, as herein alleged, the said dynamite and detonating caps, stored in said building as aforesaid, exploded with terrific force and violence, completely demolishing said brick building, throwing the north wall upon the said John Elmer Pinson and then and there killing him instantly; that the proximate cause of his death was the gross and wanton carelessness and negligence of said defendants, their agents and employes, and each of them in there maintaining an inherently and extremely dangerous nuisance by storing and keeping of said explosives in said brick building as herein alleged."

Issues were joined, and the cause was tried to a jury, which made special findings and rendered a general verdict for the plaintiffs and against Young Bros. and the Independent Powder Company.

[1] The powder company is the principal appellant, and it assigns certain errors which will be noted in order. It contends first that there was no evidence to prove that the powder company was connected in any way with Young Bros. in the ownership or control

of powder in their magazine. But there was substantial evidence to show that the explosion which caused the greatest damage was not occasioned, or not occasioned alone, by the relatively small amount of powder in the magazine or room constructed in the corner of the building for powder storage, but by the explosion of a much larger quantity of dynamite deposited in the building outside this storage room. Some of the evidence tended to show that while it was the custom to supply the mining operators in and about Galena, including Young Bros., with powder in the early hours of the day, the powder company was frequently seen to unload powder at this building in the evening, and that it usually commenced its daily business each morning at Young Bros.' building, from which it might properly be inferred that it used this building as a powder storehouse at night and as a place of supply or partial supply for its morning trade. Certain other incidents tended to show that the powder company kept a supply of powder in this building from which it made deliveries at later hours of the day. A day or two before the explosion a large number of boxes of dynamite was seen in the building outside the powder storage room. The day before the accident, a number of such boxes was observed bearing the words "Independent Powder Company." At least five such boxes (250 pounds) were placed in the building the evening before the explosion by the defendant company's delivering agent. After the fire, it was seen that the depression or cavity in the ground where the dynamite had exploded was not in the corner of the building where the powder storage room had been, but further from that corner and near where the dynamite boxes had been seen before the fire. We note, of course, that the evidence on this point is conflicting—a controverted question of fact for the jury's consideration. Other circumstances tended to show that the powder company kept temporary supplies of powder in the building, and, while it may be true that the powder company was not interested with Young Bros. as owner or in control of the dynamite kept in the storage room, that fact would not relieve the company from the consequences of its negligent acts in relation to the explosives in the building which it did own, and which was sufficiently identified and proved as its property to require the question of its ownership and control to be submitted to the jury. Moreover, if it were established that the powder company knowingly aided or abetted Young Bros. in the maintaining of this dangerous nuisance, the company would not be relieved of liability, even if it did not own the powder wrongfully or negligently stored in disregard of the public safety or in disregard of the city ordinance. The mere question of ownership of the powder was not primarily important.

Who were responsible for the negligence? By whose negligent acts and omissions was this large amount of dynamite placed where it had no right to be? Who aided and abetted in this wrongdoing? These were the primary considerations in fixing the responsibility for the death of John Pinson. The relation of the powder company to these delinquencies was sufficiently established to make its responsibility a question for the jury's determination.

[2] It is next contended that the fire, and not negligent storage of the dynamite, was the proximate cause of Pinson's wrongful death. Both were proximate causes. The fire alone would not have caused his death. The dynamite alone might not have caused it. Perhaps the fire was the result of negligence. The storage of the dynamite was undoubtedly so. These two contributing delinquencies, the fire and the negligent storage of the dynamite, both proximate, wrought this result. *Kansas City v. Slangstrom*, 53 Kan. 431, Syl. par. 2, 36 Pac. 706; *Street Ry. Co. v. Stone*, 54 Kan. 83, Syl. par. 7, 37 Pac. 1012; *Luengene v. Power Co.*, 86 Kan. 866, Syl. par. 3, 122 Pac. 1032; *Johnson v. Northwestern Tel. Exch. Co.*, 48 Minn. 433, 436, 51 N. W. 225; *Young v. Syracuse, B. & N. Y. R. Co.*, 45 App. Div. 296, 61 N. Y. Supp. 202, 204; *Ring v. City of Cohoes*, 77 N. Y. 83, 83 Am. Rep. 574; *Phillips v. Railroad Co.*, 127 N. Y. 657, 27 N. E. 978; *Mexican National Ry. Co. v. Mussette*, 86 Tex. 708, 719, 26 S. W. 1075, 24 L. R. A. 642.

[3] The appellant complains of the trial court's refusal to give certain instructions.

These have been carefully examined. The requested were constructed on the basis that the appellant was not responsible for the dynamite which it had sold and delivered to Young Bros. and which was stored in the magazine, but they persistently ignored the responsibility attaching to appellant for the much larger amount of dynamite stored in the building, and which was no part of the amount supplied to Young Bros. for the use of the latter. The appellant's rights were duly recognized in the instructions given by the court, particularly in instruction 14 which reads:

"14. The court instructs the jury that the mere fact that the Independent Powder Company from day to day, upon the request of Young Bros., or their engineer, sold and delivered to Young Bros. such quantities of dynamite and detonating caps as were ordered would not be sufficient to make the defendant Independent Powder Company liable in this action; and if you find and believe from the evidence that powder was being used in the mine by Young Bros. while working therein, and that the Independent Powder Company did not, at any one time in September, 1912, sell and deliver to them more than 200 pounds or four boxes of powder, and did not store or keep in the building destroyed by fire on September 25, 1912, any powder belonging to the Independent Powder Company, even though you may believe from the evidence that Young Bros. had more than 200 pounds of dynamite in their possession which was owned by them on the 25th day of September, 1912, or prior thereto, you should find the issue for the defendant the Independent Powder Company on both counts of the plaintiff's petition."

Nothing approaching the gravity of reversible error appears anywhere in the record, and the judgment is affirmed. All the Justices concurring.

GER v. MARTIN et al. (No. 18532.)

me Court of Washington. May 10, 1917.)

AL ⇨143 — QUESTIONS FOR JURY — ELICTING EVIDENCE.

estions on which the evidence was con-; were for the jury under proper instruc-

Note.—For other cases, see Trial, Cent. § 342, 343.]

CARRIERS ⇨305(4)—CARRIAGE OF PASSEN- —ILLEGAL SPEED.

order that an illegal rate of speed by the of a jitney bus shall be actionable by a ger injured, it must be the proximate of the injury.

Note.—For other cases, see Carriers, Dig. §§ 1136-1139, 1245.]

IAL ⇨261 — INSTRUCTION — ERBONEOUS QUESTS.

hen an instruction, partly good and part-d, is offered, the court is not required to out and reject the bad and give the good ain of reversal.

l. Note.—For other cases, see Trial, Cent. §§ 484, 660, 671, 673, 675.]

CARRIERS ⇨305(4)—CARRIAGE OF PASSEN- —JITNEY—EXCESSIVE SPEED.

The proprietor of a jitney bus, a passenger hich was injured in a collision, was liable he passenger if the excessive speed of the would, without more, have brought it to place of the collision at the moment of : when it took place.

Id. Note.—For other cases, see Carriers, t. Dig. §§ 1136-1139, 1245.]

TRIAL ⇨252(10)—INSTRUCTION—APPLICA- LITY TO EVIDENCE.

In an action against the proprietor of a ey bus by a passenger injured when the bus ided with another car, the instruction that, ore the jury could find verdict against de-dants, the proprietor and his insurer, they st further find that the driver of the jitney ed to take the care of a reasonably prudent n to avoid the other car after he saw the ger of collision, was improper as invoking hase of the rule of last clear chance, a doc-ne which was inapplicable.

Ed. Note.—For other cases, see Trial, Cent. g. § 603.]

TRIAL ⇨295(6)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The court's first instruction stated the na-re of the action. The second enumerated the arges of negligence, in operating the jitney ithout having it under control, unlawful and ccessive speed, and negligent driving against e other car. The third correctly defined the gree of care required of a common carrier. he fourth defined unlawful speed. The fifth arged that, if the driver of the jitney failed any of the particulars charged to observe the quired degree of care, defendant would be able, regardless of any negligence on the part f the driver of the other car, if the accident ould not have happened except for defendant's relessness. The sixth instruction was that he burden was on plaintiff to show that de-ndant's driver was guilty of negligence in the nanner charged, and that such negligence con-ributed to and was the proximate cause of the collision. *Held* that, taken as a whole, such in-structions gave the jury the law of proximate ause as applied to excessive speed as well as o every charge of negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 700.]

7. TRIAL ⇨255(13)—INSTRUCTION—FAILURE TO REQUEST.

Failure to give a definition of proximate cause in the instruction was not erroneous where no such instruction was requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 639.]

8. CARRIERS ⇨280(1)—PASSENGERS—DUTY OF CARRIER.

The operator of a jitney bus, as a common carrier, owed a passenger the duty to exercise the highest degree of care compatible with the practical operation of the car, a duty not met as a matter of law by a mere observance of the law of the road; his negligence, if any, as between him and his passenger, being measurable only by his duty as a common carrier, not by his duty to other users of the highway.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1088, 1102, 1106, 1109.]

9. CARRIERS ⇨280(2)—CARRIAGE OF PASSEN- GERS—SPEED—REPEALED STATUTE.

Rem. & Bal. Code, § 5671, limiting the speed of automobiles to four miles an hour over cross-ings or crosswalks within the limits of any city or village, etc., in force at the time of a collision between a jitney bus and another car, wherein a passenger of the bus was injured, created a duty on the part of the operator of the bus entering into the passenger's contract of carriage, so that its repeal by Rem. Code 1915, § 5562-35, could not operate retrospec-tively to relieve the carrier.

10. CARRIERS ⇨205(7)—CARRIAGE OF PAS- SENGERS—SPEED—STATUTE.

Such statute could be invoked in favor of the passenger as well as in favor of pedestrians.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1197.]

11. MUNICIPAL CORPORATIONS ⇨661(1)—JIT- NEY—BOND—LIABILITY.

Under Rem. Code 1915, § 5562-37 et seq., requiring a jitney operator to give bond for the faithful performance of the provisions of the act, and to pay all damages sustained by any person from any negligent or unlawful act, and giving a cause of action against the principal and the surety on the bond to every person in-jured for all damages sustained, the same ele-ments of damage for which recovery may be had against the principal enter into and form a part of the liability against the surety to the limit of the amount of the bond.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434.]

12. DAMAGES ⇨216(8) — INSTRUCTIONS — PLEADING—DAMAGE TO BUSINESS.

After setting forth the character and extent of the injuries to his person, plaintiff's com-plaint stated he had incurred an indebtedness of \$75 for nursing and medical attendance, al-leged total damage to a suit of clothes, hat, and a pair of eyeglasses, averred that he had been compelled to neglect his business for over a month, and fixed his total damages at \$2,200. *Held*, that the complaint was not intended to allego injury to business as such, so as to war-rant an instruction thereon, the reference to neglect of business being only a claim of dam-ages for loss of personal earnings.

[Ed. Note.—For other cases, see Damagos, Cent. Dig. § 553.]

13. DAMAGES ⇨37—DAMAGE TO BUSINESS— PERSONAL INJURIES.

Damages to business as such, particularly when measured in terms of profits, are not re-coverable in an action for personal injuries, where the business involves an investment of capital and the time and services of plaintiff's wife; and it is only when the investment is in-significant, and merely incidental to the perform-

ance of plaintiff's personal service, that profits may be taken as a measure of loss or considered as an element of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241.]

14. DAMAGES *§* 172(1)—**PERSONAL INJURIES**
—LOSS OF PLAINTIFF'S SERVICES TO BUSINESS—EVIDENCE.

In an action for injuries in collision to a passenger in a jitney bus, where plaintiff's whole business as a wigmaker, as shown by the evidence, was largely dependent on his own exertions, it was competent to show the character and magnitude of the business, the capital and assistance employed, and even the profits, not as elements of damage, but as circumstances to be considered by the jury in determining the value of plaintiff's loss of his own services in the business because of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Tom Singer against I. Martin and the Pacific Casualty Company. From a judgment for plaintiff, defendants appeal. Reversed, and cause remanded for new trial.

Geo. McKay and H. S. Noon, both of Seattle, for appellants. Benjamin M. Levine, Willett & Oleson, and John A. Soule, all of Seattle, for respondent.

ELLIS, C. J. Action to recover damages for personal injuries. Defendant Martin owned an automobile which he operated as a jitney in the city of Seattle, the car being driven by an employé. On June 6, 1915, while plaintiff was a passenger on the car, it was proceeding east on the south side of Pike street, when, at or near the intersection of that street and Ninth avenue, it collided with another car driven by one Herald. As a result of the collision plaintiff received the injuries of which he complains. The Pacific Coast Casualty Company, being surety on Martin's bond given pursuant to Laws 1915, c. 57, p. 227 (Rem. Code, § 5562—37 et seq.), was made a party defendant. From a verdict and judgment in favor of the plaintiff, both defendants appeal.

[1] The evidence was sharply conflicting as to the speed of both cars, as to whether the collision occurred immediately at or a short distance to the east of the intersection, and as to which of the two cars was actually driven against the other. A review of the evidence on these questions would serve no purpose. The conflict presented made them questions for the jury under proper instructions.

Appellants urge that the court erred in refusing to give certain requested instructions. Several of these were, in substance, covered by the instructions given. In others were so combined the sound and the unsound that they could not be properly given. One of these was as follows:

"In order that an illegal rate of speed shall be actionable it must be the proximate cause of the injury; in this case I charge you that it was not an actionable wrong for the defendant

to drive at a speed exceeding the legal speed, unless such excessive speed, if there was any, was the proximate cause of the injury; it is not enough, without more, that the excessive speed, if any, brought the jitney to the place of the collision at the moment of time when it took place. Before you can find a verdict against the defendants or either of them, you must further find that the driver of the jitney failed to take the care of a reasonable, prudent man to avoid the Herald car after he saw the danger of collision."

[2, 3] The first part of this request is unobjectionable, and doubtless would have been given had it been proffered as a separate instruction. But when an instruction partly good and partly bad is offered, the court is not required to weed out and reject the bad and give the good on pain of a reversal. *Ramm v. Hewitt-Lea Lumber Co.*, 49 Wash. 263, 267, 94 Pac. 1081.

[4] The part which we have italicized is palpably bad. The excessive speed would be enough, without more, if it alone brought the car to the place of collision when that place was occupied by another car. The argument that, without the qualification requested, the jury might have found excessive speed, at an antecedent time and in another place, the proximate cause, is entirely too refined. Neither the first part of this requested instruction nor any instruction given was reasonably capable of such a construction.

[5] The last sentence requested is even more objectionable. It invokes one phase of the rule of last clear chance, a doctrine wholly inapplicable on the facts here as between the carrier and his passenger. This last defect appeared in several other requested instructions. So far as this instruction correctly stated the law it was covered in general terms by the instructions given. The court's first instruction stated the nature of the action. The second enumerated the charges of negligence, namely, carelessness in operating the jitney without having it under control, unlawful and excessive speed, negligent driving against the Herald car. The third correctly defined the degree of care required of a common carrier. The fourth defined unlawful speed. The fifth charged that, if the driver of the jitney failed "in any of the particulars charged" to observe the required degree of care, defendant would be liable regardless of any negligence on Herald's part, "if the accident would not have happened except for defendant's driver's carelessness." The sixth was as follows:

"The burden of proof is upon the plaintiff in this case to show by the greater weight of the evidence that the defendant's driver was guilty of negligence in the manner charged and that such negligence contributed to and was the proximate cause of the collision."

[6] Taken as a whole, these instructions gave to the jury the law of proximate cause as applied to excessive speed as well as to every charge of negligence. But appellants complain because a definition of proximate cause was not given.

[7] The answer is that no such instruction was requested.

Another instruction offered and refused was as follows:

"If you find from a fair preponderance of the testimony that the jitney was proceeding east along the south side of Pike street, and that the Herald car was approaching from the north along Ninth avenue, the driver of the jitney had the right of way, and it was the duty of the driver of the Herald car to keep clear of the jitney's course, and the driver of the jitney had the right to assume that the driver of the Herald car would keep out of his way till he had notice that the driver of the Herald car would not or could not keep out of his way; till he had such notice it was not negligent for the driver of the jitney to go ahead."

No statute is cited nor was any city ordinance pleaded or proved declaring this rule as to right of way. But assuming this a proper statement of the law of the road, and that the refusal of the court to so instruct might be soundly urged as error if this were an action between the owners of the respective cars, it was not error in this case.

[8] Appellant Martin as a common carrier owed to respondent as his passenger the duty of exercising the highest degree of care compatible with the practical operation of the car. That duty would not be met as a matter of law by a mere observance of the law of the road. His negligence, if any, as between him and his passenger, is to be measured by his duty as a common carrier, not by his duty to other users of the highway.

The law in force at the time of the accident (Laws 1905, p. 295, § 10; Rem. & Bal. Code, § 5571) limited the speed of automobiles to 4 miles an hour over crossings or crosswalks within the limits of any city or village when any person is upon the same, and between intersections to 12 miles per hour in thickly settled districts, and to 24 miles an hour outside of such districts. By an act taking effect after the accident, but before trial, that law was repealed. Laws 1915, c. 142, p. 397 (Rem. Code, § 5562—35). In his charge the trial court stated the permitted speed over crossings and intersections correctly as 4 miles an hour, and between intersections as 20 miles an hour. No complaint, however, is made of this discrepancy. The court then instructed the jury to the effect that any person driving an automobile over an intersection faster than 4 miles an hour, or between intersections faster than 20 miles an hour, would be guilty of negligence as a matter of law. This is assigned as error. Appellants contend that the speed regulation of the repealed statute furnished a rule of evidence merely, which could not survive, for any purpose, its repeal.

[9] Both reason and authority, however, sustain the view that the statute in force at the time created a duty entering into the contract of carriage, so that the repeal could not operate retrospectively. This exact question was decided contrary to appellants' contention in *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1062. In that case

the injury sued for was to a passenger on one of defendant's street cars. At the time of the accident a statute applicable to the place of the accident limited the speed of street cars to eight miles an hour. After the accident, but before the trial, the statute was amended so as to eliminate the provision as to the speed of cars. The court instructed the jury, in substance, that a speed in excess of eight miles an hour was negligence as a matter of law. Upon an appeal the defendant contended, as contend appellants here, that the repealed provision was merely a rule of evidence which could be changed, and when changed it ceased to apply even to existing causes of action. The appellate court refuted that view by an argument so cogent that we quote from it at some length:

"We think the criticised instruction states the law upon the subject to which it relates, as it existed at the time the accident happened, clearly and with accuracy, and we do not assent to the proposition that the repeal by the Legislature, subsequently to the happening of the accident, of that portion of the section regulating the rate of speed of cars within cities, had the effect of depriving the plaintiff of any rights vouchsafed to her by the statute at the time her injuries were sustained. The action here is not founded upon the statute. In other words, there was immediately vested in plaintiff, upon receiving the injuries of which she complains, the right to institute an action, independently of the statute, to recover damages for such personal injuries as she might have sustained through the negligence of the defendant. The statute prescribed the measure of care, in the matter of speed, which the defendant was required to exercise in the execution of its contract with her to transport her with safety from one point to another over its lines. While it may be correct to say that the breach of the condition thus imposed upon the defendant by the Legislature in the operation of its business as a common carrier would operate as a rule of evidence, since the violation of the condition would raise the presumption of negligence, the condition was nevertheless an element entering into the contract with plaintiff as important and substantial as any other essential element involved in the care with which common carriers are charged by the law in the transportation of passengers. This condition is not, therefore, as appellant contends, a mere matter of procedure or a rule of evidence which, having been abrogated after a right of action had accrued and before the trial thereof, cannot be invoked or applied in such action under the rule laid down by the authorities cited. * * *

"In the case here the plaintiff's right of action was a vested right, founded in the breach of the contract of carriage between herself and the defendant; one of the substantial elements of the agreement upon the part of the latter being that, in order to insure the safe and comfortable carriage of plaintiff, the rate of speed of the car on which she took passage, when passing through the streets of a city, would not exceed the limit prescribed by the statute. In other words, the law regulating the business of the transportation of passengers by street railroad corporations subsisting at the time and place of the making of a contract of carriage, and where such contract is to be performed, enters into and forms a part of it, as if such law was expressly referred to or incorporated in its terms."

In the case of *Miller v. Union Mill Co.*, 45 Wash. 199, 88 Pac. 130, this court recognized the same principle. *Miller*, an employé of

the mill company, had received injuries from exposed cogs in the company's sawmill while the factory act of 1903 was in force. After the accident, but before the trial, the act was repealed by the factory act of 1906. Under the act of 1903, as construed in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587, the common-law defense of assumption of risk was not available to a master who had failed to safeguard machinery as required by that act. Miller having testified that he knew that the cogs were exposed and unguarded, the trial court held, as a matter of law, that he assumed the risk of injury from the cogs, excluded evidence that they could have been advantageously guarded, and refused to instruct that by its failure to guard the cogs, as required by the act of 1903, the mill company was deprived of the defense of assumption of risk. Upon appeal this court held that the act of 1903, abrogating the defense of assumption of risk, entered into the contract of employment; that the repeal of that act did not operate retroactively nor affect causes of action that arose prior to the repeal. See, also, *Garnau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

[10] The further claim that the speed statute can only be invoked in favor of pedestrians is without merit. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903. It imposed a positive rule of conduct upon all drivers. It seems clear that it should be invocable in favor of any person who can show that its violation was the proximate cause of his injury, in the absence of contributory negligence on his part.

Respondent was permitted to testify that he was a wigmaker, and conducted a large hair goods business in a store on one of the main streets of Seattle; that he employed eight assistants in his establishment; that he drew business from all over the Northwest; that his orders ran from \$25 to \$50 each; that since 1912 his gross receipts had been practically uniform every year, averaging \$2,500 to \$2,600 a month; that once or twice a year he traveled over his territory, personally soliciting orders, at which times he secured in advance the services of a man from San Francisco or Chicago to take his place in the store, but that he could not supply his place when he was injured, because he had no time to find a suitable man. He further testified that he was absent from his place of business about a month owing to the accident, during which time his wife remained in charge of the store, but his male customers would not deal with a woman; and that the time lost from his business on account of the accident was worth \$1,000. Respondent's wife testified that while her husband was away on account of the injury the business suffered a loss of two-thirds of the general income. She kept the books of the business, and produced them in court, but this was on request of appellants them-

selves. From these books she testified that the amount of the orders received in June, 1915, the month respondent was absent from his business, was \$968.65, while in May of the same year they amounted to \$2,357.67; that the expenses were from \$615 to \$625 a month, and that the gross profit ranged from 100 to 200 per cent. All of this was admitted over an objection that it was beyond the complaint, tended to establish speculative damages to the business, and was, in any event, inadmissible as against the casualty company.

In his general charge the court instructed the jury as follows:

"If you find in favor of the plaintiff, you will allow him such sum as damages as you may find from the evidence will fairly and reasonably compensate him for injuries which he has received, whether to his person or property."

Pursuant to that instruction, the court then submitted to the jury an interrogatory as follows:

"I have instructed you that if you find for the plaintiff you will allow him such sum as will fairly and reasonably compensate him for injuries to his person or to his property, one or both. * * * If you find for the plaintiff, then you will answer this interrogatory: 'What sum, if any, do you allow plaintiff on account of injuries to his property?'

"Property injury means injuries to property separate from injuries to his person. Property means clothing, business, and so forth. So that if you allow the plaintiff a verdict, and if that verdict includes injuries to property, loss of business or property, you will advise the court of the amount you allow him for injuries to property by answering that interrogatory on the blank line and have it signed by your foreman."

The verdict was for \$1,500, \$750 of which was found for injuries to property in answer to the interrogatory. Appellants took an exception to the above instruction, and now assign as error the rendering of any judgment for more than \$750, and especially the rendering of any judgment against the casualty company in excess of that amount.

Appellants' dominant contention in this connection is that this evidence was inadmissible, especially as against the casualty company; the argument being that the statute (*Laws 1915, c. 57, p. 227; Rem. Code, § 5562—37 et seq.*) requiring the jitney operator to give a bond was not intended to provide protection against damages other than to the bodies of persons injured by such conveyance.

[11] We find no merit in this contention. By section 2 (*Id. § 5562—38*) the statute requires the bond to be given "for the faithful compliance by the principal of said bond with the provisions of this act, and to pay all damages which may be sustained by any person injured by reason of any careless, negligent, or unlawful act on the part of said principal, his agents or employés." Section 3 gives a cause of action against the principal and the surety upon the bond to "every person injured * * * for all damages sustained." This language is too plain for construction. Clearly, this means that the

same elements of damages for which a recovery may be had against the principal enter into and form a part of the liability against the surety, the only statutory limitation being that the recovery against the surety shall be limited to the amount of the bond.

[12] These instructions are, however, vulnerable to two other objections. In the first place, they submitted to the jury a question wholly outside the issue, namely, damage to business as such. In his complaint, after setting forth the character and extent of the injuries to his person, plaintiff states that he has incurred an indebtedness of \$75 for nursing and medical attendance, alleges total damage to a suit of clothes, hat, and pair of eyeglasses, avers that "he has been compelled to neglect his business for over a month," and fixes his total damages at \$2,200. Clearly this is not, and was not intended to be, an allegation of injury to business as such, nor aside from the loss of the suit, hat, and glasses, does it contain any allegation of injury to property. By no construction, however liberal, can the reference to neglect of business mean more than a claim of damages for loss of time or loss of personal earnings. *Lombardi v. California St. R. Co.*, 124 Cal. 311, 57 Pac. 66.

[13] In the second place, damages to business as such, especially when measured in terms of profits, which was the only measure possible under the evidence adduced, are not recoverable in an action for personal injuries, where, as here, the business involves an investment of capital, the labor of several employees, and the time and services of the wife. This point is not argued in the briefs, but, since it is fundamental and controlling upon the error assigned, a proper disposition of the case forces us to an independent investigation. It is only when the investment is insignificant and merely incidental to the performance of a plaintiff's personal service that profits may be taken as a measure of loss or considered as an element of damages in personal injury cases, and then only because they are in reality personal earnings. *Weir v. Union R. Co.*, 188 N. Y. 416, 81 N. E. 168, 11 Ann. Cas. 43; *Kronold v. New York*, 186 N. Y. 40, 78 N. E. 572; *Mahoney v. Boston Elevated R. Co.*, 221 Mass. 116, 108 N. E. 1033; *Jordan v. Cedar Rapids & M. C. Ry. Co.*, 124 Iowa, 177, 99 N. W. 693; *Beebe v. Greene*, 34 R. I. 171, 82 Atl. 790; *Ehrgott v. Mayor, etc.*, of New York, 96 N. Y. 264, 48 Am. Rep. 622.

The guiding principle is nowhere better stated than in the case first above cited:

"Where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, the income or profits from a business should not be considered in determining the amount of the damages to which the plaintiff is entitled."

Measured by this principle, the instructions are obviously bad. They not only permitted the jury to find a damage to the business as such when none was pleaded, but committed the fundamental error of allowing a recovery for loss of profits in a business the profits of which were essentially produced by the capital invested and the labor of others, in addition to respondent's services, and were affected by the cost of materials and many other uncertain elements.

But it does not follow, as counsel contended in the court below and intimates here, that all of the evidence to which these instructions were directed was improperly admitted.

[14] Respondent's own testimony was plainly admissible as bearing upon the quality of his services which were lost for a month and as tending to throw light on his earning capacity. Manifestly the services of a man who had built up and successfully managed for years a business of the magnitude of that shown in the evidence were worth much more than what it would have cost him to secure a wigmaker merely to take his place for a month in the matter of fitting wigs. The whole business, as shown by the evidence, was largely dependent upon his own exertions. It was therefore competent to show the character and magnitude of the business, the capital and assistance employed, and even the profits, not indeed as elements of damage, but merely as circumstances to be considered by the jury in determining the value of respondent's loss of his own services in the business because of the injury. *Heer v. Warren-Scharf Asphalt Pav. Co.*, 118 Wis. 57, 94 N. W. 789; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

In the case last above cited the personal element was certainly not more prominent in the business than in the case here, yet the court held evidence of the character here involved admissible. Justice Winslow, speaking for the court, referring to the *Heer Case*, said:

"In that case it was, in substance, held that where a man not working on a salary, but managing an established business, which is mainly dependent on his personal exertions, has been disabled, and sues to recover damages for the injury, it is competent to show the character and magnitude of the business, and to that end to show the capital and assistance employed in the business, also the quality and amount of the plaintiff's services in the business before the accident, and the amount of the profits of the business, not for the reason that such profits are in any respect elements of damage, nor that their loss or impairment can be proven because they represent interest on the capital employed, the value of the good will, and perhaps other elements, in addition to the value of the personal services of the plaintiff, but for the reason that all these elements, when known, are truly descriptive of the quality of the service of which the plaintiff was capable before his injury, and thus tend to throw light on his earning capacity."

See, also, *Ripon v. Bittel*, 30 Wis. 614; *Hart v. New Haven*, 130 Mich. 181, 89 N. W. 677; *Muskogee Electric Traction Co. v. Eaton* (Okl.) 152 Pac. 1109; *El Paso Electric R. Co.*

v. Murphy, 49 Tex. Civ. App. 586, 109 S. W. 489.

The question of damage to business should not have been submitted to the jury. The evidence as to the character, extent, and income from the business, and respondent's part therein, should have been submitted solely as an element in determining the reasonable value of the time lost by respondent, with an express caution that diminished profits were not to be used as a measure of damages in any sense.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, MAIN, and MORRIS, JJ., concur.

In re COLLINS' ESTATE.
CHAPPELLE v. WOODHAMS.
(S. F. 7913.)

(Supreme Court of California. March 20, 1917.
On Rehearing, April 16, 1917.)

1. APPEAL AND ERROR §151(3)—PARTY AGGRIEVED—EXECUTOR.

The executor of a will admitted to probate having been duly appointed, and taken up, the administration, represents, and is under duty to protect the interests of, all the beneficiaries, and may oppose contest of the will till final decision thereof, and so appeal from revocation of probate as a party aggrieved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947.]

2. WILLS §55(1)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence on a will contest held insufficient to support a verdict that decedent was not of sound and disposing mind.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-140, 148-150, 161.]

3. WILLS §41—TESTAMENTARY CAPACITY.

Testator's extreme stinginess, repulsive or filthy personal habits, ill temper, jealousy, dictatorial and disagreeable disposition, and propensity to drive hard bargains do not constitute insanity or unsoundness of mind, but at most accentuate any inference of unsoundness founded on other circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 84, 85.]

4. WILLS §34—TESTAMENTARY CAPACITY—INSANITY.

Aside from dementia leaving no mental power to form any conception of the relation of things, insanity which will avoid a will is delusion operating on the testamentary act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 71-73.]

5. WILLS §55(1)—TESTAMENTARY CAPACITY—OPINIONS.

Opinions as to unsoundness of mind are insufficient to establish the fact, being based on facts showing neither morbid delusion nor total mental incapacity, and showing nothing more than personal peculiarities and habits, occasional lapses or failure of memory and defective nervous and muscular co-ordination, and it clearly appearing that none of these frailties was present at the execution of the will or affected its provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-140, 148-150, 161.]

On Rehearing.

6. APPEAL AND ERROR §151(3)—"PARTY AGGRIEVED"—EXECUTOR.

Code Civ. Proc. § 1299, providing an executor named in a will may petition to have the will admitted to probate, and so make it a final determination, and so makes it a trustee for the beneficiaries a party aggrieved who may appeal from the order refusing admission to probate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947.]

For other definitions, see Words and Phrases, First and Second Series Aggrieved Party.

Department 1. Appeal from Supreme Court, Santa Clara County; P. F. Goode, Judge.

Albertine Collins Chappelle contested the will of Betsey H. Collins, deceased, and from an order revoking probate, W. E. Woodhams, executor, appeals. Reversed.

William H. Johnson, of San Jose, for appellant. Hiram A. Blanchard, of San Jose, for respondent.

SHAW, J. This is an appeal from an order revoking the probate of the will of Betsey H. Collins, deceased.

[1] The appellant has no interest in the estate except such as arises from the fact that he is the duly appointed and qualified executor of the will previously admitted to probate. The will provides for several legacies and devises the residue of the property to the contestant. Respondent contends that the executor is not a party aggrieved, and hence that he cannot maintain this appeal. This proposition is not well taken. When a will has been admitted to probate and the executor is duly appointed and has taken up the administration of an estate, he represents all of the beneficiaries of the will. He then becomes his duty to protect their interests, and as such executor he has the right to oppose a contest of the will until the final decision thereof; consequently he may maintain an appeal from an adverse judgment of the lower court. Estate of Whetton, 98 Cal. 203, 32 Pac. 970; Estate of McKinney, 111 Cal. 454, 44 Pac. 743; Estate of Dillon, 18 Cal. 685, 87 Pac. 379; Estate of Hite, 15 Cal. 457, 101 Pac. 448; Estate of Logan, 17 Cal. 362, 153 Pac. 388.

[2] The only question presented in the case is whether or not the evidence is sufficient to support the verdict of the jury that the decedent was not of sound and disposing mind at the time of the execution of the will.

The testatrix was the wife of Herman Collins. They had no children born to them. The contestant, Mrs. Chappelle, was adopted by them as their daughter when she was about 2 years of age, and lived with them until her marriage to Chappelle about the year 1909. The family formerly resided in South Dakota. Some 10 years previous to her death they removed to San Jose, Cal. In May, 1912, Collins left his wife and went to

1, remaining there until his death in 1915. The testatrix, in her later years, afflicted with varicose veins in her leg. On October 28, 1914, a surgical operation was performed on her to remove them. At the time of making the will, on March 25, 1915, she was about 75 years of age. Her estate consisted of a farm in South Dakota, valued at \$12,000, something over two thousand dollars on deposit in savings banks, and \$100 loaned on secured notes amounting to \$100, besides some small articles of personal property. Before leaving his wife Herbert Collins executed a deed purporting to convey to the contestant the residence in which he and the testatrix had lived prior to his departure. This deed he placed in his will to be delivered to the contestant upon his death, and it has since been delivered to her. The testatrix occupied this residence until her death. The will bequeathes a sum of \$500 each to two nieces, and a like sum to a nephew and his wife jointly. It also bequeathes \$100 to the nephew and wife for the upkeep of the graves of the father and mother of the testatrix. All the residue of the estate is given to Albertine O. Appelle, the contestant.

The contestant and five other women, intimate acquaintances and near neighbors of the testatrix, each testified that in her opinion the testatrix was not of sound mind when she executed the will. There was no other testimony on the subject except that of two physicians, one of them the husband of the contestant, who, in answer to hypothetical questions purporting to state the substance of the reasons given by the contestant's witnesses, each stated his opinion to be that she was of unsound mind. We will state as briefly as possible the facts given by the witnesses as the foundation for their opinions. The testatrix did not eat enough; she was too close to feed herself properly; so close that she would not take proper nourishment, and if she saw anybody else eating plenty, she thought that they spent too much money; she wanted so many vegetables for a nickel that the vegetable peddler refused to call at her house. She wanted the neighbors to cut down the lilac trees so that she could see her husband when he turned the corner. When he saw her husband give three peaches from his back yard to a neighbor woman she became very angry, and thereafter was always talking about it. She was troubled frequently with aphasia, and would at such times try to tell things, but could not make herself understood. One of these spells occurred about a month before the will was made. In these spells she would open and close her eyes, trying hard to think of the words, then give it up, then try again and fail. Her mouth was drawn to one side from paralysis of the facial muscles. After the operation mentioned she shuffled her feet in walking, as if she were unable to raise them. During

the last two or three years she frequently asked a neighbor to do little errands for her, such as paying her taxes, buying her wood, and the like. She grieved about her husband not coming back or writing to her. There did not seem to be, in the opinion of one witness, any good common sense to her talk. No instances, however, were given of this lack of common sense. After the operation in 1914 she lost flesh very rapidly and became very thin. Prior to that she was rather fleshy. She harbored a grudge against one of the witnesses because her husband had given the witness a chair, and she was jealous about it. She never wanted any one to have pleasure. When the contestant visited her for a month, in May, 1915, she did not seem to recognize her as she entered the room, but recognized her in a moment and broke down and cried. She did not inform the contestant of the operation for varicose veins, in October, 1914. She first told the contestant to go home, and then when she got ready to go she begged her to stay. She was very suspicious, very disagreeable and ill-tempered, getting so agitated with anger that she would get weak and have to sit down and rest. Sometimes she could not be made to understand anything except by writing, which she would then try to read and would shake her head as if she did not understand it. She would not allow her daughter to do the washing for herself and children during the said visit for fear she would use more water than was permitted, and she would turn down the gas when the daughter was cooking in the kitchen, saying that it was wasting. She was always a woman it was nearly impossible to live with, always nagging and scolding, and was extremely penurious. This was true before the daughter's marriage in 1909. When eating she would grab the victuals in her hands and eat as if she were starving. She ate peas with a spoon and took meat in her fingers, when eating, seldom using a knife or fork. She would pick up partly eaten scraps out of other plates and sop up the gravy off the meat plate with a piece of bread, when visiting at a neighbor's after a meal. A few weeks after making the will she got some Easter cards to send to friends and her daughter. She did not know what to write on them, and was very much disturbed because of that fact, said she did not know how to put it on paper, and finally sent the cards without anything on them except the address. She was foolishly fond of money, and on one occasion hugged and kissed a cent piece given her by a neighbor. She had trouble with her left hand at times so that she could not move it very well, and she had to move it from one place to another with the other hand.

On the other hand, the evidence showed that, notwithstanding these peculiarities and physical conditions upon which the witnesses

based their opinion that she was of unsound mind, during all of this time she was able to and did transact her ordinary business as before and without serious difficulty, except that which arose from her deafness. The savings banks accounts show that she was depositing and withdrawing money therefrom during this period. The \$2,500 loaned as aforesaid was represented by eight notes, bearing interest payable at different times, some annually, some semiannually and some quarterly. These loans were made for her by the appellant, Woodhams, who, during all this time, was acting as her agent for that purpose. Before making a loan he would submit the proposition to her, and she would approve it. She kept the notes and mortgages and all her other valuable papers in her own custody. As each installment of interest became due she would take the note to Mr. Woodhams' office, receive from him the interest paid and have it credited on the note. She kept a close account of the dates, and never failed to look after the interest promptly as it became due, or to select the right note from among her papers. She had loaned \$100 to contestant's husband, Dr. Chappelle. In May, 1915, when the contestant was visiting the testatrix, and when she says she believes the testatrix was of unsound mind, the testatrix handed her this note and told her to give it to her husband as a present. The contestant received it without objection, and delivered it as instructed. The testatrix knew the date when taxes became due and made preparations in advance for paying the same. She made one loan just three weeks before the making of the will, and she withdrew money from the bank and deposited money therein shortly before and shortly after the making of the will. Those who transacted business with her testified that they saw no cause to question her capacity to transact business or the soundness of her mind. The will itself bears evidence of a rational mind. In view of the amount and character of her property and her family relations, the dispositions of her will seem entirely reasonable. She herself wrote the instruction stating how it was to be made, and it was prepared in accordance therewith after a prolonged consultation extending over two days, by Mrs. Smith, secretary to Mr. Woodhams. She brought the deed for the Dakota farm in order to have it correctly described in the will. She assisted in comparing the description in the will with that in the deed, she reading one paper and Mrs. Smith reading the other. Some 14 months before the date of the will she wrote a letter to Woodhams concerning one of the loans. Its language is clear and forcible and the ideas sound and rational, showing a business capacity of a rather unusual character for so old a woman. There was no evidence of any sudden change in her mental condition. The aphasia and the difficulty in moving the

left hand were first manifested shortly before the making of the will, but the peculiarity of habits, character, and disposition had, so far as appears, existed for many years and while she was in normal condition.

[3] Extreme stinginess, repulsive or filthy personal habits, ill temper, jealousy, a dictatorial and disagreeable disposition, and a propensity to drive hard bargains do not constitute insanity or unsoundness of mind. As was said in *Estate of Redfield*, 116 Cal. 652, 48 Pac. 794, they have no greater effect "than to accentuate the inference of unsoundness founded on other circumstances." In this case they do not even have that effect, for the evidence shows that the testatrix had had these habits and peculiarities in as great degree for many years, and there is nothing to indicate that they had their origin in a diseased mental condition.

[4] The fact that she shuffled her feet as she walked, after the operation on her leg in October, 1914, for varicose veins, showed physical disability, but it had no direct tendency to prove mental disease or insanity. The attacks of aphasia and the difficulty in moving one hand, there being evidence of but one instance of the latter, show a considerable degree of senile deterioration. But these things do not of themselves establish the insanity that is essential to render a person incapable of making contracts or a will. "It is commonly held that aside from those cases of dementia where the patient has not mental power to form any conceptions whether true or false, of the relations of things, the true test of insanity is mental delusion; that if a person persistently believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity. * * * But before a will can be rejected on that account it must appear that 'its dispositive provisions were or might have been caused or affected by the delusion,' * * * delusions which are not operative in the testamentary act, do not relate to the persons or objects affected by it, are not permitted to invalidate it." *Estate of Redfield*, supra.

In this case there is no pretense that the testatrix had not mental power to form reasonably accurate conceptions of the true relations of things. Her peculiarities and eccentricities do not constitute the degree of dementia referred to in the exception first noted in the passage just quoted. With respect to the true test there stated, the existence of delusions, there is absolutely no evidence. It is obvious that the physicians who gave their opinions that she was of unsound mind were measuring it by a more exact and perfect standard than is required by the law, the mind wholly normal and healthy, free from any defective co-ordination arising

from disease or decay. In a medical sense anything short of this may constitute insanity or unsoundness of mind; but the law does not demand such perfection to give capacity to manage one's affairs and make valid dispositions of property. The law defining insanity which will avoid such an act requires "either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion." *Estate of Chevallier*, 159 Cal. 168, 113 Pac. 130. And even in the latter class the act to be avoided must have been produced in whole or in part by the delusion or hallucination. *Id.*

[5] At best, the testimony of expert witnesses as to insanity, based on hypothetical questions skillfully framed to call for an answer favorable to the party in whose behalf it is asked, "is evidence the weakest and most unsatisfactory." *Estate of Dolbeer*, 149 Cal. 243, 86 Pac. 695, 9 Ann. Cas. 795. When, as in this case, the opinions as to unsoundness of mind, including those of the intimate acquaintances, are based on facts which show neither morbid delusion nor total mental incapacity, which prove nothing more than personal peculiarities and habits, accompanied by physical weakness, occasional lapses or failure of memory and defective nervous and muscular co-ordination, and it clearly appears that none of these frailties was present at the time of the execution of the will or affected its provisions in any way, the evidence is wholly insufficient to establish the fact.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

On Rehearing.

PER CURIAM. [8] In the opinion heretofore rendered the court in department held that the appellant, Woodhams, was sufficiently interested in upholding the will of the deceased to maintain an appeal from the order in controversy, but inadvertently assumed that it was an order revoking the probate of the will, the fact being that it was an order refusing to admit the will to probate, and it was made upon a contest of the will before probate. The record on appeal was in typewriting as provided in section 953a, Code of Civil Procedure, and neither party for the information of the court printed in their briefs the order appealed from, or any part of the pleadings in the case. Code Civ. Proc. § 953c.

The difference in the facts does not require a different ruling. Woodhams was named in the will as executor thereof, and as such he filed a petition for the probate thereof, to which the respondent filed the contest. The Code (§ 1299, Code Civ. Proc.) provides that

any executor named in any will may petition the court to have the will proved. This clearly authorizes the executor to file and prosecute the petition to a final determination. An appeal may be taken from an order refusing to admit a will to probate. Having the authority and the right to file and prosecute the petition, he stands, with respect thereto, in a fiduciary relation to all the beneficiaries thereunder, and it is his duty, and accordingly his right, to take all the proceedings necessary to secure a just determination of its validity, including an appeal from an adverse decision on the question. He has authority, also, under section 369, Code of Civil Procedure, to sue without joining with him the persons for whose benefit the action is prosecuted. In this case he is interested because his position as the executor named in the will and as the petitioner for its admission to probate makes him the trustee for that purpose of the legatees named in the will. In that capacity and by virtue of that right he is a "party aggrieved" by the decision, and one who may appeal therefrom as provided in section 938 of the Code of Civil Procedure. There are no decisions by this court on the exact point, but the principle is everywhere recognized. 40 Cyc. 1229, 16 Ency. of Plead. & Prac. 997; 18 Cyc. 206, 3 Cor. Jur. 622.

Petition for rehearing denied.

VAN CALBERGH v. EASTON et al. (L. A. 3917.)

(Supreme Court of California. April 13, 1917.)
ADVERSE POSSESSION — § 54 — UNINTERRUPTED POSSESSION — BEGINNING ACTION BEFORE TIME.

Under Code Civ. Proc. § 325, providing that to constitute adverse possession there must be uninterrupted and continuous possession for five years, relief cannot be given if suit is begun before, although it is not concluded till expiration of five years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 271.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by E. Van Calbergh against Alice A. Easton, J. M. Moyer, and others, in which Moyer filed an answer and cross-complaint. From a judgment for plaintiff, and an order denying a new trial, Moyer appealed to the District Court of Appeal, which reversed the judgment, and appellant files application for rehearing. Rehearing denied.

The following is the opinion of James, J., of the District Court of Appeal, in which Conrey, P. J., and Shaw, J., concurred:

Plaintiff brought this action to quiet his title to a certain lot of land in the city of Los Angeles, alleging that he had for more than five years last past been the owner and in possession of and had paid the taxes upon the lot. It was asserted by the complaint that Alice A.

Easton, a defendant, and certain other persons sued by fictitious names, claimed an interest in the property adverse to the plaintiff. The complaint was filed on November 12, 1912. J. M. Moyer appeared and answered, claiming to be the successor in interest of the defendant Alice A. Easton, and to be one of the persons mentioned by fictitious name in the complaint of plaintiff. He filed an answer and cross-complaint, alleging fee-simple ownership of the land in controversy and asking for judgment accordingly. There was an answer to the cross-complaint, and the case went to trial; findings and judgment being made and entered in favor of the plaintiff, from which judgment and from an order denying a new trial to the defendant, this appeal was taken.

The record of the trial is presented by bill of exceptions. It is shown that by stipulation of the parties it was agreed that in April, 1889, Alice A. Easton was the owner of the property in fee title. The plaintiff testified that prior to the year 1907 he had owned and lived upon the lot immediately adjoining that in controversy here; that in November, 1907, he was informed by one Warden, connected with an abstract company, that said Warden had for sale the lot described in the complaint; that he was assured by Warden that he could give a clear certificate of title, which was given, and in consideration of a deed being made, the plaintiff paid to Warden the sum of \$375. The deed from Warden to the plaintiff was introduced in evidence. It bore date of November 6, 1907, but the plaintiff testified he did not receive the deed until the latter part of November, 1907. By that testimony we take it to mean that the transaction was completed and the deed delivered in the latter part of November, 1907. Plaintiff testified that he immediately took possession of the lot after receiving the deed, built a fence around it, and had used it continuously from that time on up to the date of the trial, which occurred in March, 1914. He showed payment of taxes for the years, 1908, 1909, 1910, and 1911; the tax receipts introduced showing that the second payment for the year 1911 was made to the tax collector on April 24, 1912. The defendant showed that he had made several payments of taxes on the property, and particularly that he had paid the second installment of the 1911 taxes on February 7, 1912, more than two months prior to the time that the plaintiff made a duplicate payment of the same tax. In proving his chain of title, taking the fact stipulated that Alice A. Easton was the owner in fee of the property in 1889, he showed by the judgment roll that title had been quieted in his favor against Alice A. Easton and others in July, 1910.

The court in its findings did not determine that at the time of the commencement of the action the plaintiff had acquired title to the lot and was the owner thereof, but made its findings in this way: "That at the date of the filing of the complaint, to wit, the 12th day of November, 1912, the plaintiff was not, and for more than five years next preceding said date had not been, the owner of the tract of land described in the complaint. * * * That for more than five years prior to the filing of the complaint in this action, to wit, ever since the 10th day of November, 1907, to the present time, viz. the date of the filing of these findings, the plaintiff has been, by actual occupation, in the open, notorious, uninterrupted, adverse, continuous, exclusive, hostile possession, under a claim of title and color of title, of said lands hereinbefore described, and the plaintiff has paid all taxes levied and assessed since the inception of said possession, but he did not pay the second half of the city or of the county taxes levied and assessed for the year of 1912 until after the filing of the complaint herein."

Appellant argues, and we can see no escape from the legal logic, that in order to authorize

a judgment in favor of the plaintiff it was necessary, because of the fact that adverse possession was relied upon, that plaintiff show continuous and uninterrupted possession and the payment of taxes for a period of five years preceding the commencement of the suit. The evidence did not establish such a condition of fact, and neither was it by the findings of the court so determined. By his own testimony, the plaintiff did not receive a deed or enter into possession of the lot until "the latter part of November, 1907." He commenced this action on the 12th of November, 1912, which was, according to his own testimony, less than five years from the date of the delivery of the deed. If the conclusion of the court is the correct one—that is, that it mattered not whether the complaint was filed within five years, so long as at the time of the trial or the making of findings the full five years had run—then the complaint may as well have been filed during the third year of the prescriptive term, with the only condition that the full period of five years should have completely run before judgment. It would seem that a bare statement of the proposition is its own answer.

Appellant makes the further contention that, conceding that the plaintiff had been in possession adversely for the full period of five years prior to the commencement of the action, nevertheless it was not shown that he had paid all taxes levied and assessed against the property, because the second half of the 1911 tax was paid by the defendant in February, and that the further payment of the same tax by the plaintiff more than two months later would not satisfy the requirements of the statute. We are in accord with the appellant on this proposition also. We recognize the decisions in cases like *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983, and *Cummings et al. v. Laughlin et al.*, 160 Pac. 833, as determining, under the facts of those particular cases, that a payment by each of the contending parties of the same tax would not debar the prescriptive claimant from the benefit of the payments made by him. Such decisions are applicable to cases of overlapping boundaries, but we think not applicable to facts such as are here involved. If it be the law that an adverse claimant can rest upon his payment of taxes, notwithstanding they may have already been paid by the record owner, then the record owner is absolutely powerless to protect himself at all against the evidence of the payments made by the adverse possessor, and in order to prevent title to his property from being divested he will be compelled to go into court before the prescriptive period has run and either ask for an ejectment of the person in possession, or seek a decree to quiet title against the unmatured right of the claimant. The statute (Code Civ. Proc. § 325), to our minds, makes it an indispensable prerequisite that the adverse claimant shall have paid all taxes levied and assessed within the period of his occupancy, and if they have been paid prior to the time that he offers payment to the tax collector, then the tax debt for that year has been satisfied and the double payment amounts to naught. In such a case he could not be held to have paid the tax. The argument that this view may result in a scramble between the owner of the legal title and the adverse claimant as to who shall be first at the tax collector's office is rather an argument against the expediency of the statute than against its effect. To our minds, its effect is plain, and stated in language unmistakable.

We think the contentions of appellant on each of the questions discussed must be sustained.

The judgment and order are reversed.

Charles Lantz, of Los Angeles, for appellant. Frank C. Prescott, of Los Angeles, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied. In denying the petition we deem it proper to say that we do not desire to be understood as approving the portion of the opinion relative to the matter of the payment of the second installment of taxes for the year 1911. We are satisfied that the decision of the District Court of Appeal is correct upon the first ground for its decision stated therein.

RODGERS v. PACIFIC COAST CASUALTY CO. (L. A. 3921.)

(Supreme Court of California. April 24, 1917.)

1. INSURANCE \Leftrightarrow 435—LIABILITY INSURANCE—PAYMENT OF JUDGMENT.

Under a liability policy insuring against sums paid by insured toward satisfying judgments against him, insured's giving a note for such a judgment constitutes a payment rendering the insurer liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144.]

2. APPEAL AND ERROR \Leftrightarrow 842(1)—REVIEW—JURY QUESTION.

Where a liability policy insured against sums paid toward satisfying judgments obtained against insured, whether insured's giving a note for a judgment upon the understanding that it should be surrendered for an assignment of insured's cause of action against the insurer constituted a bona fide payment of the judgment which was actually satisfied of record was a question of fact determined by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3318.]

In Bank. Appeal from Superior Court, Los Angeles County; Carlis D. Wilbur, Judge.

Action by Frances G. Rodgers against the Pacific Coast Casualty Company. A judgment for plaintiff was affirmed by the District Court of Appeal, and defendant petitions for a rehearing. Petition denied.

The following is the opinion of James, J., in the District Court of Appeal, in which Conrey, P. J., and Shaw, J., concurred:

In this action the judgment entered by the trial court was in favor of the plaintiff. Thereafter a motion for a new trial was made by the defendant and denied by the court. The appeal is taken from the judgment, and also from the order.

Plaintiff on the 18th day of April, 1910, suffered bodily injuries in an elevator which was being run in an apartment house in the city of Los Angeles. The owner of the apartment house business was Nevada Irwin. The latter at the time of the accident held a policy issued by the defendant herein indemnifying her against loss and expense arising for damages accidentally suffered by reason of the operation of elevators in the apartment house. The maximum liability fixed by the policy was the sum of \$5,000 where injury was suffered by one person only. This plaintiff, after suffering her injuries, commenced an action in the superior court to recover from Nevada Irwin damages on account thereof, which suit resulted in a final judgment (after appeal taken and decided) in her favor for

the sum of \$2,539.93. Within 60 days after this judgment became final, Nevada Irwin gave to the plaintiff herein her promissory note for the full amount of and in satisfaction of the judgment. She then, upon the promissory note being surrendered to her and canceled, delivered to this plaintiff an assignment of her (the said Irwin's) claim against the defendant here on the policy of indemnity insurance. This action was then brought. The case was tried before a jury with the result already indicated.

The policy issued by the defendant to Nevada Irwin in terms insured said Irwin on the account mentioned "against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any person by reason of the operation of the elevators described herein." There were a number of conditions stated in the policy. It was required, among other things, that notice should be given to the company immediately of any accident, and that, if suit was brought on account thereof, the assured should forward to the company all process and papers served, and then that "the company, at its own expense, will settle or defend said suit whether groundless or not. The moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the company." It further provided that "no action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue." The contentions of appellant for reversal herein rest upon two principal propositions which are advanced in the briefs: (1) That under the terms of the policy no action would lie against appellant until the assured had actually paid the amount of the judgment rendered against her, or some part thereof, and that the execution of a promissory note to the injured party would not amount to payment within the meaning of the policy; (2) that under the facts shown in evidence the making of the promissory note by Nevada Irwin in favor of this plaintiff appears not to have been done in good faith, and that the transaction was not bona fide. There seems to be no contention but what an assured has the right under such a policy as that here considered to make a valid assignment of a matured claim against the insurer. The policy contains no terms appropriate to forbid such assignment. It was alleged in the complaint herein, and there appeared to be no dispute as to the facts of the matter, that Nevada Irwin gave the requisite notices to the defendant company as to the accident having happened to this plaintiff, and that when suit was brought to recover damages she delivered to the legal counsel for this defendant all papers in connection with such suit; that this defendant by its counsel took charge of the litigation, managed and controlled it throughout, both in the trial court and upon appeal—in fact, contested the action to the court of last resort. It has been held in several well-considered cases that, where an insurance company acting under the terms of policies practically identical with those made by the insurer in this case takes out of the hands of the assured direction and control of litigation, its liability to the assured becomes fixed and determined upon the entry of judgment; and it is also held that, if precedent payment of the judgment is required of the assured, such payment may be made by promissory note. The decisions indicating a

contrary view on the first proposition do not commend themselves to our judgment as presenting a reasonable and fair construction of the contract, when the objects and purposes sought to be accomplished are taken into view. We are in agreement with the expressions to be found in the opinion of the Supreme Court of Minnesota in *Patterson v. Adam et al.*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184. The court there says: "The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the lengthy document before us was not the choice of the assured. Recognition needs to be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them." The court proceeds with the statement that, even granting that the policy was so worded that it must be considered one of indemnity, under the facts the company placed itself in a position which resulted in liability; there having been no payment of the judgment in that case by the assured. This last conclusion was based upon the fact, as here, that the company exercised the right reserved to it to settle and carry on litigation, excluding the assured from any interference therewith. The court again says: "Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. . . . We therefore hold that in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff (the plaintiff being the person who secured a judgment for damages because of injuries suffered), it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency." It was determined by that decision that the judgment creditor of the assured could attach by garnishment the amount of the liability incurred by the insurance company as a debt then due to the assured. The following cases support the proposition that under the terms of a policy of indemnity insurance which promise to indemnify for loss paid by the assured the satisfaction of a judgment procured by the giving of a promissory note is to be deemed payment of the judgment debt: *Kennedy v. Fidelity & Casualty Co. of New York*, 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 638, 10 Ann. Cas. 673; *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 132 Pac. 398. In the latter cases it is pertinently suggested as being inconsistent with the general purposes and intent of such policies to hold that, unless the assured has the actual money or specific property to apply in discharge of the judgment, and that such money or property is so applied, no liability ever arises against the insurer. It has been often held, too often to require citation of authorities, that where there is an express agreement to that intent, a

promissory note given to the creditor will extinguish the debt to which it is to be applied. The second proposition advanced by the appellant, we think, is one which was finally decided by the jury, because it rests upon the evidence heard in the case and the circumstances surrounding the matter to be adjudicated. It appeared that after the plaintiff here had learned that Nevada Irwin had not sufficient property out of which she might at the time obtain satisfaction of the judgment, she, through her attorney, conferred with the attorney for Nevada Irwin; that it was then agreed that a promissory note should be made by Nevada Irwin in payment of the judgment, and (perhaps simultaneously) it was also understood that the promissory note after being so given should be rendered and paid by the assignment of Nevada Irwin's claim to this plaintiff. Upon the giving of the promissory note satisfaction of the judgment was actually entered. Under the evidence the jury was altogether authorized to find that it was the intent that liability under the judgment should be extinguished by the giving of the promissory note of Irwin to this plaintiff. As we have suggested, however, this branch of the case enters the realm of fact, and it may not be said that there was no evidence sufficient to sustain the finding made by the jury as is in fact from the verdict. And it may be further said that under the law as announced in the decree we first cited herein, when the judgment against Irwin became final the liability of the insurer became fixed. Assuming the correctness of this conclusion, it would then have been competent for Nevada Irwin, without the giving of a promissory note, to have assigned her claim against the insurer to Rodgers in consideration of the satisfaction of the judgment. The transaction as it was made, however, was perfectly legal in the form it took, and, we think, conceding the good faith of the transaction, as we must, was wholly within the rights of the parties. The complaint made of error because of the giving of certain instructions and refusal to give other instructions offered has been examined. The court, in the view we take of the case properly submitted to the jury the question as to whether the transaction wherein the note and assignment were given and made was one carried out in good faith and with the intent to extinguish the liability of Irwin upon the judgment. The instructions as a whole appear to have sufficiently and correctly stated such propositions of law as the jury needed advice upon. The judgment and order are affirmed.

Gray, Barker & Bowen, William A. Bowen, and Bowen & Ballie, all of Los Angeles, for appellant. Lee Riddle, W. O. Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles, for respondent.

PER CURIAM. In its petition for rehearing the defendant insists that the opinion of the District Court of Appeal holds that under the terms of the policy of insurance to Nevada Irwin, the company became bound to pay to Irwin the amount of the judgment recovered against her by the injured party as soon as it became final, and without previous payment thereof by Irwin to the injured party, and that the decision is based on that proposition.

[1] The opinion is not based solely on that proposition. It also proceeds upon the theory that the payment by Irwin of the judgment against her in favor of the injured party is a condition precedent to the existence of a cause of action in favor of Irwin against

pany, as indeed the policy expressly s, but that such previous payment ot be made in money, but may be made erty of any kind including the prom- note of Irwin if such note is accepted sly as payment—a theory in which we

This leaves as the main point of the he question whether or not the note cepted as payment and was made in faith. This, as the District Court says, marily a question of fact which the on the evidence, resolved against the any.

petition for rehearing is denied.

K et ux. v. PACIFIC ELECTRIC RY. CO. (L. A. 4000.)

reme Court of California. May 4, 1917.)

HUSBAND AND WIFE — 209(3)—INJURIES TO WIFE—ACTIONS.

By express provision of Code Civ. Proc. § subd. 8, the husband and wife may incorporate in one cause of action a statement of the ages sustained by the wife on account of onal injuries, and a statement of the consequential damages suffered by the husband.

[Ed. Note.—For other cases, see Husband and e, Cent. Dig. §§ 768, 968, 973.]

DAMAGES — 186—INJURIES TO WIFE—RECOVERY BY HUSBAND — EVIDENCE — SUFFICIENCY.

Uncontradicted evidence that a wife in an ident lost an arm above the elbow, that she l been in sound health, and did the housework, : that her injuries were permanent, and of a ure preventing her performance of her usual ties, and that her nervous system was serious- impaired, and that the expectation of life of th the plaintiffs was upwards of 30 years, a sufficient showing upon which the jury is thorized to find the value of the services of e wife, since there is no need of direct or press evidence of the value of the wife's serv- in order to entitle the husband to recover for e loss thereof.

[Ed. Note.—For other cases, see Damages, ent. Dig. § 509.]

DAMAGES — 216(1)—INJURIES TO WIFE—MEASURE OF DAMAGES—INSTRUCTIONS.

In suit by husband and wife for injuries to ie wife, an instruction that in fixing the dam- ges the jury should fix the amount in each parate matter irrespective of the amount of e other, and should not consider whether the otal amount awarded is large or small, was ot erroneous.

[Ed. Note.—For other cases, see Damages, ent. Dig. §§ 548, 549.]

DAMAGES — 132(12)—EXCESSIVE DAMAGES — INJURIES TO WIFE.

In suit by husband for loss of wife's serv- ces and by wife for personal injuries, verdict of \$22,500 was not excessive, where the wife, 30 years of age, lost an arm, suffered in both body and mind, suffered a shattered nervous system, and was no longer able to perform her usual household duties.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 383.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by J. F. Meek and wife against the Pacific Electric Railway Company. Judgment for plaintiffs, and order denying motion for new trial, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. Action by plaintiffs as husband and wife to recover damages for personal injuries to the latter alleged to have been caused by the defendant's negligence. The trial resulted in a verdict for plaintiffs, pursuant to which judgment was entered in their favor for the sum of \$22,500, from which, and an order denying its motion for a new trial, defendant appeals.

[1] The grounds upon which appellant seeks a reversal are: First, want of sufficient evidence to support the verdict; second, erroneous instructions given to the jury; third, that the verdict is excessive. In addition to a statement of the injuries suffered by Evalena Meek and for which compensation in damages is sought, it was alleged in the complaint that by reason thereof, J. F. Meek had incurred liability and made expenditures in a large sum for medicines and surgical treatment rendered necessary on account of the injuries to his coplaintiff, and that, due to the loss of her services caused by such injuries, he had sustained damages in the sum of \$20,000. Express authority for thus incorporating in one cause of action a statement of the damages sustained by the wife on account of personal injuries with a statement of the consequential damages suffered by the husband is found in subdivision 8 of section 427 of the Code of Civil Procedure, which provides that:

"In any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband."

With reference to damages sustained by the husband and due to the loss of services of his wife it was alleged and, except as to the amount of damage, proved:

"That before said accident said plaintiff Evalena Meek was an able-bodied woman; sound in mind and body; made part of her own clothes; did the housework for herself and husband, and when she had any one employed to assist in the housework she overlooked the same, and, in fact, was in charge and control of the household and performed the usual duties that a housewife performs in that behalf; but that since said accident said plaintiff Evalena Meek has been unable to perform, and will never be able to perform, the said duties as aforesaid, to the plaintiff J. F. Meek's damage in the sum of \$20,000."

In rendering its verdict the jury found that, due to the injuries suffered by the wife,

plaintiff had sustained damages in the sum of \$15,000, and that the damages sustained by J. F. Meek for loss of the services of his wife and expenses was \$7,500. It is conceded that the expense incurred by the husband for medical care and treatment was \$1,148, leaving a balance of \$6,352, awarded for lost services.

[2] The attack made upon the verdict for insufficiency of evidence is directed to the amount of consequential damage awarded to the plaintiff J. F. Meek for loss of his wife's services, and this is based upon the fact that, while the allegations of the complaint in this regard were conclusively established, no evidence was introduced or offered as to the pecuniary value of such services. The uncontradicted evidence in support of the allegations that, prior to the injuries sustained, which included the loss of an arm above the elbow, the wife was in sound health, did the housework, performed the household duties and usual duties of a housewife, and that her injuries are permanent and of a nature by reason whereof she will never be able to perform her usual duties, together with proof of the fact that her nervous system was seriously impaired, and that the expectation of life as to both of the plaintiffs was shown to be upwards of 30 years, constituted a sufficient showing upon which the jury, guided by their general knowledge of such matters, were authorized to find the value of such services. *Redfield v. Oakland C. S. Ry. Co.*, 112 Cal. 220, 43 Pac. 1117; *Martin v. Southern Pacific Ry.*, 130 Cal. 285, 62 Pac. 515. Indeed, from the very nature of the case, the husband's loss is not susceptible of direct proof. Suppose a wife performed no manual labor, can it be said that her husband has no right to recover from the wrongdoer compensation for rendering her incapable of performing such service? The services rendered by a wife, aside from the consideration of her society, or what is termed the consortium, damages for which are not recoverable in this state, may be and often are of such character that no witness can say what they are worth. Conceding that part of the service performed by the wife might be the subject of market value it is not true when applied to all, since the aid, advice, and assistance rendered a husband in conducting his affairs, and management of the home, is not to be tested by what such service could be hired for. Hence "there is no need of direct or express evidence of the value of a wife's services, either by the day, week or any other stated period, in order to entitle the husband to recover for the loss thereof, as the relation which she sustains to him is a special and peculiar one, and the actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience, and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the husband for his

loss." 13 Cyc. p. 215, note 22. See, also, *Metropolitan St. R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 816; *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329; *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892. The fact that some of the cases supporting the proposition are from jurisdictions where both the consortium as well as the services of the wife are elements of damages recoverable by the husband render them of no less weight as authorities, since they hold that the service, whether physical in character or rendered in an advisory capacity, for which, as well as the consortium, recovery is sought, is not a subject as to the value of which direct evidence is required.

By an instruction designated U, the jury was told:

"In view of the fact that this is an action by the plaintiffs for the injuries to the wife, and also by the husband for lost services of his wife, and alleged expenses, I instruct you that in fixing the damages, if any, you should fix the amount in each separate matter irrespective of the amount in the other, and should not consider whether the total amount awarded is large or small, but should fix the amount in each instance according to the instructions that I have given you on that issue."

Appellant insists that the instruction was prejudicial in that it not only caused the jury to lose sight of the fact that plaintiffs were entitled to but one payment on account of the injuries suffered, but required the jury to arrive at their verdict by a process, the effect of which was well calculated to increase the award to a sum in excess of that which they would otherwise have fixed as the total damage to both plaintiffs for the wrong suffered. And also claims that the instruction is in conflict with one wherein the jury was told:

"In the event that you find for the plaintiffs herein, you should return but one verdict for an amount which in your judgment will compensate both plaintiffs for the damage and loss suffered by reason of the injury to the plaintiff Evalena Meek."

[3] We are unable to perceive any merit in these contentions. Only one verdict was returned, and by that the jury found that the total damage sustained by both plaintiffs was \$22,500. In view of the fact that the action was not only to recover damages for the wife's injuries, but, on behalf of the husband, to recover for loss of her services, the instruction designated U, wherein the jury was told that they should not permit the amount, whether large or small, awarded in the one case, to influence them in fixing compensation for the other was, in our opinion, a correct statement of the law properly given the jury, and in accordance with which, as shown by the form of their verdict in fixing the amounts found due, it acted in arriving at a conclusion.

[4] Aside from the amount of the award,

there is nothing disclosed by the record from which we, as a matter of law, can say that the verdict is excessive. Evalena Meek was at the time of the accident 30 years of age, and, among other serious injuries of a permanent nature suffered, as the loss of an arm, in consequence of all which she has not only suffered in both mind and body, but can indulge in little or no hope for future improved condition of health. The language used by this court in *Reeve v. Colusa Gas & Elec. Co.*, 152 Cal. 99, 92 Pac. 89, wherein the court refused to disturb as excessive a verdict for \$30,000 awarded to a woman 57 years of age, is applicable to the facts herein involved. It was there said:

"It is impossible adequately to describe the suffering and misery—past, present, and future—inflicted upon the plaintiff as a consequence of the injury. The verdict is large, the amount of damage was a question for the jury, subject to the supervision and correction of the trial court, and, having been passed by the latter without disapproval, it is not for us to say, under the circumstances, that it is excessive."

See, also, *Morgan v. Southern Pacific Ry.*, 95 Cal. 501, 30 Pac. 601, where it is said:

"A verdict will not be disturbed because excessive, 'unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.'"

In the case at bar it appears that the sum awarded by the jury consisted of \$15,000 for injuries to the wife, \$1,148 for expenses incurred and paid by the husband on account of her injuries, and \$6,352 for loss of services to the husband. There is nothing disclosed by the record upon which this court can as a matter of law say that the verdict is excessive.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.

JOHNSON v. V. D. REDUCTION CO. et al.
(L. A. 4025.)

(Supreme Court of California. May 4, 1917.)

1. APPEAL AND ERROR §994(3)—SCOPE OF REVIEW—CREDIBILITY OF WITNESSES.

If witnesses compared notes with plaintiff and exhibited a partisan feeling in testifying, that was for consideration of the trial judge, and not for the court on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3904-3905½.]

2. NUISANCE §72 — PUBLIC NUISANCE—ABATEMENT—RIGHT OF ACTION.

Civ. Code, § 3480, defines a public nuisance as one which affects at the same time an entire community and any considerable number of persons, although the damage to individuals may be unequal. Section 3493 provides that a private person may maintain an action for a public nuisance if it is specially injurious to himself. Code Civ. Proc. § 731, provides that an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance. Defendant

maintained 30,000 hogs in pens and fed them the refuse collected from the entire city of Los Angeles. A private individual owning land in the vicinity sued to abate the alleged nuisance. Held, that as he was specially affected, he could maintain the suit, although other persons in the same vicinity were affected by the nuisance, and it was in fact public.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169.]

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Injunction by W. R. Johnson against the V. D. Reduction Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

Collier & Clark and James E. Shelton, all of Los Angeles, for appellants. Robert L. Hubbard, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an action brought by plaintiff to enjoin the continuance of a nuisance alleged to have been created and maintained by defendants in growing and feeding hogs upon garbage produced and gathered in the city of Los Angeles, from whence it was transported in cars to a railroad switch adjacent to the lots and pens of defendants, which covered an area of about 200 acres, where they, at all times, kept approximately 30,000 head of swine upon a daily ration of some 300,000 or 400,000 pounds of city garbage hauled out and fed to them.

The appeal is by defendants from a judgment in favor of plaintiff granting a permanent injunction as prayed for, the effect of which is to prevent defendants from shipping to said switch and distributing as feed to said hogs at the place in question garbage or similar material of a partially fermented, decayed or decaying character, and from maintaining at said place, or in the vicinity thereof, hogpens where such material shall be kept and fed in a manner to pollute and befoul the atmosphere with noxious, unwholesome, and offensive odors, in consequence of which plaintiff and his family shall be deprived of the free use and enjoyment of his home, or which shall injuriously affect his property.

The court made findings from which it clearly appears that the effect of the operations, conducted at a place less than a mile distant from the plaintiff's home, was to create vile and noxious odors, offensive to the senses, and which reached and polluted the air in the vicinity of and in plaintiff's residence, at times rendering it unfit for occupation, thus interfering with the enjoyment thereof and causing his family great inconvenience and physical distress.

[1] Appellants insist that there was not sufficient evidence introduced to justify the action of the court as to some of the findings made. This objection is not directed so much to the substance of the findings as to the ex-

aggregated and superlative form of language used by the court in describing the alleged variety of offensive odors and disagreeable conditions created by the acts of defendants which, in a number of ways, as found by the court, interfered with the plaintiff and his family's comfort and health and their right to the enjoyment of his home, so alleged to be impaired and destroyed by the conditions to which he and his family were subjected. Not only was there direct testimony of witnesses in support of the findings, but inferences fairly deducible from facts proved, and the manner in which the defendants conducted the business, tend strongly to establish the material facts found by the court, and upon which the judgment is based. The fact that, as claimed by appellants, such witnesses "compared notes with plaintiff" and in testifying exhibited a partisan feeling, while a subject for consideration by the trial judge, is not one with which this court is concerned. An examination of the record discloses no just ground for the attack made upon the findings.

In their answer defendants, as a separate defense, alleged that a large number of persons by reason of living and having homes in the vicinity of the place where the hogs were kept and fed were equally with plaintiff affected by the operations which it was claimed constituted a nuisance, and if found to be a nuisance, then it was of a public nature, as defined in section 3480 of the Civil Code, and since plaintiff suffered no special injury he could not by reason of section 3493 of the Civil Code maintain an action to enjoin the same. Notwithstanding such defense was, on motion, stricken from the answer, it nevertheless appears that evidence was received upon the issue so assumed to have been raised, from which the court found:

"That there are a considerable number of other persons living as near to the said hog ranch as does plaintiff, and some nearer, and in almost a direct line between plaintiff's home and said hog ranch, and the odors which arise from the hog ranch and permeate the atmosphere as heretofore described, at times, affect the other persons residing in that community in the same manner and nearly to the same degree as plaintiff."

[2] The ruling of the court in striking from the answer the matter set up as a separate defense is assigned as error, upon which, and the findings quoted, appellants strenuously insist upon a reversal of the judgment. The contention is based upon the claim that not only, as shown by the allegations of the answer made the subject of the motion to strike out, but as shown by the quoted finding of the court, the nuisance was of a public nature, as defined by section 3480 of the Civil Code, as to which, as provided by section 3493 of the Civil Code, a private person may not maintain an action unless the nuisance is "specially injurious to himself." The facts of the case are practically identical with those involved in that of *Fisher v. Zumwalt*,

128 Cal. 493, 61 Pac. 82, where the nuisance complained of was caused by the manner in which a creamery was operated in a thickly settled neighborhood by reason whereof vile and offensive odors, stench, etc., were permitted to escape and pollute the air in and about the dwellings and homes of a considerable number of persons, rendering them unfit for occupation, thus causing the plaintiff, who sued alone in said action and others similarly affected, great distress and inconvenience. The court, after a lengthy discussion of the point here made, urged by the appellant therein, held that, conceding the nuisance to be of a public nature, such facts did not deprive the individual plaintiff of the right to an action for its abatement if it interfered with or obstructed the use and enjoyment of his private property; that as to each of such persons whose homes were rendered uninhabitable, and the right to personal enjoyment thereof seriously impaired by such odor and stench, a cause of action existed for the abatement of the nuisance, which each of them so specially injured might maintain. Civ. Code, § 3493; Code Civ. Proc. § 731. The rule adopted was approved and applied in *Meek v. De Latour*, 2 Cal. App. 281, 83 Pac. 300, which also was a case involving like facts to the one at bar. Counsel for appellants, conceding, if accepted as the law, the decisive character of the *Zumwalt* case, attack it upon the ground that, while section 731 of the Code of Civil Procedure, as it then read, in express terms authorized any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance defined in section 3479 of the Civil Code to sue for the abatement thereof, the effect of the amendment thereof, made in 1905 (St. 1905, p. 130), was to deprive persons so injuriously affected of the right of action. Reference to the amendment shows an added clause the sole purpose of which was to empower district attorneys and city attorneys of their own motion to institute civil actions for the abatement of public nuisances in counties and cities, and to compel them so to do when directed by the legislative authorities of counties and cities. Clearly it was not the intention of the Legislature by enacting the amendment to abridge or affect the rights given by the section prior to the amendment to private persons in maintaining actions for the abatement of nuisances whether of a private or public nature when the effect thereof seriously impairs their health, abridges their right to personal enjoyment, or renders their dwellings and homes unfit for occupation. Its only purpose was to provide statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers.

Counsel for appellants, in support of his claim for reversal, has cited a number of authorities to the effect that where a con-

siderable number of persons sustain a common injury only as a result of the nuisance the injury is public—illustrations of which are found in cases involving obstructions to highways and navigable streams, or offensive odors and unwholesome smells free from habitations and which affect those only traveling upon highways or in public places. Such cases are not in point, and are readily distinguished from those where the disagreeable odors and smells pollute the air in and about the dwellings and places of business of persons to such an extent as to render them uninhabitable, and cause the occupants thereof inconvenience and physical distress. See *Wood on Nuisances* (3d Ed.) § 671; *Adams v. City of Modesto*, 131 Cal. 501, 63 Pac. 1083.

While conceding some apparent conflict of decisions upon the question, we are of the opinion that the correct rule to be applied is stated in the *Zumwalt Case*, *supra*, and upon the authority thereof the judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

PEOPLE v. LOGAN. (Cr. 2025.)

(Supreme Court of California. May 3, 1917.)

1. HOMICIDE §309(1) — MANSLAUGHTER — PROVOCATION—INSTRUCTIONS.

While it is proper to instruct that to reduce homicide to manslaughter, defined by Pen. Code, § 192, as unlawful killing without malice, on a sudden quarrel or heat of passion, the heat of passion must be such as would naturally be aroused in an ordinarily reasonable person, and that defendant must have acted under it, it is error to instruct that there must have been a personal injury inflicted or attempted to be inflicted on defendant, as the heat of passion may be due to other causes; and it is for the jury to determine whether or not the facts and circumstances in evidence are sufficient to lead them to believe defendant acted under a heat of passion, or to create a reasonable doubt thereon.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 649.

For other definitions, see *Words and Phrases*, First and Second Series, *Manslaughter*.]

2. HOMICIDE §340(1)—APPEAL—PREJUDICIAL ERROR—FAILURE TO GIVE INSTRUCTIONS.

There being other circumstances calling for an instruction on manslaughter, erroneously limiting the provoking cause of heat of passion to personal injury is prejudicial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 715.]

In Bank. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Dave Logan was convicted of murder, and appeals. Reversed.

Frank J. Murphy, Charles N. Douglas, of San Francisco, A. L. Frick, of Oakland, and Oscar Hudson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

HENSHAW, J. The defendant, charged with the crime of murder, was convicted of murder in the second degree, and sentenced to life imprisonment. Upon his appeal, first heard by the District Court of Appeal, it was urgently insisted that the trial court erred to his injury in an instruction which it gave on the crime of manslaughter. The District Court of Appeal upheld the conviction and a petition for hearing before this court was asked upon the ground that the District Court of Appeal had mistaken the argument of appellant against the legality of the instruction. For a further consideration of this question a hearing here was ordered.

It is not questioned but that instructions defining the crime of manslaughter under the facts developed at the trial were proper to be given. The importance to the defendant of accurate instructions becomes manifest from the following brief statement of facts. This statement is not, of course, to be regarded as containing any view of this court upon the weight to be given to the defendant's evidence. It is simply a statement of the evidence which defendant himself and his witnesses offered, both to exculpate him and to lessen the degree of the crime from that charged. The parties and the principal witnesses were colored people. Mabel Jones, a colored prostitute, had formerly been the intimate of the deceased, John Brooks. He was her "lover"; her "man." During his absence from the city of San Francisco she transferred her favors to the defendant, who lived with her. She and defendant had retired for the night together, when Brooks knocked at her door in the house of prostitution where she was living and demanded admission. He threatened to kick the door in and to shoot them through it if the door was not opened. The defendant then arose from the bed in his night clothes and, unarmed, opened the door. Brooks entered the room with a pistol in his hand and demanded that the woman leave the room and talk with him, and threatened to shoot her as she lay in the bed if she did not do so. Logan protested, and Brooks turned on him and beat him to the ground with the pistol which he held in his hand, then jumped on him and beat him over the head. The house was aroused, the police were sent for, and Brooks fled. This was the origin of the ill feeling between the men. After this encounter threats of Brooks were brought both to the knowledge of Logan and of the Jones woman, he declaring that he would kill them both. In fear of this, defendant went armed. Brooks was physically much the superior of Logan. On the night of their fatal encounter Logan entered a resort of the colored people—part saloon, part café—in which, for the entertainment of the guests, there was a piano. He was about to go to San Diego, and had purchased a ticket for that purpose.

He went to the resort to meet a friend, not knowing that Brooks was in the place. In fact, however, it appears that Brooks was under employment there as pianist and entertainer. Logan walked back through the bar and into the restaurant or café where the piano was situated to procure something to eat. It was quite usual in that place for the guests to walk back toward the kitchen and give their orders directly to the cook, and this Logan proceeded to do, still unconscious that Brooks, who was seated at the piano, was in the room. In so walking toward the kitchen his course led him behind Brooks seated at the piano. The distance between the two men was very short. As he passed, Brooks swung around on the piano stool and rose to his feet, saying: "What the hell are you standing behind me for? Why don't you go on and sit down?" Brooks had one or both hands in his pocket. He sprang toward the defendant, who jumped back, drew his pistol, and began to fire. The deceased, the much more powerful man, forced him to the ground, and he continued to fire while the deceased was on top of him and beating him. One or more of these shots proved fatal, Brooks collapsed, and Logan fled, afterwards surrendering himself to the officers of the law. Under its evidence the prosecution attempted to show that the defendant, harboring a spirit of murderous revenge for the injuries, real or fancied, which Brooks had inflicted upon him, sought him out in the café, stood behind him until Brooks' attention was directed to him; Brooks then rose to his feet and asked the defendant why he was thus standing behind him, to which the defendant replied, "Are you afraid of me?" pushed Brooks with his left hand, stepped back himself, drew his pistol, and immediately began to fire. Over certain features of the encounter the evidence leaves little doubt. Brooks did arise and face the defendant with one or both hands in his pocket, and either before the defendant drew his pistol (as the defendant testifies) or after he drew his pistol and fired the first shot (as the witnesses for the people testify). Brooks did spring upon the defendant, hurled him to the ground and fought him on the floor, the defendant being underneath.

This is a sufficient résumé of the evidence for the purposes of the consideration to follow. The court, after its instructions concerning the nature and elements of the crimes of murder in the first and second degrees, defined manslaughter to the jury correctly in the terms and language of the Penal Code, saying that:

"Voluntary manslaughter is the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion." Pen. Code, 192.

It then gave a further instruction to the jury in the following language:

"I instruct you that in the case of a voluntary killing of a human being, without lawful excuse

or justification, in order to reduce the killing from murder to manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible, for, if there should appear to have been an interval between the assault, or a provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing must be attributed to deliberate revenge, and should be punished as murder."

And again:

"To reduce the killing from murder to manslaughter, you must find from the evidence that such killing was the result of a sudden, violent impulse of passion on the part of the defendant, caused by some immediate serious or highly provoking injury inflicted, or attempted to be inflicted, on the person or reputation of the defendant, and which injury was sufficient, in your minds, to excite an irresistible passion in a reasonable person, and the interval of time, if any, between the provocation and the killing, if any, was not sufficient for the defendant's passion to cool and the voice of reason and humanity within him to be heard."

These instructions are almost literally a transcript of section 23 of the Crimes and Punishment Act of 1850. Stats. 1850, p. 231. But that section ceased to be the law by failure to re-enact it in the Penal Code. People v. Salvador, 71 Cal. 16, 11 Pac. 801.

[1] In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man. But as to the nature of the passion itself, our law leaves that to the jury, under these proper admonitions from the court. For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed

or obscured by some passion—not necessarily fear and never of course the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. *Maher v. People*, 10 Mich. 217, 81 Am. Dec. 781. Thus the sight of a wife in adultery, or even a reasonable belief that his wife was committing an act of adultery, although the belief may be unfounded, has been held sufficient evidence to go to the jury as creating “the heat of passion” in the mind of the defendant. *State v. Yanz*, 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, 92 Am. St. Rep. 205. And this heat of passion may result from terror as well as anger or jealousy. *Stevenson v. U. S.*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980; *Wiley v. State* (Tex. Cr. App.) 65 S. W. 190. It may arise from the slayer’s father-in-law attempting to take from him his wife and children. *Cole v. State*, 45 Tex. Cr. R. 225, 75 S. W. 527. These cases serve to illustrate that it is not alone the fear of great bodily injury which will reduce a homicide to the grade of manslaughter. The passion aroused may be one entirely disconnected with any fear of personal injury, the fundamental inquiry being, we repeat, whether it be sufficient to obscure reason and render the average man liable to act rashly. *Mack v. State*, 63 Ga. 693; *Flanagan v. State*, 46 Ala. 703. The next proposition for the jury’s determination is whether the existence of the provocative cause arousing passion being shown the defendant in fact did act under it. It remains but to add that in this state the question has received due consideration in the cases of *People v. Bruggs*, 93 Cal. 476, 29 Pac. 26, and *People v. Jones*, 160 Cal. 358, 117 Pac. 176.

[2] Indisputably, then, the instruction which was given was erroneous under our existing law. The only remaining consideration is whether or not it was injurious to defendant. But upon this suffice it to say that, having in mind the facts as above outlined, the feelings naturally engendered in defendant’s mind by the indignity previously put upon him, the physical superiority of the deceased, the aggressive manner in which he accosted him, the fear that he was about to be subjected to a second humiliating beating, there was at least some evidence tending to reduce the crime from murder to manslaughter, for the due consideration of which evidence defendant was of right entitled that the jury should be correctly instructed. For, as well said in *Stevenson v. United States*, supra:

“The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of

such evidence must be for the jury, and cannot be matter of law for the decision of the court.”

The judgment and order appealed from are therefore reversed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.

WARD et al. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA
et al. (S. F. 7939.)

(Supreme Court of California. May 2, 1917.)

MASTER AND SERVANT §373—WORKMEN’S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT.

Injury to employé sent in a team to dig post holes, from accidental discharge of a gun, which, with his acquiescence and that of the employer, a fellow servant had taken along for personal use, was not from an accident arising out of the employment, within the Workmen’s Compensation Act (St. 1913, p. 279); the accident not resulting from a risk reasonably incident to the employment, but bearing no relation to the nature of the employment.

In Bank. Application by John Ward and another for writ of review against the Industrial Accident Commission of the State of California and others. Award of compensation annulled.

Walter H. Linforth, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. John Ward, petitioner herein, is a contractor. William Ward, his brother, was employed by John to do general labor. John had a contract to dig post holes on land some miles distant from the city of Santa Barbara. William was directed to drive the team hauling the wagon which contained the tools and implements for this work. The work would consume several days. Thomas Ward, a nephew of both of the brothers, was employed by John Ward to accompany his Uncle William on the wagon to the scene of the work and then during the progress of it to take care of the horses. Thomas was a young man of about 21 years of age. The wagon was loaded with the tools and implements, and Thomas climbed onto it, taking his seat beside his uncle, the driver, William. He took with him and placed on the seat between himself and his uncle, a shotgun, resting the butt of the gun on the seat and the barrel leaning against the tools and implements with which the wagon was loaded. He took the gun for his own pleasure, thinking he would “get a chance to hunt out there after we quit work.” The shotgun had no connection with nor bearing upon any part of the work which the men were employed to do. His employer, John, knew he was taking the gun. His Uncle William knew that he had placed it on the seat between them and did not object. After having thus proceeded

some miles on their journey, in a rough place on the road, the gun slipped from its insecure position on the seat, struck the footboard, and was discharged, the shot striking William in the left arm and mutilating it so as to necessitate amputation. Under this state of facts—and they are without controversy—the Industrial Accident Commission, to which application was made for compensation, awarded compensation under its finding that the injury “arose out of and happened in the course of said employment, and occurred while the injured employé was performing service growing out of, incidental to and in the course of his employment.” To review this award the employer and his insurance company secured this writ of review, and the sole question presented is whether it can be said that, within the contemplation of our law, this accident “arose out of” William Ward’s employment; for admittedly it happened in the course of his employment and while he was performing service under his employment.

Clearly we think this award cannot be upheld. Respondents’ attorney has referred us to no authority upholding any similar award, and from his known industry and ability it is a safe assumption that such authorities do not exist. The case is clearly one where an employé in the performance of his duty meets with an accident bearing no relation whatsoever to the nature of the employment. The only argument in support of the award would be, it seems to us, that the employer in permitting the fellow employé to take, with him the shotgun subjected the injured man to an extra hazard. But as against this it is clear that the employer, though he knew that the shotgun was to be taken along, neither ordered it nor in any other way than by his silence assented to it. It is not even contended that the employer knew that the gun was loaded, and unloaded it was as harmless as any of the tools which they were carrying. It was quite open to the injured man to object to the presence of the gun, if in fact he did object to it, and it was but a part of common prudence for him to have seen that the gun was unloaded when he assented to his nephew placing it in this obviously dangerous position. The decision of this matter is clearly within the principle declared in such cases as *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fishering v. Pillsbury*, 172 Cal. 690, 158 Pac. 215. In the first of these cases it is said:

“The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé’s work or to the risks to which the employer’s business exposes the employé. The accident must be one resulting from a risk reasonably incident to the employment.”

This accident was no more reasonably incident to the employment than it would have been had a pistol been carried in the neph-

ew’s pocket and by the same jolt of the wagon had been accidentally discharged to the injury of the uncle.

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

PALO ALTO MUT. BUILDING & LOAN ASS’N v. FIRST NATIONAL BANK OF PALO ALTO. (Civ. 1622.)

(District Court of Appeal, Third District, California. March 12, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

1. BUILDING AND LOAN ASSOCIATIONS — 23(1)—OFFICERS—AUTHORITY—EVIDENCE—SUFFICIENCY.

The fact that the secretary of a corporation was intrusted by the board of directors with the performance of some of their duties did not justify the conclusion that the board had abandoned its functions to be exercised by the secretary, where it was shown that the board still directed and supervised matters of importance in the business of the corporation.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. §§ 27, 31.]

2. BUILDING AND LOAN ASSOCIATIONS — 26 — CONTRACTS — IRREGULARITIES — RATIFICATION BY DIRECTORS.

Irregularity in advancing the money of a corporation before the loan was approved by the board of directors was cured by the subsequent approval and ratification of the loan by the directors.

3. BUILDING AND LOAN ASSOCIATIONS — 26 — IRREGULARITIES IN MAKING LOAN—RIGHT OF BORROWER TO COMPLAIN.

A borrower who actually obtained a loan from a corporation could not object to any irregularity in the proceedings whereby he secured it, and a bank concerned in obtaining the loan for him is in no better position to complain.

4. MORTGAGES — 25(3) — CONSIDERATION — EXISTING DEBT—INTEREST.

A trust deed given in place of a mortgage and in release thereof properly included an amount of interest, since interest and principal stand upon the same footing as to the consideration for the security.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 34.]

5. CORPORATIONS — 426(1) — RESOLUTION OF STOCKHOLDERS — WRITING DOWN STOCK HOLDINGS.

The resolution of the stockholders and directors of a corporation in “writing down” the value of its stock holdings to the amount of a defalcation of its secretary in order to secure permission to resume business, which resolution expressly provided that it should not be deemed in any manner a waiver of the corporation’s rights to enforce any claim, liability, or obligation due from any debtor, etc., did not deprive the corporation of the right to sue for the conversion of a check cashed by the stockholder at a bank without authority.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702.]

6. SUBROGATION — 2—RESOLUTION OF STOCKHOLDERS—SECRETARY’S BOND.

Nor would such resolution support the contention that the amount received on the secretary’s bond should be credited pro rata on the claim for the conversion of the check.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 3.]

7. BUILDING AND LOAN ASSOCIATIONS **↔** 23(4)—**SECRETARY—POWERS.**

A secretary of a corporation had no authority by virtue of his office to indorse and cash a check payable to the corporation.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 29.]

8. PRINCIPAL AND AGENT **↔** 108(7)—**AUTHORITY OF AGENT — TRANSFER OF PRINCIPAL'S PROPERTY.**

In the absence of authority, express or implied, an agent cannot transfer his principal's property and such authority will not be presumed. [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 283½.]

9. CORPORATIONS **↔** 429 — **OFFICERS — RIGHT TO DEAL WITH CORPORATE PROPERTY FOR OWN BENEFIT—NOTICE.**

In view of Civ. Code, § 2230, prohibiting, with exceptions, trustees and their agents from taking part in transactions concerning the trust in which they are interested adversely to the beneficiary, and section 2234, providing that violation of such provisions is a fraud against the beneficiary, and section 2322, relating to the manner of creating a trust, an officer of a corporation who is an agent and trustee within the contemplation of such sections has no authority to use the corporate property for his own benefit, and such use is notice of lack of authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723, 1725.]

10. CORPORATIONS **↔** 428(11)—**ACTS OF AGENT — IMPUTATION OF KNOWLEDGE.**

Where an agent of a corporation is dealing with corporate property in his own behalf in a transaction in which he is interested adversely to the corporation or in a scheme to defraud the corporation, it will not be presumed that he will communicate to the corporation facts affecting the transaction, and knowledge of such facts will not be imputed to a corporation, except where the corporation is in fact represented in the whole transaction by the officer as agent, since the knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in course of his agency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1760.]

11. PRINCIPAL AND AGENT **↔** 177(1) — **PRESUMPTION—IMPUTATION OF KNOWLEDGE.**

Any presumption that an agent will communicate knowledge to his principal is disputable. [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670, 672.]

12. CORPORATIONS **↔** 425(4)—**AUTHORITY OF OFFICERS—OSTENSIBLE POWER.**

Where the secretary of a corporation without authority indorsed a check payable to the corporation and used the proceeds in a transaction in which he was interested adversely to the corporation, there being no evidence that he had before applied corporate property in substantially the same manner, the corporation is not bound by the agent's act nor estopped to deny his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1700, 1701.]

13. BILLS AND NOTES **↔** 341 — **HOLDER IN DUE COURSE—PARTIES IN PRIVITY.**

Where the secretary of a corporation without authority indorsed a check payable to the corporation to a bank, as between the corporation and the bank the doctrine of bona fide holder does not apply, as they are parties in privity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 829.]

14. BILLS AND NOTES **↔** 338 — **INDORSEE IN DUE COURSE—STATUTE.**

Nor is the bank an indorsee in due course as defined by Civil Code, § 3123, or entitled to the rights of such indorsee as enumerated by section 3124.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 819, 820.]

15. CORPORATIONS **↔** 426(1)—**MISAPPROPRIATION OF CORPORATE FUNDS.**

The contention that the corporation suffered no loss because the money was used to secure title to property upon which the corporation had a mortgage equal to the amount of the check is without merit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702.]

16. CORPORATIONS **↔** 426(12)—**ACTS OF OFFICERS—RATIFICATION.**

In view of Civ. Code, § 2310, providing that a ratification of an agent's act can be made only in the manner necessary to confer original authority for the act ratified or where an oral ratification would suffice by accepting or retaining the benefit of the act with notice thereof, where the secretary of a corporation without authority indorsed a check payable to the corporation and used proceeds to secure title to property upon which the corporation had a mortgage, the fact that the corporation subsequently took a renewal deed of trust in place of the mortgage did not amount to a ratification of the secretary's unauthorized act of which it was not then aware.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1716.]

17. CORPORATIONS **↔** 426(10)—**ACTS OF OFFICERS—RATIFICATION.**

Even though the corporation was benefited by the execution of the renewal trust deed, its retention of such benefits would not constitute a ratification of the act or prevent it from repudiating the unauthorized act, since, when a principal first acquires knowledge of facts, if the time and conditions are such that he cannot in justice to himself repudiate the whole of the agent's act, he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1704, 1714.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by the Palo Alto Mutual Building & Loan Association against the First National Bank of Palo Alto. Judgment for plaintiff, and defendant appeals. Affirmed.

Green, Humphreys & Green, of San Francisco, for appellant. J. S. Hutchinson and Cushing & Cushing, all of San Francisco, for respondent.

BURNETT, J. The suit is for the conversion of a check for \$7,500 and the proceeds thereof. The answer denies the conversion and sets up the special defense that plaintiff discounted and cashed the check at defendant's bank, that the money was appropriated for the benefit of plaintiff, and that the demand in suit has been paid. Respondent is a building and loan association, and appellant a national bank, both doing business in Palo Alto. Appellant was not the bank of deposit

of respondent; the banking business of the latter being done at the Bank of Palo Alto. One Marshall Black was the secretary of respondent, but held no other position therein. Appellant bank was located in the same block as respondent's place of business, while the Bank of Palo Alto was three blocks distant. Plaintiff's ownership of the check was admitted by the pleadings, said check being in the following form:

"\$7,500. Daniel Meyer.

"San Francisco, Cal., May 5, 1910. No. 1901.

"The Anglo & London Paris National Bank of San Francisco: Pay to the order of Palo Alto M. B. & L. Ass'n \$7,500^{00/100} seventy-five hundred ^{00/100} dollars. Daniel Meyer."

Black indorsed the check as follows:

"Pay to the order of First National Bank, Palo Alto Mut. Bld. & Loan, by Marshall Black, Secretary"

—and delivered it to appellant. At that time two deeds respectively from Annie MacIntyre and Alexander MacIntyre to Black, covering a tract of land in Palo Alto, were on deposit in escrow with appellant to be delivered to Black on the payment of \$7,366.40. Appellant received the check, so indorsed and delivered, without the actual knowledge of respondent, and applied the proceeds as follows: It credited the account of Alexander MacIntyre at the bank with the sum of \$2,755.25, and applied \$4,611.15 on a promissory note then due from MacIntyre to appellant, thus paying the note. Of the former amount it remitted MacIntyre \$2,366 in cash, and applied what remained apparently to an overdraft due from MacIntyre to itself. The balance of \$133.60 it paid to Black in cash. It then delivered said deeds to Black, who thus acquired title to said property. Prior to March, 1910, Black had organized a corporation known as the "Marshall Black Investment Company," of which he was the president and manager, and he owned practically all the stock. On March 22, 1910, the investment company, through Black, applied to respondent for a loan of \$7,500 upon the security of said land standing then in the name of the MacIntyres. The application for the loan was approved, the money advanced, and Black, on receiving the deeds from the MacIntyres, conveyed the property to said investment company, which had executed a mortgage on the property to respondent for the said sum of \$7,500.

On November 29, 1911, the investment company, in consequence of the release of the mortgage and other considerations, executed to the San Jose Abstract Company, as trustee for the benefit of respondent, a trust deed covering said property as security for said indebtedness to respondent. The sum secured thereby was \$8,500, value actually received by said company and until September, 1912, respondent had no knowledge of the misappropriation of the separate and independent sum of \$7,500 covered by the check involved herein. About this time it became known that Black was a defaulter to the ex-

tent of over \$100,000, and the facts concerning the transaction between him and appellant, as to said check, came to light. On account of said defalcation the building and loan commission of the state compelled respondent, pending investigation as to its financial condition, to suspend business. The suspension continued from October 1, 1912, to December 14, 1912, when, after the adoption of a plan of reorganization of the finances by the directors and stockholders in compliance with the demand of said commissioner, the association was permitted to resume business. This plan is fully set forth in the findings, and it amounted substantially to a sufficient reduction in the value of the stock of the stockholders to cover the deficit caused by Black's defalcations, thus making it appear that the assets of the association equaled its liabilities. In consenting to said plan the board of directors of respondent adopted the following resolution:

"Be it further resolved that the acceptance and carrying out of said plan or any charge or entry made pursuant thereto or otherwise shall not be, or be deemed to be, in any manner a waiver by this corporation of any right it may have to in any manner enforce any claim, liability, or obligation whatsoever due from any debtor or party in any manner involved in or connected with the loss referred to in said plan and generally known as the Marshall Black deficiency."

The same resolution was adopted at the stockholders' meeting.

Counsel on both sides have displayed great industry and ability in presenting their views as to the legal propositions involved, and seemingly have exhausted about all the learning on the subject. The discussion has, indeed, taken a wide range, and we cannot within reasonable limits follow it in all its ramifications.

We think the contentions of appellant have been satisfactorily answered in the brief of respondent, and, as far as specific attention is paid to them, we shall probably do little more than present a synopsis of the argument contained in said brief.

[1] As to the authority of Marshall Black to represent respondent, upon which appellant lays much stress, the court found as follows:

"That at all times mentioned in said complaint and for several years immediately prior to May 6, 1910, one Marshall Black was the secretary of plaintiff, but did not hold any other office in the said plaintiff, and was not a director thereof; that during all of said time the business of plaintiff was managed and controlled by a board of directors, and said Marshall Black (as such secretary) had charge of the business of said plaintiff corporation, subject to the control and supervision of the board of directors of plaintiff, except as otherwise found herein."

There is abundant evidence for the support of this finding, notwithstanding appellant's contention that Black was literally in control of the business, that he was permitted to handle the business of the association as he saw fit, and that the directors took no

part in its management and never examined its books and records. Appellant makes a common mistake, to which we have had occasion before to advert, in that it has directed attention to evidence opposed to said finding, but has ignored what is favorable thereto. Respondent calls attention to some 20 matters of importance in the business of the association which had been directed and supervised by the board, as shown by the evidence. These we need not enumerate, but they are sufficient to justify the conclusion of the court, and they certainly negative the claim that the board abdicated its authority and abandoned its functions to be exercised by Black. We think it can safely be said that the association was actually under the supervision and control of said board, and that Black was authorized to discharge only the duties that usually belong to the office which he held, although we could not affirm with much confidence that said board of directors "were particularly vigilant and active in guiding its affairs." Like many other similar boards, they were disposed to withhold their personal individual attention from the exercise of the duties of the secretary in the business of the concern, believing, no doubt, that these matters could and would receive effective consideration from said officer. If the directors had been as active and vigilant as they should, it is quite probable that the rascality of Black would have been discovered much earlier, to the great advantage of the association and its stockholders. It is but a truism to say that directors of such organizations generally confide too much in the honesty of their ministerial officers and are too prone to delegate to the latter services which should be performed or personally supervised by the directors themselves. The misplaced confidence in an unworthy agent herein disclosed finds many a parallel in the history of such organizations, and the serious and deplorable consequences of such confidence should be a lesson to those charged with the duty of managing these important concerns involving the interests of those illy prepared to experience financial loss. However, in the apparent remissness of the directors herein we find no comfort for appellant nor warrant for its claim that any loss occasioned by this particular transaction is chargeable to their negligence.

Another finding of which complaint is made is the following:

"That on various occasions prior to May 6, 1910, Marshall Black, as a matter of convenience in operating the office of said plaintiff, did from time to time cash some checks or drafts payable to the order of said plaintiff at the office of said defendant; * * * that none of the checks so cashed amounted to a greater sum than \$500, excepting one check, the transaction involved in the cashing of which is now in controversy and litigation, and the acts of said Marshall Black in cashing said checks were not, nor was any thereof, brought to the knowledge of plaintiff corporation, its officers or directors, and neither the said plaintiff corporation, nor its officers, or directors, other than

said Marshall Black, had any knowledge thereof, and said Marshall Black never communicated the fact of the cashing thereof to plaintiff; that the discounting or cashing of notes, drafts, or bills of exchange by said Marshall Black with defendant was carried on under the circumstances as herein stated, and not otherwise, and never became nor was at any time nor at all an established or any practice or custom; that said corporation plaintiff never at any time or at all, either directly or indirectly, ratified or acquiesced in, or confirmed or approved the said acts of said Marshall Black in cashing said checks or drafts; that neither the articles of incorporation nor the by-laws of said plaintiff ever at any time or at all authorized or empowered said Marshall Black or any other person as such secretary or otherwise, or at all, to cash or discount checks or drafts or bills of exchange for any purpose whatever or otherwise, or at all."

We think there is no ground for the contention that this finding in any respect is unsupported. There may be evidence in the record that would warrant a contrary finding as to some of the facts enumerated, but, of course, that is of no consequence here. Respondent calls attention to the specific portions of the transcript wherein is found testimony in harmony with the views of the court as thus expressed, but it is not deemed necessary to set it forth herein.

[2, 3] We are of the opinion that there is no more merit in the objection to the finding as to the payment of \$7,500 as a loan to the investment company. There was undoubtedly an irregularity in advancing the money before the loan was approved by the board and before the notification by the attorney that all legal requirements had been complied with, but the irregularity was cured by the subsequent approval and ratification of the loan by the directors. In fact, it seems to have been approved a second time on May 10, 1910, four days after the deed to the property came into the possession of plaintiff. Aside from that, it must be true that the borrower who actually obtained the loan could not object to any irregularity in the proceedings whereby he secured it, and, of course, appellant is in no better position to complain.

[4, 5] The trust deed given in place of said mortgage and in release thereof was to secure the payment of \$3,500. This included the amount of \$1,000 in interest, and we can see no possible reason for an objection to this any more than to the principal of the indebtedness. Manifestly they stand upon the same footing as to the consideration for the security.

We can perceive no merit in the claim that "the liability of respondent arising out of Black's defalcations have been paid, satisfied, and canceled as shown by the 'Marshall Black Deficiency Account.'" It is quite apparent that there was no actual payment to respondent of the proceeds of said \$7,500 check. We have already detailed the disposition that was made of the money. There is nothing to show that any part of it ever

came into the possession of respondent or that the loss by reason of the misappropriation of the fund was ever made good either entirely or partially. It is equally plain, from the resolution passed as aforesaid by the directors and the stockholders, that there was no intention, by reason of said deficiency account or otherwise, to satisfy and cancel said obligation. The actual loss by reason of the defalcations of Black was over \$100,000, but, in order to satisfy the building and loan commission and to secure permission to resume business, it seems that the capital stock, reserve fund, undivided profits, etc., were reduced or written down to the extent of the loss. This, as stated by respondent, was a matter of bookkeeping and adjustment of the various accounts to satisfy the said commission that the concern was solvent and entitled to do business; or, in other words, the large sums credited to said deficiency account were simply written off the value of the stockholdings. We can see nothing in the transaction that should be construed as operative to extinguish respondent's claim to compensation for the conversion of said check. The amount received, as we understand it, although nominally for the corporation, is actually for the benefit of the stockholders who have suffered the loss.

[6] In this connection it may be said that we view similarly the contention that the amount received on Black's bond should be credited pro rata on this claim. The question is really one of subrogation which concerns only respondent and the surety company.

Thus far there seems but little room for debate, but some other points made by appellant probably possess more merit.

The question of agency in its various aspects has received much attention, and it is claimed that, in accordance with its well-established principles, the act of Black in cashing the check must be regarded as the act of respondent. We do not so understand the law and the facts.

[7] It is plain that Black had no express authority to indorse the check, and this has already been sufficiently considered. It is also true that he had no such authority simply by virtue of his office as secretary. *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435; *Cook on Corporations*, vol. 3 (6th Ed.) § 717.

[8, 9] Likewise it must be admitted that, in the absence of authority, express or implied, he cannot transfer his principal's property, and such authority will not be presumed. *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; *Cal. Winemakers' Corporation v. Sclaroni*, 139 Cal. 277, 72 Pac. 990. Beyond that an officer of a corporation can have no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. Sections 2230, 2234, 2306, and 2322, Civ. Code. Directors and officers of corporations are agents and

trustees within the contemplation of these sections of the Code. *Graves v. Mining Co.*, 81 Cal. 319, 22 Pac. 665; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 363, 78 Pac. 550, 104 Am. St. Rep. 42.

In relation to this question some interesting cases are reviewed by respondent.

In *Hubback v. Ross*, 96 Cal. 428, 31 Pac. 353, one Makin desired to obtain money from plaintiff in connection with certain shipments, and plaintiff drew bills of exchange upon his correspondents in Liverpool and delivered them to Makin. Plaintiff demanded security of Makin, and the latter presented a deed from Ann S. Ross to plaintiff conveying certain property. Makin delivered the deed for the bills of exchange running to himself. The action was brought to foreclose the deed as a mortgage and defendant denied that it was given for the purpose declared by plaintiff. The latter claimed that Makin, being intrusted with the conveyance, had at least apparent authority to deliver it for the purpose of securing his personal obligation, but it was held that the apparent authority was limited, by one of the fundamental principles of agency, to the right to deliver it only as a security for some obligation of his principal, and, further, that plaintiff was not justified, as a matter of ordinary prudence, in presuming that Makin might use the instrument for his own benefit and purpose.

In the *Smith Case*, supra, the court had under consideration the indorsement of a corporate obligation by the president of a company to himself. Therein it is said:

"It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, general authority to act for the corporation must necessarily have existed in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority."

The same rule is enforced in the late case of *Western States Life Insurance Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496, wherein, in reference to the president of plaintiff, it is said:

"It is universally held as a consequence of this doctrine that he may not, on behalf of the corporation contract with himself as an individual, which, of course, includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation."

Among the many cases cited from other states we refer only to *Ward v. City Trust Co. of New York*, 192 N. Y. 61, 84 N. E. 585. Therein, it seems, certain officers of Hartman Manufacturing Company obtained a check for \$125,000 from Hanover Bank, payable to the order of Hartman Company, by falsely representing that the loan was secured for said company. One of these officers indorsed

the check in the name of Hartman Company by himself as president and general manager, and delivered it to the City Trust Company in payment of his personal note. The referee in the lower court found that the defendant trust company acted in good faith, and concluded that it was a bona fide holder for value. The Court of Appeals reversed this decision, holding that the defendant was not justified in taking the check for the personal obligation of the president and that it could not be a bona fide holder of the obligation. Therein it is said:

• "The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. * * * The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt."

It was also held that the broad power conferred upon the president of the corporation was not sufficient to authorize him to give away the assets of the company or to use them to pay the personal debts of its officers. Emphasis is laid upon the proposition that by reason of the fact that the check showed upon its face that it belonged not to Umsted or Kiefer, but to the Hartman Company, there was a "shadow" upon it, and the defendant could not in good faith accept it until the shadow had been removed. It is declared that:

"While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint."

Of course, it is true, as pointed out in the decision, that if reasonable inquiry would have led to the discovery of facts which would have dispelled any suspicion, the purchaser of the paper is entitled to the benefit thereof as if he had made proper investigation. That is self-evident, being equivalent to saying that, if the agent had ample authority in the premises, the want of knowledge thereof by the purchaser would not invalidate the transaction. Manifestly it is only in the case where the agent lacks authority that the principal may exact the duty of inquiry and that the failure to inquire imposes a penalty upon the purchaser.

The Ward Case, *supra*, substantially covers most of the principles of law involved herein, but we append the other cited cases as instructive on the subject: *M. Jacoby & Co. v. Payson*, 85 Hun, 367, 32 N. Y. Supp. 1032; *Knoxville Water Co. v. East Tenn. Nat. Bank*, 123 Tenn. 364, 131 S. W. 447; *Germania Safety Vault & Trust Co. v. Boynton*, 71 Fed. 797, 19 C. C. A. 118; *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293; *Robinson v. Chemical National Bank*, 86 N. Y. 404; *Bank of*

New York N. B. A. v. American Dock & Trust Co., 143 N. Y. 559, 38 N. E. 713; and also *Randolph on Commercial Paper*, § 368, and *Thompson on Corporations*, § 1700.

[10, 11] One feature or incident of agency to which appellant has adverted at considerable length is embraced in the term "imputation of knowledge to plaintiff." This, however, is nothing but a phase or circumstance of express, implied, or ostensible authority. The knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in the course of his agency. If he does not acquire it while acting within the scope of his authority, the knowledge is no more to be imputed to the principal than to an utter stranger. The imputation has been held to rest upon the presumption that the agent will communicate such knowledge to his principal. Manifestly no such presumption can exist where the agent is engaged in a transaction beyond his authority and in which he is interested adversely to his principal or in a scheme to defraud his principal. In *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997, it was said:

"A corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation."

And in *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75, the court says:

"Where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction."

An exception is recognized to the rule where the principal is in fact represented in the whole transaction solely by the party as agent. Herein plaintiff was not represented by Black in the matter of the loan to the investment company, since he dealt with respondent through its board of directors, its security committee and attorney. Respondent would not, therefore, be charged with constructive knowledge of Black's misapplication of the fund. But if the presumption existed it would be a disputable presumption, and the court has found, on sufficient evidence, that the plaintiff had no knowledge of these things. The doctrine manifestly cannot be applied to the extent and end claimed by appellant. The contention resolves itself to this: That the principal, if he has knowledge of the exercise by the agent of certain powers, is bound by the act of the agent, and he must be held to have such knowledge from the fact that the agent knows of it himself. Such doctrine, of course, could not be maintained, as it would place it within the power of an agent to bind the principal to any course of conduct however foreign or obnoxious to the authority actually conferred.

[12] There is no doubt that the circumstances might be such as to estop the principal from denying the authority of the agent. That is a familiar principle, but it does not

apply here. The acts of the agent may be so open and frequent as to create and compel the inference of acquiescence on the part of the principal. But they must be acts of a similar nature. Here there is no evidence that Black had before applied the corporate property in substantially the same manner. The elements of ostensible agency to do the thing which was done are entirely lacking, and we can see no reason for invoking the principle contended for that "a corporation is bound by the powers that its agent is permitted to exercise openly."

What has been said, we think, disposes of the contention of appellant that it was a "bona fide purchaser for value without notice." It cannot be said to be a purchaser "without notice," since, as we have seen, it was put upon inquiry, and it must be held to know what it could have found out by investigation. In *Smith v. Los Angeles Irrigation, etc., Association*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53, the court says:

"The fact that the note appeared upon its face to have been executed by Garey on behalf of the corporation was sufficient to charge his assignee with notice of any want of authority to execute it."

In *Randolph on Commercial Paper*, § 1012, the rule is stated:

"In like manner, one cannot become a bona fide holder of a check drawn by a bank president on his own bank, and certified by himself, or of a certificate of deposit given by a bank cashier in the name of a bank, and indorsed and deposited by him to his own credit."

[13, 14] And, as pointed out by respondent, the controversy here is between plaintiff, the payee of the check, and appellant as indorsee. They are parties in privity, and, strictly speaking, the said doctrine does not apply as between the immediate parties to the transaction. The rule is stated in *Daniels on Negotiable Instruments* as follows:

"It is a general principle of the law merchant that, as between the immediate parties to a negotiable instrument—parties between whom there is a privity—the consideration may be inquired into, and that as to them the only superiority of a bill or note over other unsealed evidences of debt is that it prima facie imports a consideration."

Nor is the situation changed within the contemplation of sections 3123 and 3124 of the Civil Code, as appellant is not an "indorsee in due course" as therein defined. Among the many authorities as to this point it is sufficient to refer to Judge Cooley's opinion in the case of *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321, where a partnership had issued promissory notes and thereafter transferred its property to the corporation, which assumed certain indebtedness, excluding, however, the notes of plaintiff. The president of the corporation, though, renewed the notes to plaintiff by giving him corporation notes. It was said:

"The case was such that the plaintiff must be deemed to have accepted renewals of the notes with knowledge of all the facts. They held partnership notes, and they accepted corporation notes in renewal; and they must be deem-

ed to have known that an officer of a corporation can have no general authority to give the notes of the corporation to take up the outstanding obligations of members. Special authority would be required to empower him to do so; and those persons who should venture to take such notes from him must, at their peril, ascertain that the special authority has been conferred."

Furthermore, it was declared that:

"A corporate note given for an individual obligation is not given in the regular course of business, but presumptively is ultra vires. An officer of a corporation can never have implied authority to give such notes. * * * The general authority to make commercial paper in the name of a corporation is given to be exercised for the benefit and in the business of the corporation, not for the benefit or in the business of others; and it is therefore obvious that one who takes such paper with knowledge that it is not given for a corporate purpose can have no claim to the protection which the law accords to a bona fide holder."

[15, 16] Another point made by appellant, worthy probably of some notice, is that respondent suffered no loss by reason of the fact that the money was used to secure title to the property upon which respondent had a mortgage for \$7,500. The contention seems to be that, if the proceeds of said check had not been applied to the purchase of said property, respondent would have lost the \$7,500 which it had already loaned on the strength of the security. However, there does not appear to be merit in the defense that, if the \$7,500 had not been misappropriated, another equal amount would have been lost. A thief who admits a theft and his use of the money for his individual benefit could hardly find justification or excuse in the plea that by his unwarranted use of the money he saved the owner the loss of another similar amount. Respondent was entitled to the security and also the proceeds of the check. Nor does it appear that the additional \$7,500 could have been realized out of the property. The amount of the various incumbrances made in good faith greatly exceeded its value, and while respondent was enabled to secure the repayment of the said sum of \$8,500 covered by the trust deed, there is nothing to show that the other amount misappropriated by Black could have been obtained. Nor can we agree with appellant:

"That plaintiff cannot retain the advantage derived from the renewal deed of trust executed in 1911, and at the same time insist that such retention does not constitute a ratification of Black's unauthorized act."

The doctrine of ratification is gone into pretty thoroughly in the briefs. The principle is reiterated by respondent that it is necessary in order to effect a ratification that action be taken with full knowledge of the facts (Civ. Code, § 2310; *Hall v. E. W. Wells & Son*, 24 Cal. App. 238, 141 Pac. 53; *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53), and attention is directed to the fact that, when respondent took said renewal and mortgage, it had no knowledge of Black's appropriation

of the check; hence there was no such ratification.

[17] Again, assuming that respondent was benefited, the situation is covered by the doctrine announced in 2 Corpus Juris, § 183, as follows:

"Where, however, when the principal first acquires knowledge of the facts, conditions are such that he cannot in justice to himself repudiate the whole of the agent's acts, he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority."

Other qualifications of the doctrine are pointed out which lead to the conclusion that by taking said security respondent did not ratify the act of Black or of appellant in said transaction as to the check, but we forego specific mention of them.

We are satisfied that Black had no authority, express or implied, for the indorsement of said check; that no authority, however broad, could have authorized him to cash the check for his own benefit; that appellant was put upon inquiry as to the limit of his authority, and that it must be deemed to have known that he was not acting within the scope of his agency; that appellant converted the property without authority of law; that respondent has not been paid the amount nor any portion thereof; that it is not estopped by reason of having received the benefits of the transaction or otherwise from recovering the proceeds of said check; that it has not ratified the said unauthorized act of Black; and that it has been damaged to the extent claimed by the conduct of appellant in cashing said check.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. GONZALES. (Cr. 533.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. HOMICIDE \S 208(3) — ADMISSIBILITY OF EVIDENCE—DYING DECLARATIONS.

Declarations that "I am done," "I am going to die," etc., indicated a sense of impending death sufficiently to render them admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 432.]

2. HOMICIDE \S 116(6)—JUSTIFIABLE HOMICIDE—SELF-DEFENSE.

A homicide is not justifiable unless the slayer was then in apparent imminent danger of losing his life or sustaining serious bodily injuries, and previous threats, unaccompanied by hostile acts, are insufficient.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 163.]

3. HOMICIDE \S 339 — EVIDENCE — STRIKING OUT.

There is no reversible error in striking out testimony of previous threats made by deceased when there had been no testimony of, nor offer to prove, a hostile act by deceased at time

of killing, although evidence received later in the trial might have furnished a sufficient foundation for the stricken testimony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Jose Gonzales was convicted of murder, and appeals. Affirmed.

W. C. Dorris, of Bakersfield (Henry R. Holsinger, of Bakersfield, of counsel), for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Appellant was convicted of the crime of murder in the first degree, and, in accordance with the verdict rendered, sentenced to imprisonment for life.

Deceased, Abraham Morales, with his wife and others, among whom was appellant, attended a gathering at the house of a neighbor on the evening of August 13, 1916. About 9 o'clock p. m., defendant requested deceased to step out of the house with him, ostensibly for the purpose of a private conversation, whereupon deceased left his wife and went outside with defendant. A few minutes thereafter a pistol shot was heard, and Morales was found a short distance from the house, suffering from a bullet wound which caused his death three days later.

[1] The court permitted the prosecution to introduce statements made by deceased immediately after being shot. Their reception in evidence was objected to upon the ground that they were not made under a sense of impending death, and therefore inadmissible as dying declarations. Touching the question, deceased, when found lying upon the ground, among other things, said:

"He (referring to defendant) took advantage of me; run me out friendly and now done me. I am done." "Joe (referring to defendant) took advantage of me; got me out there friendly and shot me. Now I am done." "I am done; lift me up." "I am in a dying condition; I am sure I am going to die." "He took advantage of me. I think he killed me all right; I think I am dead."

The wife of deceased testified:

"He said he was going to die, and that he was going to leave me very far from my parents; that he (Gonzales) had not spoken to him as a man; that if he had spoken to him as a man, he would have defended himself."

In People v. Cord, 157 Cal. 568, 108 Pac. 514, it is said:

"Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover and is soon about to die, his statement made in this belief, relating to the cause of his injury, is admissible, if it appears that he subsequently died from the direct effects of the wound."

Measured by this rule, the admission of the statements so made by deceased did not constitute error.

[2, 3] Testimony was offered to the effect that some three months prior to the homicide an altercation occurred between de-

fendant and deceased, at which time blows were exchanged, and, upon being separated, the deceased said, "Later I will settle this," and, referring to himself and defendant, said that "they would settle it in a very short time." Objection was made to this line of testimony upon the ground that no foundation was laid for its introduction, since there was no evidence of an overt act or attack being made upon defendant by the deceased. Thereupon counsel for defendant said: "If I can't connect this up, I will consent that it be stricken out." Thereupon the evidence was admitted, and upon the conclusion of the testimony of the witness the district attorney moved to strike out the testimony upon the same ground upon which he had objected to its reception. The motion was granted. In *People v. Campbell*, 59 Cal. 247, 43 Am. Rep. 257, it is said:

"If A. threaten the life of B., this fact will not of itself justify B. in killing A. There must be some act on the part of the person making the threat, from which it appears that there is real or apparent danger of the execution of the threat."

When this evidence was tendered there was no testimony whatsoever tending to show any act of aggression committed by deceased at the time of the homicide indicating that he intended to attack defendant. Since there was neither claim nor proof of a hostile demonstration by deceased at the time of the homicide, the fact that he had theretofore made threats against defendant could not justify the latter in killing him. The law does not justify a homicide, unless it is shown that the slayer was at the time of the killing in apparent imminent danger of losing his life, or of sustaining serious bodily injury; and previous threats, unaccompanied by some hostile act, do not afford such justification. "Previous threats alone, * * * unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party." *People v. Scoggins*, 37 Cal. 683. As shown by the record, the objection urged to the introduction of the evidence and the argument used in support of the motion to strike out, as well as the language used by the court in granting the motion, were all calculated to acquaint defendant's counsel with the ground upon which the ruling was made. Nevertheless, he did not offer to reintroduce the evidence, after defendant's testimony was received, to the effect that after the deceased, at defendant's request, accompanied him outside the house, deceased "got mad when I told him about the paper, * * * [and] came after me and struck me three or four times and tore my shirt. It was then that I drew the gun, and he took hold of it and as I pulled the gun back, why the gun went off, and that was all."

Assuming the act of deceased to have been such as would have justified defendant in apprehending danger of great bodily harm,

there was no evidence of it when the ruling so complained of was made, and no offer to make such showing preceding the ruling of the court, when it must have been apparent to counsel that for want thereof the court deemed it inadmissible. Under the circumstances shown, it cannot be said the court erred in granting the motion to strike out.

The judgment and order from which the appeals are prosecuted are affirmed.

We concur: CONREY, P. J.; JAMES, J.

SCHNIEROW v. BOUTAGY et al.
(Civ. 1941.)

(District Court of Appeal, Second District,
California. March 28, 1917.)

1. LANDLORD AND TENANT §22(5)—AGREEMENTS TO LEASE—DAMAGES FOR BREACH.

Under Civ. Code, § 3300, providing that, when not otherwise provided, the measure of damages for breach of a contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, plaintiff could not recover the loss incurred by him in selling his business at another location at a sacrifice as damages for defendants' breach of an agreement to lease him a storeroom, as the parties did not contemplate that plaintiff should sacrifice his property, and the loss was not attributable to defendants' breach.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 59.]

2. APPEAL AND ERROR §1151(2)—MODIFICATION OF JUDGMENT—REDUCING RECOVERY.

Where, in an action for breach of an agreement to lease a storeroom, the court improperly allowed plaintiff \$400 for loss incurred in selling a business at a sacrifice, the judgment may be modified by deducting \$400.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4498-4500, 4503-4506.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Barnett Schnierow against W. S. Boutagy and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

William H. Fuller, of Los Angeles, for appellants. Baird, Gerecht & Chambers, of Los Angeles, for respondent.

SHAW, J. Plaintiff obtained judgment in the sum of \$502 against defendants as damages for breach of a contract, whereby the latter agreed to lease to the former a storeroom then in process of construction. Defendants appeal upon the judgment roll.

As alleged in the complaint and found by the court, plaintiff in reliance upon defendants' agreement, disposed of his business on Temple street at a loss of \$400, changed his residence at a cost of \$15, and incurred a loss of time, to his damage in the sum of \$87, in securing another storeroom.

[1] Conceding the loss of time and expense of removal incurred by plaintiff so found by

the court to have been a detriment proximately caused by the breach of defendants' contract, we are unable to perceive how the loss due to the sacrifice sale of his business could be attributed to such breach. "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote." *Hunt Bros. Co. v. San Lorenzo, etc., Co.*, 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913. Certainly the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should give his property away or sell it at a sacrifice. In cases of this character, the measure of damages for a breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Section 8300, Civ. Code. Upon this record, the loss incurred by plaintiff in selling his business at a sacrifice cannot be attributed to the act of defendants in refusing to comply with their contract. *Mitchell v. Clarke*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529. Indeed, had there been no breach of the contract on the part of defendants, plaintiff's loss would have been precisely the same.

[2] Under this view, it is apparent that the findings do not support the judgment rendered by the court; nevertheless justice between the parties may be accomplished by a modification thereof. It is therefore ordered that the judgment be modified by deducting therefrom the sum of \$400, leaving a balance of \$102; and since as thus modified plaintiff is not entitled to costs (section 1025, Code Civ. Proc.), the award of \$15.70 as costs of suit is stricken therefrom. As thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

EDDIE v. GAGE MFG. CO. et al.
(Civ. 2050.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. LANDLORD AND TENANT §208(1) — ASSIGNMENT OF LEASE—RELEASE OF LESSEE.

The tenant was not released from obligation to pay rent by his assignment to a corporation, to which the landlord consented in writing; such consent being conditioned on the assignee complying with the terms of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821, 830, 831.]

2. EVIDENCE §466 — PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT.

Where tenant assigned his lease to corporation, the landlord consenting thereto in writing, evidence that landlord orally agreed to re-

lease tenant from payment of rent was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2145.]

3. LANDLORD AND TENANT §208(1) — ASSIGNMENT OF LEASE—SURRENDER.

Where landlord consented to assignment of lease upon conditions not performed by assignee, written consent, however, not purporting to release tenant from payment of rent, such tenant cannot claim that the leasehold interest was surrendered to lessor by operation of law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821, 830, 831.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by E. C. Eddie against the Gage Manufacturing Company, a corporation, and others. From a judgment for plaintiff, and an order denying a new trial, defendant C. E. McClay appeals. Affirmed.

Hyman Schwartz, of Los Angeles, for appellant. T. O. Gould, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought a recovery of money alleged to be due under the terms of a lease of real estate made by him to defendants McClay, Gage, Freeman, Lloyd, and Gage Manufacturing Company, a corporation, who thereafter by assignment transferred the same to the Union Car Company, a corporation. Judgment went for plaintiff, from which, and an order denying his motion for new trial, C. E. McClay alone appeals.

[1] The instrument whereby the transfer was effected was a naked assignment, and did not purport to impose any obligation upon the assignee to pay the rent reserved in the lease. Indorsed thereon, and signed by plaintiff, was an instrument in writing as follows:

"I hereby consent to the transfer of a certain lease on 683 Antonio street, from Jay Gage, C. E. McClay, O. E. Freeman, and C. T. Lloyd to Union Car Company, a corporation, provided that said Union Car Company complies with all the legal formalities, through its board of directors. * * * in accepting this transfer and agreeing to comply with the terms of said lease. * * *

While, as shown by the record, the assignee adopted a resolution accepting the assignment of the lease, it made no promise whatever to pay any rent thereunder, nor in any manner whatsoever agreed to comply with the terms of the lease. Under these circumstances, the court properly found this consent to the transfer of the leasehold estate did not release the defendants from their obligation upon the covenant to pay the rent. Indeed, had the consent been unconditional, or had the assignee complied with the conditions so exacted, the finding would not have been subject to attack upon the record here presented. *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Brosnan v. Kram-*

er, 135 Cal. 36, 66 Pac. 979; Cyc. vol. 24, p. 1177.

[2] Neither, since it would have violated a fundamental rule of evidence, did the court err in refusing to permit defendants to introduce evidence tending to show that plaintiff orally agreed to release appellant and his colessees from any and all liability upon their covenant to pay the rent reserved in the lease.

[3] There is no ground upon which to base the claim of a surrender to the lessor of the leasehold estate by operation of law. As we have seen, the consent made by plaintiff to the assignment was not only upon conditions never complied with by the assignee, and who, as disclosed by the record, never paid any rent to plaintiff, but it did not purport to constitute a release of defendants. No facts whatsoever are made to appear which tend in the slightest degree, by implication or otherwise, to show an intent on the part of the lessor to accept a surrender of the lease. On the contrary, so far as shown, plaintiff looked to appellant and his colessees for the payment of rent and compliance with its terms.

We are unable to perceive any merit in the appeal, and the judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

YOUNG v. CANFIELD'S ESTATE. (Civ. 1932.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. BROKERS \Leftrightarrow 71 — CONTRACTS AS TO COMPENSATION—CONSTRUCTION.

Plaintiff having rendered services to C. in the purchase of certain land, C. signed a writing stating that it was his understanding and agreement that plaintiff was to have one-third of the net profits arising from the operation or final sale of the property. The property was sold at an advance in price, but if C. were allowed interest on his investment, there would be no profits. *Held*, that the contract did not authorize C. to charge any interest, notwithstanding the use of the term "net profits."

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 56.]

2. INTEREST \Leftrightarrow 6 — EXPRESS CONTRACT — NECESSITY.

As a general rule interest is not recoverable, unless made the subject of an express agreement except in the case of a loan, which under the express provision of Civ. Code, § 1914, is presumed to be made upon interest unless otherwise stipulated.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 13-16.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by C. S. Young against the estate of C. A. Canfield. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

James Donovan, of Los Angeles, for appellant. Goodwin & Morgage, of Los Angeles, for respondent.

JAMES, J. [1] Appeal from a judgment entered against the plaintiff. The appeal is presented on the judgment roll. The facts as they may be gathered from the complaint are as follows:

Prior to December 17, 1903, the plaintiff had rendered services to C. A. Canfield, since deceased, in and about the purchase of certain land. Canfield became the owner of the land, and, as evidence of the compensation to be paid to the plaintiff for his services, wrote the plaintiff as follows:

"Dear Sir: Relative to our understanding at the time of the purchase of the N. E. $\frac{1}{4}$ of Sec. 23—28—27, and in consideration of your services granted in connection thereof, it is my understanding and agreement that you are to have one-third (1/3) of the net profits arising from the operation or final sale of the above-mentioned property.

"Yours truly,

C. A. Canfield."

The total price paid by Canfield for the land, including taxes, was \$6,765.79. Canfield sold the property on April 30, 1913, for \$8,000; that amount being in excess of the purchase price by the sum of \$1,234.21. The plaintiff duly presented his claim against the estate of Canfield for the sum of \$411.40, being one-third of the apparent profit made by Canfield on his investment. The court found the facts as they were alleged by the plaintiff, but found that there was nothing due the plaintiff for the reason that by adding interest at the rate of 7 per cent. to the amount of Canfield's original investment and charging that interest as a part of the investment, no profits resulted by reason of the price obtained at the sale of the property. The one question is presented as to whether interest was properly chargeable under the contract made between Young and Canfield. On the part of respondent the cases of *Hentz v. Pennsylvania Co.*, 134 Pa. 343, 19 Atl. 685, and *Barry v. Bernays et al.*, 162 Mo. App. 27, 141 S. W. 933, are cited. In the case first noted the court refers to a work on partnership, and the opinion contains this statement: "There are no profits in a land speculation which does not return to the investor his purchase money with interest upon it."

This language is approved in *Barry v. Bernays*, supra. As applied to the facts of this case, we are not in accord with the determination of the Pennsylvania and Missouri courts. There was no agreement expressed here for the payment of any interest upon Canfield's investment. The plaintiff had rendered certain services, and his compensation was agreed upon in the manner declared in the letter written by Canfield to him. We are of the opinion that the term "net profits," as used in this letter, does not authorize the charge of any interest amount, and that if

such had been in contemplation it should have been expressed. Furthermore, Canfield, for aught that is shown by the pleadings or record presented, might not have been able to have secured a 7 per cent. income on the money which he invested in the land, nor any per cent. at all, for that matter.

[2] The general rule is that the matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged; excepting, of course, a case of a loan of money which by our Code is made subject to the payment of interest by presumption. Civ. Code, § 1914. The general rule to which we have adverted finds expression in *Tirrell v. Jones*, 39 Cal. 655, and *Adams v. Lambard*, 80 Cal. 438, 22 Pac. 480.

The judgment is reversed, with directions to the trial court to enter judgment upon the findings of fact in favor of the plaintiff.

We concur: CONREY, P. J.; SHAW, J.

O'DEA v. ROBERTS. (Civ. 1903.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. APPEAL AND ERROR §605—TRANSCRIPT—RULE OF COURT.

Supreme Court rule 7 (119 Pac. xi), regulating the size, arrangement, indexing, etc., of transcripts on appeal, is intended to secure records of uniform size, arranged in orderly and convenient form, and an appeal not complying with such rule and misdescribing the judgment appealed from will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2660-2663.]

2. APPEAL AND ERROR §608(1)—RECORD—DESCRIPTION OF JUDGMENT.

Where the judgment appealed from was entered on April 13th, a record containing a judgment rendered April 26th, which the clerk certified on April 23d to be a true copy, etc., is insufficient, and in connection with the failure to observe Supreme Court rule 7 (119 Pac. xi), regulating the form, indexing, etc., of transcripts on appeal, will cause the appeal to be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2673-2681, 2683, 2684.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. F. O'Dea against R. G. Roberts. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Crouch & Crouch, of Los Angeles, for appellant. Ingall W. Bull and Harold Larson, both of Los Angeles, for respondent.

PER CURIAM. [1] This appeal purports to have been taken under what is designated the alternative method of appeal and the record prepared and brought up pursuant to the provisions of section 953a, Code of Civil Procedure. No attempt, however, is made to comply with rule 7 of the Supreme Court

(119 Pac. xi) as to the form and preparation of the transcript. This rule requires that:

"Transcripts on appeal in civil cases, prepared under section 953a of the Code of Civil Procedure, * * * must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width. The leaves must be bound together on the left-hand side in volumes of convenient size. The papers required to be sent by the clerk * * * in civil cases under section 953a, * * * constituting the ordinary judgment roll are here designated as the 'Clerk's Transcript,' and the certified transcripts of the phonographic reporter's notes required by * * * section 953a in civil cases are here designated as the 'Reporter's Transcript.' The respective papers in the clerk's transcript must be placed in chronological order, and if it is bound with the reporter's transcript, it must come first in order. The pages of the clerk's transcript and those of the reporter's transcript must be numbered separately by consecutive numbers. The lines of each page must be numbered separately and consecutively. An index of each transcript must be inserted at the beginning thereof, referring to each document and to the page beginning the examination, cross-examination, redirect, and recall of each witness."

The reporter's transcript here presented, in form and size only, complies with the rule. The clerk's transcript consists of what appear to be some discarded office copies of the pleadings, findings, and judgment, inserted in the reporter's transcript, which contain neither index nor paging that is intelligible. It is unnecessary to direct attention to other matters wherein the transcript is not in accordance with the rule; suffice it to say that it appears to have been prepared without reference to the existence of any rule governing the subject. Obviously, the purpose of the rule is not only to secure records of uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal.

[2] Moreover, the appeal is from a judgment entered on April 13, 1915. The judgment brought up in the purported record which we are asked to review was not rendered nor filed until April 26, 1915. The clerk by his certificate dated April 23, 1915, certifies this judgment so rendered on April 26th, and being the only judgment embodied in the record, to be a true copy of the judgment entered in the above-entitled action. Not only is there no appeal from this judgment, but it is impossible to perceive how the clerk could, on April 23d, have certified to the correctness of a judgment which was not rendered nor filed until three days later. It thus appears that the judgment entered on April 13th from which the appeal is sought to be prosecuted is not contained in the record, and the judgment embodied in the record is not one the correctness of which is authenticated by the certificate of the clerk, or from which an appeal is prosecuted.

The appeal is dismissed.

VAN DE WATER v. FRIDHAM et al., Board of Sup'rs of Los Angeles County.
(Civ. 2277.)

(District Court of Appeal, Second District, California, March 17, 1917. Rehearing Denied by Supreme Court May 16, 1917.)

1. DRAINS ⇐18—ISSUANCE OF BONDS—STATUTES—CONSTRUCTION.

St. 1903, p. 354, entitled "An act to promote the drainage of wet, swamp, and overflowed lands, and to promote the public health in the communities in which they lie," was amended by St. 1915, p. 359. Sections 8b, 8c, and 8g relate to the issuance of bonds and determination of incidental cost to be charged against the contractor, and section 8d provides that, when signed, "said bonds shall be delivered by said treasurer to said contractor or to his order, assignee, or lawful representative." Section 8e provides for the raising of a fund by special tax for the discharge and payment of the bonds and interest thereon, etc., followed by the provision, "and the board of supervisors is hereby vested with the power and it is the duty of said board to advertise said bonds for sale by at least one insertion of a notice of sale in a newspaper * * * and to sell said bonds to the highest responsible bidder," etc. Pol. Code, § 4484, provides that, where there is a conflict between two provisions of a statute, so complete as to leave no possible room for giving effect to both, the one last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article. *Held*, it was an intent of the Legislature that payment for work should be in bonds in a sum equal to the amount of the contractor's bid plus such sum as he, under the requirements of the act, shall advance for the payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees, while the provision for sale as a means of such administration is incomplete and uncertain as to acts necessary to accomplish the purpose of the law, and the provisions of section 8g have no reference to the sale of the bonds provided for in section 8e, but to the conditions under which the treasurer shall deliver the bonds to the contractor, etc.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13.]

2. DRAINS ⇐2(1)—STATUTES—VALIDITY.

St. 1903, p. 354, as amended by St. 1915, p. 359, § 1½, provides that whenever a portion of any drainage system passes through or forms the boundary line of any municipal corporation, or where adjacent territory within such municipality is found to be benefited, such adjacent territory may be included within the boundaries of such drainage district, provided petitioners obtain the consent of the governing body of such municipality, expressed by ordinance. The board of supervisors of a drainage district obtained from the legislative body of Long Beach its consent and permission to construct a drainage canal through certain specified streets in such city, which was operating under a freeholder's charter. *Held*, that the ordinance did not confer upon the district a control of the streets, violative of the provisions of the charter vesting in the city plenary control of all uses of its streets.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

3. MUNICIPAL CORPORATIONS ⇐683(1) — DRAINAGE DISTRICT—STATUTE.

Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1½, providing for inclusion of a portion of a municipality in a drainage district, an ordinance granting consent of the city of Long Beach to the construction of a drainage

ditch through its streets was not rendered a nullity, because such consent was upon certain terms named in the ordinance, which were protective of public interest, germane to the subject, and violative of no provision of the drainage district act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1471, 1472, 1475, 1479.]

4. DRAINS ⇐14(3) — DRAINAGE DISTRICT — STATUTE.

Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1, providing for the initiation of proceedings by filing a petition with the board of supervisors, defining the boundaries of the proposed district to be benefited, and for hearing upon objections, and section 5, providing that, at the conclusion of the hearing, the determination of the board shall be made in writing, to be filed and entered upon the minutes of the board, the board was impliedly authorized to deny, modify, or change the petition.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 5.]

5. DRAINS ⇐2(1) — DRAINAGE DISTRICT — STATUTE.

Although St. 1903, p. 354, as amended by St. 1915, p. 359, does not expressly provide that the doing of the work shall depend upon its being a public benefit, section 4 makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends, and the act is not rendered void by its failure to provide that the doing of the work shall depend upon its being a public benefit.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

6. DRAINS ⇐2(2)—STATUTE—REPEAL—FLOOD CONTROL ACT.

St. 1903, p. 354, as amended by St. 1915, p. 359, was not superseded by St. 1915, p. 1502, entitled "An act to create a flood control district, to be called 'Los Angeles county flood control district,'" since the purpose of the drainage act is to dispose of water as an injurious element, while the purpose of the flood control act is to conserve it as a beneficial agent, and it could not be the intent of the Legislature, by creating a flood control district, to repeal provisions for the drainage of wet and swamp lands.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

Certiorari by O. F. Van de Water against R. W. Pridham and others, as constituting the Board of Supervisors of the County of Los Angeles, to review the proceedings of respondents in creating and establishing a drainage district. Proceedings of board of supervisors affirmed.

A. J. Sherer and Robert Young, both of Los Angeles, for petitioner. A. J. Hill, County Counsel, and Charles E. Haas, Deputy County Counsel, both of Los Angeles, for respondents.

SHAW, J. Certiorari. The board of supervisors of Los Angeles county, claiming authority so to do under and by virtue of the provisions of a certain act of the Legislature, entitled "An act to promote the drainage of wet, swamp and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21,

1908 (Stats. 1908, p. 354), the title to which and the act were amended in 1915 (Stats. 1915, p. 359), in a proceeding instituted therefor by petition, created and established a drainage district, designated as "Los Angeles County Drainage District No. 1," the boundaries of which embrace certain territory in the city of Long Beach. When the proceedings had progressed to a point where the contract for constructing the drainage improvement had been awarded for the doing of the work, and contract therefor executed, petitioner, as an owner of land in the district, brought this proceeding, attacking the proceedings as in excess of the jurisdiction of the board. Petitioner asserts that the law under which the board of supervisors assumed to act is invalid, and hence the proceedings so had and thereunder taken by the board of supervisors for the formation of the district, award of contract for the doing of the work therein, and providing for the payment of the cost thereof by bonds issued for and on behalf of the district to the contractor for the cost of the work, were had and taken without authority of law.

This contention is based upon the following grounds: First. That there is an irreconcilable contradiction between the different sections of the drainage act relative to the disposition to be made of the bonds to be issued by the county to represent the cost of the proposed work. Second. That the inclusion of part of the city of Long Beach within the proposed drainage district is unauthorized by law. Third. That the drainage act under which the proceedings were taken is wanting in any provision which restricts the power of the board acting thereunder to cases where the improvement would constitute a public benefit. Fourth. That the act has been superseded in Los Angeles county by a subsequent act adopted by the Legislature, known as the "Los Angeles County Flood Control Act." We will discuss the points made by petitioner in the order in which they are presented in his brief.

[1] 1. To meet the cost of the formation of the district, and the proposed improvement therein, the act provides for the issuance of bonds in form as prescribed. Section 8c of the act provides that if, upon a hearing had in accordance with section 8b, the board is of the opinion that the work contracted for has been completed, it shall by a resolution so declare, and accept the work, and state therein "the aggregate amount for which bonds shall be issued, and * * * the amount of the incidental costs and expenses of the work and the proceeding which are charged against and to be paid by the contractor," as provided in section 8g. Section 8d requires the clerk to transmit a copy of the order so made by the board of supervisors to the county treasurer, upon receipt of which such officer is required to issue bonds in the amount fixed by said board in said order, which bonds are to be

signed by the presiding officer of the board and the county treasurer, and when so signed, "*said bonds shall be delivered by said treasurer to said contractor or to his order, assignee or lawful representative.*" Section 8e provides for the raising of a fund by special tax for the discharge and payment of the bonds and the interest thereon as the same become due, and to maintain and keep the works in repair, followed by the provision: "*And the board of supervisors is hereby vested with the power and it is the duty of said board to advertise said bonds for sale by at least one insertion of a notice of sale in a newspaper of general circulation within the county and to sell said bonds to the highest responsible bidder, and to do all and singular the things necessary for the purpose of selling said bonds and which in this section aforesaid it is declared shall be done.*" It thus appears that the act contains two provisions touching the disposition of the bonds, which are wholly repugnant. It is impossible to give effect to both, for it is apparent that, if the treasurer be required by the provision contained in section 8d to deliver them to the contractor or to his order, assignee or lawful representative, as payment for doing the work, it must necessarily render the provision for the sale thereof, contained in section 8e, wholly inoperative. Throughout the proceeding the board of supervisors acted upon the theory that the cost of the work and expenses incidental thereto should be paid for, not from the proceeds of the sale of bonds to be issued for and on behalf of the district, but in bonds issued and delivered directly to the contractor, who was required to advance all sums necessary to cover surveys, inspection, and incidental expenses.

The contention of petitioner is that, since the conflict between the two provisions is so complete as to leave no possible room for giving effect to both, the one last in numerical order must prevail (Turner v. Wilson, 171 Cal. 600, 154 Pac. 2), and this, indeed, is the provision of section 4484 of the Political Code, to which, however, must be added the qualification therein provided: "*Unless such construction is inconsistent with the meaning of such chapter or article*"—in which case the rule of interpretation is that the court should look to the language of the whole act, and if it finds in any particular clause an expression not consistent in its import with those used in other parts of the same statute and not in harmony with its plan, purpose, and scope, and if by taking a view of the whole act it can collect from such larger and more extensive expressions the real intention of the Legislature, it is its duty to give effect to that intention. State v. Jennings, 27 Ark. 419; Torrance v. McDougald, 12 Ga. 528; Mason v. Finch, 2 Scam. (Ill.) 223; In re Vanderberg, 28 Kan. 243; Pond v. Maddox, 38 Cal. 572. Applying this rule, we have no difficulty in reach-

ing the conclusion that it was the intent of the Legislature that payment for the work should be in bonds in a sum equal to the amount of the contractor's bid, plus such sum as he, under the requirements of the act, should advance in payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees. So construed, the act provides a complete scheme for the financial administration of the undertaking, while the provision for sale as a means for such administration is incomplete and uncertain as to acts necessary to accomplish the purpose of the law. Among other provisions contained in the act, which support the interpretation given, are those found in section 8g, which provides that:

"All the costs and expenses of the proceeding, inclusive especially of the compensation of the person appointed to furnish the specifications, of the superintendent of work, of the engineer of work, of the cost of all publications under this act required to be made, shall be chargeable to and paid by the contractor, and they shall have been paid before delivery of the bonds shall be made by the county treasurer: Provided, however, that the county treasurer may make delivery of such bonds, if there be deposited with him, subject to the order of the board of supervisors, money to the amount of the costs and expenses chargeable to the contractor as the same is stated in the attested order of the board of supervisors, provided for in section 8d of this act. The contractor and all persons claiming under him any interest in said bonds, whether of ownership, lien or otherwise, shall be deemed to have notice of the contents of this section."

The provisions of this section, later in numerical order than 8e, could have no reference to the sale of the bonds provided for in said last mentioned section, but unquestionably refer to the conditions under which the treasurer shall deliver the bonds to the contractor or upon his order or to his assignees, in which case the latter shall take notice of the provisions of the section as to the payments so required to be made by the contractor as a condition of having the bonds claimed by him, which shall represent the total cost of the work (section 8b), delivered to him by the treasurer (section 8d), for the cost of the work.

[2] 2. Section 1½ of the act provides:

"Whenever a portion of any ditch or drain or system of ditches or drains for the drainage of any such body of wet, swamp, or overflowed lands passes through or forms the boundary line of any municipal corporation, or where adjacent territory within such municipality is found by said board of supervisors to be benefited by such work or improvement, such adjacent territory may be included within the boundaries of such drainage district in proceedings instituted for the creation of said drainage district: Provided, said petitioners first obtain the consent of the governing body of such municipality, expressed by ordinance, to the construction of such ditch or drain or ditches or drains within the limits of such municipality, and thereupon all such territory shall be subject to the provisions of this act, and any work of any improvement herein contemplated to be done may be done either within or without the boundaries of the district organized therefor as may be necessary to properly drain by a ditch or drain or a sys-

tem of ditches or drains any body of wet, swamp or overflowed lands within said district."

Incorporated within the boundaries of the proposed district were certain lands located within the city of Long Beach, through which the proposed drainage canal was to extend. Under the authority of said section 1½ of the act, the board of supervisors sought and obtained from the legislative body of the municipality its consent and permission, expressed by ordinance, to the construction of the drainage canal through certain specified streets of said city. Notwithstanding this ordinance, which contained conditions upon which the consent was made, petitioner insists, first, that the legislative body of said city of Long Beach, operating under a freeholders' charter, was without power to make the grant of such use; and, second, that the attaching of conditions to such consent rendered it null and of no effect. The want of power to consent to the construction of the works through the streets of the city to an outfall emptying into the ocean is based upon the contention that such use thereof confers upon the district control of the streets, which is violative of the provisions of the charter vesting in the city "plenary control of all uses of its streets," together with all matters of internal sanitation; that hence the work proposed to be done by the district is a municipal affair, as to which the freeholders' charter under which the city is operating is the controlling law. Section 6, art. 11, Const.; *Fritz v. San Francisco*, 132 Cal. 373, 64 Pac. 566; *Barber Asphalt Pav. Co. v. Costa*, 171 Cal. 138, 152 Pac. 296.

In our opinion, the control of its streets, which under its freeholders' charter the city of Long Beach exercises over its streets, does not differ from that exercised by cities of the state operating under the general law. The act recognizes the right of such control in all municipalities, whether created under general law or operating under charter adopted pursuant to the Constitution. Without regard to the character of the charter, the consent of the legislative body of the city is a prerequisite condition to extending the drainage canal through the streets of the municipality. It has been repeatedly held that the Legislature may provide for the creation of districts such as that here involved and for the financial administration of their affairs, which include lands in municipalities. *Modesto Irrigation Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. 237; *La Mesa Homes Co. v. La Mesa*, etc., Irr. Dist., 159 Pac. 593; *In re Madera Irrigation Dist.*, 92 Cal. 297, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. In the case last cited the question involved was that of including a part of a municipality in an irrigation district, and it was there said:

"Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a

'municipal purpose' within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera."

So in the case at bar the construction of a drainage system for the purpose of draining swamp and overflowed lands adjacent to Long Beach, although the drainage ditches extend through the streets of such city, cannot be deemed a municipal affair. Since the conditions existing, as where the lands are outside the city limits, or inclusive of lands both in and outside thereof, it becomes a matter of more than local concern. In the case of *Pixley v. Saunders*, 168 Cal. 152, 141 Pac. 815, where a like question was involved, the Supreme Court said (quoting from the syllabus):

"While generally the question of sanitation is a municipal affair, in many instances it is one of broader scope, which cannot be adequately handled by the municipal authorities of a single town. Therefore it cannot be said to be a 'local' or 'municipal' affair within the inhibition of sections 12 and 13 of article 11 of the Constitution, but it falls within the class of public purposes for which the Legislature has the authority to provide governmental agencies or districts by general laws."

[3] In our opinion, there is no merit in petitioner's claim that the ordinance granting consent of the city of Long Beach to the construction of the drainage ditch through its streets is a nullity by reason of the fact that such consent is upon certain terms named in the ordinance. The conditions attached are terms protective of the public interest, germane to the subject, and violative of no provision or principle of the drainage district act; indeed, without being attached to the ordinance, they might be and, for ought that appears to the contrary, are incorporated into the specifications for the construction of the ditch through the streets of the city. At all events, since the city might, at its option, deny the use of its streets for the purpose of constructing the canals therein, it could attach any condition, not in conflict with the conditions of the act, which was germane to the subject and calculated to protect the public interest in the streets, thus exercising plenary control over the streets. A similar question arose in the case of *Lake v. Ocean City*, 62 N. J. Law, 160, 41 Atl. 427, where it is said:

"It has been generally understood that a municipality that may lawfully consent to the formation of a private corporation for certain public purposes may lawfully condition its consent upon terms protective of such public interests, and germane to the subject. If the persons upon whom the stipulations impose terms do not complain, it is difficult to see how others are affected otherwise than beneficially."

It is optional on the part of the city whether or not it grant the use thereof for such purpose at all, and likewise optional with the district whether or not it accepts other than an unrestricted grant of such use. We perceive no legal objection, how-

ever, to the district accepting a conditional grant of the use of the streets where the terms imposed are not inconsistent with the purposes of the act and which it might adopt in doing the work (*Railroad Co. v. Day*, 73 Ohio St. 83, 76 N. E. 396), in the absence of such imposed conditions.

[4] 3. Section 1 of the act provides for the initiation of the proceeding by filing with the board of supervisors a petition defining the boundaries of the proposed district to be benefited by the construction of the improvement, upon which, after notice given; a hearing is had upon objections filed as provided in said section. While not in express terms authorizing the board to deny the petition, such power to deny, modify, or change, we think, must be deemed implied from the provision of section 5 that:

"At the conclusion of the hearing, the determinations of the board shall be made in writing to be filed and entered upon the minutes of the board."

[5] Nor, in our opinion, is the act subject to the objection that it is void by reason of its failure to provide that the doing of the work shall depend upon its being a public benefit. True, it does not require in direct terms a finding on the part of the board that it shall be a public benefit, though the record discloses that the board did find that the public interest and convenience would be subserved by the doing of the work. In *Page and Jones on Taxation by Assessment*, § 334, it is said:

"Possibly the special and local benefit is clearer in drainage than it is in any other of the public improvements for which assessments are levied. The improvements of drainage, and its beneficial effect upon the land drained are matters of general knowledge which have often been commented upon by the courts."

And again (section 335):

"If land in its natural condition is generally or often covered with stagnant water it is likely to be a menace to public health. * * * Under these circumstances, there is no doubt that the drainage of such land, by artificial means, is an improvement which confers a benefit upon the public at large."

The Supreme Court of this state, in the case of *Hagar v. Board of Supervisors*, 47 Cal. 222, in discussing the validity of the drainage act of 1868, said:

"But we think the power of the Legislature to compel local improvements, which, in its judgment, will promote the health of the people and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement."

In *Lewis on Eminent Domain* (2d Ed.) vol. 1, § 188, it is said:

"The promotion of the public health is undoubtedly a public use within the meaning of the Constitution, and private property may be taken for the construction of drains, levees, or other works in order to accomplish this object."

See, also, *Laguna, etc., District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933.

The power of the Legislature to authorize the doing of the work at the expense of those owning swamp and wet lands, who are chiefly benefited by the improvement, is, as we understand the law, founded, like municipal sanitation measures, not only upon its power to do all things necessary to conserve the health and general welfare of the public, but statutes authorizing drainage of swamp lands are upheld, independently of any effect upon the public health, as reasonable regulations for the benefit of those who are deemed owners of a common property. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, and cases cited. And hence the power to act does not depend upon any express provision contained in the act that the board of supervisors shall first determine that it is necessary for the public welfare. Moreover, section 4 of the act makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends.

[§] 4. Petitioner suggests that the act in question has been superseded, in so far as Los Angeles county is concerned, by "An act to create a flood control district, to be called 'Los Angeles county flood control district.'" *Stats.* 1915, p. 1502. We are unable to perceive any merit whatsoever in this contention, and agree with counsel for petitioner that:

"There is a radical difference between the purposes of the drainage act involved in this action and the said Los Angeles county flood control act. The purpose of the drainage act is to dispose of the water and get rid of it as an injurious element, while the purpose of the Los Angeles county flood control act is to conserve it as a beneficial agent."

The purpose of one is "to promote the drainage of wet, swamp or overflowed lands"; the other, as declared by the first paragraph of section 2, is "to provide for the control of the flood and storm waters of said district (which embraces practically the entire county of Los Angeles), and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district." The fact that in the proceedings mention is made of the proposed drainage ditch as the "construction of a storm drain," which purpose it might at times serve, is in no wise inconsistent with the purpose declared in the act itself. Certainly it was not the intent of the Legislature that by creating a flood control district, embracing almost the entire county of Los Angeles, such act should repeal all provisions for the drainage of wet and swamp lands in the county, any more than by the act under which irrigation districts are created it was intended to destroy all acts providing for the drainage of swamp

lands embraced within such irrigation districts.

While the act is loosely drawn, nevertheless its purpose is clear, and we have reached the conclusion, not without some difficulty, however, that, taken as a whole, it affords a mean for effecting such purpose, the validity of which is not subject to attack upon the specific grounds urged by petitioner.

It is therefore ordered that the proceedings be affirmed.

We concur: CONREY, P. J.; JAMES, J.

BONER et al. v. FALL RIVER COUNTY BANK. (No. 899.)

(Supreme Court of Wyoming. May 28, 1917.)

APPEAL AND ERROR \S 771 — BRIEFS — DELAY IN FILING — EXCUSES.

The failure of plaintiffs in error to file their briefs within the time required by the rules was not excused by the sickness and absence from the state of their resident attorney, and the non-resident attorney's lack of knowledge that the proceedings in error were perfected, or that the time for filing briefs had arrived, or that the briefs were not filed, where such nonresident attorney intended to complete the brief, and knew of the resident attorney's absence, and, though furnished a copy of the rules, made no effort to ascertain from the clerk of the court whether the brief had been filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105.]

Error to District Court, Niobrara County; William C. Mentzer, Judge.

Action between F. M. Boner and others and the Fall River County Bank. On motion to dismiss proceedings in error by F. M. Boner and others. Motion granted, and proceedings dismissed.

J. E. Porter, of Crawford, Neb., and John W. Hartwell, of Lusk, for plaintiffs in error. John F. Harkin, of Lusk, and Wm. B. Ross, of Cheyenne, for defendant in error.

BEARD, J. This case is before the court on the motion of defendant in error to dismiss the proceedings in error for the reason that no brief was filed by plaintiffs in error within the time required by the rules or at all. The petition in error was filed January 31, 1917, and the motion to dismiss was filed April 16, 1917. Under the rule (Rule 15, 104 Pac. xiii) plaintiffs in error had 60 days after the filing of the petition in error within which to file their brief. Their time, therefore, expired April 1, 1917, and no brief was then or ever has been filed, nor was any extension of time for so doing applied for or granted. In resistance of the motion each of the attorneys for plaintiffs in error has filed an affidavit. Mr. Porter, a nonresident attorney, states in his affidavit:

That Mr. Hartwell, an attorney at Lusk, in this state, was associated with him in the case from its inception. "That I attended to the

preparation of the bill of exceptions, and in Mr. Hartwell's absence from Lusk, believing that the time within which to file and docket the case in this court was about to expire, I transmitted the petition in error and sent *præcipe* to the clerk of this court, but omitted to sign Mr. Hartwell's name or his name as signed was not recognized by the clerk, who notified me that the case could not be docketed until a Wyoming attorney appeared for appellant, and that the time for docketing would not expire until June, 1917, I believe it was. I have not the letter referred to, as I sent it to Mr. Hartwell, and I am informed that it has been mislaid or lost. That I immediately communicated with Mr. Hartwell and shortly afterwards saw him personally, and informed him that, as I was not familiar with the Wyoming practice, I would expect him to look after the perfecting of the appeal, and that he would let me know when it was perfected and when the rule or brief day was. During the months of February and March on different occasions I tried to communicate with Mr. Hartwell by long distance telephone as to this matter, but was informed that he was out of the city, and I had no knowledge that the appeal was perfected or that the brief time had arrived, and, if arrived, that briefs were not filed until notice of this motion was served upon me. I did, of course, expect to aid in the preparation of briefs, but depended entirely upon my associate, Mr. Hartwell, to prepare draft brief, and see that no advantage was lost by reason of lapse of time."

Inasmuch as it is stated in the affidavit that the letter of the clerk to affiant became mislaid or lost, we have taken the liberty of referring to the carbon copies of the clerk's letters to Mr. Porter, and find the following. On January 26, 1917, he wrote Mr. Porter:

"Your letter of the 22d inst., inclosing petition in error, *præcipe* for summons in error, application for original papers, and journal entries, and \$10 fee, in the case of Boner v. Fall River County Bank, was received day before yesterday. Before the petition in error can be filed it is necessary for you to either file an application for permission to file and prosecute the case in this court, or to associate yourself with some member of the Wyoming bar in the case. If you will kindly do either of these things, the petition will be filed at once, and summons in error and order for papers issued. For convenient use, I am sending you the rules of this court, and also the statutes governing admission."

We also observe in the clerk's files a copy of a letter to Mr. Porter, dated January 31, 1917, advising him that Mr. Hartwell had entered his appearance, and that the petition in error and other papers in the case had been filed, and summons in error and order for papers and entries issued that day. Mr. Hartwell states in his affidavit that he did not at the time understand that he was to attend to the preparation and filing of the brief; that Mr. Porter prepared the bill of exceptions, and soon thereafter he (Hartwell) went to South Dakota and was there taken ill, and did not return until early in April, 1917; that he did not notify Mr. Porter of his absence.

It clearly appears from Mr. Porter's affidavit that he was to complete the brief at least before it should be filed, and that he knew of Mr. Hartwell's absence from Lusk. He could have easily ascertained from the

clerk of this court whether the brief had been filed. A copy of the rules of this court appear to have been sent to him; but, if not, he could have applied for them, and it was his duty in any event to learn what they were and to comply with them. The facts do not show such unavoidable casualty as would excuse the failure to file and serve the brief, or the failure to apply for an extension of time for so doing.

The motion to dismiss the proceedings in error will be granted, and the proceedings in error dismissed; and it is so ordered.

Proceedings in error dismissed.

POTTER, C. J., concurs. SCOTT, J., did not sit.

HATCHER et al. v. ROBERSON et al. (No. 6883.)

(Supreme Court of Oklahoma. Jan. 9, 1917
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1078(1)—ASSIGNMENTS OF ERROR—CONSIDERATION.

Assignments of error presented by counsel in their brief, if unsupported by authority or argument, will not be noticed by the court, unless it is apparent without further research that they are well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4256.]

Error from District Court, Wagoner County; Fred P. Branson, Judge.

Action by David Roberson and Herbert Roberson, by their legal guardian and next friend, Ed Knox, against Cinderella Hatcher and Eula Connelly, née Hatcher, as heirs at law of Henry Hatcher, deceased, the original defendant. From the decree awarding to the defendants a life estate to the lands in controversy, the defendants bring error. Affirmed.

Charles A. Moon and Bailey & Wyand, all of Muskogee, for plaintiffs in error. J. H. Sutherlin, of Wagoner, for defendants in error.

SHARP, J. The proceeding in error in this case is prosecuted from a decree made and entered April 20, 1914, awarding to the defendants, as the sole heirs at law of Henry Hatcher, deceased, a life estate in and to the allotment of one William McKinley Roberson, deceased, for the natural life of one Green Roberson, and which decree further determined that the said David Roberson and Herbert Roberson were each the owners in fee of an undivided one-third of said allotment, the remaining one-third thereof being vested in a brother, Jesse, not a party to the suit, and that said David, Herbert, and Jesse were entitled to the possession of said lands in reversion upon the death of said Green Roberson, and found that the defendants, Cinder-

ella Hatcher and Eula Connelly, née Hatcher, were entitled to the possession and occupancy of the premises for and during the natural life of said Green Roberson. From the record of the proceedings had in the trial court it seems that the case there turned upon the quality of the estate conveyed by Frances Roberson and Green Roberson, father and mother, respectively, of David and Herbert, to Charles J. Brown, under the deeds of January 5, 1904, and May 4, 1904, and which title to Brown was by him reconveyed to Green Roberson, the father, and from him, through mesne conveyance, acquired by the original defendant, Henry Hatcher. The trial court found, and so decreed, that on account of the conveyances Hatcher acquired an estate in said lands for the period of the natural lives of the said Frances E. Roberson and Green Roberson, and none other, and hence that the title cast upon the heirs at the death of William McKinley Roberson was alienable, but held that, because of the limitations contained in the deed, the purchasers in turn took only such estate therein as the original deed called for.

Looking to the petition in error and the assignments of error found in the brief, the point is sufficiently made that the trial court erred in holding that defendants, through the purchase of their ancestor, acquired only an estate during the life of Green Roberson; Frances E. Roberson having died prior to the institution of the suit. But nowhere is there any argument directed to a construction of the conveyances through which Hatcher acquired his title. On the other hand, in the brief is found no argument save that the homestead allotment of a deceased Creek freedman was on the dates the deeds were executed alienable under the governing laws of Congress. The court's attention is called to the opinion of Judge Campbell in *Re Lands of the Five Civilized Tribes* (D. C.) 199 Fed. 811, *United States v. Cook*, 225 Fed. 756, 141 C. C. A. 22, *Welty v. Reed*, 219 Fed. 864, 135 C. C. A. 534, *Bentley et al. v. McCoy*, 35 Okl. 77, 128 Pac. 244, and other cases involving questions of alienability of lands of the class involved. This, however, the trial court determined in favor of plaintiffs in error, and held that the lands were alienable, so that from the brief of plaintiffs in error no question adversely determined is presented for our consideration. It is well settled in this jurisdiction that assignments of error presented by counsel in their brief, if unsupported by argument or by authority, will not be noticed by the court, unless it is apparent, without further research, that they are well taken. *Title Guaranty & Surety Co. v. Slinker*, 35 Okl. 128, 128 Pac. 696; *Id.*, 35 Okl. 153, 128 Pac. 698; *Pacific Mut. Life Ins. Co. v. O'Neil*, 36 Okl. 792, 130 Pac. 270. This we cannot say.

Rule 25 (38 Okl. x, 137 Pac. xi) requires that the brief of plaintiff in error shall contain, in addition to the specifications of error complained of, the argument and authorities in support of each point relied on. Where this rule is not complied with, the judgment appealed from will be affirmed. *King et al. v. King*, 42 Okl. 405, 141 Pac. 788; *Federal Discount Co. v. Gault Bros.*, 42 Okl. 630, 142 Pac. 300. The foregoing authorities are supported by a long line of decisions of this court.

The argument made that the homestead of the deceased allottee in the hands of the heirs, upon whom the law cast his estate, is by such heir alienable, furnishes no aid to the court in determining the kind or quality of the estate conveyed; and, no other question being presented, the judgment of the lower court should be and is affirmed. All the Justices concur.

RATCLIFF-SANDERS GROCER CO. v. BLUEJACKET MERCANTILE CO.
et al. (No. 7174.)

(Supreme Court of Oklahoma. April 10, 1917.
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 584—RES JUDICATA—REQUISITES IN GENERAL.

In order to make a matter *res adjudicata*, there must be a concurrence of the four conditions following, namely: (1) Identity in the thing sued for (or subject-matter of the suit); (2) identity of the cause of action; (3) identity of persons or parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1060.]

2. JUDGMENT \S 707—RES JUDICATA—ACTION ON ACCOUNT.

Record examined, and held, that the question involved in the issue herein is not *res adjudicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230.]

Error from District Court, Craig County; Preston S. Davis, Judge.

Action by the Ratcliff-Sanders Grocer Company against the Bluejacket Mercantile Company, a corporation, and C. M. Condon. Judgment for defendants on a directed verdict, and plaintiff brings error. Reversed and remanded, with directions to grant a new trial.

W. H. Kornegay, of Vinita, for plaintiff in error. Nelson Case, of Oswego, Kan., Grant Foreman and J. D. Simms, both of Muskogee, and Wm. T. Rye, of Vinita, for defendants in error.

KANE, J. This was an action on an open account, commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below. The petition was in the short statutory form, briefly alleging that the defendants are indebted to the plaintiff

on an open account in the sum of \$2,364.20, an itemized statement of which is hereto attached and made a part hereof, and ending with a prayer for judgment. The answer of the defendants alleged, in effect, that neither of the defendants in this action was indebted to the plaintiff as alleged, and that the question of their liability was involved in a certain bankruptcy proceeding filed by C. M. Condon & Co. State Bank et al. v. one Roy J. Wiggins in the District Court of the United States for the Eastern District of Oklahoma; that, said cause coming on to be heard by the said United States District Court for the Eastern District of Oklahoma, it was found that the merchandise described in the exhibit attached to the petition had been purchased by said Roy J. Wiggins, as a sole trader, doing business under the name of the Bluejacket Mercantile Company, and not by the Bluejacket Mercantile Company, a corporation. Therefore the defendants aver the question of the liability of the defendants in this action to the plaintiff is res adjudicata; that it is settled by a former judgment of a court of competent jurisdiction in favor of these defendants. The reply alleged, in substance, that the plaintiff was not a party to the bankruptcy proceedings; that the bankruptcy court has no jurisdiction to adjudicate the rights of the plaintiff as against C. M. Condon and the Bluejacket Mercantile Company, a corporation, and that said court did not adjudge that the defendants were not responsible or liable to said plaintiff as alleged in its petition, and if the bankruptcy court did so decide, it was without jurisdiction so to do. After the evidence offered in support of the issues thus joined was all in, the defendants moved the trial court to direct the jury to return a verdict in their favor, which motion was sustained, and judgment entered in favor of the defendants for their costs. It is to reverse this action of the trial court that this proceeding in error was commenced.

From this brief statement of the case it is apparent that the only question presented for review is whether the trial court erred in directing the jury to render a verdict in favor of the defendants. The record before us does not disclose the precise ground upon which the trial court directed a verdict, but it was probably upon the ground that it found the defendants' plea of res adjudicata to be well taken. In this we are unable to agree with the trial court. The evidence shows without material conflict substantially the following state of facts: The Bluejacket Mercantile Company, a perfectly solvent domestic corporation, had been engaged in the mercantile business at Bluejacket, Okl., for several years, practically all of its \$10,000 capital stock being owned by Mr. C. M. Condon, of Oswego, Kan. On the 1st day of January, 1911, the Bluejacket Mercantile Company, by C. M. Condon, entered into an agreement in writing with one Roy J. Wiggins, by the

terms of which the former conditionally sold to the latter its entire stock of merchandise, including its business and good will, at Bluejacket, Okl., on the following terms:

"For said stock of merchandise, business, and good will said Wiggins agrees to pay said company the sum of \$8,794.21, with 6 per cent. interest on deferred payments as follows: \$200 on the 1st of each month beginning October 1, 1911, and as much larger monthly payments as the business will justify from the proceeds of said sale; said Wiggins is allowed to take monthly the sum of \$100, or as much thereof as he may actually need, for family living expenses: from the income he shall also make such purchases of goods as are necessary to keep the stock replenished and up to the needs of the trade. The balance of the said income from said business shall be paid as it comes in on said purchase price until the whole amount thereof is paid. The title to said stock of goods and business shall remain in said company until the purchase price thereof is fully paid, and until that time no change shall be made in the firm name or general mode of conducting the business. Upon failure on the part of said Wiggins to comply with any of the provisions of this contract, or to fully carry out its terms, the said company may take possession of said stock and business, and in any business way make therefrom the amount due it together with costs and expenses."

In pursuance of this agreement Mr. Wiggins, who was known to be a man of no financial standing, took charge of the business, making no change in the firm name or general mode of conducting the business, and continued to conduct the same until involuntary bankruptcy proceedings were commenced against him by the Bluejacket Mercantile Company, a corporation, and C. M. Condon for failure to meet his obligations with them pursuant to the terms of their contract.

It was for the recovery of the purchase price of goods purchased from the plaintiff subsequent to the date of this contract and prior to the commencement of the bankruptcy proceedings that this action was commenced.

The bankruptcy proceedings in which the judgment was rendered, which it is claimed is res adjudicata as to the liability of the plaintiffs herein, were instituted by the Bluejacket Mercantile Company, a corporation, C. M. Condon, and other creditors of Roy J. Wiggins, a sole trader doing business as the Bluejacket Mercantile Company, the corporation alleging that it had sold the bankrupt, Roy J. Wiggins, a stock of goods, wares, and merchandise located at Bluejacket, Okl., for the sum of \$8,794.21, of which there was a balance over amounting to \$7,194.21, evidenced by 35 promissory notes, signed by Roy J. Wiggins and payable to the president of the Bluejacket Mercantile Company, C. M. Condon, one of the defendants herein. Thereafter the United States court declared Roy J. Wiggins a bankrupt, and appointed a receiver, who took possession of the stock of goods in question and proceeded to administer upon the affairs of the bankrupt under orders of the court. The question decided by the bankruptcy court arose out of a dispute between the petitioner, the

Bluejacket Mercantile Company, a corporation, and a receiver appointed by the state court in the instant case, the former contending that Roy J. Wiggins purchased not only the stock in bulk, but all subsequently acquired merchandise, as a sole trader, and thereafter continued to conduct the business as such sole trader under the name of the Bluejacket Mercantile Company; whilst the latter insisted that in the circumstances of the case the sale in bulk was conditional, and, this condition not being performed, the title to the merchandise never passed from the Bluejacket Mercantile Company, a corporation, to Roy J. Wiggins, doing business as a sole trader in the name of the Bluejacket Mercantile Company, and that the subsequent sales of merchandise by the plaintiff were made upon the strength of the apparent liability of the corporation. Therefore, he contended, the entire stock should be turned over to the receiver appointed by the state court for administration on behalf of the plaintiff in this cause and other creditors similarly situated. As alleged in the answer, the bankruptcy court found that Roy J. Wiggins, as a sole trader, doing business in the name of the Bluejacket Mercantile Company, originally purchased the stock in bulk from the Bluejacket Mercantile Company, a corporation, and subsequently purchased the merchandise involved herein in the same capacity from the plaintiff, and therefore ordered the entire stock to be administered by the referee in bankruptcy as the property of Roy J. Wiggins, which was done. It is quite apparent to us that this action did not necessarily determine the liability of the Bluejacket Mercantile Company, a corporation, to the plaintiff for the purchase price of the merchandise sold in the foregoing circumstances. The bankruptcy court merely found the merchandise involved was purchased by Roy J. Wiggins, a sole trader, doing business as the Bluejacket Mercantile Company, and therefore it should be turned over to the receiver appointed by the bankruptcy court.

[1] The plaintiff was not a party to the bankruptcy proceedings, and if he had been, that court was without jurisdiction to adjudicate his rights as against C. M. Condon and the Bluejacket Mercantile Company, a corporation, and there is nothing in the record before us which indicates that the bankruptcy court attempted to do so. In order to make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: (1) Identity in the thing sued for (or subject-matter of the suit); (2) identity of the cause of action; (3) identity of persons or parties to the action; (4) identity of the quality in the persons for or against whom the claim is made. The principle on which judgments are held conclusive upon the parties requires that the rule should apply to only that which was directly in issue, and not to everything that was

incidentally brought into controversy during the litigation. Black on Judgments, 610.

[2] As we have seen, by the terms of its contract the Bluejacket Mercantile Company, a corporation, sold not only its entire stock of merchandise and its business and good will to Roy J. Wiggins, retaining title to the merchandise in its own name until the purchase price was fully paid in monthly installments, but by providing that "until that time no change shall be made in the firm name or general mode of conducting the business" it also loaned him its credit. The corporation and Mr. Condon knew that Roy J. Wiggins was a man of no financial standing, and it was evidently their purpose to sell him the stock and good will of the business, thus to enable him to continue to buy merchandise from the wholesale houses as though no change had been made, in order that he might carry out his contract with them. The contract between the Bluejacket Mercantile Company and Roy J. Wiggins was not recorded, and no apparent change took place except that Mr. Wiggins appeared to be in charge of the business. As the provision of the contract that "no change shall be made in the firm name or general mode of conducting the business" was strictly observed, we have no doubt that in these circumstances the Bluejacket Mercantile Company, a corporation, was liable for any merchandise purchased by the concern while the business thereof was being thus conducted.

There is some contention to the effect that, inasmuch as the plaintiff had notice of the precise relation existing between the Bluejacket Mercantile Company, a corporation, and Roy J. Wiggins, and sold its merchandise on the strength of the credit of the latter, and not the former, the judgment of the court below should be affirmed. We cannot agree with counsel that the evidence is conclusive to that effect. Of course, if that state of affairs really exists, and the plaintiff, with notice of all the facts and circumstances surrounding the transaction between the corporation and Wiggins, continued to sell its merchandise to the latter as a sole trader, it would not be entitled to recover from the Bluejacket Mercantile Company, a corporation. In our judgment, there was a sharp conflict in the evidence on this point which should have been submitted to the jury, and it was therefore error to direct a verdict in favor of the defendants.

It is also contended that as to the defendant C. M. Condon there is no testimony in the record upon which a judgment against him can be predicated. It is not clear to us that the court below ever passed squarely on this question. The motion for a directed verdict in favor of the defendants was joint in form, and the order of the court sustaining the same merely stated in general terms that the motion is sustained. Mr. Condon does not appear to have asserted any

rights in the premises independent from those common to himself and the Bluejacket Mercantile Company, a corporation. Therefore we prefer to leave the question of his individual liability open until it is presented in such a manner as to attract the attention of the trial court to the precise point involved.

We also find a contention to the effect that the appeal herein should be dismissed for certain reasons raised for the first time in the brief of counsel for defendant in error. It is not the practice of this court to write opinions on motions to dismiss, where the same are overruled, unless the question of practice or procedure thereby presented is, in the judgment of the court, of such importance or novelty as to make such action necessary. In our judgment, the questions raised by the motion to dismiss herein do not belong to that class. Therefore, finding no merit in the motion, we will overrule the same without further comment.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

SHARP, C. J., and HARDY, TURNER, and THACKER, JJ., concur.

KEENAN v. CHASTAIN et al. (No. 6155.)
(Supreme Court of Oklahoma. May 29, 1917.)

(Syllabus by the Court.)

1. MOTIONS \S 56(1)—ORDERS MADE OUT OF COURT—ENTRY.

Section 5317, Rev. Laws 1910, requiring orders made out of court to be forthwith entered on the journal of the court by the clerk, is directory, and compliance with said requirement that such orders be so entered is not essential to the validity of such orders, nor is it necessary that the case-made show affirmatively the recording thereof.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. \S 67.]

2. APPEAL AND ERROR \S 719(3)—FUNDAMENTAL QUESTION OF JURISDICTION.

The fundamental question of jurisdiction, first, of the appellate court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2971, 3490.]

3. APPEAL AND ERROR \S 801(1)—REHEARING—OVERRULING.

The Supreme Court may grant a rehearing of an overruled motion to dismiss an appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3161, 3164.]

4. APPEAL AND ERROR \S 568—CASE-MADE—NOTICE.

The defendant has a right to notice of the time and place of the settlement of a case-made, and where no such notice is given or waived, and there is no appearance by the defendant in

error, either in person or by attorney, the case-made is fatally defective.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2523–2529.]

5. APPEAL AND ERROR \S 568—CASE-MADE—WAIVER OF NOTICE—AMENDMENT.

The suggestion of amendments to a case-made where the record shows that one of them was disallowed by the trial court, without showing its materiality, does not constitute a waiver of notice of the time and place of settlement.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2523–2529.]

Error from District Court, Cherokee County; John H. Pitchford, Judge.

On second petition for rehearing and motion to dismiss appeal. Former opinion withdrawn, and appeal dismissed.

For former opinion, see 157 Pac. 326.

Bruce L. Keenan, of Tahlequah, for plaintiff in error. Asbery Burkhead, of Tahlequah, for defendants in error.

KANE, J. This cause is now before the court on second petition for rehearing and motion to dismiss appeal. The facts out of which this proceeding arose are briefly as follows: Originally this was a suit to foreclose a mortgage upon certain land in Cherokee county. The mortgage was foreclosed, and the property sold to satisfy the judgment rendered. Plaintiff, Chastain, filed his objections to the confirmation of the sale. Upon hearing said objections the court sustained the same and set aside the sale. It is from the order refusing to confirm the sale that this proceeding in error is prosecuted. The appeal was dismissed sua sponte in an opinion by Mr. Commissioner Davis, and upon petition for rehearing being filed Commissioner Davis wrote a second opinion, adhering to the former opinion dismissing the appeal. A motion to dismiss the appeal was filed and overruled by the court prior to the opinions by Commissioner Davis.

[1] In the original opinion dismissing the appeal the first two grounds for dismissal, as stated in the syllabus, are in effect: (1) For the reason that the journal entry of judgment did not bear the filing mark of the clerk of the court, or other indication that it had ever become a part of the record in the case; (2) that a recital in the case-made that certain orders had been made extending the time to make and serve case-made must show affirmatively that they have been entered of record. These two points have been expressly overruled by this court subsequently in *St. L. & S. F. R. Co. v. Taliaferro*, 160 Pac. 610, decided October 10, 1916. In an opinion by Mr. Justice Hardy the court said: "Section 5317 (Rev. Laws 1910), requiring orders made out of court to be forthwith entered on the journal of the court by the clerk, is directory, and compliance with said requirement that such orders be so entered is not essential to the validity of such orders, nor is it necessary that the case-made show affirmatively the recording thereof."

Thus it will be seen that the first two grounds upon which the opinion dismissing this appeal is based are now overruled, and said holding should be set aside.

[2-4] However, the appeal must be dismissed upon another ground. It is conceded that no notice of the time and place to settle and sign case-made was served upon the defendant, and that he was not present when the same was signed and settled by the trial judge. It is settled law in this jurisdiction that the defendant has a right to notice of the time and place of the settlement of a case-made, and where no such notice is given or waived, and there is no appearance by the defendant in error, either in person or by attorney, the case-made is fatally defective. *Southwestern Surety Co. v. Going*, 150 Pac. 488; *Moore v. Howard Merc. Co.*, 40 Okl. 491, 139 Pac. 524; *Ft. S. & W. Ry. Co. v. State Nat. Bank*, 25 Okl. 128, 105 Pac. 647; *First Nat. Bank v. Daniels*, 26 Okl. 383, 108 Pac. 748; *Lister v. Williams*, 28 Okl. 302, 114 Pac. 255; *Harrison v. Penny*, 28 Okl. 523, 114 Pac. 734; *Foral v. Bogle*, 44 Okl. 805, 146 Pac. 706.

To meet this counsel for plaintiff in error contends: (1) That after the overruling of the motion to dismiss in the first instance by the court, that action became *res adjudicata*, and thereafter the court was without authority to dismiss the appeal upon substantially the same grounds as were urged in the former motion to dismiss; (2) that inasmuch as defendant in error suggested amendments to the case-made, some of which were incorporated therein by the trial court, he thereby waived his right to notice of the time and place of settlement of the case-made. Neither of these contentions can be sustained.

The fundamental question, of jurisdiction, first, of the appellate court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; 3 Cyc. 182.

It is also well settled that the Supreme Court may grant a rehearing of an overruled motion to dismiss an appeal. *Bd., etc., City of Frankfort v. Farmers Bank*, 105 Ky. 811, 49 S. W. 811; 3 Cyc. 198.

[6] On the second proposition raised by counsel the record shows that counsel for defendant in error offered four suggestions of amendments, and that only three of them were allowed by the trial court. It has been held that the reason why attorneys of record are entitled to notice to appear before the judge at the time of settling a case-made upon appeal to the Supreme Court is in order that their suggestions may be considered, and, if approved, adopted. *Symms Grocer Co. et al. v. Burnham, etc., Co.*, 5 Okl. 222,

47 Pac. 1050; *Pioneer Tel. & Tel. Co. v. Davis*, 26 Okl. 205, 109 Pac. 299. Under this rule, where suggestions of amendments are made by counsel and all incorporated in the case-made by the trial court, no good reason appears why notice should be served upon attorneys of record to appear at the time of settling the case-made. In the case at bar, however, whilst amendments were suggested, they were not all allowed and incorporated in the case-made, and counsel, not having been served with notice and not being present, had no opportunity to urge the allowance of the rejected suggestion, which, for aught we know, may have been very material to his case. We think in these circumstances the motion to dismiss herein is governed by the general rule that, a proceeding in error brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error. If all the suggestions made were allowed by the court the rule probably would be different.

As this opinion covers all questions raised by the motion necessary to be passed upon, all former opinions are hereby withdrawn.

For the reasons stated, the appeal must be dismissed. All the Justices concur.

Ex parte GORDON. (No. 8566.)

(Supreme Court of Oklahoma. Nov. 21, 1916.
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 111(4)—ORDINANCE—PARTIAL INVALIDITY—EFFECT.

Unless the invalid part of a city ordinance is so clearly severable from the valid portions thereof that it would be presumed that the law-making body would have passed the valid portion without the invalid, the entire ordinance must be held to be void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 248-251.]

2. MUNICIPAL CORPORATIONS \S 111(4)—ORDINANCE—LICENSE TAX—PARTIAL INVALIDITY—EFFECT.

That part of the city ordinance of Oklahoma City providing for levying a license tax upon merchant auctioneers, designated as section 842, which attempts to exempt from the general operation of the ordinance any merchant or other person who has resided in and conducted a business in Oklahoma City, etc., being admittedly invalid, the balance of the act must also be held invalid, for otherwise a class of merchants or persons would be subjected to the payment of a license tax or be punished for nonpayment whom the lawmaking body of the city did not intend to be.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 248-251.]

Original habeas corpus by Louis Gordon against W. B. Nichols, Chief of Police of Ok-

lahoma City. Writ allowed, and petitioner ordered discharged.

Morse & Standeven, of Oklahoma City, for petitioner. B. D. Shear, A. T. Boys, and Frank Watson, all of Oklahoma City, for respondent.

KANE, C. J. This is an original application for a writ of habeas corpus, wherein Louis Gordon is petitioner and W. B. Nichols, chief of police of Oklahoma City, is respondent. The petitioner, who is a nonresident of this city and state, was arrested upon the charge of having violated certain ordinances of the city pertaining to the licensing of merchant auctioneers, and thereupon commenced this proceeding upon the theory that his arrest and subsequent restraint by the chief of police was without authority of law, for the reason that the ordinance purporting to provide for the licensing of merchant auctioneers is void: (1) Because it is discriminatory, allowing certain rights and privileges to residents of Oklahoma City which were not allowed to nonresidents; (2) that the amount of the license tax, to wit, \$25 per day, is unreasonable and confiscatory.

As the first ground for assault upon the ordinance seems to us to be well taken, it will not be necessary to examine the second. Section 581, Rev. Laws Okl. 1910, provides:

"The city council shall have authority to levy and collect a license tax on auctioneers: * * * Provided, however, that all scientific and literary lectures and entertainments shall be exempt from taxation, and also all concerts and musical or other entertainments given exclusively by citizens of the city."

Pursuant to this section of the statute and the terms of its charter, the city passed ordinances which provide, in effect, that no person, firm, or corporation shall carry on any auction room, or store for the sale of goods, wares, or merchandise, without having procured a license as a merchant auctioneer; that the license tax for a merchant auctioneer shall be \$25 per day for each and every working day said auction room shall be open for the sale or disposal for sale of goods at auction or public outcry; that any person or corporation, either as auctioneer, owner, manager, clerk, or employé, who shall neglect any of the duties prescribed herein, or violate any of the provisions of this ordinance, shall, upon conviction, for each and every offense be punished by a fine of not less than \$20 nor more than \$100, or by imprisonment in the city jail not more than 30 days, or by both such fine or imprisonment. Another provision, section 842 of said ordinance, provides as follows:

"Any merchant or other person who has resided in and conducted a business in Oklahoma City for a period of six months next preceding the application therefor, and who has paid his regular assessment of taxes upon his stock or business for the year last past may obtain from the mayor of Oklahoma City a special permit to close out or sell at public auction his at that

time stock of goods without paying a license as merchant auctioneer. Provided, that the provisions of this ordinance shall not apply to or restrict sales on commission of secondhand or used farm machinery or implements, household goods, furniture and kitchen utensils when sold by the owner thereof or a duly licensed auctioneer."

[1] The merchandise which the petitioner sought to dispose of as a merchant auctioneer consisted of a stock of jewelry purchased at a sale held pursuant to the bankruptcy laws of the United States, upon which the original owner had paid his regular assessment of taxes for the year last past. It is conceded that if the stock had been purchased in precisely the same circumstances by a resident merchant or any person who had resided in and conducted a business in Oklahoma City for the period of six months, such person could have disposed of it as a merchant auctioneer without violating the ordinance. Counsel for respondent in their brief also make the following admission:

"We admit that section 842 is void, not because of being discriminatory, but because it: First, attempts to delegate a nondelegable authority to the mayor, which point seems to have been overlooked by the petitioner. It is fundamental law that legislative or judicial function of determining whether a thing is or is not subject to a tax cannot be delegated to an unrestricted individual's official discretion. Second, attempts to provide an exemption for a certain kind of merchant, which exemption is unauthorized by section 581 of the Revised Laws of 1910, which says: 'Provided, however, that all scientific and literary lectures and entertainments shall be exempt from taxation, and also all concerts and musical or other entertainments given exclusively by citizens of the city.' The well-established law of statutory construction lays down the rule that an exception or proviso is exclusive. Therefore this exemption as provided is exclusive of all other exemptions, and in attempting to provide therefor the board of commissioners have clearly exceeded their authority."

It seems to us that this admission virtually disposes of the case in favor of the petitioner. There is no merit in the contention that the admittedly invalid section is so separable and independent of the valid provisions of the ordinance that it can be eliminated without defeating the object of the ordinance, and therefore the valid part may stand notwithstanding the invalidity of section 842, supra. The rule is laid down by Judge Dillon in his work on Municipal Corporations, § 647 (5th Ed.) as follows:

"If part of a by-law is void, other essential and connected part of the same by-law is also void; but it must be essential and connected to have this effect. * * *"

[2] It is obvious that if section 842 of the ordinance is eliminated as invalid, the act as it stands will apply to a resident merchant or any other person who has resided in and conducted a business in Oklahoma City for a period of six months, and that those classes would in that way be reached and fined, when the legislative authority of the city evidently intended that they should be regarded as not offending against the law, even if they

disposed of merchandise as merchant auctioneers in the same circumstances disclosed by the record before us. Therefore the entire ordinance must be declared invalid, in order to avoid contravening the intent of the legislative department of the city by subjecting to the penal provisions thereof a class of persons which they clearly intended to exempt from the payment of the license tax.

The applicable rule is so well established that the citation of authorities in its support is superfluous, but we think a few cases disclosing the reason for the rule and its proper application to a given state of facts may be cited with profit. A valuable authority for this purpose is the leading case of *Sprague v. Thompson*, 118 U. S. 96, 6 Sup. Ct. 988, 30 L. Ed. 115. *Sprague* was one of the owners of the steamer *Saxon* against whom *Thompson* had instituted proceedings in the state courts of Georgia to recover pilotage charges. *Thompson* was a licensed pilot whose services were refused by the steamer. The laws of Georgia provided that all vessels engaged in coastwise trade should pay certain pilot charges and port duties, except such vessels as should ply between Georgia ports or between the Georgia ports and those of Florida or South Carolina. The Supreme Court of Georgia (89 Ga. 409, 47 Am. Rep. 760) held that the exemption of these vessels was void as contravening the act of Congress (section 4237, R. S. [U. S. Comp. St. 1916, § 7983]) which provided that there should be no discrimination in the matter of pilot charges, but that the remainder of the act would not be invalidated by reason of this exception. On writ of error to the Supreme Court of the United States the case was reversed, and the whole act was declared invalid. In that case, as in the case at bar, counsel contended that the valid parts of the law were not necessarily dependent upon the void provision thereof, and therefore the valid part should be permitted to stand. Mr. Justice Matthews, who delivered the opinion for the court, in answering this contention, says:

"But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

A similar contention was answered by Mr. Justice Harlan in *Union Sewer Pipe Co. v. Connelly* (C. C.) 99 Fed. 354; *Connelly v. Union Sewer Pipe Co.*, 185 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, as follows:

"If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would, in that way, be reached and fined, when evidently the Legislature intended

that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation, and thereby protected from prosecution."

An authority more nearly analogous in its facts is *Ames v. People*, 25 Colo. 508, 55 Pac. 725. The statute there provided in effect that no auctioneer or other person shall sell without a license, but exempts from its operation merchants who pay an annual tax upon merchandise assessed according to the revenue laws of the state. The Supreme Court held the proviso invalid, whereupon the question arose as to the validity of the balance of the act. The court, in passing upon this question, says:

"Section 2823, without the proviso, was enacted by the territorial Legislature in 1861. Sections 2828 and 2829 were passed at the same time. In 1862 the proviso was added to section 2823, whereby under this section as thus amended, all persons except those dealing in specified classes of merchandise are required to take out a license. By section 2828 a penalty is provided for a failure to obtain such license, while by section 2829 there is a further limitation of the persons who are subject to such license. So that it requires a construction of these sections as a whole in order to ascertain what persons are subject to a license, and they are therefore so inseparably connected in substance, and interdependent, that one qualifies the other, and they must be read together for the purpose of ascertaining the intent of the Legislature, and their legal effect upon the rights of plaintiffs in error, under the established facts in this case; for, unless so read, or if either section 2823 or 2829, or both, should be rejected, persons would be subjected to a license whom the Legislature did not intend should be."

Comanche Light & Power Co. v. Nix, 156 Pac. 293, not yet officially reported, is also in point to the same effect.

Looking, then, to all the sections of the ordinance together, we must hold that the elimination of section 842 confers upon the act a positive operation beyond the legislative intent, and beyond what any one can say would have been enacted in view of the illegality of the part thereof which seeks to exempt resident merchants from its operation.

The writ of habeas corpus is therefore allowed, and the petitioner ordered discharged. All the Justices concur.

In re CARTWRIGHT. (No. 7615.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR — §151(6) — SURETY ON BOND—RIGHT OF APPEAL.

The surety on the bond of a guardian, when aggrieved, may appeal to the district court from

a decree of the county court settling the final account of the guardian.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 951, 952.]

Commissioners' Opinion, Division No. 4. Error from District Court, McIntosh County; R. W. Higgins, Judge.

The Southwestern Surety Insurance Company, surety on the bond of King Walton, as guardian of Charlie Cartwright, appeals from a judgment of the district court, dismissing an appeal from the probate court, disapproving certain items claimed as credits by the guardian. Reversed.

Kent V. Gay, of McAlester, for appellant. C. H. Tully, of Eufaula, for appellee.

EDWARDS, C. One King Walton was guardian for Charlie Cartwright, a minor. The Southwestern Surety Insurance Company was surety on said Walton's guardianship bond. In 1913 the probate court removed the said Walton as guardian and ordered him to file his final report. The final report was filed, the hearing thereon had, the resignation of the said Walton accepted, and another guardian appointed for the minor. Upon hearing of such final report the court disapproved certain items aggregating \$448.18 claimed as credits by the said Walton, as guardian. The surety on the guardianship bond appealed from said order disapproving said items to the district court. The guardian appointed subsequently to the removal or resignation of Walton filed in the district court a motion to dismiss the appeal, assigning as a reason that the court had no jurisdiction of the appeal as taken by the plaintiff, for the reason that the Southwestern Surety Insurance Company had no power or authority at law to appeal from the order or decree complained of, which motion was by the court sustained and the appeal dismissed. From the order dismissing the appeal the said Southwestern Surety Insurance Company appealed to this court. In a decision of this cause it must be determined whether or not the surety, upon a guardianship bond, though not a party to the action, may appeal from an order of the county court approving or disapproving the final report of the guardian.

The statutory provisions in regard to this are as follows:

Section 6501, Revised Laws 1910:

"An appeal may be taken to the district court from a judgment, decree or order of the county court. * * *

"Sixth. Settling an account of an executor, or administrator or guardian."

Section 6502:

"Any party aggrieved may appeal as aforesaid, except where the decree or order of which he complains, was rendered or made upon his default."

Section 6503:

"A person interested in the estate or funds affected by the decree or order, who was not a party to the special proceeding in which it was

made, but who was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it has been previously acquired, may appeal as prescribed in this article. The facts which entitle such person to appeal, must be shown by an affidavit which must be filed with the notice of appeal."

It is well settled that the final settlement of a guardian's account had in the county court is conclusive upon the sureties on a guardian's bond, regardless of whether or not they were parties to the proceeding. *Southern Surety Co. v. Burney*, 34 Okl. 552, 120 Pac. 748, 43 L. R. A. (N. S.) 308; *Title Guaranty & Surety Co. v. Slinker*, 35 Okl. 128, 128 Pac. 696; *Henry v. Melton*, 46 Okl. 278, 148 Pac. 730. And if such order becomes final, the sureties must pay the amount found due in case the principal defaults. In the case of *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. 503, it is said:

"A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree."

And in *Farrar v. Parker*, 85 Mass. (3 Allen) 556, the court discussed this proposition at some length, and says:

"In the present case, it is obvious that the decree deeply affects the rights of the appellants. It fixes the amount of property of the ward in the hands of his late guardian. The guardian having died insolvent, his estate cannot be relied on to discharge his indebtedness as guardian. The sureties are directly liable upon their bond; and the amount of this liability is fixed by the decree of the judge of probate, unless the same can be revised upon an appeal."

The facts in the latter case are not entirely similar to the case at bar, but the principle it announces is in point. In the case of *Moulding v. Wilhartz*, 169 Ill. 422, 48 N. E. 189, the court holds:

"In an action on an assignee's bond, the sureties are concluded by the findings of the county court as to the amount unaccounted for that came into his hands, and which he was ordered to pay over, no appeal being taken therefrom, since they had an interest in such order, were 'aggrieved' thereby, and were entitled to appeal from it."

In *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478, the court discussed the liability of sureties upon bonds at some length, including bonds of the kind involved in this action, and holds that a surety on the cost bond may file a motion to retax the costs, though not mentioned in the judgment, and may appeal from the judgment against the principal alone as being aggrieved by such judgment. And in the case of *Mertz v. Mehlhop*, 117 Ill. App. 77, it is held that:

"A surety upon a guardian's bond may appeal from an order restating the account of his principal as guardian of a minor."

There are numerous other holdings of like effect. Since the sureties upon the guardian's bond are bound by the order of the county court settling the final account of the guardian, it is evident that the protection afforded a surety is somewhat meager, as he

may not, in the absence of fraud, resist his liability upon the bond, or question the correctness of the account or the order of the court thereon, unless the law gives him the right of appeal. In our judgment a proper construction of the statutes above referred to does give the surety a right to appeal from orders of the county court allowing or disallowing the final account of the guardian or particular items thereof.

The judgment will be reversed, with instructions to the lower court to proceed in conformity with this opinion.

PER CURIAM. Adopted in whole.

SHAW v. DICKINSON. (No. 7309.)

(Supreme Court of Oklahoma. Jan. 18, 1917.
Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS §2(1) — WHAT LAW GOVERNS—CONTRACT.

As a general rule, since statutes of limitation affect the remedy only, an action on contract is governed by the statutes of limitation of the forum, and not by the *lex loci contractus*, nor the *lex domicilii*.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4, 6.]

2. LIMITATION OF ACTIONS §187—NOTE—BAR OF STATUTE—BURDEN OF PROOF.

In an action upon a promissory note, which upon its face shows that it is barred by the statutes of limitation of this state, and to which the defendant had pleaded such statutes as a bar, the burden is upon plaintiff to plead and prove facts relieving such action from the bar of the statutes of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 696.]

3. LIMITATION OF ACTIONS §187—NOTE—RESIDENCE.

In an action upon a promissory note executed in the state of Ohio, which, upon its face, appears to be barred by the statutes of limitation of this state, and to which action defendant pleaded the statutes of limitation of Oklahoma as a bar, it is not sufficient for plaintiff to plead and prove that such action has not been barred in the state of Ohio, and that defendant was a resident of the state of Ohio; but it must be made to appear by pleading and proof that the defendant had not been within the state of Oklahoma a sufficient time to bar said action under our statutes of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 696.]

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; M. A. Breckenridge, Judge.

Action by Joseph J. Dickinson against Thos. R. Shaw. From a judgment for plaintiff, defendant brings error. Reversed and remanded, with directions to render judgment for defendant.

Edwin R. Perry and Roy R. Poe, both of Tulsa, for plaintiff in error. Randolph, Haver & Shirk and Elton B. Hunt, all of Tulsa, for defendant in error.

RUMMONS, C. This action was commenced in the superior court of Tulsa on March 23, 1914, by the defendant in error, hereinafter called plaintiff, against the plaintiff in error, hereinafter called defendant, to recover on a promissory note, dated October 2, 1898, due one year after date. Plaintiff alleged that said note was executed and delivered in the state of Ohio, and that at the time of its execution and delivery both plaintiff and defendant were residents of the state of Ohio. Plaintiff further pleads that at said time, and at all times since said date, the statutes of limitation in force in the state of Ohio provided a limitation of 15 years in actions upon contracts or promises in writing. The defendant answered, specifically denying that said note was executed and delivered in the state of Ohio, or that at the time of the execution of said note that plaintiff and defendant were residents of the state of Ohio. Defendant further pleaded the statutes of limitation of the state of Oklahoma (section 4657, Laws 1910) as a bar to said action. At the trial it was admitted that the statutes of limitation in Ohio, for promissory notes, provided a limitation of 15 years.

Plaintiff was the only witness called in his behalf, and identified the note here in controversy, and the same was offered in evidence. Plaintiff's testimony, which was all of the testimony as to the residence of defendant, was as follows:

"Q. Are you acquainted with the defendant Thos. R. Shaw? A. Yes, sir; I am. Q. How long have you known him? A. Twenty-eight years. Q. Where did he live before he came to Oklahoma? A. Lima, Ohio. Q. You know what he did there? A. He was a lawyer, practiced law and dealt in farms and real estate mortgage loans, representing a company I was connected with."

At the conclusion of plaintiff's testimony, the defendant demurred to the evidence, which demurrer was overruled by the court. Defendant excepted to the ruling, and rested without offering evidence. Both plaintiff and defendant then moved the court for instructed verdicts. The court overruled the motion of the defendant, and sustained the motion of plaintiff, and directed the jury to return a verdict for the plaintiff for the face of the note and interest, which was done. Defendant in due time moved for a new trial, which motion was by the court overruled, and judgment was rendered upon the verdict. The defendant, having excepted to the ruling of the court, brings this proceeding in error to reverse the judgment of the court below.

The first assignment of error presented in the brief of defendant assigns the overruling of his demurrer to the evidence as error.

[1, 2] As a general rule, since statutes of limitation affect the remedy only, an action on a contract is governed by the statutes of limitation of the forum, and not by the *lex*

loci contractus, nor by the lex domicilii. *Gaier & Stroh Millinery Co. v. Hilliker*, 152 Pac. 410. This being the case, the question of whether or not plaintiff's cause of action was barred must be determined by the laws of Oklahoma. It seems clear that in this case the petition of the plaintiff shows on its face that his cause of action was barred by our statutes of limitation, and defendant having pleaded such bar, it was incumbent on plaintiff to plead and prove facts sufficient to take his cause of action out of the bar of the statute. Section 4660 of Revised Laws of 1910 provides as follows:—

"If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

This court, in the case of *Vanselous v. McClellan*, 157 Pac. 923, in applying this provision of our statutes to a state of facts very similar to the facts in the case at bar, says:

"The statute clearly makes the personal absence of the debtor the test, and not the place of his residence. Upon its face this note showed that it was barred by the statute of limitation. It was more than 18 years old, and matured 12 months after it was made; and, when the defendant challenged the plaintiff's right to recover upon this instrument, the burden was upon the plaintiff to show that he had come into court with an instrument upon which he was entitled to recover."

Commissioner Brett, who wrote the opinion of the court, cites the case of *Hoggett v. Emerson*, 8 Kan. 262, in which case it is said:

"Plaintiffs further aver that defendant has only been a resident of Kansas three years last past. This is not enough to take the notes out of the statute. The language of section 21 of our Code is: 'If when a cause of action accrues against a person, he be out of the state, or has absconded, or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed.' 'Be out of the state,' not reside out of the state. The question is not one of domicile, but of personal presence. A party may reside in Illinois, and yet spend more than half his time in Kansas. An allegation that a party 'has only been a resident of Kansas three years last past' throws no light upon the question of his presence in or absence from the state during the years prior thereto."

[3] The statutes of limitation of Oklahoma began to run against plaintiff's cause of action when the defendant came to Oklahoma, and the cause of action would be barred under our statutes if the defendant had been in Oklahoma for a period of 5 years before the commencement of the action. *Richardson v. Mackey*, 4 Okl. 328, 46 Pac. 546; *Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029.

The petition of the plaintiff and his evi-

dence only shows that the defendant executed the note in Ohio and resided in Ohio until he came to Oklahoma. Neither the petition nor the evidence of plaintiff were sufficient to show that defendant had not been in Oklahoma more than 5 years before the commencement of this action; and upon the authority of *Vanselous v. McClellan*, supra, this was insufficient to establish his cause of action. The trial court therefore erred in overruling the demurrer of the defendant to the evidence.

The judgment of the court below should be reversed, and this cause remanded, with directions to the trial court to render judgment for defendant.

PER CURIAM. Adopted in whole.

WALLER v. STATE. (No. A-2634.)
(Criminal Court of Appeals of Oklahoma.
May 26, 1917.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW § 628(5)—TRIAL—INDORSING NAMES OF WITNESSES.

Where a county attorney, after trial began, showed that he had learned of another witness whom he did not know of before, leave to indorse the name of such witness on the information and to permit him to testify might be granted by the court in its discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1413, 1414.]

Appeal from County Court, Oklahoma County; Wm. H. Swick, Judge.

R. W. Waller was convicted for selling a half pint of whisky to one Glen Cowden, and sentenced to a fine of \$100 and imprisonment in the county jail for 60 days, and appeals. Affirmed.

Ledru Guthrie, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Two alleged errors are relied upon for reversal of this judgment: First, that the court erred in permitting the county attorney to indorse the name of the witness Bocock on the indictment after the case was called for trial; and, second, that the evidence is insufficient to sustain a conviction.

We have carefully examined this record, and find that the evidence, although conflicting, is sufficient to sustain the conviction if the jury believed the evidence of the prosecuting witness and that of the sheriff, irrespective of the evidence of the witness Bocock, whose name was indorsed on the information after the case had been called for trial. The prosecuting witness and sheriff, M. C. Binion, were both unimpeached and appeared to be credible witnesses. The prosecuting witness was a chiropractic doctor

living in Oklahoma City, who apparently had no malice or ill will against the defendant, but was, as he admitted, interested in the enforcement of the prohibitory liquor laws of this state. We also find from an examination of the record that before the court permitted the county attorney to indorse the name of the witness Bocock upon the information and to use him upon the trial of the case the county attorney disclosed facts sufficient to put himself within the holding of this court in the case of *Steen v. State*, 4 Okl. Cr. 309, 111 Pac. 1097, and other cases to the same effect.

The judgment is affirmed.

LANCASTER v. STATE. (No. A-2557.)

(Criminal Court of Appeals of Oklahoma. May 24, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §561(1) — EVIDENCE — BURDEN OF PROOF.

The burden is on the state to introduce proof sufficient to establish the guilt of a defendant who is being tried upon a criminal charge beyond a reasonable doubt; and, when this is not done and when all the proof fails to establish guilt, a judgment of conviction should be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267.]

Appeal from District Court, Atoka County; R. W. Higgins, Judge.

Joe Lancaster was convicted of larceny of domestic animals, and appeals. Reversed.

Ira J. Banta, of Atoka, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Joe Lancaster was convicted at the June, 1915, term of the district court of Atoka county, on a charge of larceny of domestic animals and adjudged to serve five years in the state penitentiary. The information charges Lancaster jointly with Ed Smith with the larceny of a black mare, the property of Charley Christopher. Separate trials were had.

The proof indicates that Smith lived near Chockie in Atoka county; that Christopher also lived near the same place. Lancaster lived near Canadian, and at the time of the alleged larceny was engaged in picking cotton for a tenant on the farm of J. F. Riley near Canadian. Lancaster lived in a tent near or adjoining a small house in which his brother, Jess, was living. Some time in October, 1914, a stranger rode up to the camp and asked for feed for the black mare in question, a colt and a young mule. The plaintiff in error, Joe Lancaster, had started to work. His brother, Jess, was talking to the stranger when he went away. Within a day or two a deputy sheriff from Atoka went to the Lancaster place, and in a cedar flat

near by found the mare, colt, and young mule.

Ed Smith, who was also prosecuted for the theft, was apparently in possession of the stock. No one ever saw them in the possession of the plaintiff in error, Lancaster, and no one testified to any incriminating facts against him further than a statement by the person for whom he was working, to the effect that he would need his money to pay Smith for a horse which he expected Smith to bring him. Nothing indicates that he was ever in the community where the owner of the black mare lived, or that he ever had anything to do with her at any time. None of the state's witnesses connected Lancaster with the theft directly or indirectly. It may be that he was implicated or concerned in the unlawful taking of the mare, but the state wholly fails to prove facts capable of supporting the judgment of conviction upon this charge. The most that can be said of the testimony is that it generates a suspicion that he knew something concerning the transaction. This, however, does not warrant the sending of a man to prison for a term of five years, or any other term. The burden is on the state to prove beyond a reasonable doubt that the accused is guilty of the crime charged. Unless this is done, the verdict and judgment of guilty is contrary to the law and the evidence.

When there is any testimony tending reasonably to establish the crime charged, the question of guilt or innocence under our practice is for the jury to determine, but when there is no testimony offered or considered by the jury from which a legitimate conclusion of guilt can be drawn, then it is the duty of the court to reverse the judgment of conviction on the ground that the same is contrary to the law as well as the evidence.

The judgment is reversed.

Mandate is directed to issue forthwith.

DOYLE, P. J., and BRETT, J., concur.

LEMLEY v. STATE. (No. A-2485.)

(Criminal Court of Appeals of Oklahoma. May 29, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1162 — APPEAL — FUNDAMENTAL ERROR.

When, in the trial of a criminal case, the proof introduced on behalf of the state overwhelmingly establishes the guilt of the accused, and when the testimony of the accused himself is insufficient to justify the criminal conduct complained of, only fundamental error will be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085.]

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

E. L. Lemley was convicted of an assault with a dangerous weapon with intent to do

bodily harm, without justifiable cause, and he brings error. Affirmed.

Frye & Frye, of Sallisaw, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, E. L. Lemley, was tried at the December, 1914, term of the district court of Sequoyah county, upon a charge of assault with intent to kill, and convicted of assault with a sharp and dangerous weapon, with intent to do bodily harm, without justifiable or excusable cause, and his punishment fixed at imprisonment in the state penitentiary for one year.

The information charges E. L. Lemley with committing an assault with intent to kill Ora Green. The trouble occurred at a neighborhood schoolhouse near Pawpaw, in Sequoyah county. It appears that the building was used jointly for school and church purposes; that various religious denominations used the building as a church; that in September, 1914, a Christian preacher, who is referred to in the testimony as a Campbellite, was conducting services at this schoolhouse. Plaintiff in error, Lemley, appears to be a member of some other church which promulgates the doctrine of Holy Sanctification. The Campbellite preacher had announced that he would deliver a sermon on "Holy Sanctification," and apparently was proceeding to do so in first-class order, when Lemley interrupted the proceedings and began to criticize the preacher's conduct. The preacher informed Lemley that if he did not behave himself he would have him taken out of the house. Lemley's 17 year old son joined in the controversy and told the preacher that he would take him out. Neighbors counseled with the Lemleys, and the boy finally got up and left the house. On the outside Ora Green was taking care of his small children, when young Lemley came out and began to curse the Campbellites in general and the preacher conducting the services in particular. The testimony shows that Green is not a member of any church, but "leans towards the Campbellites," as he puts it. His wife also is inclined towards the Campbellites. Following some remarks made by young Lemley, Green knocked him down with his fist. The older Lemley learned of the trouble and came on to the scene, used some rough language, and threatened to kill Green, and approached him with an open knife. Green says that he asked him to fight fair; that he approached with his knife open and a business appearance in his eye, whereupon Green started to run; that the two Lemleys followed him; that they ran around the house rapidly. Other witnesses testified to the same facts; that he (Green) stepped in a hole and fell; that the older Lemley got on him and cut him severely with the knife. A young man named Cherry pulled Lemley off of Green. Considerable language was

used in connection with the trouble. Young Lemley, it is charged, holloed to his father to catch Green and that he would cut his throat. Green seems to have called for help. When young Cherry pulled Lemley off of Green, Lemley stuck his knife into him (Cherry), but the wound was not serious.

Dr. T. W. Collins, a local physician, testified that he attended Green after the trouble for several weeks; that there were two wounds; one was six or eight inches long, and cut very deep into the muscles of the arm, and barely missed severing an artery; that there was another wound about five inches long and an inch deep in the leg.

Lemley himself testified that he was a farmer and had a wife and six children; that he went to church on the night of the difficulty, and that the preacher was ridiculing holiness and read certain Scriptures and skipped verses, and that he asked him to read all of it, and the preacher advised him to shut his mouth and called him a liar and vilified him; that Tom Walls made a statement that if there were those in the house who did not want to hear this preacher for them to go outside; that he started out, and when he got out he heard the boy hollo, "Hurrah for the Campbellites," and that a man hit him, and he ran around the house after the man, and the boy holloed, "Catch him, Papa;" that he fell on the man, and that the man kicked at him and struck the knife; that he had nothing against Green and had been his friend; that Green threw up his arm, and he struck him in the arm with his knife; that Elmer Cherry ran up and said, "I want to see the son of a bitch that will just jump on one;" that he punched Cherry with his knife. He also said that he never swore at all that night, and that Ora Green never spoke a word; that just before the difficulty he testified that he was sanctified, but was in a passion at the time of the trouble; that he was a larger man than Green.

Upon this testimony, in fact upon the testimony of the plaintiff in error himself, the jury was warranted in finding him guilty of assault with a sharp and dangerous weapon with intent to do bodily harm, without justifiable or excusable cause. The court instructed the jury to take into consideration the fact that the son of the plaintiff in error had been assaulted in his presence, in the matter of mitigation of punishment or as a defense.

A careful consideration of the record impels us to the conclusion that the jury made no mistake in this case. This is a country wherein each and every person is entitled to his own religious belief, and if one does not agree with the views of others, he is not bound to attend their church or participate in their religious exercises. No one has any right whatever to go into any religious meeting of any kind and create a disturbance.

The law protects the most humble congregation from rowdism, and rowdism would be a mild designation of the disturbance precipitated at this meeting, out of which this criminal charge finally grew.

The record discloses no error prejudicial to the rights of the plaintiff in error.

The judgment of the trial court is therefore affirmed.

DOYLE, P. J., and BRETT, J., concur.

COLLINGWOOD v. STATE. (No. A-2608.)
(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

(Syllabus by Editorial Staff.)

1. INTOXICATING LIQUORS §236(1)—SALE—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for selling whisky held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-302, 307, 308, 319-322.]

2. CRIMINAL LAW §404(4)—DEMONSTRATIVE EVIDENCE.

In such prosecution, a certain pint of whisky which the prosecuting witness identified as that bought from the defendant, and which the sheriff testified was the whisky he got from the prosecuting witness, was sufficiently identified to authorize its admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 878, 891, 893, 1457.]

3. WITNESSES §379(2)—IMPEACHING TESTIMONY.

In such prosecution, the court should have permitted a witness called to impeach the prosecuting witness to answer a question as to whether the prosecuting witness in a conversation with him stated that he did not get the whisky from defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1220, 1248.]

4. CRIMINAL LAW §1120(3)—APPEAL—EXCLUSION OF EVIDENCE—RECORD.

Where the trial court refuses to permit a question to be answered, the record must show what the answer would have been so that the appellate court can determine whether it was material and proper and whether defendant was injured by its exclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931, 2932.]

5. CRIMINAL LAW §1163(3)—APPEAL—PREJUDICE—BURDEN OF PROOF.

Before a judgment of conviction based on competent and credible evidence can be reversed on the ground of refusal to permit an impeaching witness to answer, defendant must affirmatively show that he has been prejudiced by the court's action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3094, 3095.]

Appeal from County Court, Woods County; Gus Hadwiger, Judge.

M. G. Collingwood was convicted for selling whisky, and he brings error. Judgment affirmed.

L. T. Wilson, of Alva, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Several assignments of error are relied upon for reversal of this judgment.

First. That the evidence on the part of the state is not of that credible character upon which the accused should be convicted.

[1] We have carefully examined the record and find that the prosecuting witness, a farmer who had lived in Woods county for 18 years, testified positively that he bought a pint of whisky from the appellant in the city of Alva and paid him \$1 for it. Counsel for the defendant contend that, because a prosecution was lodged against the prosecuting witness for conveying the whisky that he alleged he bought from this defendant, and the sheriff had told said prosecuting witness that if he told the truth in this case it would go lighter with him in his own case, therefore he should not be believed. The jury had all the witnesses before them and are the sole judges of the weight to be given to their testimony and of their credibility. The testimony of the prosecuting witnesses, corroborated as it was to some extent by the sheriff, if believed, is amply sufficient to sustain the judgment.

[2] It is also contended that the court erred in admitting in evidence a certain pint of whisky which the prosecuting witness identified and alleged he bought from the defendant. The identification was sufficient to authorize the introduction of this evidence. The prosecuting witness testified that that was the identical whisky he bought from the defendant, and the sheriff testified that was the whisky he got from the possession of the prosecuting witness at that time.

[3-5] It is also contended that the court erred in refusing to permit the witness Tidwell who was called for the purpose of impeaching the prosecuting witness, to answer the following question:

"I will ask you whether or not in that conversation (referring to a conversation which the prosecuting witness admitted that he had had with Tidwell) he stated that he did not get it (referring to the whisky) from Mr. Collingwood?"

An objection was sustained to the question on the ground that it was incompetent, irrelevant, and immaterial, and not binding on the state. Counsel for the defendant took an exception to this ruling. The court should have permitted the witness to answer this question, but we cannot determine whether the action of the court was prejudicial to the defendant, unless we knew what the answer of the witness would have been had he been permitted to answer. The witness might have testified that the prosecuting witness made no such statement. Such an answer would not have been prejudicial. Again, he might have testified that the prosecuting witness did make such a statement and the exclusion of that answer would have been prejudicial. It must affirmatively appear

before a judgment of conviction based on competent and credible evidence will be reversed on this ground that the defendant has been prejudiced by the action of the court. The burden is upon the appellant to show prejudice. The court can only guess that he was prejudiced in this instance. If counsel had made an offer of proof of what the testimony of the witness Tidwell would have been had he been permitted to answer, and it was shown by said offer that his testimony would have been favorable to the defendant and contradictory of the prosecuting witness, then this court could determine that the defendant was prejudiced.

This court has heretofore repeatedly indicated that, where the trial court excludes or refuses to permit evidence offered, the record must show what this evidence was, so that this court can determine whether or not it was material and proper testimony, and as to whether or not the defendant was injured by its exclusion. *Warren v. State*, 6 Okl. Cr. 2, 115 Pac. 812, 34 L. R. A. (N. S.) 1121; *Stoue et al. v. State*, 6 Okl. Cr. 415, 119 Pac. 271; *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010.

We cannot therefore determine from this record that the defendant was injured by reason of the action of the trial court in refusing to allow the witness Tidwell to answer the question as propounded.

The judgment of the trial court is affirmed.

NEIGHBORS et al. v. STATE. (No. A-2520.)

(Criminal Court of Appeals of Oklahoma, May 28, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1159(2)—APPEAL—CONCLUSIVENESS OF VERDICT.

When the facts disclosed by the proof in a criminal case clearly warrant a verdict of conviction, a reversal will not be granted by this court on the ground that the verdict and judgment are contrary to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

Appeal from District Court, Comanche County; Cham Jones, Judge.

Oscar Neighbors and James Hourigan were convicted of larceny, and they bring error. Affirmed.

J. F. Thomas, of Lawton, for plaintiffs in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiffs in error, Oscar Neighbors and James Hourigan, were convicted in the district court of Comanche county on a charge of larceny of domestic animals, and their punishment fixed at two years in the state penitentiary.

The proof offered on behalf of the state tends to show that W. T. Dunn lived in Co-

manche county, near Indianola; that on the night of July 28, 1914, three cows were stolen from him. One was a brown milk cow about three years old, and was expected to become fresh in about ten days. The day before the cattle were stolen the plaintiffs in error were at Dunn's place trying to buy fat cattle, and were shown the cattle. The stolen cattle were in the bunch at the time, but were not specifically pointed out. After the cattle were stolen, Dunn made a search and got information that the thieves had driven the cattle north. In his search he found the hide of the brown cow at the home of Lem Wise several miles away. The cow was marked, but was not branded. The plaintiffs in error were seen in the vicinity of Indianola late in the evening upon which the thefts were committed at night. Early on the morning of July 29th two persons riding horses answering the description of those of the plaintiffs in error were seen driving three cattle north from the direction of the home of the witness Dunn. The brown cow in question gave out on the road, and was sold by these plaintiffs in error to Lem Wise. She died the next day after he purchased her, and was skinned by him and an Indian, and the hide turned over to Mr. Dunn. The Indian, Lomeck, testified that he helped skin the cow; that she had been freshly marked; that the cow was with calf fully developed. It appears that at the time the cow died she had been rapidly driven some 25 miles, probably further, in the middle of July, and had died from exhaustion.

The plaintiffs in error rely on an alibi as a defense, and offered a number of witnesses to establish the fact that they were not in the vicinity of the Dunn home on the night the theft was committed. They offered other testimony tending to establish that the cow they sold to Lem Wise was one they had owned for some time. A number of witnesses testified that a cow somewhat similar to the one sold Wise was owned by the plaintiffs in error, but there is no witness who testified positively that this was the identical cow. Testimony as to the alibi was given by neighbors of the plaintiffs in error. This proof tended to establish the fact that it was 40 miles from the home of the plaintiffs in error to the home of Dunn, and that these plaintiffs in error were each at their respective homes on the night of the theft, as alleged and proved by the state.

The issues of fact were clearly for the jury. There is sharp conflict in the evidence as to the whereabouts of the plaintiffs in error on the night of the theft and the early morning following. The jury is impeached for the purpose of determining the issues of fact, and it is exclusively their prerogative, as well as duty, so to do. They found against the plaintiffs in error, and the finding is duly

supported by ample facts. The verdict cannot be disturbed.

Upon the proposition of ownership of the cow the proof offered by the state to the effect that this was the cow of witness Dunn is clear-cut and convincing. There is not a doubt after reading this record but that the cow sold to Wise by these plaintiffs in error was the cow which belonged to the witness Dunn. Nor is there a doubt about the guilt of the plaintiffs in error of the crime charged.

That the verdict is contrary to the evidence is the principal proposition urged by counsel for the plaintiffs in error. A five-line paragraph at the close of the brief refers to argument of the county attorney in his closing remarks to the jury, which it is contended were prejudicial. The page in the record where these remarks could be found is not set forth. The index to the case-made does not disclose the page upon which the remarks complained of could be readily discovered. We will therefore not undertake to discuss the assignment further than to say that the remarks, although constituting improper conduct, do not necessarily constitute reversible error in the case at bar. It should be at least probable upon the examination of the record that prejudice resulted by reason of the unwarranted remarks complained of. The record discloses no prejudice. No prejudicial error having been pointed out by counsel and none having been discovered by the court upon a review of the record, the judgment will be affirmed.

Affirmed.

DOYLE, P. J., and MATSON, J., concur.

Ex parte CAMPBELL. (No. A-8021.)

(Criminal Court of Appeals of Oklahoma. May 29, 1917.)

(*Syllabus by Editorial Staff.*)

HABEAS CORPUS \S 62—DISMISSAL ON MOTION.

Where the petitioner, immediately after filing his petition for habeas corpus, filed a motion to dismiss the cause, the petition would be dismissed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 55.]

Petition of L. B. Campbell for writ of habeas corpus. Petition dismissed.

W. F. Wilson, of Oklahoma City, and L. T. Cook, of Purcell, for petitioner. R. McMillan, Asst. Atty. Gen., and J. E. Crowder, Co. Atty., of Purcell, for the State.

PER CURIAM. On this day a petition for writ of habeas corpus was filed in this court. The petition avers that L. B. Campbell, is unlawfully restrained of his liberty by Hugh Boone, sheriff of McClain county, upon a

warrant issued upon an information filed in the county court of said county. That said restraint is illegal and unauthorized because said information does not state facts sufficient to constitute an offense under the Constitution and laws of the state of Oklahoma. Immediately after filing said petition counsel for petitioner filed a motion to dismiss the cause. The application is therefore dismissed.

HARDING v. NORTH POUDRE IRR. CO.
(No. 8392.)

(Supreme Court of Colorado. May 7, 1917.)

DEDICATION \S 85(5)—ACCEPTANCE.

Though defendant constructed a bridge over its canal in a vacated highway, and left open a short strip through its land for travel to and from the bridge, used by its tenants and a few others, and maintained the bridge for eight years, yet, the county commissioners having expressly refused to adopt the recommendation of road reviewers that it be a public highway, it did not become such, as regards obligation of defendant to continue maintenance of the bridge.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 68.]

Scott, Teller, and Allen, JJ., dissenting.

En Banc. Error to District Court, Larimer County; Robert G. Strong, Judge.

Action by J. J. Harding against the North Poudre Irrigation company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. Thomason and Frank J. Annis, both of Ft. Collins, for plaintiff in error. R. W. Fleming and P. W. Lee, both of Ft. Collins, for defendant in error.

HILL, J. The plaintiff in error brought this action to recover damages from the defendant in error for its failure to keep in repair and safe for travel a bridge across its canal, which it is alleged afforded plaintiff the only means of ingress and egress to and from his farm. The complaint contains two counts growing out of the same transaction. The first is upon the theory that in 1902 defendant constructed its canal upon and across a public highway, where it constructed a bridge about 40 feet in length and maintained it up to 1910; that thereafter it refused to keep the bridge in repair, which had become unsafe for travel, and which prevented plaintiff from using it as a means of ingress and egress to and from his farm, etc., to his alleged damage in the sum of \$6,000. After sundry amendments, the second count, among other things, alleges that during 1902, at the request of defendant company, the county commissioners ordered vacated that portion of a public road which lay contiguous to plaintiff's land, which order was based upon a report of a board of road viewers theretofore appointed, etc.; that the necessity for said action arose from the fact that defend-

ant constructed its canal in and over a portion of said highway, practically the distance of said land, by which it was cut off from said public highway, and that, in consideration of the commissioners vacating said highway and allowing the defendant to occupy the same, the defendant constructed a roadway and a bridge thereon over said canal, and agreed to maintain the same at its own expense from the lands of plaintiff to said proposed public highway on the east side of said canal, for the benefit of plaintiff, as well as the general public, and that, in consideration of the recommendations of said road viewers, the defendant constructed the road at its own expense, and the bridge opposite plaintiff's gate, which gave him access to the public highway, etc.; that plaintiff, relying upon the recommendations of said road viewers and the acts and conduct of the defendant in constructing said road and bridge, accepted and has used the same, with the public, ever since as a public highway, and as the only means of ingress and egress to and from his farm; that the defendant, in accordance with its agreement, maintained and kept in repair said bridge at its own expense until 1910, when it refused to thus continue to his damage, etc. Trial was to the court, which, at the close of plaintiff's testimony, gave judgment to defendant for its costs.

Numerous errors are assigned pertaining to the pleadings. It is unnecessary to consider them. The plaintiff filed sundry amendments. The last was during the taking of testimony. We are unable to appreciate wherein his rights were in any way prejudiced concerning the ultimate pleadings. The difficulty is with the plaintiff's proof. It fails to establish that the defendant company constructed its bridge over its canal upon a public highway, but it discloses affirmatively to the contrary, and that the road referred to in the first cause of action had been vacated by the board of county commissioners in the method provided by statute.

Counsel claim that the proof sustains plaintiff's second cause of action, to the effect that the road in question is a public road; that it became such by dedication of the defendant, either express or implied, the acceptance by user, etc.; and that, as the bridge is more than 20 feet in length, our statute requires the defendant to perpetually maintain it in good repair. If such were the facts, the duty follows; but, in passing upon plaintiff's proof, the court found and said:

"The motion will be sustained, not finding from the evidence any contract, express or implied, or the existence of a public highway, or any highway under the meaning of the statute, at the point of the location of the bridge; that any former highway theretofore existing has been vacated by order of the public board charged with power; that there is no clear, unequivocal evidence of the dedication for the purposes of a public highway attempted, even to private individuals as such, at the particular location of the bridge, and no statutory dedication."

Plaintiff's evidence discloses that during the year 1902, in the manner provided by statute, the board of county commissioners ordered vacated that portion of the county road thereafter used for the ditch right of way; that said order was based upon a report of a board of road viewers theretofore appointed, but the plaintiff failed to show as his pleadings alleged, by direct declaration or necessary implication, that in consideration of said commissioners vacating said highway, or at all, that the defendant constructed the other roadway and bridge thereon and agreed to maintain it at its own expense. So far as any contractual relations are concerned, there is an entire lack of testimony to support the plaintiff's contention; besides, it is shown upon cross-examination of plaintiff's witnesses that, after the ditch and bridge were constructed, a condemnation suit between these parties was tried, which called for the taking of a certain portion of plaintiff's farm through which this canal passed; that in that action plaintiff was not only awarded damages for the land taken, but also damages to the residue upon account of the construction of the canal, which included the condition in which his farm was left pertaining to ingress, egress, roads, etc.; that when the board of county commissioners vacated certain highways and established others upon the report of the road viewers acting upon the petition therefor, etc., the road viewers recommended the opening of a new road through lands of defendant, including where the bridge was constructed; but that the board of county commissioners, while accepting and ordering other roads petitioned for and recommended by the road viewers, refused to adopt the recommendation as to this road No. 2. In referring to it, their record states, that this portion (describing it) "shall not be a public highway." There is no testimony showing that the county commissioners have ever accepted this road or the bridge as a part of the public highway, or have ever expended anything thereon. "Tis true, defendant constructed the bridge, and left a space through its land for travel to and from the bridge, which has been used by plaintiff and a few other people, and that the defendant kept the bridge in repair until about 1910, but the evidence further shows that when the bridge was constructed, the defendant was the owner of land reached by this bridge, and that it was used by its tenants in going to and from defendant's land; that the strip claimed to be thus dedicated was only 150 feet in length, extending from the public road to private lands only, and had no other objective point; also that the bridge was in existence when the board of county commissioners refused (and made it a matter of record) to permit it to become a county road.

Without considering the contention of the defendant that the act of 1891 eliminates roads by prescription or adverse user, unless continued for a period of 20 years or more, and

assuming for the purposes of this discussion that the law is the same now as it was when *Starr v. People*, 17 Colo. 458, 30 Pac. 64, and *City of Denver v. Railroad Companies*, 17 Colo. 588, 31 Pac. 338, were decided, when tested by the rules announced in these cases, we are of opinion that the court was correct in holding that there was no public highway at the place where the bridge was constructed, and that under the circumstances disclosed by plaintiff's proof, defendant was under no legal obligation to bear the expense of maintaining the bridge in the future.

The former opinion will be withdrawn, and the judgment affirmed.

Affirmed.

SCOTT, TELLER, and ALLEN, JJ., dissent.

PEOPLE v. DENVER ATHLETIC CLUB
et al. (No. 8590.)

(Supreme Court of Colorado. May 7, 1917.)

1. CRIMINAL LAW \S 1131(4) — DISMISSAL — MOOT QUESTION.

A writ of error by the state under Rev. St. 1908, \S 1997, to review a judgment dismissing the prosecution for unlawfully selling intoxicating liquors, will be dismissed, where the constitutional prohibition amendment and defendants' immunity under said section from being placed in jeopardy a second time, render the question moot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 2974, 2976, 2977.]

2. CRIMINAL LAW \S 192 — FORMER JEOPARDY.

Under the express provisions of Rev. St. 1908, \S 1997, defendants discharged upon the charge of illegally selling intoxicating liquors cannot be placed in jeopardy a second time upon the state successfully prosecuting a writ of error from such discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 376, 377, 379.]

En Banc. Error to District Court, City and County of Denver; H. S. Class, Judge.

Prosecution for selling intoxicating liquors by the People of the State of Colorado against the Denver Athletic Club, the Denver Club, and the University Club. Judgment discharging defendants, and the People bring error. Writ dismissed.

John A. Rush, Dist. Atty., and Wayne C. Williams, Asst. Dist. Atty., both of Denver, for the People. C. F. Clay, of Denver, for defendant in error Denver Athletic Club. Yeaman & Gove, of Denver, for defendants in error Denver Club and University Club.

WHITE, C. J. In April, 1914, the Denver Athletic Club, the Denver Club, and the University Club were each charged, in separate informations filed by the district attorney, with unlawfully selling intoxicating liquors without a license in the city and county of Denver. On the day of trial it was stipulated that the three cases should be submitted at the same time to the court

without a jury on an agreed statement of facts in each case, supplemented by evidence. Upon final submission of the cases, the court discharged the defendants, and the district attorney prosecutes this writ of error under the provisions of section 1997, R. S. 1908.

The defendants in error, among other contentions, question the jurisdiction of this court to review the cases, because, as they assert, no writ of error has issued from this court to review the judgment as to the Denver Club or the University Club, and the record here in the case of the Denver Athletic Club is so imperfect that no question is before this court for determination therein. The record shows but one judgment, though there were three cases, and it is claimed no transcript of the record or bill of exceptions is shown as to either the Denver Club or the University Club, and no writs of error were issued from this court to review the judgments in such cases, and that there is no agreed statement of facts in the record as to the Denver Athletic Club.

[1, 2] Correct procedure in the determination of rights is fundamental, and the contention of defendants in error, under the condition of the record before us, presents serious questions. We are of the opinion, however, that it is unnecessary to determine these questions, or any of the issues involved, or discussed herein by the parties in their respective briefs. Whether the license laws relating to the sale of intoxicating liquors was applicable to defendant clubs has become a moot question by virtue of the constitutional prohibition amendment and the statutory laws enacted in pursuance thereof. The defendants were informed against, the issues made, and trial had. Under these circumstances, defendants, by express terms of the statute, section 1997, supra, may not be placed in jeopardy a second time for the same offense.

The writ of error is therefore dismissed.

NORTH Poudre IRR. CO. v. LIGGETT.
(No. 8539.)

(Supreme Court of Colorado. May 7, 1917.)

1. WATERS AND WATER COURSES \S 156(6) — IRRIGATION CONTRACT — RIGHTS.

Under a contract by plaintiff with defendant irrigation company's predecessor giving plaintiff certain water rights, such rights are limited to the water supply as it existed before the defendant acquired the property, and do not include water from reservoirs built by defendant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 181.]

2. WATERS AND WATER COURSES \S 156(6) — IRRIGATION — CONTRACT — RIGHTS.

Where defendant irrigation company's predecessor granted plaintiff one of 216 water rights and 30 contracts were sold, and defendant exchanged all but plaintiff's contract for stock in-

terests, plaintiff must prorate in times of water scarcity with 216, instead of 30, water rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 181.]

En Banc. Error to District Court, Larimer County; Nell F. Graham, Judge.

Action by Coleman M. Liggett against the North Poudre Irrigation Company. From a decree for plaintiff, defendant brings error. Reversed and remanded, with directions.

This action involves the construction of a water contract. Plaintiff, Liggett, commenced the suit against the defendant company to enforce the delivery of water for irrigation, under the contract. He obtained a decree in the lower court, and defendant brings the case here as plaintiff in error.

The North Poudre Land, Canal & Reservoir Company, organized in 1880 to construct an irrigation system composed of a canal and series of reservoirs taking water from the North fork of the Cache la Poudre river, did considerable construction work, and in the general adjudication of 1884 the system was given a conditional decree. See *W. S. & S. Co. v. Tenney*, 24 Colo. 347, 51 Pac. 505. This company failed to complete the undertaking, and in 1888 the North Poudre Land & Canal Company was organized, took over, and attempted to complete the project. In 1890, it entered into the contract involved in this action, with one Morse, which, so far as pertinent to the inquiry, is as follows:

"No. 15.

"Agreement for One Water Right.

"This agreement, made this first day of January, in the year 1890, between the North Poudre Land & Canal Company, a corporation existing under the laws of Colorado, party of the first part, and E. F. Morse of the county of Larimer and state of Colorado, party of the second part, witnesseth: That in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party one water right to the use of water flowing through the canal of said party of the first part, each water right representing one and three-tenths cubic feet of water flowing over a weir per second, subject to the following terms and conditions, to which the said party of the second part or assigns expressly agree:

"1. The said first party agrees to furnish the said water to the said second party or assigns continuously during the irrigation season, except as hereinafter provided, and at no other time.

"2. Said water shall be used only for domestic purposes, and to irrigate the following described tract of lands, and none other, to wit: S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ 9-8-68 W. 6th P. M., and under no circumstances shall said water, or any part thereof be used for mining, milling or mechanical power, or for any other purpose not directly connected with or incidental to the purposes first herein mentioned.

"3. The said second party or assigns shall not permit said water, or any portion thereof, furnished as aforesaid, to run to waste; but as soon as a sufficient quantity shall have been used for the purposes herein allowed and contracted for, the said second party or assigns shall shut off said water and keep the same shut and turned off until the said shall be again needed for the purposes aforesaid; but in no case shall the amount of said water taken or received by said second party or assigns exceed the quantity hereby sold.

"4. The said first party shall deliver said water at such point or points along the line of said ditch or from any of its reservoirs, either or all, as it may determine to be the most practicable, and the manner of withdrawing and regulating the supply of said water from said first party's ditch and reservoirs shall be prescribed by said first party, and shall at all times be under its control, as determined and directed by the board of trustees of said first party. The headgates, flumes, weirs or other arrangements through which the water hereby sold shall be drawn off from the said first party's ditch or reservoirs, shall be made and placed in position by said first party, but at the cost of the said second party, who shall also be liable for the expense of keeping the same in good repair and condition, and the said first party may collect and enforce the payment of all sums expended for said purposes in the same manner as prescribed for collecting and enforcing assessments.

"5. The said first party agrees to keep and maintain said canal and any and all of its reservoirs in good order and condition, and in case of accident to the same to repair the injury thereby occasioned as soon as practicable and expedient; and the first party shall have a right to assess for ordinary expenses of maintaining, repairing and superintending said canal and any and all reservoirs connected therewith, a sum not exceeding twenty-five dollars per water right sold, per annum, and in addition thereto may, when necessary, by reason of some unforeseen or unavoidable accident, assess all owners or holders of water rights pro rata such sum as may be necessary to repair the injuries so occasioned. The amount, manner of collection and time of payment of all assessments herein provided for shall be determined by said first party according to its judgment and discretion; and the first party also reserves to itself the right to establish and enforce such rules and regulations, and to provide and declare such penalties as it may deem necessary or expedient for the purpose of enforcing and collecting said assessment or any part thereof.

"6. The said party of the first part agrees that when it shall have sold and shall have outstanding and in force, such number of water rights as shall in the opinion of the corporation equal to the estimated capacity of its canal to furnish water, and all of the purchasers of such water rights shall have fully complied with and performed the terms and conditions of their respective contracts, or before that time, if said party of the first part shall so elect, it will, without further consideration, issue and deliver to the owner and holder of each water right hereby sold, that number of shares of its capital stock or as near thereto as can be computed without making fractions of shares, which shall bear the same proportion to seven thousand five hundred that the number of water rights hereby sold bears to the number of water rights which may be ascertained to be equal to the said canal's capacity to furnish water as aforesaid, which the said party of the second part agrees to accept. But said distribution of stock shall include no interest in any lands which may at any time be owned by the company, but the same may be sold or held for the benefit of those who are stockholders of record before the distribution of stock to water contractors in this article specified; and stockholders who may acquire stock under the provisions of the article, and by reason of this contract, shall not thereby acquire any interest in said lands, but said corporation may before making such distribution of stock to holders of water contracts, convey all the lands of said company not then sold or contracted to be sold, to the stockholders of record before such distribution, or to trustees or a trustee for their ratable benefit.

"7. It is hereby distinctly understood and agreed by and between the parties hereto, that in case the canal of said party shall be unable

to carry and distribute a volume of water equal to its estimated capacity, either from casual or unforeseen or unavoidable accident, or if the volume of water prove insufficient from drouth, or from any other cause beyond the control of said first party, the first party shall not be liable in any way for the shortness or inefficiency of supply occasioned by any of said causes.

"8. It is further agreed that if by reason of any causes the supply of water shall be insufficient to fill and flow through said canal, according to its estimated capacity, or if from any other cause, as aforesaid, beyond the control of said first party, the supply shall be insufficient to furnish an amount equal to all the water rights then outstanding, the said first party shall have the right to distribute such water as may flow through said canal to the holders of such water rights pro rata; and, for the purpose of so doing, may establish and enforce such rules and regulations as it may deem necessary or expedient.

"9. * * *
"10. * * * It is also stipulated and agreed that from and after the execution hereof, the said second party may enter into the use and enjoyment of the water flowing through said ditch to the extent of the right above contracted to be conveyed as fully as though a final certificate for said right had been issued; but subject, nevertheless, to all the terms and conditions above set forth.

"It is further expressed, understood and agreed between the parties hereto, that neither this contract nor any of its terms, conditions or provisions shall be in any manner supplemented, altered or changed from what has been provided, or any other or further contract be made respecting the subject-matter of this contract, except that it be indorsed hereon in writing, signed by the president, and attested by the secretary, under the corporate seal of said first party."

In 1903, Liggett became the owner of the contract and the land to which it applied. This company failed, and was succeeded in 1896 by the National Land & Irrigation Company, which also failed, and in 1901 plaintiff in error, the North Poudre Irrigation Company, became the owner. It is a mutual company, in which the stock stands for and represents the consumer's interest in the water, canal, and reservoirs. Before defendant acquired the property, only 30 water contracts had been issued, each representing 1.3 cubic feet per second, and instead of selling the remainder of the 216 rights, which it is agreed would exhaust the capacity of the ditch, this company called in the contracts, issuing in lieu of each right, stock of the corporation representing a sufficient amount of water for the irrigation of 80 acres. Plaintiff, however, declined to surrender his contract or to accept stock therefor. The company purchased independent priority water and had it transferred by decree, from other ditches to its headgate; it also constructed new and other large reservoirs not contemplated or included in the original plan of furnishing contract holders with water, expending in such behalf some \$850,000 above the expense incident to the management, upkeep, and maintenance of the property. All this was done after defendant acquired the property.

The judgment of the lower court requires the irrigation company to furnish and deliver

to plaintiff, his heirs and assigns, on the contract, one 80-acre water right to the use of water flowing through the canal representing 1.3 cubic feet per second during the irrigating season when sufficient water is available from the canal and reservoirs of the company from any water flowing in the canal or stored in the reservoirs, out of all ditch and reservoir priorities and appropriations belonging to defendant excepting, however, all reservoirs constructed and all independent water rights acquired by defendant since it became the owner of the property, the delivery to be made on the basis of 1/30 of such water, instead of 1/216, to each 80-acre water right in times of scarcity. The decree failed to place plaintiff upon a prorating basis with the remaining water rights represented by stock.

R. W. Fleming, of Ft. Collins, for plaintiff in error. Frank J. Annis and John P. Kilgore, both of Ft. Collins, for defendant in error.

GARRIGUES, J. (after stating the facts as above). [1] 1. It is admitted in the briefs that the canal had a capacity of 216 80-acre water rights, and the contract provides when this capacity is sold the property shall be turned over to the water right holders who shall stand upon an equal footing and in times of scarcity prorate on this basis. The plan as originally contemplated failed, and only 30 of the 216 rights were sold on such contracts. When defendant acquired the property in 1901, it was contemplated and intended that all the water rights would be represented by stock. No more contracts were issued, and 29 of the 30 were voluntarily surrendered upon a stock basis.

Plaintiff's contract, when defendant acquired the property, was an easement in the canal and reservoirs and a binding servitude upon the property. The question is, To what extent is the property of the company now charged with this servitude, or, in other words, from what source may plaintiff insist that his water right shall be supplied? Defendant contends that the servitude is restricted exclusively to the canal and water for direct irrigation from it, and does not include or rest upon any of the reservoirs or reservoir water, and that it is under no obligation to supply plaintiff with any reservoir water. The court held that the servitude created by the easement extended to and rested upon the canal and all reservoirs built prior to defendant's acquisition of the property, taken together as a whole and constituting a system for supplying water under the contract. In this respect the decree is correct. The ditch has a very late priority, and, depending on the river water alone, one would only obtain a few days' run, which would be during high water. The plan as a whole for supplying its consumers with water contemplated reservoirs as a part of the

system, which were to be built, owned, and controlled by the canal company, and used in connection with the canal as a means of furnishing water on the contracts. We, therefore, are of the opinion that the supply from which plaintiff was entitled to have the water furnished him under his contract was the canal in connection with such reservoirs. After the project passed into the hands of the mutual company, plaintiff in error, it built other reservoirs and acquired independent water from other sources not contemplated in and foreign to the contract, for the exclusive use of its stockholders, in which plaintiff had no interest. Plaintiff stood upon his contract and refused to become a stockholder, and his rights are governed by his contract, and he is limited to the source of supply therein contemplated.

[2] 2. There is another branch of the case, however, in which the decree is wrong. The court appears to have acted upon the theory that, as no contracts were issued for the remainder of the 216 water rights, therefore the 30 contracts sold represented preferred water to the exclusion of the remaining water rights represented by stock, and in times of scarcity, plaintiff was obliged to prorate with only 30 rights. In this, the court was in error. The recognized capacity of the canal was 216 water rights of 1.3 cubic feet, and the agreement was that all should stand upon an equal footing and prorate in times of scarcity. Because the original plan was not carried out and but 30 of these rights had been sold when the system was changed or converted into a mutual ditch company wherein the balance of the shares was represented by stock does not change or enlarge plaintiff's original interest in the system. He purchased a 1/216 interest which the court has enlarged by decree into a 1/30. Because contracts were not issued for the remaining rights, which are now represented by ditch stock, does not change plaintiff's status with the other consumers. He must still prorate upon the same basis as if the remaining water rights had all been sold under contract like his own.

The cause will be reversed and remanded, with directions to the lower court to modify the decree in accordance with the views herein expressed, and the costs in this court are taxed to plaintiff in error.

Reversed and remanded, with directions.

KENDRICK, County Treasurer, v. A. Y. & MINNIE MIN. & MILL. CO. et al.
(No. 8796.)

(Supreme Court of Colorado. May 7, 1917.)

1. TAXATION 6607—COLLECTION—INJUNCTION.

The courts do not look with favor on suits to enjoin the collection of public revenue.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1230.]

2. TAXATION 6608(9)—COLLECTION—INJUNCTION.

Where a company has paid an amount of tax equal to the levy on an original assessment, but declined to pay the increase arising from an order of the state board of equalization, a suit brought by it to enjoin collection of the unpaid tax should be dismissed; a plain, speedy, and adequate remedy at law being provided, and it being the duty of complainants to have paid the whole of the tax assessed and to have proceeded under Rev. St. 1906, § 5750, providing for the refunding of taxes improperly levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238.]

En Banc. Error to District Court, Lake County; Chas. A. Wilkin, Judge.

Injunction by the A. Y. & Minnie Mining & Milling Company and others against F. B. Kendrick, as County Treasurer of Lake County, Colo. Judgment for plaintiffs, and defendant brings error. Reversed.

Jos. W. Clarke, of Leadville, for plaintiff in error. John A. Bwing, of Denver, and Michael F. Ryan, of Leadville, for defendants in error.

SCOTT, J. The A. Y. & Minnie Mining & Milling Company is the owner of a producing mine located in Lake county. This action involves a portion of the tax on such mine for the year 1912. Assessment of the tax was made by the county assessor in all respects as provided by law.

On October 22, 1913, the state board of equalization, upon the recommendation of the state tax commission, raised the total assessed valuation of Lake county in the sum of \$2,275,000, or 23.42 per cent. Thereafter the county assessor, acting under the order of the state tax commission and the state board of equalization proceeded to place such assessment on the properties of the county, in compliance with the action of the state board making such raise in valuation, after deducting from such sum assessments on properties thereafter discovered. The discovery and assessment of these later properties reduced the increased per cent. of valuation of the county to 15.52 per cent. The assessed valuation of the property of the A. Y. & Minnie Mining & Milling Company was thus increased from \$76,548.75 to \$88,429.

The company paid an amount of tax equal to the levy on the original assessment, but declined to pay the increase arising by reason of the order of the state board of equalization. The county treasurer proceeded to advertise the property for sale to recover the delinquent tax. This action is a proceeding in injunction to prevent such sale and collection.

The other defendants in error are in the same relative situation as the A. Y. & Minnie Mining & Milling Company. The court granted a temporary injunction which it afterward made permanent. The county brings the case here for review.

[1] By legislation and by the uniform decisions of this court, actions the purpose of

which is to restrain the collection of the public revenue have been discouraged. *Hallett v. Arapahoe Co.*, 40 Colo. 315, 90 Pac. 678; *Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004; *Insurance Co. v. Bonner*, 24 Colo. 220, 49 Pac. 366; *Tallon v. Vindicator M. Co.*, 59 Colo. 316, 149 Pac. 108; *Bent County v. Santa Fé County*, 52 Colo. 609, 125 Pac. 528; *Nile Dist. v. English*, 60 Colo. 406, 153 Pac. 760.

[2] But the law has provided a plain, speedy, and adequate remedy at law for the hearing and determination of the grievances of plaintiff. It was the duty of complainants in this case to have paid the whole of the tax assessed, and to have proceeded under authority of section 5750, Rev. Stat. 1908.

The judgment is reversed, and the cause dismissed.

JONES et al. v. RICE. (No. 8607.)

(Supreme Court of Colorado. May 7, 1917.)

1. JUSTICES OF THE PEACE ⇨192—CERTIORARI—SUBSTITUTE FOR APPEAL—STATUTE.

A writ of certiorari, under Rev. St. 1908, § 3837 et seq., to transfer a cause from a justice to the county court and there retry it, is a substitute for appeal, and applicable only in unusual cases where a party without negligence has been prevented from taking an appeal in the ordinary way.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 759.]

2. JUSTICES OF THE PEACE ⇨202(2)—CERTIORARI FOR RETRIAL IN COUNTY COURT—REQUIREMENTS OF STATUTE.

In petition for certiorari under Rev. St. 1908, § 3837 et seq., by plaintiff in a suit in justice court to have the cause transferred to and retried in the county court after the appeal of one defendant was dismissed over plaintiff's objection, plaintiff stated that, at the conclusion of the trial, a defendant, speaking for both, stated to plaintiff and his counsel that he would take the case to the Supreme Court rather than pay the claim in suit; that on the afternoon of the last day on which an appeal in the ordinary way could be taken, a defendant perfected an appeal by filing with the justice her bond; and that it was petitioner's intention to take an appeal unless the opposing parties did. *Held*, that such facts failed to meet the requirements of the statute, making the writ of certiorari a substitute for appeal, only where a party without negligence on his part has been prevented from taking an appeal in the ordinary way.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 781-788.]

3. JUSTICES OF THE PEACE ⇨149(1)—APPEAL—DISMISSAL.

Any party to a suit before a justice of the peace may take an appeal when dissatisfied with the judgment, and thereafter has the right to control the appeal so taken by him, even to the extent of dismissing it.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 504, 505.]

En Banc. Error to County Court, City and County of Denver; E. J. Ingram, Judge.

Suit by Walter L. Rice against Edith Jones and William S. Jones, wherein judgment was entered by the justice for Rice against defendant Edith Jones, from which

judgment she prayed an appeal, which was lodged in the county court, and thereafter was dismissed on appellant's motion, and plaintiff had the cause as against both defendants transferred to and retried in the county court upon certiorari. To review the judgment of the county court, both defendants bring error. Reversed, with directions to quash the writ of certiorari, and dismiss the appeal.

Frank E. Hickey, of Denver, for plaintiffs in error. Paul Knowles, of Denver, for defendant in error.

WHITE, C. J. Rice prosecuted a suit before a justice of the peace in the city and county of Denver against Edith and William S. Jones. The defendants filed a counterclaim, and thereafter, upon trial, judgment was entered in favor of Rice against the defendant Edith Jones alone, from which judgment she prayed an appeal and filed her bond accordingly. In due time the appeal was lodged in the county court, and some time thereafter Rice appeared therein and paid his docket fee, whereupon appellant did likewise. William S. Jones did not appear, nor was he served with summons therein. Thereafter, upon motion of appellant, the appeal was dismissed over the objection of Rice, and he thereupon had the cause, as against both defendants, transferred to and retried in the county court upon certiorari, under the provisions of chapter 78, pp. 987, 988, R. S. 1908. Plaintiffs in error questioned the sufficiency of the petition upon which the writ of certiorari was issued, and moved to quash the writ, which was denied.

[1] The only important question necessary to determine is whether the failure of Rice to appeal from the judgment of the justice of the peace was inexcusable or negligent under the facts and circumstances involved. We are compelled to answer the question in the affirmative. The writ of certiorari here employed is a substitute for appeal. It is applicable only in unusual cases where a party, without negligence on his part, has been prevented from taking an appeal in the ordinary way. *Austin v. Bush*, 11 Colo. 198, 17 Pac. 501. Section 3840, R. S. 1908, provides that the petition shall show that the judgment was not the result of negligence of the petitioner; that it is, in his opinion, erroneous and unjust, setting forth wherein the error and injustice consist; and that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing. The facts stated in the petition for not taking an appeal in the ordinary way, briefly stated, are that at the conclusion of the trial William S. Jones, speaking for himself and Edith Jones, stated to plaintiff and his counsel that "he would take the case to the Supreme Court of the state rather than

pay anything on account of the claim and suit," and that he and his counsel had thereafter frequently made the same statement; that on the afternoon of the last day within which an appeal in the ordinary way could be taken, Edith Jones perfected an appeal by filing with the justice of the peace her bond for that purpose, and that it was petitioner's intention to take an appeal unless the opposing parties did.

[2, 3] These facts wholly fail to meet the requirements of the statute. In fact, they show a want of even ordinary diligence on the part of Rice to have the judgment reviewed on appeal. *Austin v. Bush*, supra. Neither the assertion of the one nor the action of the other defendant in appealing from the judgment warranted or justified the plaintiff in failing to appeal in the ordinary way if he was dissatisfied with the judgment. Any party to a suit before a justice of the peace may take an appeal when dissatisfied with the judgment, and thereafter has the right to control the appeal so taken by him, even to the extent of dismissing the same. *Pueblo Chicago Lumber Co. v. Danziger*, 7 Colo. App. 149, 150, 42 Pac. 683. The judgment of the county court is therefore reversed, with directions to quash the writ of certiorari, and to dismiss the appeal.

* Reversed, with directions.

NESBITT et al. v. SWALLOW. (No. 8663.)
(Supreme Court of Colorado. May 7, 1917.)

WITNESSES \S 139(14) — COMPETENCY — SUIT AGAINST ADMINISTRATOR — STATUTE.

Under Rev. St. 1908, \S 7267, providing that no party to any civil action shall be allowed to testify in his own behalf when any adverse party sues or defends as administrator, with exceptions, in suit to foreclose a mortgage made to secure a note on premises later sold by the mortgagor to one who gave a note secured by deed of trust, which note was transferred to a party whose administrator was made a defendant to effect a complete foreclosure, plaintiff could testify to the execution and delivery of the note by the mortgagor, and that it had not been paid, the mortgagor being alive, and able to testify against plaintiff, there being no presumption that the administrator's decedent, if alive, would have knowledge as to the execution and delivery.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 595.]

Error to District Court, Denver County; William D. Wright, Judge.

Suit by George R. Swallow against Frank B. Nesbitt, administrator of the estate of Jonathan Nesbitt, deceased, and others. To review a decree of foreclosure, defendant administrator brings error. Affirmed.

John F. Rotruck, of Denver, for plaintiff in error. John Hipp, of Denver, for defendant in error.

TELLER, J. The defendant in error brought suit to foreclose a mortgage made

by one Holloway to secure a promissory note, who later sold and conveyed the mortgaged premises to one Beatty, and took from Beatty a promissory note secured by a deed of trust on said premises. The note secured by this deed of trust was transferred to Jonathan A. Nesbitt. He having died, Frank B. Nesbitt, the plaintiff in error, became administrator of the Nesbitt estate.

Holloway, Beatty, and Nesbitt, as administrator, were all made defendants, though the only relief prayed for was against Nesbitt and Beatty was that they be foreclosed of all rights, etc., in the premises.

Plaintiff in error by his answer claimed that the lien of the deed of trust was prior to that sought to be enforced by the plaintiff in the case. The court found against him on that point, and a decree of foreclosure in the usual form was entered.

The only question discussed in the briefs is as to the competency of the plaintiff to testify on his own motion, as he was permitted to do, over the objection of defendant Nesbitt.

It is urged that, under section 7267, R. S. 1908, he was incompetent to testify because Nesbitt was defending as administrator.

Counsel cite several decisions of this court, in some of which general statements are made from which counsel conclude that in no case can a plaintiff testify on his own motion where one is defending as an heir, devisee, executor, or administrator. Those cases, however, must not be accepted as stating the law except as applied to the facts of the cases.

The question here presented has never been before us for determination, though the principle here involved was touched upon in *Cree v. Becker*, 49 Colo. 268, 112 Pac. 783. There an action was brought against two sureties on a bond, one of whom died before the trial. The administrator of his estate was substituted, and the other defendant was, during the trial, dismissed out of the case. The trial court sustained an objection to the competency of the plaintiff as a witness, and this we held no error. But in the court's opinion, by Mr. Justice Bailey, it was said that, if the other surety were in the case as a defendant, it might well be that the plaintiff would be a competent witness, at least against him, and possibly for all purposes. In *Lowry v. Tivy*, 69 N. J. Law, 94, 54 Atl. 521, where the question was raised under a statute similar to ours, it was held that in an action on a note against one of the makers and the administrator of the other maker, the plaintiff was entitled to testify against the surviving maker as to transactions with the deceased. To the same effect see *Bush v. Prescott & N. W. Ry. Co.*, 83 Ark. 210, 103 S. W. 176; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; and *Purple v. Lowe*, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310.

This case clearly does not fall within the reason of the statute.

Speaking of a similar statute, the Supreme Court of Missouri, in *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429, said the purpose was "to guard against false testimony by the survivor, and in order to do this the statute establishes a rule of mutuality by which, when the lips of one contracting party are closed by death, the lips of the other party are closed by the law."

The plaintiff in this case merely testified to the execution and delivery of the note by Holloway, and that it had not been paid. Holloway was alive and could have testified against plaintiff, but it is not to be presumed that Jonathan Nesbitt, if alive, would have knowledge on that point, and there is no possible reason why the law should apply here. No relief was sought against the estate, and the fact that the administrator was a necessary party in order to effect a complete foreclosure should not prevent the plaintiff from making his case against the maker of the note and enforcing his lien.

The judgment is affirmed.

WHITE, C. J., and HILL, J., concur.

CITY OF PUEBLO v. LUKINS. (No. 8723.)

(Supreme Court of Colorado. May 7, 1917.)

1. COMMERCE §63—ORDINANCE—CHARACTER AS REVENUE MEASURE.

A city ordinance providing that no person should distribute or hand out circulars, placards, or advertising matter within the city limits without having received a permit from the city clerk for a fee of \$25 was a revenue measure, and not a police ordinance.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 100, 103-122.]

2. COMMERCE §63—INTERSTATE COMMERCE—DISTRIBUTION OF ADVERTISING MATTER.

Where defendant, a nonresident of Colorado, and a traveling salesman for a New York corporation manufacturing a preparation for use in making gelatin desserts, which article was kept and stored without the state, and shipped into the state upon calls by local merchants, contracted with the merchants of a city to whom he sold the preparation that he would distribute samples of it and recipe books showing its practical use among residents of the city, his distribution of samples and books of directions was one of the causes which put in motion the interstate shipment of the goods, and an ordinance of the city providing that no person should distribute advertising matter without a permit from the city clerk, the fee therefor being \$25, as applied to defendant, was violative of Const. U. S. art. 1, § 8, giving Congress sole power to regulate commerce between the states, and void.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 100, 103-122.]

Error to Pueblo County Court; Frank G. Mirick, Judge.

C. J. Lukins was convicted in the municipal court of the City of Pueblo of distributing advertising matter within the city limits

without permit in violation of a city ordinance, and he appealed to the county court, which gave judgment for him, to review which the City brings error. Affirmed.

Alva B. Adams, of Pueblo, for plaintiff in error. Andrew B. Gillilan, of Buffalo, N. Y., and West & Strickland, of Denver, for defendant in error.

BAILEY, J. Defendant in error, defendant below, was convicted in the municipal court of the City of Pueblo of distributing advertising matter within the city limits without a permit, in violation of a city ordinance. The case was appealed to the county court, where it was tried upon an agreed statement of facts. Judgment was entered for defendant, and plaintiff brings the case here for review.

Defendant is a non-resident of this State, and a traveling salesman for a New York corporation manufacturing a preparation for use in making gelatin desserts. The manufactured article is kept and stored without the State, and shipped here upon calls by local merchants. Defendant contracted and agreed with the merchants of Pueblo to whom he sold the preparation that he would distribute samples of it, and recipe books showing its practical use, among residents and citizens of that city. While he was engaged in such distribution he was arrested and fined, under sec. 12, of ordinance number 880, which is as follows:

"Section 12. No person shall distribute or hand out circulars, placards or advertising matter within the limits of the City of Pueblo, without having received a permit so to do from the City Clerk. The fee for such permit shall be twenty-five dollars per annum."

The lower court held this ordinance to be a revenue measure and invalid, in that it was an attempt to tax interstate commerce.

[1] The plaintiff city contends that it is a police ordinance to prevent littering the streets, frightening horses with flying papers being blown about, and to restrain the distribution of harmful and improper articles, and that it is not in conflict with constitutional provisions relative to interstate commerce. It is impossible, however, to hold this ordinance to be a police measure, for, after paying the fee and obtaining the permit, the holder thereof may, so far as this ordinance is concerned, litter the streets as he pleases, or perpetrate any of the other acts which the measure is assumed to prevent. It is clearly a revenue measure.

As Congress has sole power to regulate commerce between the States it is necessary to determine whether the ordinance is, in this instance, an interference with interstate commerce. Numerous cases have been cited to support the contention that defendant's distribution of samples and recipe books cannot be considered a part of the contract up-

on which the goods were sold and shipped so as to bring it within the scope of the Interstate Commerce Act.

From the stipulated facts it appears that the agreement to advertise the article in question by free distribution of books and samples was a part of the contract, and part of the consideration therefor. It was one of the causes which put in motion the interstate shipment. In defining interstate commerce, and discussing transactions therein, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, at page 17, 84 C. C. A. 167, at page 183, the court said:

"Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, * * * whether it be of goods, persons, or information, is a transaction of interstate commerce."

The distribution of samples was one of the means and instruments employed by defendant to introduce his wares, and bring them upon the market. In *Norfolk, etc., R. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394, the question decided was the constitutionality of a tax upon an office maintained by the railway company within the State. It appeared that the railway itself did not extend beyond the boundaries of Virginia and West Virginia, and that it was not actually engaged in transportation within the limits of the State of Pennsylvania. It was, however, part of a system which was engaged in transporting persons and freight in interstate commerce, and the office sought to be taxed was established to further this interstate business. The court, in declaring the tax upon the office a tax upon interstate commerce, at page 120 of 136 U. S., at page 960 of 10 Sup. Ct., 34 L. Ed. 394, said:

"In other words, was such a tax a tax upon any of the means or instruments by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. * * * A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States."

[2] What was the purpose of the defendant in agreeing to distribute, and in distributing, samples of his wares, with books of directions for their use? It was for the purpose of furthering his business interests, and these consist entirely of transactions in interstate commerce. A tax on any of the means or instruments used by him for this purpose is, under the authorities, in violation of the commercial clause of the Constitution (article 1, § 8), and void.

Judgment affirmed.

WHITE, C. J., and ALLEN, J., concur.

STATE v. ROGLE. (No. 21039.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS §236(9) — MAINTENANCE OF LIQUOR NUISANCE—SUFFICIENCY OF EVIDENCE.

The evidence examined, and held sufficient to sustain a judgment convicting defendant of maintaining a nuisance in violation of the prohibitory law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 311.]

Appeal from District Court, Crawford County.

Steve Rogle was convicted of maintaining a liquor nuisance, and he appeals. Affirmed.

Arthur Fuller and W. J. True, both of Pittsburg, for appellant. S. M. Brewster, Atty. Gen., and F. P. Lindsay, of Topeka, for the State.

PORTER, J. The defendant was found guilty of maintaining a liquor nuisance, and appeals from a judgment sentencing him to 6 months in jail, and a fine of \$100.

The state called but one witness, the sheriff who made the arrest, and who testified that he saw defendant carrying a keg of beer from a wagon to a dwelling house in one of the mining camps in Crawford county. He found four cases of beer and three empty beer casks in the wagon. When he spoke to the defendant the latter admitted having delivered a keg of beer at that house, and claimed that each keg or case had on it a tag with the name of the purchaser. The sheriff testified that he then asked defendant if he had any receipts, and the defendant said he had none.

The defense called but one witness, the defendant himself, who testified that he was hired by a brewing company of East St. Louis, Ill., to deliver beer upon orders sent from customers in mining camps in Kansas and Missouri; that the customers sent their orders direct to the brewery, which then shipped the beer to its storage house on the Missouri side of the state line; and that the separate casks or cases bore tags showing the names of the purchasers. He testified that his business was to deliver the beer by a wagon and team belonging to the brewery; that he had been employed for this purpose for 11 months and received monthly wages; that he had no interest in the sale of the beer, but was employed merely to deliver it. He contradicted the testimony of the sheriff in one respect, and testified that the woman at the house where he delivered the beer in question signed a receipt. The beer, he said, was left there for a miner named Bogena, who was then at work in one of the mines.

The main contention is that the beer was not subject to seizure by the state author-

itles until after delivery to the consignee, and it having been sold in Missouri, the defendant had the right to deliver it to the purchaser in Kansas, and was protected by the "commerce" clause of the federal Constitution. In defendant's brief there is a discussion of the law which it is claimed controls this case, and *Kirmeyer v. Kansas*, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. Ed. 721, and a number of authorities construing the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1916, § 8739]) are cited. We do not deem it necessary to enter into a consideration of these authorities, for the reason that the evidence produced by the state was sufficient to make a prima facie case, and unless overcome by that offered in defense, must be held sufficient to sustain the judgment. The statute declares that:

"All places where intoxicating liquors are manufactured, sold, bartered or given away in violation of law, * * * and all intoxicating liquors, bottles, glasses, kegs, pumps, bars and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances; and every person who maintains or assists in maintaining such common nuisance shall be guilty," etc. Section 5524, Gen. Stat. 1915.

In *Breweries Co. v. Kansas City*, 96 Kan. 731, 153 Pac. 523, it was held that a vehicle moving about from one place to another while engaged in selling intoxicating liquors in violation of law is a "place" within the meaning of the foregoing section.

At the close of the evidence introduced by the state it would have been entitled to judgment if the defendant had offered no evidence to overcome the prima facie showing. The testimony he did offer was not considered by the jury sufficient to overcome the prima facie case against him. His defense was that he was engaged in interstate commerce. Section 4 of what is known as the Mahin Law (chapter 248, Laws 1913) makes it unlawful for any carrier, express company, or person to deliver intoxicating liquor to any person other than the consignee, or to deliver even to the consignee, without first having such consignee sign and deliver to him a written statement showing the consignee's name and post office address, that the consignee is more than 21 years of age, and that the package containing the intoxicating liquor was consigned at a certain place on a certain date for the consignee's own use.

The evidence of the state was that the defendant admitted making the delivery without having taken a receipt, and his own testimony is that he delivered it to a person other than the consignee. Although he testified to facts tending to show that he was engaged in interstate commerce, he was obliged to admit that he had not complied with the provisions of the Mahin Law, which were designed to prevent the evasion of the prohibitory laws under the guise of interstate com-

merce. Besides, the verdict of the jury, which has been approved by the trial court, is a finding against him upon the facts.

The judgment is affirmed. All the Justices concurring.

CALDWELL et al. v. SKINNER et al.
(No. 20862.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

WAREHOUSEMEN — §34(5) — DELIVERY OF GOODS FOR STORAGE—NEGLIGENCE—BURDEN OF PROOF.

Where goods are delivered in good condition to a warehouseman for hire and it is shown that they have not been delivered on demand and payment of charges by the depositor, but have been destroyed by fire while in the custody of the warehouseman, the burden is upon him to absolve himself from negligence by showing a lawful excuse for his failure to deliver the goods in compliance with the demand.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 76, 77.]

Appeal from District Court, Shawnee County.

Action by Sam C. Caldwell and Edith Caldwell against C. D. Skinner and another. Demurrer to the defense pleaded sustained, and defendants appeal. Affirmed.

D. R. Hite, of Topeka, for appellants. J. M. Stark, of Topeka, for appellees.

JOHNSTON, C. J. The plaintiffs stored goods with defendants, who were warehousemen, and, the goods not being returned on demand, this action was brought to recover the damages sustained.

In the first cause of action plaintiffs alleged the storage for hire of goods of the value of \$3,500, the agreement by the defendants to keep them safely and deliver them to plaintiffs on demand, the payment of storage charges, and the failure of defendants to redeliver the goods on demand. In the second cause of action it was alleged that representations were made by defendants that they carried insurance on their property for the benefit of their patrons, that the warehouse was fireproof, and that insurance by plaintiffs was unnecessary, and that plaintiffs, relying on these representations, did not obtain insurance on their goods. It was alleged that the representations were false, and that a fire occurred which destroyed the plaintiffs' goods, and that by reason of the false representations of the defendants and the plaintiffs' reliance thereon they suffered a loss of \$3,500 for which they ask judgment. The defendants filed an answer, and in the second defense alleged "that any property of the plaintiffs stored in defendants' warehouse was wholly destroyed by fire in October, 1912." To this defense plaintiffs filed their demurrer, which the court sustained, and from that ruling this appeal is taken.

It is insisted by the defendants that it was enough for them to allege the destruction of the goods by fire while they were stored in their warehouse, and that it was unnecessary to allege that the fire and consequent loss was without fault on their part. It is argued that negligence is not presumed, and when it was shown that the goods were destroyed by fire, the burden was then upon the plaintiffs to show that the fire was due to the negligence of the warehousemen. Cases are cited by defendants which tend to sustain their view, and there is a conflict of authority on the question, but the Legislature has provided a different rule for establishing claims of this character. In the act relating to warehouses it is provided that, in the absence of lawful excuse, the warehouseman upon demand must deliver the goods, upon the payment of the warehouseman's lien, a surrender of the warehouseman's receipt, and an acknowledgment of the delivery. It then provides:

"In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal." Gen. Stat. 1915, § 4422.

Under the statute, if it be shown that goods were delivered to the warehouseman in good condition and destroyed, lost, or returned in a damaged condition, it then devolves upon him to acquit himself of negligence; that is, to show a lawful excuse for his failure or refusal to deliver the goods in compliance with the demand. Doubtless the Legislature considered that the warehouseman who had control of the premises and the goods intrusted to his care was better situated than the depositor to know the facts and circumstances under which the destruction, loss, or damage occurred, and is best able to prove them.

In *Wiley v. Locke*, 81 Kan. 143, 105 Pac. 11, 24 L. R. A. (N. S.) 1117, 19 Ann. Cas. 241, goods were delivered to a warehouseman, who stored them in a building less secure than the one he agreed to keep them in, and they were destroyed by fire. In determining his liability, it was held that he was not an insurer of goods received, nor required to provide a building secure from danger, from within or without, that could not be foreseen or provided against, but that, in the absence of an express agreement, he is required to exercise reasonable care to protect and preserve the property intrusted to him for safe-keeping. In the course of the opinion it was said that:

"When the appellee proved that he had intrusted his goods to the appellants, who were unable to return them because they were burned, it then devolved upon the appellants to show that the loss did not occur through any want of care on their part." 81 Kan. 147, 105 Pac. 13, 24 L. R. A. [N. S.] 1117, 19 Ann. Cas. 241.

Plaintiffs' demurrer to the defendants' second defense was rightly sustained, and the judgment of the district court is therefore affirmed. All the Justices concurring.

McDANIEL v. PUTNAM. (No. 20855.)*

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS ⇐225(3) — "CONTINGENT CLAIM" — ACCRUAL — PAYMENT.

A claim payable on the death of another person is not a contingent claim that might never accrue, but is an absolute, unconditional claim, payable in the future, the time of payment only being uncertain; it is a claim accrued when created, the payment merely postponed until the happening of an event which must surely transpire.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 790, 792.

For other definitions, see *Words and Phrases*, First and Second Series, *Contingent Claim*.]

2. EXECUTORS AND ADMINISTRATORS ⇐225(1, 7) — PRESENTATION OF CLAIMS — TIME.

Except by some provision in a will requiring the keeping open of an estate longer than two years, the statute controls. A person has no power, by an oral agreement with his creditor, to establish a different rule as to the time for the presentation of a claim against his estate than the rule declared by the statute of "nonclaim," barring all demands against estates of deceased persons which are not presented within two years (Gen. St. 1915, §§ 4565, 4590).

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 789, 793½, 795, 799, 800, 803, 805.]

3. EXECUTORS AND ADMINISTRATORS ⇐225(7) — PRESENTMENT OF CLAIM — NONCLAIM STATUTES.

More than two years after notice of the appointment of the executor of a deceased person and before final settlement of the estate, plaintiff presented a claim against the estate, relying upon an agreement with the deceased in his lifetime by which, in consideration of the payment to him of \$5 upon the claim, which was then barred by the statute of limitations, he agreed not to present the claim against the estate until after the death of the wife of the deceased. Her death occurred two years after the appointment of the executor of her husband's estate. Held, that the claim is barred by the provisions in the *Executor's and Administrator's Act* (sections 4565, 4592, Gen. Stat. 1915), which requires all demands against the estate of a deceased person to be exhibited within two years.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 800.]

Appeal from District Court, Franklin County.

Claim by George McDaniel against C. E. Putnam, executor of John McDaniel, deceased. Demurrer to the evidence sustained by the probate court, and from a judgment of the district court on appeal sustaining a demurrer to the evidence, plaintiff appeals. Affirmed.

F. M. Harris, of Ottawa, and R. E. Oullison, of Iola, for appellant. W. B. Pleasant, of Ottawa, for appellee.

PORTER, J. In 1876 George McDaniel, then 13 years old, went to live with his uncle John McDaniel on a farm in Franklin county. He continued a member of the family until 1888, at which time his uncle married, and he left to do for himself. John McDaniel died November 25, 1912, and C. E. Putnam, who was appointed executor of his will, duly qualified. More than two years after notice of his appointment George McDaniel presented a claim against the estate for work and labor on the farm of John McDaniel from 1876 to 1888, amounting to \$2,160, with credits on the claim as follows:

September, 1885.....	\$25 00
October, 1885.....	15 00
February, 1888.....	30 00
June, 1892.....	5 00
November, 1912.....	5 00

The claim, with interest, amounted to \$5,560. At the time the claim was exhibited no final account had been filed by the executor and no notice of final accounting had been published. On the hearing of the claim the probate court sustained a demurrer to the evidence, and an appeal was taken to the district court. A motion was sustained to require the plaintiff to make the statement of his claim more definite and certain: First, by stating in what way the alleged payment of \$5, made in November, 1912, avoided the statute of limitations; second, by showing why his demand is not barred by lapse of time and by reason of its not being filed in the probate court or exhibited to the executor within two years after the appointment of the defendant as such executor. Thereupon the plaintiff amended his petition, and alleged the making of an oral agreement with John McDaniel in November, 1912, "when the said claim of claimant for labor was barred by the statute of limitations and unenforceable," by which agreement, in consideration of plaintiff's promise not to "attempt to enforce payment of said claim during the life" of decedent's wife, and plaintiff's agreement that the claim should not become due until her death, the decedent agreed to pay, and did pay, plaintiff the sum of \$5 "upon said claim." It alleged that the wife of decedent died December 24, 1914, and that the administration of John McDaniel's estate was not closed, but remained open. The defendant answered by a general denial, a plea that the action was barred by the general statutes of limitation, and also because the claim was not filed in the probate court within two years after the appointment of the executor and until after the executor had paid over and disbursed all of the assets of the estate. At the first trial the court overruled a demurrer to the evidence, and the jury returned a verdict in favor of the

plaintiff for \$1,490. A motion for a new trial having been granted, the cause was again tried before a jury on the same pleadings and evidence, and the court sustained a demurrer to the evidence, from which ruling the plaintiff appeals.

Plaintiff's evidence was that when John McDaniel married in 1888 he left the family because he could not get along with Mrs. McDaniel, who disliked him. A witness testified that Mrs. McDaniel objected to her husband making payments on the old claim; that at one time when George McDaniel visited at the home she asked her husband what George wanted, and he replied, "He wants me to pay him some money;" that she then said, "You will never give another cent as long as my head is hot," and that her husband replied, "Maybe your head won't always be hot." Walter McDaniel, a nephew of the plaintiff, testified that he overheard a conversation between George and John in November, 1912, when the latter was ill and just a short time before his death. The substance of his testimony is that George asked the old gentleman in regard to his getting well, and his uncle said that—

"he wasn't going to get well. * * * Then George asked him if he intended to pay him anything for his work or help him out in any way. Then John told him he would, and told George to get the pocketbook in the dresser. George went and got the purse and gave it to John. * * * He took \$5 out of the pocketbook and gave it to George, and he told him he would give him this \$5 for his work, and when she was gone—motioning towards the kitchen—for him to get the rest of his wages from the estate. * * * When John pointed towards the kitchen Mrs. McDaniel and Mrs. Wemmer were in there, but John did not say who she was that he was pointing towards. * * * Well, I can make it plain by saying that he gave him the \$5, and he said he would pay him this \$5 for his work, and when she was gone for him to go to the estate for the rest of his pay. * * * He told him this would renew it, and then he might get the rest of it from the estate; that is the only thing that I remember of."

A number of reasons are advanced by the defendant to sustain the court's ruling. It is said there was no consideration for the extension, because the petition alleges the making of the oral agreement upon the consideration of the \$5 payment "upon said claim," and that the plaintiff's promise to forbear the enforcement of a claim which he could not enforce lost him nothing. It is also insisted that the agreement was void under the statute of frauds because it was not to be performed within a year. The contract was made in November, 1912, and Mrs. McDaniel's death did not occur until December, 1914. It is insisted that if such an agreement is valid, an oral contract to pay money after the death of a child who might live out the allotted span of life would not contravene the statute, and that the present case cannot be controlled by the decision in Pierson v. Milling Co., 91 Kan. 775, 139 Pac. 394, where an oral promise of em-

ployment for life was held not within the statute of frauds. The reason given there was that the employment was to begin at once and to be continuous, and might be entirely performed within the year.

We prefer to rest our decision, however, upon the failure of the plaintiff to present his claim within two years after notice of the appointment of the executor as required by the statute which is known as the statute of "nonclaim." After providing for the classification of demands against the estate of a deceased person, the Executor's and Administrator's Act declares that "all demands not thus exhibited within two years shall be forever barred" (section 4585, Gen. Stat. 1915), and section 4590, Gen. Stat. 1915, declares:

"No executor or administrator, after having given notice of his appointment as provided in this act, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within two years from the time of his giving bond."

[1] The plaintiff relies upon the provisions of section 4592, Gen. Stat. 1915, which is section 108 of the Executor's and Administrator's Act, and which provides that any creditor of the deceased whose right of action shall not accrue within the said two years after the date of the administration bond may present his claim to the court from which the letters issued at any time before the estate is fully administered. The plaintiff insists that his cause of action did not accrue until after the death of the wife of John McDaniel because he had agreed with McDaniel not to present the claim against the estate until after she was gone, but his claim was in no sense conditional or contingent. The purpose of the "nonclaim" statute is the speedy settlement of the estates of deceased persons in the interest of creditors, heirs, and devisees, and to render certain the titles to real estate.

"Statutes designed to produce a speedy settlement of estates and the relapse of titles derived under those who are dead should be stringently enforced." *Collamore v. Wilder*, 19 Kan. 67, 81.

Similar statutes of nonclaim have frequently been construed by the courts. In *Fretwell v. McLemore*, 52 Ala. 124, 139, it was said:

"There can be but one purpose in these statutory provisions, and that purpose is the speedy administration of estates; first, for the benefit of creditors, who have the priority of right, and, when their claims are satisfied, the payment of legacies, or distribution to the heir or next of kin. When the heir or legatee succeeds to the estate, that it shall be to a title freed from the incumbrance of, or liability to, debts. In subservience to this purpose has been the uniform construction of these statutes, and specially of that last referred to, known as the statute of nonclaim, which is now the subject of consideration. In the absence of this statute, a settlement of an administration, and the payment of legacies and the making of distribution, would be attended with the peril of future litigation by creditors against the legatees or distributees, to subject their legacies or dis-

tributive shares to the payment of debts. In making distribution, or paying legacies, the personal representative would act at his own hazard. The construction it [the statute] has received has been that which was necessary to avoid the evils to which we have adverted as incidental to an administration governed by common-law principles. It has been deemed to operate a complete bar to all demands, which could be charged on the assets subject to administration; a bar on which the personal representative could rely with safety, and proceed to pay legacies or make distribution; a bar which a creditor could invoke, to protect the assets subject to the payment of his debt from diminution, by being compelled to allow participation therein by those not having presented their claims within the prescribed period; a bar on which the heir or legatee may insist, for the exclusion of all claims not presented, which would reduce or exhaust the assets, otherwise subject only to pay legacies, or to distribution." 52 Ala. 140.

"The language of the statute is clear, unambiguous, and comprehensive. Words more significant to express every demand to which a personal representative can or ought to respond, or which can charge the assets in his hands subject to administration, or more expressive of every legal liability, resting upon the decedent, could not have been employed. 'All claims against the estate of a deceased person' is the language of the statute. * * * All claims, whether absolute or conditional, whether payable presently or in the future, are within the statute. *Jones v. Lightfoot*, 10 Ala. 17; *King & Barnes v. Mosely*, 5 Ala. 610; *Smith v. Grant*, 2 Root (Conn.) 142. It is only contingent claims—claims which may never accrue—that fall within the provision postponing a presentment, 'until eighteen months after the same have accrued'; such as the liability of a surety who has no demand against the principal until his payment of the debt for which he is bound." 52 Ala. 140, 141.

The language of our statute is, in the words of the Alabama court, "clear, unambiguous, and comprehensive." Upon the death of John McDaniel, if the plaintiff had any claim at all against the estate, it had already accrued. It was not a contingent claim that might never accrue, and the statute required it to be exhibited within two years from the appointment of the executor.

"A claim dependent upon a future contingency, on the happening of an event which may never happen, does not accrue until the event happens; until then it is not a claim. But death is an event which must certainly occur; and a claim payable on the death of another person is an absolute and unconditional claim, payable in the future, the time of payment only being uncertain. It is an accrued claim when created, the payment postponed until the happening of an event which must surely transpire." *Farris v. Stoutz*, 78 Ala. 130, 133, 134.

[2, 3] The evidence shows that the agreement upon which plaintiff relies was not that the debt would not be due until the death of Mrs. McDaniel, but merely that he would not present the claim against the estate of John McDaniel until after her death. In the meantime before her death occurred the claim was barred by the statute. Except by some provision in his will postponing the time for closing the settlement of his estate the statute controls, and John McDaniel had no more power by an agreement with a creditor to establish a different rule.

as to the time for the presentation of a claim against his estate than his executor would have had.

In *Collamore v. Wilder*, 19 Kan. 67, 81, the creditor was held bound to obey the plain requirements of the statutes, and the fact that he fails to present a claim in reliance upon "an agreement which the administrator had not the power to make is a mistake of law on his part for which the courts furnish no relief." It has been held that the statute absolutely extinguishes the right of the claimant instead of affecting merely the remedy. 18 Cyc. 937.

The judgment is affirmed. All the Justices concurring.

STATE ex rel. DAWSON, Atty. Gen., v. KANSAS FLOUR MILLS CO. et al.
(No. 19455.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MANDAMUS \S 132—SUBJECT—LOWERING OF DAM.

A writ of mandamus will issue at the suit of the state to compel a corporation which is the owner of a dam to lower it to the height authorized by law; but before such a writ will issue it must be shown by a clear preponderance of the evidence that the dam is higher than is authorized.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 266, 267.]

2. WATERS AND WATER COURSES \S 160—CONSTRUCTION OF DAM—SPECIAL ACT—TRANSFER.

A dam built by an individual under a special act of the Legislature does not become illegal by reason of being transferred to a corporation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 193, 195.]

Original mandamus by the State of Kansas, on relation of John S. Dawson, as Attorney General, etc., against the Kansas Flour Mills Company and others. Writ of mandamus issued.

F. S. Jackson, of Topeka, S. M. Brewster, Atty. Gen., and F. P. Lindsay, of Topeka, for plaintiff. T. A. Nofztger, of Wichita, and Hurd & Hurd, of Abilene, for defendants.

MARSHALL, J. This is an original proceeding in mandamus. In its petition the plaintiff asks that the defendants be compelled to remove the dam built by C. Hoffman across the Smoky Hill river at Enterprise, Kan. In its briefs the plaintiff asks that the dam be lowered 2½ feet.

By chapter 46 of the Laws of 1869 Hoffman was authorized to build a dam across the Smoky Hill river. Section 1 of that act is as follows:

"That Christian Hoffman of Dickinson county, is hereby authorized to construct and maintain a milldam across the Smoky Hill river, at his mills in said county at or near the south line of section numbered twenty in township

numbered thirteen in range three east, of the sixth principal meridian: Provided, said dams shall not be made more than seven feet high, and shall not overflow the farms or lands of any other person outside of the natural banks of said river, nor interfere with any water power heretofore improved, or any ford or public highway heretofore located: And provided, further, that said dam shall not be continued or maintained any longer than while the same is used for running a flouring mill or other machinery."

By chapter 64 of the Laws of 1870 Hoffman was authorized to raise the dam from seven to nine feet. Section 1 of that act is as follows:

"That Christian Hoffman, of Dickinson county, is hereby authorized to raise the mill dam heretofore constructed by him across the Smoky Hill river, under and by authority of the provisions of section one, chapter forty-six, of the laws of 1869, from seven feet to a point not exceeding nine feet in height: Provided, however, that this act shall not be held or construed so as to relieve said Hoffman from being liable for any damage caused by the constructing or raising of said dam."

The material allegations of the petition are that the defendants have constructed and maintained a dam across the Smoky Hill river at Enterprise, Kan., 15.79 feet high in the center and 19.79 feet high on the sides; that in the construction of the dam the defendants have narrowed the channel of the river from 200 to 100 feet; that the dam as now constructed has caused the water to overflow for many miles above the dam; that these floods have damaged, destroyed, and obstructed public roads, bridges, and culverts; that the dam constitutes a nuisance to the state of Kansas; that the franchise granted to C. Hoffman has been by him transferred to one of the defendant corporations; and that the dam is now maintained in violation of law and at variance with, and contrary to, any franchise or corporate rights of either of the defendants. The petition also alleges that the Smoky Hill river is a navigable stream, and that the dam is an obstruction to commerce.

[1] 1. The principal question for determination is the height of the dam. Charles W. Reeder was appointed commissioner to take the testimony and to make findings of fact and conclusions of law. This he did. His findings of fact and conclusions of law are against the plaintiff; but the commissioner did not find, and his report does not show, the height of the dam.

The dam, when first constructed, was on the highest part of a ledge of sand rock running across the river. From the dam the rock sloped downward both up and down the stream. From the south bank of the river the rock extended north practically level for about 50 feet, where it dropped about 8 feet, and extended thence north from 25 to 50 feet. It then rose again to a point about 5 feet high, and from there sloped gradually downward to the north bank of the river. The

evidence does not clearly disclose the fall in that part of the rock extending down stream from the dam. The dam has been repaired or reconstructed twice since it was first built. These repairs or reconstructions have been below the face of the original dam and on a lower level of the rock extending across the river. The first dam was built of rock, the second of cribbing filled with rock, and the third of concrete. At low water the crest of the dam in the center is about $16\frac{1}{2}$ feet above the water immediately below the rock on which the dam is built. This level of $16\frac{1}{2}$ feet is maintained for 147 feet. North and south of this 147 feet there are wing walls rising 3 or 4 feet higher and extending to the banks of the river. On the 147 feet a flush board is used, by which the height of the water above the dam is increased. The top of the first dam was 7 feet above the lowest point of the bed of the river where the dam was built.

The facts above outlined are clearly established by the evidence. These facts, however, do not determine the height of the dam. On that question the evidence is conflicting, unsatisfactory, and inconclusive. The plaintiff's evidence tends to show that additions to the height of the dam have been made on a number of occasions; that when the dam was first built the water in the river backed up to the foot of a riffle or ford known as Humbarger's ford; that with the successive reconstruction of the dam the water at Humbarger's ford has raised until the ford has become impassable; and that at low water, when the flush board is used, the water backs up to the foot of a dam near Abilene known as the Brown dam. This evidence tends to show that the increase in the height of the water in the river at Humbarger's ford, after the last reconstruction of the dam, was as much as 5 feet.

The dam was built by C. Hoffman. J. B. Ersham was interested in its construction. He obtained power therefrom to operate a manufacturing plant. These men testified as witnesses. They knew better than any other persons what was done when the dam was first built and when it was repaired or reconstructed. They testified that the top of the first dam was 7 feet above the rock at the lowest place; that the second dam was built 2 feet higher than the first dam; and that the top of the third dam was built practically level with, or possibly a few inches higher than, the top of the second dam. In their testimony they made statements from which it might be concluded that the dam, when it was first built and when it was repaired or reconstructed, was higher than above indicated, but such conclusions cannot be reached by a fair interpretation of their testimony. There is nothing anywhere to indicate that any witness knowingly testified falsely. All the witnesses, so far as the court can ascertain from the

transcript of the testimony, testified to the facts as they remembered them.

It must be admitted that the dam obstructs the flow of the water in the river. The dam was put there for that purpose. It does not cause the overflow of any land at ordinary stages of the water, nor at ordinary stages of high water. The Smoky Hill river has overflowed its banks in the vicinity of this dam on several occasions. At these times it overflowed its banks at other places, and the Kansas river below the Smoky Hill river overflowed its banks. Then neither the banks of the Smoky Hill nor of the Kansas river held the waters that were coming down these streams. It is a known fact that all the streams of this state at times cover the bottoms from bluff to bluff. The absence of dams will not remedy this condition, although their presence will aggravate it. But the higher the waters get the less effect do the dams have. This will be true until the influence of the dams will be practically nothing.

The Legislature granted to Hoffman the right to maintain a 9-foot dam, knowing the character of the Smoky Hill river, that it ran through a comparatively level country, and that there was no great fall in the river anywhere in the state. The maintenance of the dam at a height of 9 feet is within the terms of the franchise; but the maintenance of that part of the dam that is more than 9 feet high is in violation thereof.

The plaintiff argues that the dam is at least $11\frac{1}{2}$ feet high, and asks that it be reduced to 9 feet, to prevent the flooding of highways. The proper maintenance of highways is a matter of public concern; and if a citizen, by unlawful conduct, interferes with the use of a highway in any way, the state may prosecute an appropriate action to stop that interference.

There is another question of public concern disclosed by the evidence that should be considered by the court. Around and dependent on this dam is Enterprise, a city of 800 or 900 people. With the power of the dam greatly reduced, as it would be if $2\frac{1}{2}$ feet were taken off the top of it, the industries dependent on the dam would be greatly crippled, if not practically destroyed. The state is just as much interested in the prosperity of the city of Enterprise as it is in preventing high water from running over public roads.

The burden of proof is on the plaintiff. It should satisfy the court by a clear preponderance of the evidence that the dam is more than 9 feet high before the court will be warranted in making any order directing a reduction in the height of the dam. From the testimony submitted the court is unable to say that the dam for the 147 feet is more than 9 feet high. The evidence does show that the dam for the 147 feet is at least 9 feet high. It then necessarily follows that the north and south ends of the

dam, outside of the 147 feet are more than 9 feet high.

[2] 2. The plaintiff argues that the Kansas Flour Mills Company cannot operate this dam under the franchise to Hoffman, for the reason that such operation is a violation of that section of the state Constitution (Const. art. 12, § 1) which prohibits the Legislature from passing any special act conferring corporate powers. The acts did not confer any corporate powers. If the transfer of the dam from C. Hoffman to the Kansas Flour Mills Company was void, Hoffman still owns the dam. The fact that the dam was transferred to a corporation does not make the 9-foot dam illegal.

It is not necessary to determine whether or not the Smoky Hill river at Enterprise is a navigable stream, for the reason that the plaintiff is not asking that the dam be removed, but is asking that 2½ feet be taken from the top of it. A 9-foot dam interferes with navigation as much as an 11½-foot dam does. By asking that the dam be reduced 2½ feet, the plaintiff practically abandons the contention that the river is a navigable stream.

A writ of mandamus will issue to compel the defendants to reduce the height of the north and south ends of the dam to the level of the 147 feet in the center thereof. All the Justices concurring, except DAWSON, J., who did not sit.

PARRICK v. SCHOOL DIST. NO. 1, RILEY AND GEARY COUNTIES. (No. 20863.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨135(5) —TEACHER—IRREGULAR CONTRACT OF EMPLOYMENT—RATIFICATION.

Where a teacher was employed by the members of a school board without a formal meeting of the board, and a contract was signed by two members of the board engaging her services for a school term of eight months, and the contract delivered to her, and under such irregular employment she was permitted to teach for four months, and school warrants for her services signed by the members of the board were issued each month in her favor, and she was paid pursuant thereto in accordance with her contract, the circumstances recited amount to a ratification of her irregular contract of employment.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 297.]

2. SCHOOLS AND SCHOOL DISTRICTS ⇨141(4) —TEACHER—NEGLIGENCE—STATUTE.

Where a school board informally determines to have a midwinter vacation of two weeks on account of bad roads and shortage of coal, and the teacher occupies her vacation by getting married and postpones the reopening of school for another week on that account, notifying the board of her purpose to defer the reopening of the school, but not receiving their assent thereto, the conduct of the teacher in failing to reopen the school at the time informally determined upon by the board is a question of negli-

gence, governed by section 8975 of the Gen. Statutes of 1915.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 302.]

3. SCHOOLS AND SCHOOL DISTRICTS ⇨141(4) —TEACHER—DISMISSAL—LIABILITY.

The statute governing the dismissal of a teacher for negligence requires the consent of the county superintendent. Without a dismissal of the teacher by the board does not relieve the school district from liability to the teacher under the contract of employment.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 304.]

Appeal from District Court, Riley County. Action by Mattie E. Parrick against School District No. 1, Counties of Riley and Geary. Judgment for plaintiff, and defendant appeals. Affirmed.

J. V. Humphrey and A. S. Humphrey, for appellee. F. L. Williams, for appellant. F. L. Williams, of Clay Center, for appellee.

DAWSON, J. The plaintiff was employed as teacher in the defendant school district for a term of eight months, beginning in September, 1914. The board dismissed her because she took an extra week's holidays at Christmas time without the consent of the school board.

It seems that it was informally understood between the school board and the teacher that owing to bad roads and shortage of coal the midwinter vacation should last two weeks and that the school should be reopened on January 4, 1915. The teacher was told by the clerk of the board that the time could be made up by extending the school another week in the spring. The teacher was married during the vacation, and wrote to the clerk of the school board:

"Important business detains me for another week so I'll not be back until Jan. 10th. Will you please let the other children know when I'll be back?"

This did not suit the members of the school board, and within a day or two after January 4th another teacher was employed. When the plaintiff appeared for duty the following week, the clerk of the board informed her that on account of her taking the extra week she had broken her contract, and had dismissed herself. After some parleying, the plaintiff and the school board went to the county seat to have a meeting with the county superintendent, to consider the matter in conference with that officer pursuant to the statute (Gen. Stat. 1915, § 8975), which provides that the district board in conjunction with the county superintendent may dismiss a teacher "for incompetency, cruelty, negligence or immorality." The only basis for invoking this statute was on the question of negligence. The county superintendent disagreed with the school board, and stated that while she hoped the teacher would resign, she said:

"I told the board that I could not concur in the dismissal of the plaintiff, for it seemed to me she had not been sufficiently negligent for her dismissal. I told them [the board] that I

thought she had not done just right in adjourning school over one week. * * * I hoped they [the board] would change their minds, and I made it plain to them that I felt I couldn't concur in the dismissal of the teacher."

After the term of school closed, the plaintiff not having secured other professional employment in the interim, and there being no suggestion that with diligence she might have done so, this action was begun, and judgment was rendered against the school district for the teacher's wages for four months, which was the remainder of the school term, according to her contract.

[1] The defendant school district contends that the contract of employment was never formally entered into between the school board and the teacher, that she procured her employment merely by interviewing the members of the school board individually, and that her contract was executed in the same irregular way. Of course this procedure was invalid. But pursuant to this irregular contract and employment, the teacher was permitted to open school in September, and to teach for four months, and the board paid her regularly month by month for her services. In view of this, a defense based upon the irregularity of her contract of employment should not be countenanced. The board were more derelict than the teacher. It was their duty to meet formally to employ a teacher and to contract formally with her. It was their duty to meet regularly each month and order payment of her salary as it became due. They had no right to disburse the district funds in any other manner. If the acts of the school board were called in question for irregularly paying out the district funds, the members of the board would exercise their wits to show that the district funds were disbursed with sufficient regularity to relieve them personally. Doubtless they are upright men, but it is shown that they had not in several years had a formal meeting as a school board, and the new teacher secured to supplant the plaintiff was employed in the same irregular way. One member of the board testified:

"The signature [to the plaintiff teacher's contract] looks like my wife's writing. She has signed a school order or two when I was not at home without my consent. * * * I have been a member of the board for seven or eight years. * * * We have always employed the teacher without a meeting of the board. Miss Martin [the new teacher] was employed the same way. * * * I did not learn until after this trouble that the law required a board to meet as a board in order to hire teachers."

We think that since the irregularities touching the contract of employment and its execution were those of the school board rather than those of the teacher, there was a sufficient ratification, for the purpose of this case, by permitting her to teach four months under her contract, and by paying her from month to month in accordance with its terms. Of course this ratification was of a piece with the loose, irregular conduct which had characterized all the acts of the

school board, but under the circumstances we think it was so closely akin to ratification that it will be recognized as such. *Sullivan v. School District*, 39 Kan. 347, 18 Pac. 287; *Jones v. School District*, 7 Kan. App. 372, 51 Pac. 927; *School District v. Stone*, 14 Colo. App. 211, 59 Pac. 885; *Hull v. Ind. Dist. Applington*, 82 Iowa, 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273; *Crane v. School District No. 6*, 61 Mich. 299, 28 N. W. 105; *Graham v. School District*, 33 Or. 263, 54 Pac. 185; 35 Cyc. 1085.

[2] Turning now to the ground of the teacher's dismissal for negligence: The statute provides that the sanction of the county superintendent is necessary to dismiss a teacher for that delinquency. For reasons which seemed sufficient to the county superintendent, she withheld her concurrence therein. The county superintendent had a right to exercise her discretion—her own good judgment—with due consideration to all the circumstances. With the exercise of that discretion, the court has no right to interfere. It is not enough that the court might think the circumstances sufficient to justify the dismissal of the teacher. Unless the court is prepared to hold that the superintendent had abused her discretion in refusing to sanction the teacher's dismissal, we may not meddle with this official matter vested in her by the statute. *School District v. Davies*, 69 Kan. 162, 76 Pac. 409; *Board of Education v. Shepherd*, 90 Kan. 628, 135 Pac. 605. Although a majority of the school board may bind the board (Gen. Stat. 1915, § 10973, fourth clause), the authority for dismissing a teacher for negligence, etc., is not vested in a mere majority of four persons, the three members of the board and the superintendent, but requires the independent assent of the superintendent in addition to that of the board. While the assent of a majority of the school board would be sufficient to fix the attitude of the board, the independent concurrence of the superintendent being withheld and denied, the pretended dismissal of the teacher was of no legal effect. *State ex rel. v. Haskell County*, 92 Kan. 961, 142 Pac. 246. In this way the Legislature, in its wisdom, has sought to safeguard district school teachers from dismissal without sufficient cause or through arbitrary action, caprice, or injustice on the part of the school board.

[3] A line of argument discussed is that the statute governing dismissal of teachers for negligence was not applicable. If not, then the question was properly submitted to the jury as to whether the taking of an extra week's vacation, under all the circumstances, was such a breach of the contract by the teacher as to warrant its rescission by the school board. This phase of the case was fully covered by the instructions. We incline to the view that the matter was governed by the statute (Gen. Stat. 1915, § 8975):

but although the trial court did not take that view of the case, the result is not affected (Saylor v. Crooker, 97 Kan. 624, syl. par. 4, 156 Pac. 737).

We discern nothing more in this case that needs discussion. The judgment is affirmed. All the Justices concurring.

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SCHOOL DIST. NO. 8, TWIN FALLS COUNTY, v. TWIN FALLS COUNTY MUT. FIRE INS. CO.

(Supreme Court of Idaho. May 4, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS §90 — MEMBERSHIP IN COUNTY MUTUAL FIRE INSURANCE COMPANY — CONSTITUTIONAL PROVISIONS.

A school district cannot, under section 4 of article 8 and section 4 of article 12 of the Constitution, become a member of a county mutual fire insurance company organized under the Laws of 1911, p. 768, as amended by Laws of 1913, p. 129.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 209, 211-213.]

2. MUNICIPAL CORPORATIONS §873—INTEREST IN PRIVATE ENTERPRISE—CONSTITUTIONAL PROVISIONS.

Section 4 of article 8 and section 4 of article 12 of the Constitution are intended to prevent any county, city, town, or other municipal corporation from becoming interested in any private enterprise or from using funds derived by taxation in any manner in aid of any private enterprise, with the exceptions provided for in section 4 of article 12.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1845-1850.]

3. SCHOOLS AND SCHOOL DISTRICTS §90 — "MUNICIPAL CORPORATION"—CONSTITUTIONAL PROVISIONS.

A school district is a "municipal corporation" within the meaning of section 4 of article 12 of the Constitution.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 209, 211-213.]

For other definitions, see Words and Phrases, First and Second Series, Municipal Corporations.]

4. SCHOOLS AND SCHOOL DISTRICTS §82(1), 90—MEMBERSHIP OF DISTRICT—RECOVERY ON CONTRACT.

The liability of a member of a county mutual fire insurance company is unlimited, and therefore a contract by which a school district seeks to become a member of such organization is void under section 3 of article 8 of the Constitution. *Held*, that a contract of insurance between a school district and a county mutual fire insurance company is void, and will form no basis for recovery as against the insurance company for loss by fire.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 197, 209, 211-213.]

5. INSURANCE §55—COUNTY MUTUAL FIRE INSURANCE COMPANY — MEMBERSHIP—LIABILITY.

A county mutual fire insurance company cannot accept a member whose liability may be limited.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 67-69.]

6. ESTOPPEL §52 — ESTOPPEL IN AID OF CONTRACT—CONSTITUTIONAL AND STATUTORY PROVISIONS.

An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127.]

Appeal from District Court, Twin Falls County; E. A. Walters, Judge.

Action by School District No. 8 in the County of Twin Falls, State of Idaho, against the Twin Falls County Mutual Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. P. Guthrie and A. M. Bowen, both of Twin Falls, for appellant. Longley & Walters, C. O. Longley, and Taylor Cummins, all of Twin Falls, for respondent.

RICE, J. This action was instituted by the respondent in the district court for Twin Falls county to recover upon an alleged contract of insurance. From a judgment in favor of respondent this appeal was taken. In the complaint it is alleged that the plaintiff below, respondent here, is a school district organized under the laws of this state; that the defendant, appellant here, is a mutual fire insurance company organized under the laws of this state and doing business in Twin Falls county. It is further alleged that the respondent applied to appellant for insurance on its school building, and that the appellant agreed to insure the same; that the building so sought to be insured was burned; and that appellant failed to pay the insurance as agreed. To the complaint demurrer was filed, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action.

[1] Under the Constitution of the state, school districts are prohibited from becoming members of a county mutual fire insurance company. Section 4 of article 8 of the Constitution is as follows:

"No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or incorporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state."

Section 4 of article 12 of the Constitution contains the following provision:

"No county, town, city or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association."

In the case of *Atkinson v. Board of Commissioners*, 18 Idaho, 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412, this court, speaking of sections 2 and 4 of article 8 of the Constitution, said:

"Section 2 prohibits the state in any manner ever becoming interested with any individual, association, or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; while section 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district, or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid of any individual, association, or corporation. Section 4 of article 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in section 4 of article 8. Section 4 of article 12, however, specifically authorizes cities and towns to contract indebtedness for 'school, water, sanitary, and illuminating purposes,' thereby excluding all other purposes not governmental in their character."

[2, 3] The sections of the Constitution referred to are self-operative. They are intended to prevent any county, city, town, or other municipal corporation from lending credit to or becoming interested in any private enterprise, or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in section 4 of article 12. It is true that section 4 of article 12 does not specifically mention school districts, but when the other provisions of the Constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said section 4. *Maxon v. School Dist.*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *State v. Grimes*, 7 Wash. 191, 34 Pac. 833; *Pioneer Irrigation Dist. v. Walker*, 20 Idaho, 606, at page 615, 119 Pac. 304.

In *Fenton v. Board of County Commissioners*, 20 Idaho, 892, 119 Pac. 41, this court held that school districts are not municipal corporations within the meaning of section 6 of article 7 of the Constitution, and in that opinion the court said that it did not think article 12 thereof included them. The holding in that case should be confined to the section of the Constitution under consideration therein. It would be contrary to the intent and purpose of the Constitution to hold that a school district is not included within the term "other municipal corporation" contained in section 4 of article 12 thereof.

[4, 5] To permit a school district to become a member of a county mutual fire insurance company would be to indirectly sanction the use of public funds raised by taxation for a private as distinguished from a public purpose. The appellant company was organized under Sess. Laws 1911, p. 767, as amended by Sess. Laws 1913, p. 129. The purpose for which a county mutual fire insurance company may be organized is expressed in the opening sentence of said law, which reads as follows:

"Twenty-five or more persons, citizens of Idaho and owning insurable property in any county in this state, may form a county mutual fire insurance company in such county for the purpose of insuring each other against loss by fire, lightning, tornado, windstorm or hailstorm on prop-

erty situated in the county in which the headquarters of the association are located."

The statute further provides, with reference to articles of incorporation of such companies, as follows:

"They shall also state the objects of the organization as being one or more of the objects set forth in this section, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members."

It is further provided:

"Such company shall in no instance have the power to insure the property of others than members of the company, and all the policies issued by the company must state specifically that the liability of each member is not limited."

It is evident, therefore, that a person cannot become a member of appellant company, or any such company, without becoming an insurer of the property of other members, and his liability for the benefit of the other members will be unlimited, or limited only by the amount of insurance in force and the solvency of the members of the company.

By the terms of section 3 of article 8 of the Constitution a school district is prohibited from incurring any indebtedness or any liability in any manner or for any purpose exceeding in any year the income or revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. The language of this section is very broad and prohibits the incurring of any indebtedness or any liability in any manner or for any purpose contrary to its provisions. It may be that a postponed contingent liability is not an indebtedness within the meaning of the section of the Constitution until the contingency has occurred, but it is a liability which may become an indebtedness upon the happening of the contingency. Liabilities which are assumed by virtue of membership in a county mutual fire insurance company are not within the control of the member or limited in amount, and the contingency may occur at any time. The assumption of such liability by a school district is contrary to the provisions of section 3 of article 8 of the Constitution.

It may be that the purpose of the respondent in attempting to become a member was simply to purchase insurance, and that the actual assessments which it would be called upon to pay probably would be less in amount than the fixed premiums required by regular insurance companies, but such considerations cannot prevail. The case of *French v. Mayor of City of Millville*, 86 N. J. Law, 392, 49 Atl. 405, is not in point. The law incorporating the mutual insurance company involved in that case is not at hand, but it appears from the opinion of the court that, though the city became a "member" of a mutual insurance company, the company was entirely different from the appellant herein for the reason that the maximum liability of

the member was always fixed, and therefore the city did not assume an unlimited liability and did not become an insurer of the other members of the corporation.

Not only is a school district prohibited from becoming a member of such insurance company, but the company itself by necessary implication is prohibited from accepting as a member any person whose liability may be limited.

[6] It follows that there could have been no contract of insurance existing between the respondent and appellant, and this action cannot be maintained. *Corbitt v. Salem Gaslight Co.*, 6 Or. 405, 25 Am. Rep. 541. Respondent contends, however, that the appellant was estopped to deny the existence of the contract of insurance by reason of the fact that, owing to the representations of the agents of appellant, the respondent was induced to cancel a portion of an insurance policy which had been issued upon its property. While it is doubtful whether sufficient facts to constitute an estoppel were alleged or proved in this case, yet that consideration is not important. Estoppel cannot be invoked to prevent the denial of power in a municipal corporation to enter into a contract which is expressly prohibited by a constitutional provision or a statute. *City Council of Montgomery v. Montgomery, etc.*, Plank Road Co., 31 Ala. 76; *Dillon on Municipal Corporations* (5th Ed.) p. 1183; *Portland v. Bituminous Paving Co.*, 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527, 72 Am. St. Rep. 713; *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327; *In re Mutual Guaranty Fire Ins. Co.*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149; and compare *McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

The judgment is reversed. Costs awarded to appellant.

BUDGE, C. J., and MORGAN, J., concur.

UTAH IMPLEMENT-VEHICLE CO. v. KENYON.

(Supreme Court of Idaho. May 5, 1917.)

1. BILLS AND NOTES \S 443(4)—ASSIGNEE FOR COLLECTION—REAL PARTY IN INTEREST.

One who holds a note by assignment for the purpose of collection is the real party in interest in his own name.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1380.]

2. BILLS AND NOTES \S 443(4)—INDORSEE—RIGHT OF ACTION—"HOLDER."

An indorsee, who is in possession of a promissory note, is the "holder" thereof, and may sue thereon in his own name.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1380.

For other definitions, see *Words and Phrases*, First and Second Series, *Holder*.]

Appeal from District Court, Cassia County; Chas. O. Stockslager, Judge.

Action by the Utah Implement-Vehicle

Company against W. D. Kenyon. Judgment for defendant, and plaintiff appeals. Reversed, with instruction to enter judgment for plaintiff.

Charles A. Sunderlin, of Burley, for appellant. T. Bailey Lee, of Burley, for respondent.

BUDGE, C. J. This action was brought by appellant on a promissory note, executed by respondent and made payable to the order of the Snake River Implement Company, Limited. The note was in the principle sum of \$2,300, was dated November 20, 1911, due on or before two years after date, and bore interest at the rate of five per cent. per annum from January 1, 1912. It is alleged in the complaint:

"That on or about the 18th day of January, 1914, for a valuable consideration, this promissory note was duly and legally assigned by indorsement and delivery, by the said Snake River Implement Company, Limited, to the plaintiff in this action. Plaintiff is now the lawful owner and holder of this note."

The answer denied that the note "was for any consideration duly or legally or at all assigned or indorsed by said Snake River Implement Company to said plaintiff." And it is affirmatively alleged in the answer:

"That said note was assigned without authority to said plaintiff by some one in the office of the said Snake River Implement Company; that said Snake River Implement Company has never received any consideration for said note, but that this defendant is charged with said note at this time on the books of said company, and that payment of said note is now being demanded of this defendant by said alleged assigning company. Denies that plaintiff is the lawful owner or holder of said note, but alleges that the true owner is the said Snake River Implement Company."

The answer further admitted that appellant made demand upon respondent for the payment of the note. The cause was tried by a court and a jury. The jury returned a special verdict, finding:

(1) That the Snake River Implement Company had received consideration from appellant for the note.

(2) That at the time of the institution of the suit appellant held the direct note of the Snake River Implement Company for the indebtedness owed appellant by the said company.

(3) That the Snake River Implement Company, by its duly authorized agent, legally and lawfully assigned the note for a valuable consideration to appellant, without any limitations as to ownership.

(4) That appellant was the legal owner and holder of the note.

(5) That the note was assigned to appellant as security for indebtedness owed appellant by the Snake River Implement Company.

Upon these findings the court entered a judgment for the respondent. This appeal is from the judgment and from an order, filed the same day as the judgment, dissolv-

ing the attachment which had been theretofore issued and levied against the property of the respondent. That portion of the appeal which appeals from the order dissolving the attachment will not be considered, for the reason that no bond was filed sufficient to continue in force the attachment, as provided in section 4814, Rev. Codes.

Appellant assigns the following errors: First, that the judgment will not support the findings of the jury; second, the evidence is wholly insufficient to support the judgment; third, the judgment is erroneous, in that the court found in favor of respondent and against appellant; fourth the judgment is not supported by the law of the case.

[1, 2] The only questions involved are: First, was there a valid assignment of the note? second, is appellant the real party in interest? All of the evidence shows that respondent executed the note and delivered it to the Snake River Implement Company; that the Snake River Implement Company authorized the assignment thereof to appellant; that the said note was duly assigned and indorsed by C. E. Peterson, the general manager of the Snake River Implement Company, and delivered to appellant; that appellant was authorized to collect the note; and that whatever sum should be collected upon the note should be credited by appellant upon the indebtedness of the Snake River Implement Company. The evidence is conclusive and uncontradicted upon all of these points. The law is well settled in this state that under such circumstances the holder of the note is authorized to sue upon it. The controlling case upon the question is *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 398. The law is there clearly announced to the effect that where one holds a note by assignment, for the purpose of collection, he is the real party in interest and is authorized to sue thereon in his own name, and that the holder of a negotiable instrument is the payee or indorsee who is in possession of it, or the bearer thereof. The *Craig Case* has been followed in *Home Land Co. v. Osborn*, 19 Idaho, 95, 112 Pac. 764; *Anderson v. Coolin*, 28 Idaho, 494, 155 Pac. 677. See, also, *Brumback v. Oldham*, 1 Idaho, 709; *Pomeroy*, Code Remedies (4th Ed.) § 70.

It is impossible to determine upon what theory of law the trial court proceeded in rendering judgment for respondent under the facts as found by the jury or as disclosed by the evidence, indeed, under the evidence in this case, the appellant was entitled to a directed verdict, and there was no real occasion for submitting even the finding of facts to the jury.

The judgment is therefore reversed, and the trial court is instructed to enter judgment for the appellant, in accordance with the prayer of his complaint and the principles herein announced. Costs awarded to appellant.

MORGAN and RICE, JJ., concur.

WINDSOR v. HOLLOWAY et al.

(Supreme Court of Oregon. May 22, 1917.)

1. COSTS \S 277(8)—PAYMENT—STAY OF SUBSEQUENT SUIT.

It is within the discretionary power of a court to stay proceedings in a suit until the plaintiff therein shall have paid the costs assessed against him in a prior suit between the same parties, involving substantially the same matter and praying for the same relief.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1051-1053.]

2. APPEAL AND ERROR \S 82(4) — DECISIONS APPEALABLE—STAY OF PROCEEDINGS—COSTS.

An order providing that plaintiff shall pay the costs of prior suit within 90 days, and in default thereof his suit shall be dismissed, is interlocutory and not appealable pending expiration of the 90 days.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 332, 521.]

3. COSTS \S 277(8)—PAYMENT—STAY OF PROCEEDINGS—DISCRETION.

Where a decree was entered enjoining a judgment creditor from setting up, prosecuting, or attempting to proceed on the judgments, and such decree was not set aside or any attempt made to set aside same, the entry of an order in a subsequent suit between the same parties, involving the same subject-matter and the same relief, requiring that plaintiff pay the costs of the prior suit within 90 days and in default thereof his suit be dismissed, was not an abuse of discretion, where it was not denied that the judgments had been satisfied, though it was alleged that false testimony was introduced in the former case.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1051-1053.]

4. JUDGMENT \S 582.—RES JUDICATA.

Until the first decree has been set aside, a suit will not lie to retry a case between the same parties, involving the same subject-matter and the same relief.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1079, 1082.]

5. JUDGMENT \S 444—IMPEACHMENT—PERJURED TESTIMONY.

A decree cannot be impeached in a suit in equity merely on allegations that it was procured by perjured testimony.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 839.]

In Banc. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by J. C. Windsor against Edward Holloway and others. From an order staying proceedings until payment of costs of another suit, plaintiff appeals. Appeal dismissed.

This is an appeal from an order of the circuit court staying proceedings in the present case until the costs of another suit brought by plaintiff, involving substantially the same matter and praying for the same relief, should be paid. The order provided that the plaintiff should pay the costs of the prior suit within 90 days, and in default thereof his suit should be dismissed. Before the expiration of the 90 days prescribed by the court, plaintiff took this appeal, which defendants move to dismiss.

E. B. Dufur, of Portland, for appellant. Veazle, McCourt & Veazle, of Portland, for respondents.

McBRIDE, C. J. [1-3] The power of the court to make the order is amply sustained by the authorities. *Schwede v. Hemrich*, 29 Wash. 124, 69 Pac. 643; *Carrothers v. Carrothers*, 107 Ind. 530, 8 N. E. 563; *Shear v. Box*, 92 Ala. 596, 8 South. 792, 11 L. R. A. 620, and notes; *Buckles v. Chicago, M. & St. P. Ry. Co. (C. C.)* 47 Fed. 424. The order was interlocutory and was not appealable pending the expiration of the 90 days given plaintiff in which to comply therewith. *Roth v. Wallach*, 59 Misc. Rep. 515, 110 N. Y. Supp. 934; *Trogdon v. Brinegar*, 26 Ind. App. 441, 59 N. E. 1066. There was no abuse of discretion by the court. In a prior suit between the same parties, wherein the same subject-matter was involved and the identical relief sought as in the present case, there was a decree in favor of the defendants declaring that the judgments mentioned in the plaintiff's complaint therein, the satisfaction of which plaintiff was seeking by that suit to set aside, had been fully discharged and satisfied, and the plaintiff was enjoined from setting up, prosecuting, or attempting to proceed upon said judgments. *Windsor v. Mourer et al.*, 76 Or. 281, 147 Pac. 533, 1190. That decree has never been set aside, nor is there any attempt to set it aside in the present suit, in which it is alleged that certain material evidence used in the former cause was false and forged, and that such forgery was unknown to plaintiff at the time of the trial, although known to the defendants.

[4, 5] This is an attempt to retry the case in another suit without setting aside the first decree, which cannot be done. In addition, the weight of authority is to the effect that a decree cannot be impeached in a suit in equity merely upon allegations that it was procured by perjured testimony. 23 Cyc. 1027, 1028; *Friese v. Hummel*, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610. The reason for this rule is obvious. If a defeated party can be allowed to retry a suit on the ground that material testimony given therein was perjury, by the same token he could, if defeated, retry the second suit by alleging that perjured testimony had been introduced, and so on so long as he had the means to maintain the successive suits. The court, no doubt, took into consideration the previous litigation between the parties, the vagueness of the allegations in the complaint, and the failure of the plaintiff upon the former trial to produce the testimony of Mrs. Campbell, or to take her deposition, although the genuineness of the power of attorney and the satisfaction of the judgment were controverted questions in that suit. The failure of Mrs. Campbell in her affidavit filed upon the present motion to deny that she received from the defendants \$6,570 in settle-

ment of the judgments and for the purpose of having them satisfied throws such suspicion on the bona fides of the case that we cannot say the court abused its discretion in requiring the plaintiff to pay the costs incurred upon the trial of the former cases before requiring the defendants to relitigate the same matter which had been decided in a previous suit.

The appeal is dismissed.

STATE ex rel. OREGON BAR ASS'N v. PRENDERGAST.

(Supreme Court of Oregon. May 22, 1917.)

ATTORNEY AND CLIENT §52 — DISBARMENT PROCEEDINGS—COMPLAINT.

In proceedings under L. O. L. § 1092, subd. 1, providing that an attorney may be removed or suspended from practice "upon his being convicted of any felony or of a misdemeanor involving moral turpitude," a complaint charging merely that defendant was convicted in federal court of using the mails to defraud in violation of Penal Code U. S. (Act Cong. March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]) § 215, was demurrable in the absence of specific and substantive charge that he actually committed the offense of which he was convicted.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70.]

In Banc. Disbarment proceedings on the relation of the Oregon Bar Association against Wm. J. Prendergast. Demurrer to complaint sustained with leave to amend.

This is a disbarment proceeding instituted by the state upon relation of the grievance committee of the Oregon Bar Association. The complaint charges, in substance:

"(5) That on, to wit, the last day of July, 1916, a grand jury, duly impaneled in the District Court of the United States for the District of Oregon, returned an indictment against the said Wm. J. Prendergast for violation of section 215 of the federal Penal Code; that in the said indictment it was charged that Wm. J. Prendergast on, to wit, the 9th day of February, 1916, in the city of Portland, in the state and district of Oregon, having devised and intending to devise a scheme and artifice to defraud various and sundry persons named in said indictment, and for the purpose of furthering and executing said scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did knowingly, willfully, unlawfully, and feloniously place and cause to be placed in the post office at Portland, Ore., certain letters and other mailable matter to the said various and sundry persons therein named, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America; and that by means of said scheme and artifice so contrived and conceived the said Wm. J. Prendergast did defraud various and sundry individuals out of money, all contrary to the form of statute in such case made and provided.

"(6) That on, to wit, July 6, 1916, Wm. J. Prendergast was arrested on said charge, and at a regular term of the District Court of the United States for the District of Oregon, held at the federal courthouse in Portland, Or., on the 17th day of November, 1916, the said Wm. J. Prendergast was duly and legally tried and

convicted of the crime charged in said indictment, to wit, using the mails of the United States to defraud; that judgment was by the said District Court of the United States for the District of Oregon pronounced against Wm. J. Prendergast, and he was sentenced and ordered to pay a fine of \$800; and that on, to wit, the 5th day of February, 1917, the said Wm. J. Prendergast did pay said fine, whereby and by reason whereof said judgment of conviction became and is final against the said Wm. J. Prendergast.

"(7) That Wm. J. Prendergast has been, by reason of the proceedings herein referred to, convicted of a felony and a crime involving moral turpitude; that by reason of the said conviction the said Wm. J. Prendergast has forfeited all rights to practice in or appear before this or any other court of the state of Oregon; and that the said Wm. J. Prendergast should be required and cited to show cause why he should not be disbarred from further practice before the courts of the state of Oregon, and this court's records purged of his name."

The statute applicable to this subject is found in subdivision 1 of section 1092, L. O. L., and provides that an attorney may be removed or suspended from practice "upon his being convicted of any felony or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence." The defendant demurs generally to the complaint.

Elton Watkins, of Portland, for plaintiff.
Ralph E. Moody, of Portland, for defendant.

McBRIDE, C. J. (after stating the facts as above). The facts recited in the indictment upon which the defendant was convicted indicate that he was guilty of the use of the United States mails with intent to defraud; and while this is an offense against the laws of the United States and is declared to be a felony, it is not so under the laws of Oregon. In *Ex parte Biggs*, 52 Or. 433, 97 Pac. 713, it was held that the words "felony" and "misdemeanor" were used in their statutory sense, and that, there being no such offense as that of which the defendant was convicted in the federal court, an allegation of such trial and conviction was, in the absence of a specific and substantive charge that he actually committed the offense of which he was convicted, insufficient to sustain a charge of violation of subdivision 1 of section 1092, supra. The complaint in the matter at bar does not charge the defendant with defrauding or attempting to defraud any one by an unlawful use of the mails, but merely recites that he was so charged in an indictment found in the federal courts. If the same accusation made in the federal court had been made in the complaint in the matter at bar, the record of defendant's conviction would probably be conclusive evidence of his violation of his duty as an attorney, but there would still be open for inquiry the question of the extent of his guilt as a means of determining the nature of the penalty to be imposed. Such seems to be the line of the reasoning

adopted by Chief Justice Rean in *Ex parte Biggs*, supra, which we follow in this case.

The demurrer will be sustained, and the relator will have 30 days within which to file an amended complaint.

ELLIOTT v. STATE. (No. 426.)

(Supreme Court of Arizona. May 19, 1917.)

1. INTOXICATING LIQUORS §168—"PERMIT."

To "permit" the unlawful use of intoxicating liquors by the proprietor of a business implies his knowledge and consent and acquiescence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 189-192.

For other definitions, see *Words and Phrases*, First and Second Series, *Permission—Permit*.]

2. INTOXICATING LIQUORS §168 — PRINCIPLES—STATUTE.

The proprietor of a soft drink place was not liable for the unlawful sale of intoxicating liquors by his employé, although committed in his place of business, unless such unlawful act was directed, or knowingly assented to, acquiesced in, or permitted by the employer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 189-192.]

3. CRIMINAL LAW §829(1)—INSTRUCTIONS—REPETITION.

Refusal of proper instruction asked was not ground for reversal, where an instruction given was considered by court to cover the same ground.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011.]

4. CRIMINAL LAW §370—EVIDENCE—ADMISSIBILITY—OTHER SALES.

In a prosecution for the illegal sale of intoxicating liquors by an employé of defendant, evidence of other sales of intoxicating liquors by such employé both before and after the sale charged was properly admitted to show knowledge, consent, and acquiescence in the sales by the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 825-829.]

5. CRIMINAL LAW §783(1)—INSTRUCTIONS.

In a prosecution for sale of intoxicating liquors by an employé of the defendant, an instruction was requested that evidence had been admitted of sales other than the one charged, and verdict should not be rendered against defendants or either of them by reason of such other sales, and that the material sale is that alleged to have been made on a certain date. The court gave this instruction, adding thereto: "Evidence of other sales was admitted for the purpose merely of aiding in determining whether or not there was a sale on the date alleged." *Held*, that the instruction as requested and as modified was too general as a definition of the purpose of admitting evidence of other sales.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1872-1874, 1876.]

6. CRIMINAL LAW §370 — EVIDENCE — ADMISSIBILITY.

In a prosecution for the illegal sale of intoxicating liquors by an employé of defendant, although a conviction could not be had upon other sales, evidence of other sales not personally made by defendant were competent to show scienter or knowledge on his part; it being a reasonable and fair inference that if liquor

was frequently disposed of at his place of business, he must have known of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825-829.]

7. CRIMINAL LAW ⇨1173(4) — REVIEW — PREJUDICIAL ERROR.

In the view that the defendant's establishment was making it a business to sell liquor, the modification of the instruction made by the court, while not strictly an accurate statement of the law, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8167.]

8. CRIMINAL LAW ⇨1166½(1) — REVIEW — REVERSIBLE ERROR.

In a prosecution for the illegal sale of intoxicating liquors by an employé of defendant, where a person during the trial sent a whisky glass containing liquor to defendant's attorney, who immediately disclaimed knowledge of the performance, and upon inquiry from the court, the person stated that it was ginger ale, and that he brought it for the defendant, who then drank the liquor, and the court later called the person for examination, and fined him for contempt after his statement that he wanted the jury to see that ginger ale looked like whisky, and that his purpose was to influence them in behalf of his defendant, the refusal of the court to excuse the jury while such person was being examined was not reversible error, since it is probable that the jury were less prejudiced by the explanation of the act than they would have been had they been left to guess or draw on their imaginations for an explanation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8119-8122, 8128.]

9. INTOXICATING LIQUORS ⇨236(4) — EVIDENCE—SUFFICIENCY.

In a prosecution for the illegal sale of intoxicating liquors by an employé of the defendant, evidence held to support a verdict of guilty.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

J. J. Elliott was convicted of violating the prohibition law, and he appeals. Affirmed.

Struckmeyer & Jenckes, A. S. Hawkins, and R. G. Langmade, all of Phoenix, for appellant. Wiley E. Jones, Atty. Gen., and Geo. W. Harben and R. W. Kramer, Asst. Attys. Gen., for the State.

ROSS, J. The appellant Elliott and one Henry Wright were jointly informed against for violating the prohibition law. They were tried together and both convicted. Elliott appeals, assigning as error the giving by the court of the following two instructions:

"1. I charge you, gentlemen of the jury, that all persons who are concerned in the commission of a crime are guilty of its commission. In order to be guilty it is not necessary that one should actually commit the crime. It is sufficient if he aids and abets therein, whether he be present or absent. If a proprietor of a drinking establishment permits intoxicating liquor therein to be sold in violation of the law, he is guilty the same as the one who actually sold the liquor.

"2. The court instructs the jury that there has been evidence admitted in this cause of sales other than the one herein charged, and that you are not to render any verdict against the defendants, or either of them, by reason of any such other sales. The sale that is material

in this case is the sale that is alleged to have been made on October 6, 1916. Evidence of other sales was admitted for the purpose merely of aiding you in determining whether or not there was a sale on the date alleged."

And the refusal to give the following instruction:

"3. The court instructs the jury that Elliott is not liable for the unlawful acts of Henry Wright, if any, though such unlawful act, if any, was committed in Elliott's business, unless such unlawful act was directed or knowingly assented to or acquiesced in by said Elliott."

It is necessary to set forth some of the facts developed in the evidence in order intelligently to get the viewpoint of the appellant, and to determine if there is merit in his contentions. The evidence shows that appellant was the owner and proprietor of a soft drink place known as the "Health Office" in the city of Phoenix. Henry Wright, the other defendant, was employed as a clerk in the Health Office. It is without controversy that the sale of liquor charged in the information was made by Wright in the absence of appellant, the owner and proprietor of the Health Office.

The first instruction above complained of finds justification, if at all, upon the theory that it was not necessary to the guilt of appellant that he should have personally made the sale; that the law holds him responsible for any sale made by his clerk or agent, providing it was with the knowledge or consent or acquiescence of the appellant. The question was as to whether Wright in making the sale was acting as the agent of the appellant, or whether he was acting without the scope of his authority and instructions and in violation thereof. In the latter case the act would have been Wright's only, and the guilt would attach to him, but if the sale was made with the permission of appellant, he was particeps criminis in the transaction, and is as guilty as if he had personally made the sale. In such case both Wright and appellant were principals as, under our law, the common-law distinction of accessory before the fact and principal is abolished, and all who aid and abet in the commission of a crime or, not being present, have advised and encouraged its commission, are principals. Sections 27 and 955, Penal Code 1913.

[1] To "permit" the unlawful sale of intoxicating liquors by the proprietor of a business implies knowledge, consent, and acquiescence. The Standard Dictionary defines "permit" as follows:

"1. To allow by tacit consent or by not hindering; take no steps to prevent; consent tacitly to; suffer.

"2. To grant leave to by express consent or authorization; empower expressly; authorize."

[2, 3] The correlative instruction No. 3 above, refused by the court, undoubtedly states a correct principle of law, and we think should properly have been given to the jury. Its refusal, however, in view of the first instruction which the court doubtless

conceived covered the same ground, is not such error as would justify a reversal of the case. We believe from the first instruction the jury must have understood before a conviction of appellant could be had that it should be found he counseled, advised, and permitted the sale.

[4] Evidence of other sales of intoxicating liquor by Henry Wright both before and after the date of the sale charged in the information was before the jury. These sales, if the evidence is to be believed, were as much a part of the business of the Health Office as the sale of soft drinks. The chances to get liquor apparently depended upon the belief of Wright that the purchaser would not divulge the source of his supply. These other sales were properly admitted for the purpose of showing knowledge, consent, or acquiescence in the sales by the appellant. Joyce, *Intoxicating Liquor*, § 688. It was this evidence that called for instruction No. 2. This instruction was given upon the request of appellant, except that the court added the last sentence thereof:

"Evidence of other sales was admitted for the purpose merely of aiding you in determining whether or not there was a sale on the date alleged."

[5, 6] The instruction neither as requested nor as modified under the present facts correctly defined the purpose of admitting evidence of other sales than the one charged. It is true, as stated in the instruction, that a conviction could not be had upon other sales. It is equally true that the other sales, not having been personally made by the appellant, were competent to show scienter or knowledge upon his part, it being a reasonable and fair inference that if liquor was being frequently disposed of in the Health Office the proprietor thereof presumably was familiar with it. The instruction requested and modified was a too general statement of the law applicable to the facts; it was not as specific as it should have been.

[7] In the view that the Health Office was making it a business to sell liquor, and there was some evidence to that effect, the modification of the instruction made by the court, while not a strictly accurate statement of the law, was hardly misleading or at least prejudicial. We think it is but a common sense proposition that evidence of other sales in a place of the kind of appellant's would aid a jury in determining whether the specific sale charged was proved, it being not an incident of, but growing out of, the course of the business. 23 Cyc. 209, 270.

In the course of the trial, while a witness was testifying, a man by the name of E. A. Locke gave to the court bailiff a small whisky glass containing liquor and requested him to give it to appellant's attorney. The bailiff set the whisky glass in front of appellant's attorney, stating that it had been sent to him, whereupon appellant's attorney stated: "I don't understand such a performance, your

honor. I have no part in it." Upon inquiry from the court as to what the drink was and who sent it in, Locke, from the rear of the courtroom, answered: "It is ginger ale. * * * I sent it in to Jack" (meaning Elliott). The appellant thereupon drank the liquor in the glass. A little later and after the witness then on the stand was excused the court called Locke to the bar to inquire of him the purpose of his sending the whisky glass of liquor into the courtroom. Appellant's attorney asked that the jury be excused during the examination, which request was refused by the court. Locke admitted, upon being questioned, that he wanted the jury to have an ocular demonstration that ginger ale looked like whisky and that his purpose was to influence the jury in behalf of his friend, the appellant. Several questions were asked Locke by the court, after which a fine was imposed upon Locke for contempt, the appellant's attorney all the time objecting to the proceeding being had in the presence of the jury. The court several times remarked, in substance, that Locke had, no doubt, hurt the appellant's case before the jury; that its purpose was to hurt the prosecution's case and to help the defendant's case. These remarks, it is contended, were prejudicial to the appellant.

The trial court accepted the statement of the attorney for appellant that he had no part in the episode of introducing the glass of liquor, as true, and exonerated him from all blame. From our knowledge of the high character and learning of the attorney, we feel certain that such a thing would not be countenanced by him, and that if he had been advised of it in advance he would have frowned upon it with indignation and resentment. We cannot say so much, however, for the appellant. Neither at the time of the episode nor during the contempt proceedings nor at any time during the trial was it shown or attempted to be shown that the appellant was free from inducing or causing the conduct of Locke. It is possible that he had no previous knowledge of Locke's intentions or purpose, but it is hardly probable that Locke would assume to do what he did without first consulting the appellant. The very hurried manner in which the appellant drank the liquid from the glass would indicate that he knew from where it came, and why, and that he understood it to be necessary for him to drink the liquid in the presence of the jury to carry out his part of the demonstration. If the scheme was planned or acquiesced in by appellant and prejudice resulted therefrom, he only is to blame.

It may be that the jury should have been excused while Locke was examined and punished in contempt. The jury no doubt was as much surprised at the appearance of this mysterious glass of liquor in the midst of the trial as was the court and all of the attorneys. Something had happened that

needed explanation. We do not believe the letting the jury into the knowledge of who had sent the liquor into the courtroom and his purpose in so doing could have prejudiced the jury against the appellant any more than if the incident had been silently passed by leaving them to guess or to draw on their imaginations for an explanation.

[8] It was not so much the carrying on of the contempt proceedings against Locke in the presence of the jury as the incident that provoked the proceedings that may have influenced the jury's verdict. To give this episode the force and effect of prejudicial error demanding a reversal of the case would be an invitation to defendants in criminal cases to induce error in order to avoid the binding effect of a jury's verdict.

[9] Independent of this incident a careful examination of the evidence satisfies us that the jury could not reasonably, under their oaths, have returned any other verdict than one of guilty.

Judgment is affirmed.

FRANKLIN, O. J., and CUNNINGHAM, J., concur.

ROUSS v. RACKET STORE. (No. 1533.)

(Supreme Court of Arizona. May 19, 1917.)

PARTNERSHIP — EVIDENCE OF RELATION — SUFFICIENCY.

Evidence held wholly insufficient to show a partnership, as all acts which would indicate that the same were without authority or assent of one of the two defendants, and were never ratified by him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81.]

Appeal from Superior Court, Navajo County; John A. Ellis, Judge.

Action by Peter W. Rouss, trading as Charles Broadway Rouss, against the Racket Store, a copartnership composed of F. T. La Prade and others. From a judgment for La Prade and from an order overruling plaintiff's motion for a new trial, he appeals. Affirmed.

Thorwald Larson, of Holbrook, and Norris & Mitchell, of Prescott, for appellant. X. N. Steeves, of Williams, for appellee.

FRANKLIN, O. J. Peter W. Rouss, trading as Charles Broadway Rouss, in the city of New York, brought this action against Warren G. Hunter, Lenna L. Hunter, and F. T. La Prade as a copartnership doing business under the firm name of the "Racket Store," in Winslow, Ariz. The plaintiff sought to recover \$1,490.42 on an open account for merchandise alleged to have been sold and delivered to said the "Racket Store." At the close of the evidence the jury was instructed to return a verdict in favor of the defendant La Prade and against the plaintiff. This was done, and, following the verdict, judgment was entered. A motion

for a new trial was denied, and from the judgment and order this appeal is prosecuted.

In the argument and briefs there is much said pro and con about a certain stipulation which appellant contends limited the issues to be tried to the sole question of the copartnership relation of La Prade with the other defendants. In the view we take of the case it is unnecessary to consider the effect of the stipulation, it being sufficient to decide whether there is any substantial evidence in the record, about which the minds of reasonable men might differ, that the defendant La Prade was a member of the alleged copartnership. The defendant Hunter, when he first located in Winslow, commenced doing business in a small way, buying and selling dry goods and notions. He was assisted in this business by his wife, the defendant Lenna L. Hunter. At the beginning he occupied some property owned by La Prade as a subtenant. Afterwards, when the business had grown a little, Hunter rented another piece of property from La Prade, in which he located the "Racket Store," he and his wife occupying some living rooms adjoining. After conducting this business a few years the Hunters left Winslow rather unexpectedly, leaving behind what remained of the stock of goods and this alleged indebtedness against the business as a remembrance. There are little bits of testimony sprinkled over the record, and which it is needless to mention in detail, all compatible, however, with the relation of landlord and tenant, but none of these having any force as evidence of any copartnership interest on the part of La Prade in the "Racket Store." Such, for instance, as on occasions when Hunter was hard pressed for money, La Prade would help him out in the way of small loans. La Prade also got some items of merchandise from the store, such as a pair of pants, a few shirts, and the like. One of plaintiff's exhibits is a note and contract. The note is a joint and several one in favor of Rouss. It is dated April 2, 1912, and purports to be signed by the Hunters and La Prade. Both note and contract expressly recite that the note is given as collateral security for the payment of an open account limited to a credit extended, or about to be extended, to W. G. Hunter, in merchandise to the amount of \$300. La Prade emphatically asserts that the signature to the alleged "note and contract" purporting to be his signature is a forgery. La Prade unequivocally denies that he ever signed any such paper at any time or at all. There is no satisfactory evidence that he did sign it. The officers of the bank who were called to identify the signature expressed doubts about it being genuine. On April 5, 1912, Hunter went to the Navajo-Apache Bank & Trust Company in Winslow and asked the

president of the bank to draft a form of articles of copartnership between him and La Prade. These articles were drafted as directed by Hunter and according to his dictation. Hunter was a customer of the bank, as was also La Prade, the latter being a comparatively wealthy man and one of the substantial citizens of Winslow, with credit unimpaired. Mr. W. H. Burbage, who was the president of the bank at the time, is a lawyer by profession. When this form of a copartnership agreement had been drafted, Hunter asked the president to give him a letter to Rouss, recommending him for credit in the purchase of merchandise. At his request, and on the faith of representations made by Hunter, the president of the bank gave him the letter, a copy of which is as follows:

"[Letter Head of Navajo-Apache Bank & Trust Co.]

"April 5th, 1912.

"Chas. Broadway Rouss, New York—Sir: Mr. W. G. Hunter of this town is about to open a small store for the sale of sundry Ladies articles of wearing apparel, laces, embroideries etc, he informs me that he is intending to make his purchases from your establishment, and requested me to write you as to his standing in this community.

"Mr. Hunter since coming here to this town has at all times led a most exemplary life, he is industrious, and sober, and has the respect of every body here his partner Mr. F. T. La Prade is one of our very wealthiest citizens, worth at least \$75,000. this is an experiment to start with, and Mr La Prade does not care to be known in the business, so that according to the articles of agreement which I drew up this morning between Mr Hunter and Mr La Prade the later is to be the silent partner, so that the credit of the new firm should be the very highest. Yours respectfully,

"W. H. Burbage, Pres."

The president of the bank had no authority whatever to act in these matters for La Prade. What was done was done solely at the instance of Hunter. La Prade did not know of these matters until several weeks afterwards. When he did find out what had been done, he became very angry, scolding the president of the bank for drafting the partnership papers. La Prade at all times denied that he was a partner of Hunter. It appears that when La Prade learned of the copartnership papers he came into the bank "roaring and was mad" about it. It does not appear that La Prade had any knowledge of the letter. Mr. Burbage, the president of the bank, testifying, said:

"He (La Prade) says, 'By what authority did you draw up copartnership papers for Hunter and me?' He was mad about it. Q. What did you tell him? A. I told him I drew it up because I got paid for it. That's my business to draw up papers for anybody. Q. Is it your business to send out letters like that? A. I did that at the request of Mr. Hunter. I took Mr. Hunter's word for it; that he and La Prade were going to form a partnership. It was very

simple on my part. I had no reason to doubt Hunter. Q. Why did you say that he was the partner of Hunter? A. Because he told me he and La Prade were going into partnership, and asked me to make up the papers in accordance, and on the strength of that asked me to write that letter to help his credit, which I also did."

Conceding for the purpose of argument that La Prade did sign the "note and contract," we fail to see any evidence of a copartnership here. On the other hand, it tends to disprove any such relation. La Prade was a wealthy man, his credit excellent. If Rouss exacted it, it must have been because he would not extend credit to Hunter. If Hunter wanted it, it was for the purpose of getting credit to the extent of \$300 in virtue of La Prade's financial standing. From the very constitution of a partnership, a presumption arises that each partner is an authorized agent of the rest in contracts relating to the subject-matter of the partnership. Then why this alleged note and contract? The partnership, if it existed at all, was merchandising, and if appellant sold and delivered merchandise to it within the scope of its business at the instance of any one of them, all would become liable. Of itself the "note and contract" wholly repels any notice of the existence of a partnership. Neither does the draft of the articles of copartnership and the letter of the bank president, recommending Hunter to appellant for credit, have any probative force to prove such relation. The difficulty is that no act is traced to La Prade upon the issue of partnership. The things done, the statements made, all were without his knowledge and consent. Nothing was done in his presence which has even a remote tendency to prove the issue. What was done in his absence was unauthorized, was never assented to, or adopted or ratified by him. On the contrary, when the occasion presented he promptly and resolutely repudiated the whole thing. It may be, as appellant asserts, that the credit was extended to the "Racket Store" on the faith of the letter of the bank president recommending Hunter. But however this may be, it is perfectly clear that the indebtedness thereby incurred may not be recovered from one who played no part in the matter at all. The only intimation one gets from a careful reading of the record is that Hunter sought to give the impression by indirection that a partnership existed between him and La Prade. In this he seems to have been somewhat successful, but, even so, it falls far short of proving the issue.

The judgment of the superior court is right, and it is in all things affirmed.

CUNNINGHAM and ROSS, JJ., concur.

WATSON et al. v. CITY OF SALEM.

(Supreme Court of Oregon. June 19, 1917.)

TIME §9(4)—NOTICE—COMPUTATION OF PERIOD.

L. O. L. § 531, providing that the time for publication of legal notices shall be computed so as to exclude the first day of publication and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication, applies to the measurement of time for the publication of notices by cities or towns.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 19-23.]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 164 Pac. 567.

B. W. Macy and Grant Corby, both of Salem (Wm. H. Trindle, of Salem, H. D. Roberts, of Greeley, Colo., Rollin K. Page, of Salem, and W. T. Slater, of Portland, on the brief), for appellant. John H. Carson and Claire M. Inman, both of Salem (John A. Carson and Claire M. Inman, both of Salem, on the brief), for respondents.

HARRIS, J. In a petition for a rehearing filed in this and in the companion case of *Albert v. Salem*, the city contends that section 531, L. O. L., does not apply to the measurement of time for the publication of notices by cities or towns. The petitioner relies upon *Chung Yow v. Hop Chong*, 11 Or. 220, 221, 4 Pac. 326. The case cited is not applicable, for it refers to what is now known as section 539, L. O. L., a provision relating to the proof of the service of notices. As pointed out in the original opinion, section 531, L. O. L., has served as the standard by which to measure time, not only in actions and suits, but also in other proceedings. Notable illustrations may be found in *Rynearson v. Union County*, 54 Or. 181, 102 Pac. 785, and in *State ex rel. v. Macy*, 161 Pac. 111. To refuse to adhere by the standard fixed by that statute would be to ignore a rule that is firmly established by precedents.

The remainder of the argument found in the petition proceeds upon the theory that we held that the notice should have appeared in six successive issues of a daily newspaper. We did not rule that the charter required the notice to be printed and to appear in six successive issues of the newspaper. The original opinion points out that section 26 of the charter embraces two elements: (1) The period of publication; and (2) the manner of publication. The period of publication is measured by applying the rule established in section 531, L. O. L. This rule excludes the first day of publication in determining the period of time. For example, if a statute directed the publication of a notice for at least one week in a weekly newspaper, it would not be necessary to

print the notice in two successive issues of the weekly newspaper; and while one printing and one appearance of the notice would be enough, nevertheless the day on which the paper was actually printed and issued would not be counted in measuring the one week required. Again, if a statute required that a notice be published for not less than five successive weeks in a weekly newspaper, it would not be necessary for the notice to appear in six weekly issues, although, as stated in the original opinion, it is fair to assume that all would concede that the day of the first publication would be excluded in computing the period of five successive weeks. The rule that is applicable to weeks is likewise applicable to days. Our conclusions in the instant case are not out of joint with *Payette-Oregon S. Irr. Dist. v. Peterson*, 76 Or. 630, 635, 149 Pac. 1051; but, on the contrary, our conclusions here are in harmony with *O'Hara v. Parker*, 27 Or. 156, 39 Pac. 1004, as well as every other analogous precedent in this jurisdiction. In the original opinion (164 Pac. 567) it is distinctly stated, not that the notice should have appeared in the sixth issue of the newspaper, but that "the right to offer bids should have been kept open until the end of June 10th, and the bids should not have been opened until June 11th."

The petitions for a rehearing are denied.

McBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

HOLTZ et al. v. OLDS et al.

(Supreme Court of Oregon. June 19, 1917.)

1. INTEREST §1—ABSENCE OF CONTRACT—STATUTE.

In the absence of a contract to pay interest, the right to exact it must be found in the statutes.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 1.]

2. INTEREST §11—ACCRUAL OF RIGHT—NATURE OF LIABILITY.

Under L. O. L. § 6028, providing that the rate of interest shall be 6 per cent. "on money received to the use of another and retained beyond a reasonable time without the consent of another," etc., plaintiffs were not entitled to interest from date of deposit on money deposited with defendants as security for the purchase of stock under a contract void for uncertainty and recovered by plaintiffs in an action for money had and received, which was honestly litigated by defendants.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 22.]

3. INTEREST §3—STATUTES—CONSTRUCTION.

As interest statutes are in derogation of the common law, they must be strictly construed.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 3.]

Department I. Appeal from Circuit Court, Multnomah County; T. J. Cleeton, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 164 Pac. 583.

R. C. Nelson, of Portland (Beach, Simon & Nelson, of Portland, on the brief), for appellants. Chriss A. Bell, of Portland (Reed & Bell, C. W. Fulton, and T. M. Dye, all of Portland, on the brief), for respondents.

HARRIS, J. The original opinion awarded the plaintiffs a judgment for \$20,000 without interest. The plaintiffs insist that they are entitled to interest on \$20,000 from July 15, 1911. The defendants honestly and in good faith denied and litigated the right of plaintiffs to recover; and therefore, if the rule announced in *Baker County v. Huntington*, 48 Or. 593, 603, 87 Pac. 1036, 89 Pac. 144, is adhered to, it would prevent the allowance of interest. There is, however, a more persuasive reason for disallowing interest.

[1-3] In the absence of a contract to pay interest, the right to exact it must be found in the statutes. *Sorenson v. Oregon Power Co.*, 47 Or. 24, 34, 82 Pac. 10. Before the plaintiffs can successfully claim the allowance of interest, they must show that they come within the terms of section 6028, L. O. L., as it read prior to the amendment found in chapter 358, Laws 1917. The plaintiffs have not brought themselves within any clause of section 6028, L. O. L., as that statute is interpreted by *Sargent v. American Bank & Trust Co.*, 80 Or. 16, 42, 154 Pac. 759, 156 Pac. 431, unless they are within the clause which allows interest "on money received to the use of another, and retained beyond a reasonable time without the owner's consent, expressed or implied"; and hence we must first determine the meaning of the quoted clause before we can know whether it is available to the plaintiffs. Interest statutes are in derogation of the common law, and for that reason must be strictly construed. 22 Cyc. 1481. The action prosecuted by the plaintiffs assumed the form of the "equitable action" commonly designated as an action for money had and received. The basis of the claim of the plaintiffs was that the defendants had \$20,000 which in justice and good conscience ought to be paid to the plaintiffs; and it was upon this theory that the judgment was rendered against the de-

fendants. *Hoyt v. Paw Paw Grape Juice Co.*, 158 Mich. 619, 123 N. W. 529; *Todd v. Bettingen*, 109 Minn. 493, 124 N. W. 443; *Ulbrand v. Bennett*, 163 Pac. 445, 446; 27 Cyc. 854.

Applying the rule of strict construction, the language of the clause quoted from section 6028 is not sufficiently comprehensive to include the instant case. If A. pays money to B., to be given to C., the money has been received by B. to the use of C. From the moment of the payment to B. the money belongs to C., and not to B., for it was in fact received for the use of C., and at no time is B. the owner of the money. Interest can be allowed only when two elements combine: (1) The money must be received to the use of another; and (2) it must be retained beyond a reasonable time without the owner's consent. When the statute speaks of money received to the use of another, it means money which in fact is received to the use of another; it does not include money which, by the aid of a legal fiction interposed after the actual receipt of the money, is treated as money received to the use of another; it means money that is received to the use of another, as distinguished from money which is merely regarded as money received to the use of another. That this interpretation is not unduly narrow is confirmed by the words "and retained beyond a reasonable time, without the owner's consent." The statute contemplates that the person who actually has the money is at no time the owner, but he has only received the money to the use of another, who is in truth the owner during all the time. When the statute speaks of the consent of the owner, it necessarily signifies that some person other than the holder of the money is in fact, and not by reason of a fiction, the owner. While the conclusions expressed in *Graham v. Merchant*, 43 Or. 294, 311, 72 Pac. 1088, have neither been overlooked nor ignored, nevertheless a strict construction of the interest statute will not permit the plaintiffs to recover interest.

The petition is denied.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

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It Supplements the Decennial Digest, the Key-Number Series and
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ACCOUNT, ACTION ON.

¶2 (Or.) An action against city by its contractors to erect dam to recover on quantum meruit for excess cost of doing work incurred on account of city's increasing amount of excavation and delaying work, was not action on account.—Hayden v. City of Astoria, 164 P. 729.

¶6(2) (Or.) There is an account stated and settlement barring action for overtime, where an employé each month signs a time check stating amount of time and amount due, and receives payment without protest or objection.—Sumpter v. St. Helens Oreosoting Co., 164 P. 708.

ACCOUNT STATED.

¶6(2) (Wash.) Whether an account has been stated is largely a question of intent, and if it was intended to state the account and the balance was actually struck, and one paid and the other accepted without protest or objection of any kind, it is an account stated.—Austin v. Union Lumber Co., 164 P. 245.

Where seller of logs, knowing what his scale showed, went to office of buyer and was given

a statement of accounts, showing what their scale showed, together with a check for the amount due, which he accepted without protest other than that they scaled the logs pretty close, there was an account stated.—Id.

¶19(3) (Wash.) Evidence held insufficient to sustain recovery for price of logs in excess of account as stated, on theory that the seller's scaling, and not the buyer's, was correct.—Austin v. Union Lumber Co., 164 P. 245.

¶20(1) (Or.) Acts of city's contractors to erect dam in marking monthly estimates of their work O. K. over their signature and in accepting 90 per cent. of contract price, held not accounting month by month as matter of law.—Hayden v. City of Astoria, 164 P. 729.

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II. NATURE AND FORM.

¶28 (Wash.) Where a person wrongfully converts property of another, injured party may sue him as wrongdoer, or, waiving the tort, recover value of property as on implied contract.—Wylde v. Schoening, 164 P. 752.

¶32 (Cal.App.) Under Code Civ. Proc. §§ 509-520, where complaint showed plaintiff entitled to recover from sheriff money taken from him wrongfully under execution, judgment for plaintiff was proper, though complaint did not describe money sufficiently to entitle plaintiff to its return in specie in action in claim and delivery; these being no forms of action in California.—Hillyer v. Eggers, 164 P. 27.

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¶7 (Idaho) Under Laws 1909, pp. 38-41, §§ 1, 2, benevolent society may not consent to adoption of children where they are not surrendered to it by their parents, but are committed to it as guardian by the probate court in proceeding taking them from their parents.—*Jain v. Priest*, 164 P. 364.

Under Rev. Codes, § 2703, probate judge cannot make order of adoption of children without consent of their parents on ground that parents have been judicially deprived of them on account of parents' neglect, unless it appears of record that such is the fact.—*Id.*

Probate judge may not make an order of adoption of children without consent of parents on ground that they have been judicially deprived of their custody on account of neglect, unless record before him shows that the parents have been deprived of custody by a final judgment.—*Id.*

Order of probate court temporarily depriving parents of custody of their children, with leave to reclaim them on proper showing of reform in conduct, does not dispense with necessity for parents' consent to an adoption proceeding.—*Id.*

Order of probate court taking children from parents' custody and committing them to custody of benevolent society as guardian *held* not to permanently and absolutely deprive parents of custody, so as to dispense with necessity of their consent to adoption proceedings.—*Id.*

ADULTERY.

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ADVERSE POSSESSION.

See Limitation of Actions; Waters and Water Courses, ¶138, 146.

I. NATURE AND REQUISITES.

(E) Duration and Continuity of Possession.

¶54 (Cal.) Under Code Civ. Proc. § 325, providing that to constitute adverse possession there must be uninterrupted and continuous possession for five years, to authorize judgment for plaintiff and if suit begun before is premature, although it is not concluded till expiration of five years.—*Van Calbergh v. Easton*, 164 P. 1113.

(F) Hostile Character of Possession.

¶60(4) (Wash.) Where, after foreclosure of mortgage covering land in defendant's possession, he reasserted ownership adverse to record owners, who were advised of fact, he acquired title to land by adverse possession; requisite period having elapsed.—*Sunde v. Hanson*, 164 P. 617.

¶60(5) (Or.) The inclosure of a part of a street for some 17 years does not establish title by adverse possession under the 10-year statute, where the holding was permissive except for perhaps the last 6 years.—*McCoy v. Thompson*, 164 P. 589.

AFFIDAVITS.

See Attachment, ¶77-125, 247; Depositions; Garnishment, ¶88; Judgment, ¶159; Mechanics' Liens, ¶154; New Trial, ¶150; Pleading, ¶291.

AFTER-ACQUIRED TITLE.

See Indians, ¶15.

AGENCY.

See Principal and Agent.

AIDER BY VERDICT.

See Pleading, ¶432.

ALIENATION.

See Indians, ¶15.

ALIENATION OF AFFECTIONS.

See Husband and Wife, ¶333, 334; Witnesses, ¶58.

ALIMONY.

See Divorce, ¶210, 214.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

¶17 (Wash.) A material alteration of a mortgage by mortgagee invalidates mortgage as to mortgagee or assignee, even though innocent parties.—*Bradbury v. Nethercutt*, 164 P. 194.

AMBIGUITIES.

See Evidence, ¶450, 462.

AMENDMENT.

See Appeal and Error, ¶889, 895; Depositions, ¶81; Judgment, ¶313; Mechanics' Liens, ¶158; Municipal Corporations, ¶46; Pleading, ¶236-264; Statutes, ¶16.

AMOUNT IN CONTROVERSY.

See Justices of the Peace, ¶44.

ANIMALS.

See Commerce, ¶35.

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(Kan.) Registration of breeding animals is registration conformably to Gen. St. 1909, §§ 9075, 9078-9080, which adopts as the standard the stud books of only the horse pedigree registry associations recognized by United States Department of Agriculture.—*Everhart v. Welch*, 164 P. 1098.

¶27 (Mont.) Where parties to lease of sheep construed contract so as to express their intentions and acted in accordance therewith, court will adopt construction they placed upon it as to which party had title to lambs sold by lessee.—*National Bank of Gallatin Valley v. Ingle*, 164 P. 535.

Under lease of band of sheep, lessee's title became vested in particular half of lambs or their proceeds when division was effected by his sale and delivery to third person on date after date set by lease contract for division.—*Id.*

¶93 (Utah) Under Comp. Laws 1907, § 20, owner of sheep who directed his herder to drive them or permit them to trespass on plaintiff's uninclosed lands is liable.—*Mower v. Olsen*, 164 P. 482.

⚡100(3) (Utah) Complaint charging trespass of animals held sufficient as against general demurrer without allegations of willfulness.—*Mower v. Olsen*, 164 P. 482.

⚡100(4) (Utah) In action against sheep owner for damages for trespass of sheep on plaintiff's property, evidence held to warrant finding that trespass was willful and intentional.—*Mower v. Olsen*, 164 P. 482.

ANSWER.

See Pleading, ⚡128, 142.

APPEAL AND ERROR.

See Certiorari; Costs, ⚡232-260; Courts, ⚡185; Criminal Law, ⚡1086-1186; Exceptions, Bill of; Judges, ⚡25; Jury, ⚡17.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⚡14(4) (Utah) Where codefendant appeals, another codefendant may not assign cross-errors against party in whose favor judgment appealed from was rendered, and secure modification of judgment in so far as it affects him; proper procedure is to file cross-appeal from judgment.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 858.

To modify independent portion of decree not touched by appeal is not office of mere cross-assignments, but province of cross-appeal.—*Id.*

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

⚡19 (Idaho) Costs, being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal.—*Coburn v. Thornton*, 164 P. 1012; *Bennett v. Same*, *Id.* 1013.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

⚡69(1) (Idaho) Laws 1913, c. 16, and amendments do not provide appeal from order of district court declaring a district duly organized after first hearing on petition therefor, and such order does not finally adjudicate rights involved in proceeding thereunder.—*In re Organization of Drainage Dist. No. 1 of Ada County*, 164 P. 1018.

⚡82(3) (Kan.) Order setting aside default judgment is not reviewable while action is still pending in district court.—*Hill v. Sweet*, 164 P. 1078.

⚡82(4) (Or.) Order providing that plaintiff shall pay costs of a prior suit within 90 days, and in default thereof his suit shall be dismissed, is interlocutory and not appealable pending expiration of 90 days.—*Windsor v. Holloway*, 164 P. 1177.

(E) Nature, Scope, and Effect of Decision.

⚡113(3) (Idaho) Order of district court setting aside a default entered under Rev. Codes, § 4360, subd. 1, and granting leave to defendant to answer or plead, is not an appealable order under such section 4807.—*Omaha Structural Steel Works v. Lemon*, 164 P. 1011.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

⚡151(3) (Cal.) The executor may appeal as a party aggrieved from revocation of probate.—*In re Collins' Estate*, 164 P. 1110.

Code Civ. Proc. § 1290, authorizing executor named in a will to petition to have it proved, makes him as trustee for the beneficiaries a party aggrieved who may appeal from order refusing probate.—*Id.*

⚡151(6) (Ok.) The surety on guardian's bond when aggrieved may appeal to the district court from a decree of the county court settling guardian's final account, though not a party to the action.—*In re Cartwright*, 164 P. 1148.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⚡171(1) (Ok.) When parties have gone to trial upon one theory of case, they will not be permitted on appeal to have the case considered upon another.—*Brown v. Tull*, 164 P. 785.

(B) Objections and Motions, and Rulings Thereon.

⚡201(1) (Utah) It was plaintiff's duty to require court to properly admonish jury as to purpose of viewing premises, or to object to admonition given if not deemed sufficient.—*P. A. Sorensen Co. v. Denver & R. G. R. Co.*, 164 P. 1020.

⚡216(1) (Cal.App.) Appellant may not for first time on appeal take advantage of trial court's failure to give some specific instruction, if he presented no such instruction to trial court.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

⚡216(3) (Ariz.) An instruction on counterclaiming defendant's measure of damages was not reviewable, where plaintiff neglected at the proper time to request a proper instruction as to damages.—*Wooley v. Locarnini*, 164 P. 319.

⚡237(2) (Or.) A party who fails to move to strike out an answer to a question cannot complain that the testimony was admitted.—*White v. East Side Mill & Lumber Co.*, 164 P. 736.

⚡237(2) (Utah) Where testimony which was incompetent was also unresponsive to question, defendant need not, such testimony having been elicited by plaintiff, move to strike answer in order to preserve point for review, plaintiff alone being entitled to object that testimony was unresponsive.—*Gleason v. San Pedro, L. A. & S. L. R. Co.*, 164 P. 484.

⚡240 (Nev.) The dismissal of an action without affording plaintiff an opportunity to amend cannot be complained of where there was no application for a modification of the order or for time to amend.—*Keenan v. Keenan*, 164 P. 351.

(C) Exceptions.

⚡263(1) (Wash.) Although an instruction was not as complete as it should have been, it will not be considered where no exception was taken.—*Ennis v. Banks*, 164 P. 58.

⚡274(5) (Utah) Where only exception, was to one portion of an instruction, complaints as to other portions urged for first time in appellant's brief cannot be considered.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

(D) Motions for New Trial.

⚡289 (Kan.) Under Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), error cannot be predicated upon the rejection of testimony which is not produced at the hearing of the motion for a new trial.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

⚡304 (Wyo.) Where defendant's motion for new trial was not acted upon by trial court, it is not proper for appellate court to consider points discussed with reference to right of plaintiff to recover upon his evidence.—*Campbell v. Weller*, 164 P. 881.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⚡345(1) (Cal.) Although Code Civ. Proc. § 1715, provides that an appeal must be taken within 60 days, an appeal from an order ad-

mitting a will to probate is timely if taken within 30 days after determination of a motion for a new trial in view of section 939 as amended in 1915 (St. 1915, p. 205).—*In re Seiler's Estate*, 164 P. 401.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§362(1) (Ok.). Where petition in error presents no question for consideration except court's action on certain motions which are not reviewable, because not brought into the record either by bill of exceptions or case-made, motion to dismiss must be sustained.—*Dickson v. McDuffee*, 164 P. 476.

§362(3) (Ok.). Cross-petition in error, assigning as error the overruling of plaintiff's motion for new trial on ground that judgment was not sustained by evidence, might be amended after time in which under Rev. Laws 1910, § 4971, cross-appeal must be filed, by adding assignment that judgment was not supported by evidence.—*Jones v. Jones*, 164 P. 463.

(D) Writ of Error, Citation, or Notice.

§414 (Utah) Where joint judgment was entered against two defendants, and one of them, appealing alone, served plaintiff with notice of appeal, but failed to serve such notice upon its codefendant, appeal will be dismissed.—*Mallett v. Velie Motor Car Co.*, 164 P. 877.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

§439 (Cal.) Appeal taken by defendants removed case from jurisdiction of trial court, so that it had no power to set aside judgment pending appeal.—*Kinard v. Jordan*, 164 P. 894.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§501(4) (Ok.). Where the case-made fails to show exceptions to instructions given, errors assigned upon the giving of such instructions will not be considered.—*Henthorn v. Tidd*, 164 P. 783.

(B) Scope and Contents of Record.

§520(1) (Ok.). Motions presented to the trial court, rulings thereon and exceptions thereto are not properly a part of the record.—*Dickson v. McDuffee*, 164 P. 476.

§520(5) (Utah) Whether motion for nonsuit should have been sustained will not be reviewed, unless it is apparent from record that motion was made before trial court and properly included in record on appeal.—*Russell v. Watkins*, 164 P. 867.

§520(5) (Utah) Motion for nonsuit not shown by the record cannot be considered on appeal.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

§522(1) (Ok.). Trial court's order sustaining objection to defendant's evidence is a part of the record proper, and error therein is reviewable upon transcript, accompanied by petition in error duly presenting it.—*Boyd v. Winte*, 164 P. 781.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§549(5) (Ok.). Motions presented to the trial court, rulings thereon, and exceptions thereto can only be preserved and presented for review by incorporating them in bill of exceptions or case-made.—*Dickson v. McDuffee*, 164 P. 476.

§553(2) (Ok.). Error in sustaining a demurrer to a petition may be presented upon transcript.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 965.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§568 (Ok.). Defendant has a right to notice of the time and place of settlement of a case-made, and where no such notice is given or waived the case-made is fatally defective.—*Keenan v. Chastain*, 164 P. 1145.

The suggestion of amendments to a case-made where the record shows that one of them was disallowed by the trial court, without showing its materiality, is not a waiver of notice of the time and place of settlement.—*Id.*

(F) Making, Form, and Requisites of Transcript or Return.

§605 (Cal.App.) Supreme Court rule 7 (119 Pac. xi), regulating size, arrangement, indexing, etc., of transcripts, is intended to secure records of uniform size, arranged in convenient form, and an appeal not complying with such rule and misdescribing judgment appealed from will be dismissed.—*O'Dea v. Roberts*, 164 P. 1135.

§607(1) (Cal.) The provisions of Code Civ. Proc. §§ 953a, 953b, 953c, relating to preparation of transcript on appeal, are not jurisdictional.—*Fisher v. Oliver*, 164 P. 800.

§608(1) (Cal.App.) Where judgment appealed from was entered April 18th, a record containing a judgment rendered April 26th, which clerk certified on April 28d to be a true copy, etc., is insufficient, and in connection with failure to observe Supreme Court rule 7 (119 Pac. xi), necessitates dismissal of appeal.—*O'Dea v. Roberts*, 164 P. 1135.

(G) Authentication and Certification.

§612(5) (Idaho) Where transcript on appeal does not contain a certificate that papers therein are all the records, papers, etc., considered by judge making the order, as required by Rev. Codes, § 4821, and Supreme Court rule 24 (153 P. xi), appeal will be dismissed under rule 27 (153 P. xi) on court's own motion.—*Walsh v. Niess*, 164 P. 528.

(H) Transmission, Filing, Printing, and Service of Copies.

§628(3) (N.M.) Appellant's failure to file transcript of record within time specified by Code 1915, § 4490, is waived, where no advantage thereof is taken until after transcript has been filed.—*Herbst v. Rogers*, 164 P. 827.

§629 (Mont.) Under direct provisions of Supreme Court rule 4, subd. 3 (44 Mont. xxvii, 123 Pac. x), an appeal will not be dismissed for failure to file record within time required, where record is filed before motion to dismiss was filed and notice thereof given to appellee.—*Huffine v. Lincoln*, 164 P. 888.

(K) Questions Presented for Review.

§701(1) (Wyo.) In will contest in absence of the evidence to enable court to determine whether a statement "that uncertainty or unsoundness of mind must be established with reasonable certainty" was in fact prejudicial, court will not order reversal.—*Wood v. Wood*, 164 P. 844.

In absence of the evidence, appellate court will not reverse on ground that instructions were argumentative.—*Id.*

In absence of the evidence, *held*, that appellate court will not reverse on ground that instruction that influence is not ordinarily considered undue which arises out of "flattery."—*Id.*

§708 (Ariz.) The objection that a judgment was modified without notice cannot be raised on appeal from the modified judgment only, where the record does not affirmatively show such lack of notice.—*Ives v. Sanguinetti*, 164 P. 435.

XI. ASSIGNMENT OF ERRORS.

§719(3) (Ok.). The fundamental question of jurisdiction, first, of the appellate court, and then of the court from which the record comes, presents itself on every writ of error or appeal,

and must be answered by the court, whether propounded by counsel or not.—*Keenan v. Chastain*, 164 P. 1145.

—719(10) (Okla.) Errors in trial of issues upon a petition in replevin under Rev. Laws 1910, § 4701, claiming title and possession of attached property, are not reviewable unless trial court's overruling of motion for a new trial is assigned as error.—*Millus v. Lowrey Bros.*, 164 P. 663.

—721(1) (Utah) Where several appellants jointly assign errors, an assignment bad as to one of them must be held bad as to all.—*McGuire v. State Bank of Tremonton*, 164 P. 494.

—724(2) (Or.) Assignments of error containing a statement of what was done, plus the complaints made by appellants, are sufficiently specific, definite, and certain.—*Oregon Art Tile Co. v. Hegele*, 164 P. 548.

—733 (Or.) Under rule of court, in view of other portions of record, *held*, that plaintiffs' assignment of error that court erred in not rendering judgment for plaintiffs in larger amount was sufficient.—*Hayden v. City of Astoria*, 164 P. 729.

—747(2) (Utah) In an action to enjoin collection of improvement tax, where city did not appeal from a portion of judgment holding void tax assessed in excess of contract price, and no cross-error is assigned with respect thereto, correctness of such ruling is not before appellate court for review.—*Gwilliam v. Ogden City*, 164 P. 1022.

—747(4) (Utah) To modify independent portions of decree not touched by appeal is not the office of cross-assignments.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 858.

XII. BRIEFS.

—771 (Wyo.) Failure to file briefs in time *held* not excused by resident attorney's sickness and absence and nonresident attorney's lack of knowledge as to condition of proceedings in error.—*Boner v. Fall River County Bank*, 164 P. 1140.

—773(2) (Cal.App.) Where time for filing appellant's brief had expired when notice of motion to dismiss was served and filed, respondent is entitled to dismissal.—*Pierce v. Employers' Indemnity Exch.*, 164 P. 403.

—773(2) (Okla.) Where plaintiff in error fails to file a brief as required by Supreme Court rule 7 (38 Okl. vi, 95 Pac. vi), the appeal will be dismissed for want of prosecution.—*Saddler v. Scott*, 164 P. 778; *Saddler v. Leahy*, 164 P. 778.

—773(2) (Okla.) On failure of plaintiff in error to file and serve brief in compliance with Supreme Court rule 7 (38 Okl. vi, 137 Pac. ix), his appeal will be dismissed.—*Purvine v. Akers Tp.*, 164 P. 973.

—773(3) (Wash.) Where appellants' opening brief was served on July 6th, and was filed in Supreme Court next day, and respondent's brief was served on August 4th and filed on August 10th, and appellants' reply brief was served on August 28th and filed on August 31st, motion made on hearing of appeal on November 15th to dismiss appeal because appellants' briefs were not served within time required by law should not have been granted.—*Bogdan v. Pappas*, 164 P. 208.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

—780(1) (Or.) That costs on former appeal have not been paid does not entitle the defendant to dismissal of the appeal in the absence of showing that the costs cannot be collected.—*White v. East Side Mill & Lumber Co.*, 164 P. 736.

—781(1) (Idaho) Where appeal from denial of change of venue is prosecuted on ground that

trial judge was disqualified, and such disqualification has ceased by reason of his nonincumbency, court taking judicial notice thereof, may dismiss the appeal.—*Coburn v. Thornton*, 164 P. 1012; *Bennett v. Same*, *Id.* 1013.

—786 (Ariz.) An appeal taken for delay will be dismissed and damages awarded to appellee.—*Williams v. West Pub. Co.*, 164 P. 317.

—801(1) (Okla.) The Supreme Court may grant a rehearing of an overruled motion to dismiss an appeal.—*Keenan v. Chastain*, 164 P. 1145.

—802 (Okla.) It is not necessary for court to state its reasons on overruling a motion to dismiss on appeal because certain orders, as contained in the case-made, did not contain the filing marks and were not shown to have been entered upon journal of lower court.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 965.

XV. HEARING AND REHEARING.

—832(4) (Kan.) On petition for rehearing in appellate court, it is too late to first raise question that defendants' answer was not verified, when it was not disclosed by arguments nor in brief when case was presented, and where record does not show it raised in justice or district court.—*Blair v. McQuary*, 164 P. 282.

XVI. REVIEW.

(A) Scope and Extent in General.

—842(1) (Cal.) Where a liability policy insured against sums paid toward satisfying judgments against insured, whether insured's giving a note for a judgment upon understanding that it is surrendered for an assignment of insured's cause of action against insurer constituted a bona fide payment *held* a question of fact determined by the jury.—*Rodgers v. Pacific Coast Casualty Co.*, 164 P. 1115.

—864 (Cal.) Code Civ. Proc. § 939, subd. 1, providing that exceptions to "decisions," defined by section 1033, because not supported by evidence, may be considered on appeal, applies to appeals taken under section 940 as well as those under section 941a, 941b, 941c.—*Fisher v. Oil-ver*, 164 P. 800.

(C) Parties Entitled to Allege Error.

—880(1) (Mont.) An election contestant, appealing from judgment dismissing his contest and awarding the contestee attorney's fees, is not in position to complain that his sureties have not had their day in court; they not having appealed.—*Doty v. Reese*, 164 P. 542.

—882(12) (Cal.) Party requesting erroneous instruction cannot complain thereof.—*Walsh v. Standart*, 164 P. 795.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

—889(2) (Or.) Where error is not assigned to the order of the lower court in permitting matter to be set up in a supplemental complaint which should have been pleaded by way of amendment to original complaint, appellate court will treat such supplemental complaint as an amendment of original complaint properly allowed.—*Hotrick v. Gerlinger Motor Car Co.*, 164 P. 379.

—895(2) (Or.) Findings in equity case, though supported by evidence, are not conclusive on appeal, where trial is *de novo*.—*Metropolitan Investment & Improvement Co. v. Schouweiler*, 164 P. 370.

(E) Presumptions.

—907(3) (Utah) Where an appeal is based on the judgment roll without a bill of exceptions, the presumption is that the findings were justified by the evidence.—*McGuire v. State Bank of Tremonton*, 164 P. 494.

—914(1) (Ariz.) On appeal from a judgment claimed to have been modified without notice,

such lack of notice will not be presumed from mere silence of the record on that point.—*Ives v. Sanguinetti*, 164 P. 435.

⇒926(5) (Kan.) In the absence of instruction, it may be assumed that the court advised the jury that certain evidence received was confined to the purpose for which it was competent.—*State v. Cowan*, 164 P. 183.

⇒928(1) (Cal.App.) In view of Code Civ. Proc. § 475, where complaint is made of instructions, but all the instructions are not included in the record, no error is shown.—*Robinson v. Smith-Booth-Usher Co.*, 164 P. 29.

⇒928(2) (Cal.App.) Where instructions are omitted from record, appellate court must presume that jury was properly instructed as to law applicable to case.—*Dilger v. Whittier*, 164 P. 49.

⇒930(2) (Cal.App.) Where court instructed jury that expenses of care and nursing "are subjects of direct proof and are to be determined * * * on the evidence," it will be assumed that they followed such instructions.—*Abalas v. Consolidated Const. Co.*, 164 P. 19.

⇒932(1) (Cal.App.) Where instructions as to assessing an employee's damages for personal injuries in proportion to his contributory negligence as provided by St. 1911, p. 796, are not complained of, it will be assumed that jury properly assessed damages.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

⇒933(4) (Cal.App.) Where trial court, granting motion for new trial, does not limit order to any particular ground stated, it is duty of appellate court to sustain it if it can be upheld on any ground embodied in notice of intention.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 53.

On appeal from order granting defendants new trial in action in eminent domain, where there was wide variance between witnesses for parties on question of value, appellate court can presume, in support of order, that a reason impelling trial court to allow motion was that evidence was insufficient to justify verdict.—*Id.*

⇒934(2) (Okla.) When judgment on motion to discharge attachment traversing the existence of the grounds therefor follows a general verdict, and it does not appear that judge treated it as merely advisory and gave judgment on his own findings, judgment will be presumed to be based on such verdict.—*Millus v. Lowrey Bros.*, 164 P. 663.

(F) Discretion of Lower Court.

⇒946 (N.M.) In all matters within the discretion of an inferior court and upon which it has acted judicially, the Supreme Court, notwithstanding its powers under Const. art. 6, § 3, will refuse to review its proceedings or rulings without a showing of gross abuse of discretion or inadequacy of remedy by appeal.—*State v. Reynolds*, 164 P. 830.

⇒948 (Mont.) The applicant for appointment of a receiver must, after denial of his motion, assume the burden of showing an abuse of the judicial discretion of the trial court.—*Montana Ranches Co. v. Dolan*, 164 P. 806.

⇒954(1) (Okla.) Under Rev. Laws 1910, § 5236, where it appears on review of order for injunction that plaintiff was not entitled thereto, and that it should not have been granted, the order will be reversed.—*Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, 164 P. 671.

⇒959(1) (Cal.App.) Amendment of complaint is within discretion of court, and is not ground for reversal, except where abuse of discretion appears.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

⇒959(4) (Kan.) After a case has been called for trial, it is within trial court's judicial discretion to refuse permission to amend pleadings so as to present new issues; and unless there has been an abuse of discretion, a new trial will

not be ordered.—*Long v. Kansas City, M. & O. R. Co.*, 164 P. 175.

⇒973 (Cal.App.) An order directing a verdict for defendant after the entire case has been presented will not be reversed, unless the court abused its discretion.—*Lynch v. Pacific Electric Ry. Co.*, 164 P. 20.

⇒977(1) (Wash.) Supreme Court cannot interfere with trial court's exercise of discretion in ruling on motion for new trial, unless there has been clear abuse of discretion, unless discretion has not been exercised, or unless action of trial court is based on misconception of law.—*Skarlatos v. Brice*, 164 P. 939.

⇒979(1) (Cal.App.) Granting or denying of new trial on ground that evidence is insufficient to sustain verdict, where there is substantial conflict, rests so fully in discretion of trial court that its action is conclusive upon appellate court, unless it appears that there has been abuse of discretion.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 53.

⇒979(2) (Cal.App.) Appellate Court cannot weigh testimony of witnesses in determining whether trial court abused its discretion in granting new trial for insufficiency of evidence.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 53.

⇒979(5) (Wash.) An order granting a new trial because of inadequate damages cannot be reviewed as an abuse of discretion, where the evidence thereon is not available.—*Nelson v. Pacific Coast Casualty Co.*, 164 P. 594.

⇒981 (Cal.App.) To warrant reversal of order denying or granting new trial on ground of newly discovered evidence, evidence must clearly show abuse of discretion by trial court.—*Fiori v. Agnew*, 164 P. 899.

⇒984(1) (Utah) Where Comp. Laws 1907, § 3341, left the matter of allowing costs within the trial court's discretion, the court's action will not be disturbed except for abuse of discretion.—*Smith v. Gilbert*, 164 P. 1026.

(G) Questions of Fact, Verdicts, and Findings.

⇒994(3) (Cal.) If witnesses compared notes with plaintiff and exhibited a partisan feeling in testifying, that was for consideration of the trial judge, and not for the court on appeal.—*Johnson v. V. D. Reduction Co.*, 164 P. 1119.

⇒994(3) (Mont.) The determination of the trial court on the credibility of witness cannot be interfered with, unless his testimony is characterized by such inherent improbability as in effect to destroy it.—*Parchen v. Chessman*, 164 P. 531.

⇒997(3) (N.M.) Where each party at the close of the evidence requests a directed verdict and court directs a verdict for one, the only questions on appeal are whether there was substantial evidence supporting court's conclusion and whether there was any error of law at the trial.—*De Burg v. Armenta*, 164 P. 838.

⇒1001(1) (Wash.) Where case was tried by jury, power of Supreme Court is exhausted when it has found evidence or justifiable inferences from evidence upon which reasonable minds might reach different conclusions.—*Skarlatos v. Brice*, 164 P. 939.

⇒1002 (Cal.App.) Appellate court is bound by the verdict where testimony was conflicting.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

⇒1002 (Or.) A jury finding on conflicting evidence will not be disturbed on appeal, if there is any evidence to sustain it.—*Crowder v. Yovich*, 164 P. 576.

⇒1002 (Utah) Where there is substantial conflict in the testimony, it is the province of the jury, and not the appellate court, to determine the weight of the evidence.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

⇒1002 (Utah) Where a verdict is based on conflicting evidence, it will not be disturbed.—*P. A. Sorensen Co. v. Denver & R. G. R. Co.*, 164 P. 1020.

⇒1002 (Utah) Though findings of jury on conflicting evidence as between school board and contractor's surety and findings of judge as between a materialman and the contractor's surety were in conflict, there having been separate trials, *held*, that the Supreme Court could not interfere.—*Board of Education of Salt Lake City v. Wright-Osborn Co.*, 164 P. 1033.

⇒1004(1) (Cal.) Verdict will not be set aside on ground of excessive damages, where amount awarded is not without substantial support in evidence.—*Walsh v. Standart*, 164 P. 795.

⇒1004(1) (Colo.) Verdict supported by sufficient testimony cannot be disturbed on appeal as excessive.—*Southwestern Surety Ins. Co. v. Miller*, 164 P. 507.

⇒1004(2) (Wash.) Where the evidence left ample room for difference of opinion, *held*, that the award of damages from fire could not be disturbed as being excessive.—*Sandberg v. Cavanaugh Timber Co.*, 164 P. 200.

⇒1005(1) (Kan.) Verdict approved by the trial court will not be disturbed.—*Farmers' Nat. Bank of Lincoln v. Francis*, 164 P. 146.

⇒1005(3) (Kan.) Verdict for plaintiff on conflicting evidence approved by the trial court would not be disturbed.—*Curtiss v. Reaume*, 164 P. 1089.

⇒1005(3) (Mont.) Verdict on conflicting evidence approved by the court in denying new trial will not be disturbed.—*Savage v. Boyce*, 164 P. 887.

⇒1008(1) (Cal.App.) Where the trial court who heard oral testimony and saw witnesses believed that oral agreement sued on was substituted for a written one, the judgment will not be disturbed.—*Keeley v. Erbe*, 164 P. 906.

⇒1008(1) (Or.) On appeal at law, the findings of the trial court as to the facts are conclusive.—*Maryland Casualty Co. v. Klaber's Estate*, 164 P. 574.

⇒1009(4) (Okl.) On appeal in equity court's findings of fact may not be set aside unless from entire record they appear to be clearly against the weight of the evidence.—*Thomas v. Halsell*, 164 P. 458.

⇒1010(1) (Cal.App.) Findings with any evidence to support them will not be disturbed.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

⇒1010(1) (Colo.) Findings of fact supported by evidence will not be disturbed on appeal.—*Ft. Collins Nat. Bank v. Whitton*, 164 P. 309.

⇒1010(1) (Kan.) Where error assigned is that findings and judgment are contrary to the evidence, it is only necessary to consider whether there is sufficient evidence on which judgment is based.—*Brunington v. Wagoner*, 164 P. 1057.

The trial court's findings of fact, based upon competent evidence, are accepted by the Supreme Court as true, and that there was contradictory evidence, which, if believed by the trial court, would have compelled different findings and judgment, is of no consequence.—*Id.*

⇒1010(1) (Or.) Where findings are by the court, the evidence will not be examined except to ascertain whether any of it is competent to support the findings.—*Meagher v. Eilers Music House*, 164 P. 373.

⇒1010(1) (Or.) In trying case without jury, circuit court exercised functions of jury, and its findings, having force of special verdict, and entitling plaintiffs, in whose favor they were, to benefit of any conclusions of law arising from them, are binding on Supreme Court, unless wholly without support in evidence.—*Hayden v. City of Astoria*, 164 P. 729.

⇒1011(1) (Cal.) Findings of the trial court, based on conflicting evidence, will not be dis-

turbed on appeal.—*Del Monte Ranch Dairy v. Bernardo*, 164 P. 628.

⇒1011(1) (Cal.) Trial court's findings of fact, on which evidence is in sharp and substantial conflict, will not be disturbed.—*O'Brien v. King*, 164 P. 631.

⇒1011(1) (Cal.App.) Discretion of trial court in resolving conflicting evidence will not be reviewed on appeal.—*Colquhoun v. Fursman*, 164 P. 10.

⇒1011(1) (Cal.App.) Where the evidence was conflicting, a finding by the trial court cannot be reviewed.—*Clark v. Berlin Realty Co.*, 164 P. 333.

⇒1011(1) (Or.) Finding on conflicting testimony made by circuit court trying case without jury is binding on Supreme Court.—*Hayden v. City of Astoria*, 164 P. 729.

⇒1011(1) (Utah) Where there is conflict in testimony with substantial evidence in record to support findings of trial court, judgment will be affirmed.—*McCarrick v. Lenox Mining Co.*, 164 P. 478.

⇒1011(1) (Utah) Though findings of jury on conflicting evidence as between school board and contractor's surety and findings of judge as between a materialman and the contractor's surety were in conflict, there having been separate trials, *held* that the Supreme Court could not interfere.—*Board of Education of Salt Lake City v. Wright-Osborn Co.*, 164 P. 1033.

⇒1011(1) (Wash.) Where controversy involved findings on questions of fact upon conflicting oral testimony, and review of evidence does not warrant holding that it preponderates against findings, judgment will be affirmed.—*Mottinger v. Reagan*, 164 P. 595.

⇒1012(1) (Mont.) A trial court's finding of fact will be accepted, unless opposed to the clear preponderance of the evidence.—*Loud v. Hanson*, 164 P. 544.

⇒1015(1) (Kan.) On grant of new trial because verdict is not sustained by the evidence and for error in overruling a demurrer to the evidence, the order will not be set aside on the ground that the court did not err in overruling the demurrer.—*Walsh v. Joplin & Pittsburg Ry. Co.*, 164 P. 184.

⇒1015(2) (Kan.) An order granting a new trial because the verdict is not sustained by the evidence will not be set aside where the evidence is conflicting.—*Walsh v. Joplin & Pittsburg Ry. Co.*, 164 P. 184.

(H) Harmless Error.

⇒1032(1) (Cal.App.) It devolves upon an appellant to show prejudicial error.—*Dilger v. Whittier*, 164 P. 49.

⇒1032(2) (Cal.App.) In consolidated action of unlawful entry and detainer and for moneys had and received, landlord's showing of alleged error as to exclusion of his own and surveyor's testimony as to extent of work done by defendant, where surveyor's maps were admitted, *held* insufficient.—*Kloster v. Hawn*, 164 P. 402.

⇒1033(4) (Or.) Where court should have instructed that plaintiff insured was owner of property burned, defendant insurance company cannot complain because question was left to jury.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

⇒1039(2) (Wash.) In an action to quiet title, refusal to require plaintiff to separately state his causes of action on two instruments sought to be set aside is not reversible error, where the execution of the two instruments were made for a single and continuous purpose.—*Bradbury v. Nethercutt*, 164 P. 194.

⇒1040(2) (Nev.) Where plaintiff's complaint was based on a record of a judgment rendered in a foreign state, sustaining of demurrer and dismissal of complaint without affording op-

portunity to amend *held* harmless, though contrary to better practice.—*Keenan v. Keenan*, 164 P. 351.

⇒1040(10) (Utah) Overruling of demurrer to complaint on ground of uncertainty and ambiguity *held*, in view of nature of action, etc., to be harmless.—*Gleason v. San Pedro, L. A. & S. L. R. Co.*, 164 P. 484.

⇒1040(16) (Wash.) Where amendment to the complaint, made during trial, supplied the defects complained of by demurrer, defendant, who declined the court's offer to grant continuance, made when the defendant objected to the trial amendment, could not complain of the defects in the complaint on appeal.—*Skarlatos v. Brice*, 164 P. 939.

⇒1042(2) (Kan.) Judgment will not be reversed because allegations are stricken out of petition, where evidence to prove those allegations was properly introduced under remaining allegations.—*Henning v. Wichita Natural Gas Co.*, 164 P. 297.

⇒1046(3) (Kan.) Ordinarily judgment will not be reversed for error in placing burden of proof in trial by court without jury, where each party has ample opportunity to introduce evidence to support his contentions.—*Henning v. Wichita Natural Gas Co.*, 164 P. 297.

⇒1046(3) (Kan.) Placing of burden of proof, even if erroneous, in case triable by court and where parties were permitted to and did produce all of their testimony upon contested questions, cannot be treated as a ground of reversal.—*In re Holloway's Estate*, 164 P. 298.

⇒1046(3) (Kan.) In action upon award under fire insurance policies, ruling improperly placing the burden of proof on plaintiff and depriving defendant of right to open and close *held* not reversible error.—*Boutross v. Palatine Ins. Co., Limited, of London, England*, 164 P. 1069.

⇒1046(5) (Okla.) Remarks of judge in presence of jury do not constitute reversible error, unless from reasonable understanding of his words they would tend to prejudicial minds of jury for or against either of the parties.—*Brown v. Tull*, 164 P. 785.

⇒1048(6) (Cal.App.) In motorman's action for personal injury, refusal to allow cross-examination of plaintiff, "There is no way to account for it [running into open switch when lights signified it closed], is there?" was harmless, in view of further testimony elicited.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

⇒1048(6) (Kan.) Refusal of cross-examination of witness to establish a defense is not ground for reversal, where witness, a party to the action, could have been produced by party seeking to cross-examine him, and where matters sought to be shown on cross-examination were shown by records put in evidence offered by cross-examining party.—*Ruth v. Witherpoon-Engler Co.*, 164 P. 1064.

⇒1050(1) (Cal.App.) In an action for personal injuries sustained by child when struck by an automobile, any error in admission in evidence of torn clothes of child, and testimony as to tears and rents therein, was harmless.—*Dilger v. Whittier*, 164 P. 49.

⇒1050(1) (Cal.App.) In action to recover last payment under building contract, error in admitting parol testimony that builder's written agreement to deliver free of charges referred only to charges for extras *held* prejudicial.—*Suhr v. Metcalfe*, 164 P. 407.

⇒1050(1) (Cal.App.) Erroneous admission of evidence to establish subcontractors' claims *held* not to prejudice owner; their judgments being ordered paid out of fund found due principal contractor from owner.—*Simmons v. Firth*, 164 P. 807.

⇒1050(1) (Kan.) Admission of statements of defendant railroad's superintendent solely to prove a demand, though inadmissible as to ratification of his unauthorized act, *held* not prej-

udicial error.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

⇒1050(2) (Wash.) Admission of irrelevant evidence, which was entirely harmless, was not reversible error.—*Bergen v. Lewis County*, 164 P. 73.

⇒1052(6) (Utah) Where appellant prevailed in his claim, error in admission of evidence relating thereto was harmless.—*Smith v. Gilbert*, 164 P. 1026.

⇒1053(2) (Wash.) In action for personal injuries, effect of immaterial question to plaintiff, whether he could pay for operation advised, and his negative answer, *held* one that could be cured by instruction to disregard.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

⇒1053(3) (Wash.) Admission of evidence that, after accident at county ferry, chains were furnished to fasten boat to bank, was harmless; nature of fastenings not being claimed as negligence, and jury being instructed that change was immaterial.—*Bergen v. Lewis County*, 164 P. 73.

⇒1054(1) (Utah) Where action was tried to court, and there was sufficient competent testimony to sustain its findings, admission of incompetent testimony will be deemed harmless.—*Mower v. Olsen*, 164 P. 482.

⇒1056(1) (Kan.) Where a demurrer to evidence is sustained, error in excluding material evidence will compel a reversal if the evidence excluded, with that admitted, is sufficient to make a *prima facie* case as against the demurrer.—*Mackie v. Grand Lodge A. O. U. W. of Kansas*, 164 P. 263.

⇒1056(1) (Utah) Where testimony excluded on defendant's exception could have been later introduced by plaintiff, the error, if any, in excluding it was harmless.—*P. A. Sorensen Co. v. Denver & R. G. R. Co.*, 164 P. 1020.

⇒1056(4) (Cal.) Where court found against plaintiff on the contract set up, exclusion of evidence as to measure of damages for breach was without prejudice.—*Del Monte Ranch Dairy v. Bernardo*, 164 P. 628.

⇒1056(4) (Utah) Where appellant prevailed in his claim, error in exclusion of evidence relating thereto was harmless.—*Smith v. Gilbert*, 164 P. 1026.

⇒1058(1) (Cal.App.) The exclusion of testimony is harmless where other similar evidence of equal value was admitted.—*Clark v. Berlin Realty Co.*, 164 P. 333.

⇒1058(1) (Utah) Where testimony excluded on defendant's exception was later introduced by plaintiff, the error, if any, in excluding it was harmless.—*P. A. Sorensen Co. v. Denver & R. G. R. Co.*, 164 P. 1020.

⇒1058(1) (Wash.) Any error, in excluding testimony of a witness who experimented with an automobile that it made a great noise when operated, was harmless, where there was evidence that the car could be heard for at least a block and a half.—*Hicks v. Baumgartner*, 164 P. 743.

⇒1060(4) (Cal.App.) In action for false imprisonment, reference of counsel during argument to defendant's failure to testify, though improper, was not prejudicial where the suit was for \$25,000, and the verdict on substantial evidence was for \$500.—*Fiori v. Agnew*, 164 P. 899.

⇒1062(1) (Okla.) On motion to discharge attachment traversing the existence of alleged grounds therefor, error in submitting issue to jury and entering judgment on general verdict is reversible only when it has resulted in miscarriage of justice or violation of constitutional or statutory right.—*Millus v. Lowrey Bros.*, 164 P. 663.

⇒1064(1) (Cal.) Where the evidence would have supported a verdict for either party, any substantial error in the trial or in the instructions must be regarded as prejudicial.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

⇒1064(1) (Cal.App.) In action for injuries when struck by automobile, instruction on last clear chance *held* harmless to defendant.—Potter v. Back Country Transp. Co., 164 P. 342.

⇒1064(1) (Okl.) In foreclosure of mechanic's lien, instructions alleged to fail to submit question of failure of performance on part of the plaintiffs which might preclude their recovery, *held* free from prejudicial error.—Brown v. Tull, 164 P. 785.

⇒1064(4) (Colo.) Including reasons of rule in an instruction correctly stating the law *held* harmless.—National Surety Co. v. Queen City Land & Mortgage Co., 164 P. 722.

⇒1064(4) (Utah) Where the evidence showed that plaintiff and a person causing injury were not fellow servants, error in charging in language of statute as to what constitutes fellow servants *held* not prejudicial.—Dimmick v. Utah Fuel Co., 164 P. 872.

It was not prejudicial error to charge in the language of the pleadings as to what constituted issues where issues were stated in plain and concise language.—*Id.*

⇒1065 (Kan.) If proceeding to set aside appointment of administrator was tried as though jury trial was of right, and there was judgment without consideration of facts, error in instructions might become important or, if instructions showed misconception of law applicable, or if court decided case on wrong theory, to party's prejudice, error might be predicated on instructions.—*In re Holloway's Estate*, 164 P. 298.

⇒1066 (Cal.App.) In action for injuries to a pedestrian struck by defendant's street car, an instruction that plaintiff's negligence would not excuse defendant's negligence, if remote, and not contributing approximately to injury, although irrelevant, was not prejudicial.—Hammond v. Pacific Electric Ry. Co., 164 P. 60.

⇒1066 (Idaho) Where an examination of instructions at the trial shows that giving of an instruction not founded on issues in case did not result in substantial injury to appellant, judgment will not be reversed.—Austin v. Brown Bros. Co., 164 P. 95.

⇒1066 (Or.) Although defendant insurance company's allegations regarding plaintiff's misrepresentations were insufficient, yet instructing that such defense might be waived, constitutes reversible error, where waiver was not an issue.—Waller v. City of New York Ins. Co., 164 P. 959.

⇒1068(1) (Idaho) A judgment will not be reversed where the jury took cognizance only of matters proper for their consideration, even though the jury was erroneously instructed.—Austin v. Brown Bros. Co., 164 P. 95.

⇒1068(1) (Wash.) Where, in a personal injury suit by a passenger, the jury returns a verdict in his favor, he cannot complain of error in giving or refusing instructions none of which are upon the amount of recovery.—Stratford v. Northern Pac. Ry. Co., 164 P. 71.

⇒1068(4) (Ariz.) The giving of an instruction on measure of appellee's damages was not injurious, where the jury did not follow it, but applied a rule more favorable to appellant.—Woolley v. Locarnini, 164 P. 319.

⇒1073(1) (Cal.App.) In suit to quiet title, it being determined that legal title was vested in defendant, subject to unconditional obligation to convey to plaintiff, there was no prejudicial error in decree quieting title in plaintiff as owner and not ordering execution of any deed.—Prouty v. Rogers, 164 P. 901.

⇒1073(1) (Kan.) Rendition of joint judgment in favor of plaintiffs, instead of separate judgment for each in half amount, *held* nonprejudicial.—Hegwood v. Leeper, 164 P. 173.

⇒1073(9) (Wash.) Judgment as modified by correction of admitted error can be affirmed, even if trial court had no power to make correction,

as it did, after notice of appeal; this not requiring modification of record in trial court.—Womach v. Sandygren, 164 P. 600.

(I) Error Waived in Appellate Court.

⇒1078(1) (Okl.) Assignments of error presented by counsel in their brief, if unsupported by authority or argument, will not be noticed unless it is plainly apparent that they are well taken.—Hatcher v. Roberson, 164 P. 1141.

⇒1078(1) (Wyo.) An alleged defect of parties plaintiff not referred to in brief, except in stating questions presented in justice court upon motion to set aside judgment, will be treated as waived on appeal.—Garber v. Spray, 164 P. 840.

(J) Decisions of Intermediate Courts.

⇒1082(1) (Or.) Where the judgment of the circuit court on appeal does not order execution to issue, the promulgation of such writ under L. O. L. §§ 213, 215, is not a judicial function subject to review on appeal from judgment of circuit court.—*In re Barker*, 164 P. 382.

(K) Subsequent Appeals.

⇒1099(1) (Kan.) Former decision of the case, that "a railroad company has incidental power to contract with its own employes to pay them half wages during disability," is the law of the case on subsequent appeal, where proof is substantially the same.—McAdow v. Kansas City Western Ry. Co., 164 P. 177.

⇒1099(6) (Mont.) The holding on appeal that facts pleaded as a defense would warrant reformation of note sued on and made the defense available is binding on a second appeal.—Parchen v. Chessman, 164 P. 531.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

⇒1106(3) (Or.) L. O. L. §§ 97-99, relating to curing variances by amendment, but providing that failure of proof is not a variance, does not authorize remanding a case with permission to amend, where plaintiff entirely failed to prove his allegation.—Rosenwald v. Oregon City Transp. Co., 164 P. 189.

⇒1119 (Utah) Where part only of materialmen appealed from judgment denying their right to fund due contractor, *held*, that they waived their right and could not have relief on appeal.—George A. Lowe & Co. v. Leary, 164 P. 1052.

(C) Modification.

⇒1151(2) (Cal.App.) Judgment may be modified on appeal by deducting the amount of an item of damages improperly allowed.—Schnierow v. Boutagy, 164 P. 1132.

⇒1152 (Or.) Where plaintiff's failure of proof merited a nonsuit below, a judgment for defendant will be modified to one of nonsuit, although plaintiff resisted a nonsuit motion in court below.—Rosenwald v. Oregon City Transp. Co., 164 P. 189.

⇒1154 (Or.) Under Const. art. 7, § 3, as amended in 1910, Supreme Court need not remand cause for new trial to correct numerical errors in judgment, one caused by mistake in addition, other by mistranscribing item in finding of fact; Supreme Court being entitled to direct trial court to correct judgment.—Hayden v. City of Astoria, 164 P. 729.

(D) Reversal.

⇒1170(1) (Cal.) Where the court on appeal cannot say that, in the absence of the errors committed, the verdict would have been the same, it cannot, even under Const. art. 6, § 4½, disregard the error.—Langford v. San Diego Electric Ry. Co., 164 P. 398.

⚡1170(1) (Okl.) Where trial resulted in substantial justice, and no prejudicial error is shown, the judgment, under Rev. Laws 1910, § 6005, will be affirmed.—*St. Louis, I. M. & S. Ry. Co. v. Cantrell*, 164 P. 110.

⚡1170(1) (Okl.) Where it appears from record that proceedings in foreclosure, except as to appraisement, have been regular, and that there has been no miscarriage of justice, lower court's confirmation of sale will not be reversed in view of Rev. Laws 1910, § 6005.—*Owens v. Culbertson*, 164 P. 975.

⚡1170(3) (Cal.App.) Where defendant was not prejudiced by the allowance of an amendment to the complaint after notice, the cause will not be reversed therefor, in view of Const. art. 6, § 4½.—*Shull v. Crawford*, 164 P. 330.

⚡1170(3) (Cal.App.) Any error in overruling demurrer to contractor's complaint for uncertainty, because saying nothing as to engineer's certificate, *held* harmless within Code Civ. Proc. § 475, and Const. art. 6, § 4½; the evidence showing refusal of certificate for alleged non-compliance with contract and issue of compliance being tried.—*Simmons v. Firth*, 164 P. 807.

⚡1170(5) (Colo.) In view of *Sess. Laws* 1911, p. 17, § 20, variance between pleading and proof is not prejudicial where the evidence disclosed a greater degree of wrongdoing on the part of defendant than alleged.—*Southwestern Surety Ins. Co. v. Miller*, 164 P. 507.

⚡1170(8) (Kan.) Where plaintiff's evidence did not establish facts alleged, so as to entitle it to judgment, and tended to show defendant's right to judgment, sustaining of a demurrer to evidence was not prejudicial error, within Civ. Code, § 581 (Gen. St. 1915, § 7485).—*State v. Midland Erie No. 412, Fraternal Order of Eagles*, 164 P. 1063.

⚡1170(9) (Ariz.) An instruction, even if susceptible of being understood to require finding for counterclaiming appellee in excess of the amount admittedly due appellant, in the event appellee suffered any damages whatever, *held* not reversible error, under the constitutional prohibition of reversal for technical errors, where the jury specially found the amount of appellee's damages.—*Wooley v. Locarnini*, 164 P. 319.

⚡1170(13) (Ariz.) The constitutional prohibition of reversal for technical errors prevents reversing an amended judgment because of lack of notice of such amendment, where the amendment was made according to the truth and justice of the case and did not prejudice appellant.—*Ives v. Sanguinetti*, 164 P. 435.

⚡1176(4) (Utah) In suit to enjoin collection of an improvement assessment in which court refused all relief, and it appears that only a portion of tax was valid, and record does not show on appeal what portion of the tax is valid, *held*, that appellate court on reversing case will not order new trial, but will remand, with directions to ascertain extent to which tax is invalid and should be enjoined.—*Gwilliam v. Ogden City*, 164 P. 1022.

(F) Mandate and Proceedings in Lower Court.

⚡1195(1) (Mont.) The holding on appeal that facts pleaded as a defense would warrant reformation of note sued on and made the defense available is binding on the trial court.—*Parchen v. Chessman*, 164 P. 531.

⚡1195(1) (Wash.) Decision on a former appeal becomes the law of the case, and will govern when the same questions arise on a retrial.—*Ennis v. Banks*, 164 P. 58.

⚡1199 (Wash.) The superior court has no jurisdiction, after a judgment has been affirmed to vacate it for fraud, where permission has not first been obtained from the Supreme Court.—*Godfrey v. Camp*, 164 P. 210.

Where a will was contested as a forgery, but its validity established and affirmed upon appeal,

contestants cannot maintain an action to vacate such judgment on ground that additional evidence relative to the alleged forgery was discovered after the case was remanded.—*Id.*

APPEARANCE.

See Justices of the Peace, ⚡84.

⚡24(5) (Cal.) By answering and going to trial on the merits, a defendant makes a general appearance waiving any defects in the service, although he first appeared specially and moved to set aside the service.—*Rensberg v. Hackney Mfg. Co.*, 164 P. 792.

APPOINTMENT.

See Receivers, ⚡32; Sheriffs and Constables, ⚡18; States, ⚡46.

APPROPRIATION.

See Waters and Water Courses, ⚡30-152.

APPROVAL

See Bail, ⚡61.

ARBITRATION AND AWARD.

See Insurance, ⚡572, 574.

ARCHITECTS.

See Contracts, ⚡300; Schools and School Districts, ⚡85.

ARGUMENTATIVE INSTRUCTIONS.

See Trial, ⚡240.

ARGUMENT OF COUNSEL.

See Appeal and Error, ⚡1060; Criminal Law, ⚡1171; Trial, ⚡132.

ARREST.

I. IN CIVIL ACTIONS.

⚡39 (Kan.) In proceedings supplemental to execution, sheriff, holding warrant, issued under Gen. St. 1915, § 7429 (Code Civ. Proc. § 525), authorizing him to arrest debtor and bring him before probate judge, had no power to imprison him in county jail, even temporarily, until probate judge would be at his office.—*Haglund v. Burdick State Bank*, 164 P. 167.

ASSAULT AND BATTERY.

See Homicide, ⚡140.

I. CIVIL LIABILITY.

(B) Actions.

⚡29 (Kan.) In action for assault, character of defendant was not admissible to disprove charge.—*Colvin v. Wilson*, 164 P. 284.

⚡43(2) (Wash.) In action for injuries, instruction as to plaintiff's duty while pregnant to avoid altercation or excitement, though correct, *held* too indefinite, as to acts for which defendants were liable, to be of value.—*Geissler v. Geissler*, 164 P. 746.

II. CRIMINAL RESPONSIBILITY.

⚡78 (Wash.) Information charging second degree assault *held* sufficient under Rem. Code 1915, § 2414.—*State v. Richter*, 164 P. 250.

ASSESSMENT.

See Municipal Corporations, ⚡407-579; Taxation, ⚡319-493.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ¶719-747; Criminal Law, ¶1129.

ASSIGNMENTS.

See Judgment, ¶841; Mortgages, ¶268, 552; Sales, ¶220; Set-Off and Counterclaim, ¶49; Vendor and Purchaser, ¶214.

I. REQUISITES AND VALIDITY.**(A) Property, Estates, and Rights Assignable.**

¶12 (Idaho) Where one contracts to labor on understanding that proceeds of labor shall be paid pro rata to creditors, subsequent assignment of wages earned without creditors' consent is invalid; as there is nothing upon which assignment can operate.—*Green v. Consolidated Wagon & Machine Co.*, 164 P. 1016.

(B) Mode and Sufficiency of Assignment.

¶34 (Mont.) Where division of lambs by lessor and lessee of band of sheep effected waiver by lessor of security on lessee's share, vesting in latter right to dispose of lambs, when lessee directed payment of his share of purchase money for lambs to bank holding his mortgage thereon, direction was verbal assignment, which buyer was bound to honor, and on which bank could sue.—*National Bank of Gallatin Valley v. Ingle*, 164 P. 535.

¶57 (Cal.App.) Order on owner given by contractor to subcontractor and by latter presented to owner for acceptance is sufficient notice to owner within Code Civ. Proc. § 1184, to entitle owner to withhold amount of order from contractor.—*Suhr v. Metcalfe*, 164 P. 407.

III. RIGHTS AND LIABILITIES OF PARTIES.

¶90 (Utah) An assignee of a mere chose in action takes only the rights the assignor had therein.—*South High School Dist. of Summit County v. McMillan Paper & Supply Co.*, 164 P. 1041.

¶94 (Cal.App.) Assignment of last payment due building contractor gives assignee no rights against owner greater than contractor himself would have had.—*Suhr v. Metcalfe*, 164 P. 407.

IV. ACTIONS.

¶137 (Kan.) Evidence held to sustain trial court's findings that deceased, who had assigned his bank stock to defendants, was mentally incompetent and incapable of making assignment at the time of its execution and delivery.—*Bruington v. Wagoner*, 164 P. 1057.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Building and Loan Associations; Insurance, ¶693-793.

ASSUMPSIT, ACTION OF.

See Account Stated; Money Lent.

ASSUMPTION OF DEBT.

See Mortgages, ¶280.

ASSUMPTION OF RISKS.

See Master and Servant, ¶206-226, 288.

ATTACHMENT.

See Carriers, ¶58; Execution; Garnishment; Homestead.

I. NATURE AND GROUNDS.**(B) Grounds of Attachment.**

¶41 (Okla.) A disposition of property with intent to defraud creditors within meaning of Rev. Laws 1910, § 4812, may be effected by a mortgage thereon, so as to constitute a ground for attachment.—*Millus v. Lowrey Bros.*, 164 P. 663.

III. PROCEEDINGS TO PROCURE.**(B) Affidavits.**

¶77 (Mont.) Presenting to clerk of court an affidavit containing averments enumerated in Rev. Codes, § 6657, is essential to issuance of valid writ of attachment.—*Continental Oil Co. v. Jameson*, 164 P. 727.

¶91 (Mont.) Under Rev. Codes, § 7988, defining "affidavit" as a written declaration under oath, etc., a paper intended as an affidavit for attachment, but not signed or sealed by a notary, is on its face insufficient.—*Continental Oil Co. v. Jameson*, 164 P. 727.

¶103 (Okla.) Allegations of affidavit for an attachment held to sufficiently show that action in which attachment was asked was "a civil action for the recovery of money" within Rev. Laws 1910, § 4812, permitting the attachment.—*Millus v. Lowrey Bros.*, 164 P. 663.

¶105 (Okla.) Requirement of Rev. Laws 1910, § 4813, that affidavit for attachment shall show that plaintiff's claim "is just" is satisfied by allegation in language of the section that it "is just."—*Millus v. Lowrey Bros.*, 164 P. 663.

¶109 (Mont.) Rev. Codes, § 6657, requiring affidavits for attachment to state the indebtedness has not been secured by any mortgage, etc., or, if originally so secured, such security has become valueless, is not complied with by an allegation that debt is not secured, since it does not negative implication that it was previously secured.—*Continental Oil Co. v. Jameson*, 164 P. 727.

¶125 (Okla.) If allegations of affidavit for an attachment were insufficient to show that action in which it was sought was a civil action for the recovery of money within Rev. Laws 1910, § 4812, either the answer filed or the evidence in the case held to cure the defect.—*Millus v. Lowrey Bros.*, 164 P. 663.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

¶195 (Mont.) That defendants in attachment have no interest in the property does not affect court's authority to order a sale before judgment; the purchaser acquiring only defendants' title.—*State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County*, 164 P. 546.

¶196 (Mont.) Under Rev. Codes, § 6671, providing for sale of attached property before judgment, where interest of parties will be subserved, a showing that attached property will depreciate in value is sufficient.—*State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County*, 164 P. 546.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

¶230 (Okla.) Under Rev. Laws 1910, §§ 4862, 4863, existence of the grounds stated in affidavit for an attachment may be denied, and put in issue in a motion to discharge attachment.—*Millus v. Lowrey Bros.*, 164 P. 663.

¶247 (Mont.) Under Rev. Codes, § 6682, providing that, if motion to discharge an attachment be made upon affidavits, the plaintiff may

then, but not otherwise, offer affidavits in opposition, affidavits cannot be offered to show that a notary's seal was omitted by mistake, where motion is made upon the record.—Continental Oil Co. v. Jameson, 164 P. 727.

⚡250 (Okl.) The issues made by defendant's motion to discharge an attachment traversing the existence of the grounds alleged in the affidavit are triable to the court.—Millus v. Lowrey Bros., 164 P. 663.

Defendant moving to discharge an attachment upon a denial of the grounds alleged in affidavit therefor, who does not insist upon a decision by judge, after judgment is entered on verdict sustaining attachment, will be deemed to have waived the determination thereof by judge instead of by jury.—Id.

On motion to discharge an attachment traversing existence of alleged grounds therefor, it is error to submit the issue to jury for general verdict, instead of for special advisory findings of fact, and to base a judgment upon such general verdict.—Id.

VIII. CLAIMS BY THIRD PERSONS.

⚡302 (Okl.) Where third party files a denominated "interplea in attachment" claiming title and right to possession of attached property, he asserts a right in the nature of a petition in replevin on authority of Rev. Laws 1910, § 4701, and not a motion for discharge of attachment under section 5310.—Millus v. Lowrey Bros., 164 P. 663.

⚡308(4) (Okl.) Evidence held sufficient to support a judgment sustaining an attachment of personal property as against a third party's petition in replevin claiming title and right of possession.—Millus v. Lowrey Bros., 164 P. 663.

ATTORNEY AND CLIENT.

See Appeal and Error, ⚡1080; Constitutional Law, ⚡248, 326; Criminal Law, ⚡730, 1037, 1171; Damages, ⚡72; Insurance, ⚡675; Statutes, ⚡79; Trial, ⚡182.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

⚡52 (Or.) A complaint in disbarment proceedings under L. O. L. § 1092, subd. 1, held demurrable where a charge merely that accused was convicted in federal court of using the mails to defraud in violation of Penal Code U. S. § 215.—State v. Prendergast, 164 P. 1178.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⚡165 (Kan.) In attorney's action against railroad for fees, held, that there was no variance between the cause of action alleged in the petition and that proved by the evidence.—Long v. Kansas City, M. & O. R. Co., 164 P. 175.

⚡167(2) (Kan.) In action against railroad for attorney's fees for services, held, that demurrer to evidence was properly overruled.—Long v. Kansas City, M. & O. R. Co., 164 P. 175.

(B) Lien.

⚡180 (Kan.) Under Gen. St. 1915, § 484, amending Gen. St. 1901, § 395, the service of a written notice of an attorney's lien upon attorneys of record for the adverse party is sufficient.—Alexander v. Clarkson, 164 P. 204.

AUTOMOBILES.

See Bailment, ⚡18; Evidence, ⚡474; Highways, ⚡176, 184, 186; Licenses, ⚡26; Municipal Corporations, ⚡706; Negligence, ⚡98; Street Railroads, ⚡85, 93, 99, 103, 117, 118.

BAGGAGE.

See Carriers, ⚡16, 397½.

BAIL.

See Habeas Corpus, ⚡33.

II. IN CRIMINAL PROSECUTIONS.

⚡47 (Okl. Cr. App.) When appeal is perfected, Criminal Court of Appeals will on proper showing make all necessary orders relating to bail.—Ex parte Burton, 164 P. 135.

⚡61 (Colo.) Where the judge ordered admission to bail on surety approved by the clerk, and later directed that a certain person could become surety, the clerk's act in approving such person's bond was the act of the judge, and the bond was valid.—Bottom v. People, 164 P. 697.

Indorsement by clerk, accepting recognizance given in accordance with court order, held not to affect validity of the bond.—Id.

Clerk's duty of accepting bail bond given in accordance with court order held ministerial.—Id.

BAILMENT.

See Warehousemen.

⚡3 (Wash.) Lessee of contracting equipment, who had full opportunity to inspect and agreed to take property as it stood, cannot show fraudulent representations made by plaintiff concerning condition of equipment.—Peterson v. Jahn Contracting Co., 164 P. 937.

⚡4 (Wash.) Under a lease providing that lessee is to take entire equipment as it was seen and inspected on a certain day, including "approximately" one mile of rails and two miles of pipe, lessee cannot recover for a shortage of 1,092 feet of rails and 3,952 feet of pipe.—Peterson v. Jahn Contracting Co., 164 P. 937.

⚡18(2) (Or.) Automobile tire seller whose employees set tires on machine for reputed owner held "automobile repairer" and entitled to lien under L. O. L. § 7497.—Courts v. Clark, 164 P. 714.

⚡18(3) (Or.) Where the reputed owner of an automobile left it with a seller of tires to have a new tire attached and went about his business for a short time, the repairer's possession was of sufficient duration to entitle him to a lien under L. O. L. § 7497.—Courts v. Clark, 164 P. 714.

BALLOTS.

See Elections, ⚡177.

BANKRUPTCY.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⚡188(1) (Utah) Trustee in bankruptcy and creditors, held not entitled to object that mortgagee of bankrupt waived lien of mortgage by selling property on confession of judgment less than four months prior to bankruptcy.—Utah Ass'n of Credit Men v. Jones, 164 P. 1029.

⚡192 (Utah) Under Comp. Laws 1907, § 1400x, materialmen's rights against fund due contractor from school district held superior to rights of contractor's trustee in bankruptcy.—George A. Lowe & Co. v. Leary, 164 P. 1052.

⚡196 (Utah) Sale of property after confession of judgment by chattel mortgagor less than four months prior to his bankruptcy, held not a voidable preference.—Utah Ass'n of Credit Men v. Jones, 164 P. 1029.

⚡215 (Utah) Jurisdiction of actions to enforce rights of materialmen against money due from school district under Comp. Laws 1907, § 1400x, will be retained, though commenced within four months before bankruptcy.—Joseph Nelson Supply Co. v. Leary, 164 P. 1047.

(F) Claims Against and Distribution of Estate.

⇒363 (Utah) Materialman by filing claims against contractor with referee in bankruptcy without prejudice held not to have waived their right to prosecute actions for enforcement of preferential right in state court.—Joseph Nelson Supply Co. v. Leary, 164 P. 1047.

BANKS AND BANKING.

See Taxation, ⇒47; Wills, ⇒211.

II. BANKING CORPORATIONS AND ASSOCIATIONS.**(B) Capital, Stock, and Dividends.**

⇒40 (Kan.) Gen. St. 1915, § 570, prohibiting the transfer of shares of stock in a failing bank is for the protection of creditors, and as between the buyer and the seller of stock, the transfer may be binding.—Atchison Savings Bank v. Potter, 164 P. 149.

The stock of a bank in a failing condition may be legally sold and may still be a sufficient consideration for a note given for its purchase.—Id.

III. FUNCTIONS AND DEALINGS.**(C) Deposits.**

⇒154(6) (Utah) In order that one may recover a deposit in a bank made by the agent of the owner, on the ground that it should be held pending settlement of unlitigated claims, such claimant must prove that a deposit was made for such purpose.—McGuire v. State Bank of Tremonton, 164 P. 494.

⇒154(8) (Utah) Where a deposit slip discloses nothing indicating the money deposited is upon any condition whatever, it constitutes strong evidence that the money was not deposited for a special purpose, or as a special deposit.—McGuire v. State Bank of Tremonton, 164 P. 494.

IV. NATIONAL BANKS.

⇒233 (Wash.) State cannot impose any liability upon national bank by adding any powers to those expressly granted or fairly implied in act authorizing its creation.—Myers v. Exchange Nat. Bank, 164 P. 951.

BAR.

See Judgment, ⇒582-707.

BARROOMS.

See Negligence, ⇒134, 138.

BARTER.

See Exchange of Property.

BASTARDS.**I. ILLEGITIMACY IN GENERAL.**

⇒1 (Cal.) Under Civ. Code, § 195, and Pen. Code, § 270, criminal prosecution for nonsupport of illegitimate child will not lie against father in case of child born in wedlock of married woman, though child is in fact illegitimate.—Ex parte Madalena, 164 P. 348.

From enactment of Pen. Code, § 270, providing that father of illegitimate child may be prosecuted criminally for nonsupport, authority in state to raise question of legitimacy where child is born in wedlock is not to be implied.—Id.

III. PROCEEDINGS UNDER BASTARDY LAWS.

⇒92 (Cal.App.) The court has no inherent power in the absence of statute in an action under Civ. Code, § 196a, to compel a father to support his illegitimate child pending his appeal

from the judgment, or to pay the expenses of resisting the appeal.—Schallman v. Haas, 164 P. 386.

Civ. Code, § 196a, does not by making sections 138-140 a part thereof, authorize the court, in an action to compel a father to support his illegitimate child, to require him to pay the expenses of resisting his appeal, and to support the child pending the appeal.—Id.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Insurance, ⇒693-793.

BENEFICIARIES.

See Insurance, ⇒793.

BENEFITS.

See Municipal Corporations, ⇒437.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, ⇒402; Evidence, ⇒182, 185.

BIAS.

See Witnesses, ⇒372.

BIDS.

See Municipal Corporations, ⇒331.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, ⇒58.

BILL OF PARTICULARS.

See Pleading, ⇒314, 385.

BILLS AND NOTES.

See Carriers, ⇒58; Corporations, ⇒414; Payment, ⇒16; Reformation of Instruments, ⇒45.

III. MODIFICATION, RENEWAL, AND RESCISSION.

⇒138 (Mont.) An agreement for "renewal" of or to "renew" a note means the substitution of another with the same substantive terms as the old, save date, and, in case of partial payment, amount.—Parchen v. Chessman, 164 P. 531.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(D) Bona Fide Purchasers.**

⇒332 (Wash.) Note holder's right cannot be defeated without proof of actual notice of defect in title or bad faith on his part.—National City Bank v. Shelton Electric Co., 164 P. 933.

⇒338 (Cal.App.) Where secretary of a corporation without authority indorsed a check payable to corporation to a bank in a transaction in which he was personally interested, held, that bank was not an indorsee in due course as defined by Civ. Code, § 3123, or entitled to rights of such indorsee as enumerated by section 3124.—Palo Alto Mutual Building & Loan Ass'n v. First Nat. Bank, 164 P. 1124.

⇒340 (Wash.) Where officer of corporation makes its commercial paper payable to his own

order, signs it as such officer, and transfers it in payment of an individual debt, the transferee is not bona fide purchaser, without notice.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

Where president of one corporation signed note in its behalf for money borrowed from another corporation which used his name as president, but of which he was not in fact a member, and note was thereafter indorsed by him as president of payee corporation, of which he became member after severing connections with maker, defense of want of consideration and mala fides does not avail.—*Id.*

One who takes negotiable note of corporation from its president, as collateral security for loan to him or to firm to which he belongs, is not precluded from claiming as holder in due course by reason of fact that note was signed by president, where it was payable to third person and indorsed by him.—*Id.*

—341 (Cal.App.) Where secretary of corporation without authority indorsed a check payable to corporation to a bank as between corporation and bank, doctrine of bona fide holder does not apply, as they are parties in privity.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—352 (Kan.) Where debtor of bank fraudulently procured another bank to issue draft payable individually to president of creditor bank, who delivered up evidence of indebtedness, indorsed draft individually, and delivered it to bank, bank was not a "holder in due course," within Gen. St. 1915, §§ 6557, 6579(3).—*First Nat. Bank v. Lyons Exch. Bank*, 164 P. 137.

Where creditor bank learned that debtor's draft, payable to its president and indorsed by him individually, and by him delivered to the bank, had been protested, and secured from debtor restoration of securities and evidences of debt, it could not claim protection afforded holder in due course.—*Id.*

VIII. ACTIONS.

—443(4) (Idaho) One who holds note by assignment for purpose of collection is real party in interest and authorized to sue in his own name.—*Utah Implement-Vehicle Co. v. Kenyon*, 164 P. 1176.

An indorsee, who is in possession of a note, is the "holder" thereof, and may sue thereon in his own name.—*Id.*

—444 (Wash.) It is no defense to action on note that it was not presented to receiver of maker where maker did not make voluntary assignment, of all its property for benefit of creditors, so that Rem. Code 1915, § 1100, stating when assignor shall be discharged, does not apply.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

—497(2) (Wash.) Assuming that defendant in action on note proved lack of consideration, plaintiff then merely had burden of showing that it was holder in due course as against whom defense of lack of consideration cannot be urged, in view of Rem. Code 1915, §§ 3419, 3450.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

—517 (Wash.) In action on note of corporation, where plaintiff produced evidence that at date of execution parties signing were officers of corporation, and that they did sign on that date, in view of Rem. Code 1915, § 3402, it devolves on defendant to establish defense of forgery by alteration of date by evidence clear, cogent, and convincing.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

—519 (Okla.) In a suit upon notes, evidence held to show defendant's intention to assume absolute liability therefore, so that they became his personal obligations.—*Hays v. Smith*, 164 P. 470.

—538(5) (Kan.) Charge that law requires proof of duress to be "clear, convincing, and decisive" held not to have misled jury by use of

latter word.—*Farmers' Nat. Bank of Lincoln v. Francis*, 164 P. 146.

—538(7) (Kan.) Instruction that one signing note under duress waives duress by subsequent payment, unless at time of payment he was still deprived of his freedom of mind or will by reason of duress, held proper.—*Farmers' Nat. Bank of Lincoln v. Francis*, 164 P. 146.

—539 (Kan.) In action on note jury's special finding as to plaintiff's knowledge of the circumstances under which note had been obtained held not so inconsistent with the other findings and with the general verdict as to warrant a reversal.—*Atchison Savings Bank v. Potter*, 164 P. 149.

—539 (Kan.) In action on a note, special findings of fact as to purchase of note, forwarding for collection, and character of defendant's liability, held in harmony with general verdict for defendant.—*First Nat. Bank v. Stroup*, 164 P. 1054.

BOARDS.

See Counties, —49; Schools and School Districts, —53.

BONA FIDE PURCHASERS.

See Bills and Notes, —332-352, 497; Chattel Mortgages, —139; Vendor and Purchaser, —227.

BONDS.

See Bail; Counties, —178; Detectives, —3; Estoppel, —18; Guardian and Ward, —15; Licenses, —26; Municipal Corporations, —347, 918-925; Principal and Surety; Schools and School Districts, —81, 97; Sheriffs and Constables, —157; Trusts, —161.

BOUNDARIES.

See Adjoining Landowners.

BREEDING.

See Animals, —20½.

BRIDGES.

See Drains, —55; Waters and Water Courses, —244.

BRIEFS.

See Appeal and Error, —771, 773.

BROKERS.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

—34 (Kan.) Where broker, employed to procure exchange of properties for \$1,500 boot, arranged payment of that amount, and reported only \$1,000, and client completed the exchange, the broker was liable to client for \$500.—*Ratliffe v. Cease*, 164 P. 1091.

IV. COMPENSATION AND LIEN.

—41 (Cal.) Where a broker authorized to sell land wrote his principal that he had made a tentative contract on different terms regarding deferred payments, a reply accepting such change did not ratify the broker's act in making an option, instead of a sale, contract.—*Hicks v. Christeson*, 164 P. 395.

—52 (Cal.) An owner's broker has not earned his commission, unless an intending purchaser has made a binding contract, or has offered to the owner, and not merely to the broker, to make such an agreement.—*Hicks v. Christeson*, 164 P. 395.

—52 (Kan.) An agent for the exchange of real estate has earned his commission, where, after finding a purchaser able and willing to trade, he brings the parties together, and they agree to an

exchange on terms satisfactory to his principal.—*Wheeler v. Waymire*, 164 P. 186.

—56(3) (Okla.) A broker's mere introduction of one who thereafter purchases from the owner does not entitle him to a commission, where the purchaser was fully advised as to the property and already determined to purchase it.—*Pitts v. Pitts*, 164 P. 106.

Broker having the same surname as an owner, and who by mistake of intending purchaser was brought in contact with purchaser and who did nothing but direct purchaser to the true owner, who thereafter negotiates a sale of the property, was not entitled to a commission.—*Id.*

—65(2) (Kan.) A broker employed to procure an exchange of properties for \$1,500 boot, and who arranged for payment of that amount, but reported only \$1,000, which the client accepted, could not recover the stipulated commission.—*Ratliffe v. Cease*, 164 P. 1091.

—71 (Cal.App.) Under agreement that broker aiding in purchase of property should have one-third of net profits of sale, *held*, that interest on the investment could not be charged in determining the amount of profits.—*Young v. Canfield's Estate*, 164 P. 1134.

V. ACTIONS FOR COMPENSATION.

—86(4) (Okla.) In broker's action for commission for the sale of a farm, evidence *held* to show that he was not the procuring cause of the sale, and was not entitled to a commission.—*Pitts v. Pitts*, 164 P. 106.

BUILDING AND LOAN ASSOCIATIONS.

—23(1) (Cal.App.) That secretary of a corporation was intrusted by directors with some of their duties did not justify conclusion that board had abandoned its functions to secretary, where it was shown that board still directed matters of importance.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—23(4) (Cal.App.) Secretary of corporation had no authority by virtue of his office to indorse and cash a check payable to corporation.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—26 (Cal.App.) Irregularity in advancing money of a corporation before loan was approved by directors *held* cured by subsequent ratification by directors.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

Borrower who obtained loan from corporation could not object to irregularity in proceedings whereby he secured it, nor can a bank concerned in obtaining loan complain.—*Id.*

BUILDINGS.

See Schools and School Districts, —69.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

—41(2) (Cal.App.) Evidence which, exclusive of confession of defendant, shows without contradiction that fixtures taken from premises of owner without his knowledge or consent were afterwards found installed in another house, is sufficient to establish corpus delicti on a charge of burglary.—*People v. Sweetman*, 164 P. 627.

BY-LAWS.

See Corporations, —193; Insurance, —693.

CANCELLATION OF INSTRUMENTS.

See Jury, —13; Quieting Title; Reformation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

—22 (Cal.App.) Where there is a total failure of consideration, it is not necessary to give notice of rescission before bringing suit to cancel the contract.—*Shull v. Crawford*, 164 P. 330.

II. PROCEEDINGS AND RELIEF.

—37(6) (Cal.) Complaint, in action to cancel land contract, *held* demurrable, where it failed to allege that false statements relied upon were made with intent to deceive plaintiff and induce him to purchase land.—*Carlson v. Farm Land Inv. Co.*, 164 P. 348.

—37(6) (Cal.App.) Complaint, in action to rescind contract for purchase of tract of land, charging false representations by letter concerning value of land in missionary colony, *held* demurrable for not alleging knowledge of falsity, fraudulent purpose, or actual untruth of statements made.—*Carlson v. Farm Land Inv. Co.*, 164 P. 344.

Simple statement in complaint, in action to cancel land contract, that representations relied upon were false and fraudulent, is insufficient in absence of statements of real facts.—*Id.*

Merely alleging making of false representations by vendor is not sufficient, where no fraudulent intent to induce party to act upon them is shown.—*Id.*

—37(6) (Cal.App.) Complaint, alleging that defendant agreed to teach plaintiff to sell washing machines and subagencies, whereby plaintiff was induced to make an agency contract, which defendant refused to perform, *held* sufficient.—*Shull v. Crawford*, 164 P. 330.

—47 (Idaho) In an action to cancel a mortgage and to require defendant to surrender to plaintiff a note, and for damages, evidence *held* to support judgment for plaintiff.—*Rees v. Gorham*, 164 P. 88.

CAREY ACT.

See Waters and Water Courses, —253.

CARMACK AMENDMENT.

See Telegraphs and Telephones, —54.

CARRIERS.

See Licenses, —6.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

—13(2) (Or.) City of Portland Ordinance No. 29773, § 3, prohibiting railway companies from granting exclusive privileges to transfer companies, is invalid, not being warranted by charter.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

The advantage gained by granting exclusive privileges to a transfer company to solicit passenger's baggage is subordinate to a reasonable exercise of police power.—*Id.*

—14 (Or.) A railway company may legally contract with a transfer company giving it exclusive right to solicit from passengers the privilege of transferring baggage.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

Const. art. 1, § 20, prohibiting passing of laws granting exclusive privileges, does not prohibit carrier's power to grant exclusive rights to a transfer company.—*Id.*

L. O. L. § 6927, prohibiting railroads from giving "undue or unreasonable preference" to any

person, does not prohibit railroads from granting exclusive privileges to transfer companies.—*Id.*

☞16 (Or.) Since railroad companies are responsible for baggage, they may reasonably regulate use of stations and other matters concerning dispatch of business for that purpose.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

(B) Interstate and International Transportation.

☞32(2) (Kan.) Terminal carrier was not at liberty to waive, in favor of interstate shipper of live stock, provision of its contract with him, limiting time within which action might be commenced to six months.—*Easdale v. Atchison, T. & S. F. Ry. Co.*, 164 P. 164.

☞32(2) (Kan.) Under contract for interstate shipment of live stock providing that there can be no recovery for injury before or during transportation unless shipper notifies carrier of injury, etc., before stock is removed from destination, etc., carrier may not, under federal law, waive notice.—*Abell v. Atchison, T. & S. F. Ry. Co.*, 164 P. 269.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

☞58 (Kan.) That an attachment had been levied on a car of wheat did not prevent an effectual transfer of whatever interest plaintiff had therein by the transfer of the bill of lading.—*Oklahoma State Bank v. Hicklin*, 164 P. 257.

(I) Connecting Carriers.

☞174 (Kan.) Carrier breaching its stipulation to carry grain to certain point and there deliver it to a connecting carrier, with resulting loss to the shipper, is liable in an action for breach of contract.—*Bennett v. Missouri Pac. Ry. Co.*, 164 P. 1084.

☞177(3) (Kan.) The initial carrier is liable for the negligence of any of its connecting carriers.—*Kirsch v. Postal Telegraph Cable Co.*, 164 P. 267.

☞185(3) (Kan.) In shipper's action against a carrier for breach of its contract to carry grain to a certain point and there deliver it to a connecting carrier, proof of loss held sufficient.—*Bennett v. Missouri Pac. Ry. Co.*, 164 P. 1084.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

☞280(1) (Wash.) Operator of jitney bus as common carrier owed passenger duty to exercise highest degree of care compatible with practical operation of car, a duty not met as a matter of law by a mere observance of the law of the road.—*Singer v. Martin*, 164 P. 1105.

☞280(2) (Wash.) Rem. & Bal. Code, § 5571, in force at time of collision between jitney bus and another car, wherein passenger of bus was injured, created duty on part of operator of bus entering into passenger's contract of carriage, so that its repeal by Rem. Code 1915, § 5562-35, could not operate retrospectively to relieve carrier.—*Singer v. Martin*, 164 P. 1105.

☞282 (Ok.) Where railroad employé, assisting passengers to board and alight from trains, permitted constable to go into train to arrest carrier was bound to hold train a reasonable time to permit him to make such arrest and alight, and was liable for injury to him from its negligence.—*St. Louis, I. M. & S. Ry. Co. v. Cantrell*, 164 P. 110.

☞287(1) (Kan.) Where one traveling on a freight train, had to walk between tracks in switchyard to change trains, the yardmaster's direction to him to go alone through the switchyard at night, in view of Gen. St. 1915, § 8536, regulating conduct of stock trains, was not negligence.—*Griffith v. Atchison, T. & S. F. Ry. Co.*, 164 P. 1094.

☞288 (Cal.) The use without warning and protection against attending perils of an automatic elevator is negligence.—*Jacobi v. Builders' Realty Co.*, 164 P. 394.

☞295(7) (Wash.) Rem. & Bal. Code, § 5571, limiting speed of automobiles to four miles an hour over crossings or crosswalks within limits of any city or village, etc., could be invoked in favor of passenger in jitney bus as well as in favor of pedestrians.—*Singer v. Martin*, 164 P. 1105.

☞305(3) (Ok.) In a passenger's action for personal injury when an alleged defective gate of the car swung out and he fell from the steps and was injured, evidence held to show that defendant's negligence, if any, was not the proximate cause of injury.—*Wichita Falls & N. W. Ry. Co. v. Cover*, 164 P. 660.

☞305(4) (Wash.) In order that illegal rate of speed on part of driver of jitney bus shall be actionable by passenger injured, it must be proximate cause of injury.—*Singer v. Martin*, 164 P. 1105.

Proprietor of jitney bus, passenger in which was injured in collision, was liable to passenger if excessive speed of bus would, without more, have brought it to place of the collision at the time when it took place.—*Id.*

☞318(1) (Kan.) Evidence held insufficient to establish actionable negligence of interurban railway company toward passenger injured by contact with a trolley pole at the side of a track while riding on the bottom step of a car.—*Brigham v. Union Traction Co.*, 164 P. 1076.

☞318(8) (Kan.) Evidence that engine crew did not keep sufficient lookout, and did not see freight passenger carrying a lighted lantern while crossing tracks in switchyard to change trains before engine struck him, sustained jury's finding of railroad's negligence.—*Griffith v. Atchison, T. & S. F. Ry. Co.*, 164 P. 1094.

☞321(14) (Wash.) In action against street railroad for injuries to plaintiff when alighting from car, charge held to contain clear statement of issues involved, and to define rules of law applicable with accuracy.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

☞321(21) (Wash.) In action against street railroad for injuries to passenger while alighting, instruction that burden was on plaintiff to establish that he was thrown from car substantially as charged, held as favorable to defendant as it had any reason to expect.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

(E) Contributory Negligence of Person Injured.

☞328(1) (Cal.) That decedent stepped through the doorway of an automatic elevator shaft without looking to see if the cage was in place, held not contributory negligence precluding recovery for her death where the customary use of the elevator justified her in assuming that the door could not be opened, unless the cage was in place.—*Jacobi v. Builders' Realty Co.*, 164 P. 394.

☞333(5) (Wash.) It is not negligence per se for passenger to attempt to alight from moving street car in absence of circumstances making attempt so dangerous that it might not be made by person of ordinary prudence.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

(G) Passengers' Effects.

☞397½ (Or.) Railroad companies are responsible as common carriers for loss or damage to baggage during transportation, and for a reasonable time while baggage is in depots for delivery.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

CAUSE OF ACTION.

See Action.

CAVEAT EMPTOR.

See Sales, ¶41.

CERTAINTY.

See Contracts, ¶9.

CERTIFICATE.

See Corporations, ¶99; Mortgages, ¶552.

CERTIORARI.

See Justices of the Peace, ¶192-205.

I. NATURE AND GROUNDS.

¶9 (Okla.) In this jurisdiction certiorari is not a writ of right, but a writ which the courts, in the exercise of sound judicial discretion, may grant or refuse.—Southern Nat. Bank of Wynnewood v. Wallace, 164 P. 461.

¶17 (Wash.) Relator is entitled to certiorari where judge denies him a change of venue which he is entitled to as a matter of right.—State v. Superior Court of Washington for Clarke County, 164 P. 516.

¶28(2) (Okla.) The common-law writ of certiorari brings up for review only the question whether the inferior tribunal or court kept within or exceeded the jurisdiction conferred upon it by law.—Grady County v. Chickasha Cotton Oil Co., 164 P. 457.

¶29 (Okla.) The common-law writ of certiorari cannot be used to correct errors of law or fact committed by an inferior court or tribunal within the limits of its jurisdiction.—Grady County v. Chickasha Cotton Oil Co., 164 P. 457.

II. PROCEEDINGS AND DETERMINATION.

¶64(1) (Idaho) In proceedings under writ of review, the constitutionality of the statute upon which the inferior tribunal based its authority in view of Rev. Codes, §§ 4962, 4963, cannot be passed upon.—Weiser Nat. Bank v. Washington County, 164 P. 1014.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Justices of the Peace, ¶73, 74; Venue, ¶44.

CHARACTER.

See Assault and Battery, ¶29; Evidence, ¶322; Witnesses, ¶274, 360.

CHARGE.

On bequest or legacy, see Wills, ¶820.
To jury, see Criminal Law, ¶758-830, 803;
Trial, ¶194-296, 424.

CHARITIES.

See Guardian and Ward, ¶23, 25.

CHARTER.

See Municipal Corporations, ¶46-58.

CHATTEL MORTGAGES.

See Contracts, ¶9.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates and Interests of Parties Therein.

¶117 (Kan.) Chattel mortgage on growing corn described as "undivided three-fourths interest on 100 acres of ground," on described quar-

ter section did not include mortgagor's corn on remaining quarter sections, as against subsequent attaching creditor, though only one-tenth of corn was on quarter section described.—Danielson v. Reichert, 164 P. 184.

¶127 (Idaho) Under Rev. Codes, § 3406, the lien of a chattel mortgage on crops to be grown upon leased premises did not attach to crops subsequently planted thereon by another than the lessee.—Green v. Consolidated Wagon & Machine Co., 164 P. 1016.

(D) Lien and Priority.

¶136 (Utah) Notwithstanding Comp. Laws 1907, § 3498, chattel mortgagee held not to have waived his right to a lien by selling the property in accordance with a power in the mortgage after confession of judgment by the mortgagor.—Utah Ass'n of Credit Men v. Jones, 164 P. 1029.

¶138(1) (Mont.) After division of lambs between lessor and lessee of band of sheep, lessee having executed mortgage on lambs, held, that mortgage, which previously was subject to lessor's lien, was no longer so subject, as between lessor and mortgagee.—National Bank of Gallatin Valley v. Ingle, 164 P. 535.

¶138(1) (Wash.) Under Rem. Code 1915, §§ 1197, 1198, a chattel mortgage prior in time is not outranked by a livery stable keeper's lien subsequently acquired.—Levitch v. Link, 164 P. 233.

¶139 (Mont.) A chattel mortgage is not affected by a previous mortgage, given by one who did not own the property, but had possession of it, where her mortgagee did not rely on such possession or advance money upon the faith of it.—Loud v. Hanson, 164 P. 544.

¶150(1) (Wash.) Filing of chattel mortgage under Rem. Code 1915, § 3662, making such filing "full and sufficient notice," imports as much as actual notice to a subsequent purchaser of land of all its conditions, including agreement that property, though affixed to realty, shall be personal.—Boeringa v. Perry, 164 P. 773.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.**(A) Rights and Liabilities of Parties.**

¶225(1) (Mont.) An "innocent purchaser" is one who pays or obligates himself to pay the full purchase price of mortgaged property to the vendor, with no notice of any claim or right to the property in another.—National Bank of Gallatin Valley v. Ingle, 164 P. 535.

¶225(1) (Mont.) A landowner's mortgage of crops is superior to one subsequently given by person to whom such landowner had agreed to give the crops in return for use of certain chattels.—Loud v. Hanson, 164 P. 544.

IX. FORECLOSURE.

¶256 (Idaho) Evidence in action to enjoin foreclosure of chattel mortgages upon crops held to sustain finding that plaintiff did not assume debt secured by mortgage executed by tenant to defendant company.—Green v. Consolidated Wagon & Machine Co., 164 P. 1016.

CHILDREN.

See Adoption; Bastards; Divorce, ¶307, 308; Guardian and Ward; Highways, ¶184; Infants.

CIGARETTES.

See Nuisance, ¶61.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, ¶734.

CITIES.

See Municipal Corporations.

CITIZENS.

See Indians.

CITY MANAGER.

See Municipal Corporations, ¶48.

CIVIL RIGHTS.

See Constitutional Law, ¶248; Elections.

CIVIL SERVICE.

See Municipal Corporations, ¶125.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Bankruptcy, ¶363; Executors and Administrators, ¶216, 225; Mechanics' Liens, ¶131-158.

CLERKS OF COURTS.

See Bail, ¶61.

CLIENTS.

See Attorney and Client.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Guardian and Ward, ¶107; Judgment, ¶407-521; Municipal Corporations, ¶516.

COLLATERAL INHERITANCE TAXES.

See Taxation, ¶862-890.

COLOR OF TITLE.

See Adverse Possession.

COMMERCE.

See Carriers.

II. SUBJECTS OF REGULATION.

¶35 (Kan.) Continuous transportation of car of horses, etc., from Missouri origin to Kansas destination under separate billing from origin to Kansas City, Mo., and thence by defendant from Kansas point to destination was an interstate shipment, though shipper had intended to unload horses at Kansas City and drive them to destination.—Easdale v. Atchison, T. & S. F. Ry. Co., 164 P. 164.

III. MEANS AND METHODS OF REGULATION.

¶63 (Colo.) City ordinance providing that no person should distribute circulars, placards, or advertising matter within city limits without permit from city clerk for fee of \$25 was revenue measure, and not a police ordinance.—City of Pueblo v. Lukins, 164 P. 1164.

Ordinance of city prohibiting person from distributing advertising matter without permit from city clerk, fee being \$25, as applied to defendant, who distributed such matter as part of transaction in interstate commerce, held void as violative of Const. U. S. art. 1, § 8, giving Congress sole power to regulate commerce between states.—Id.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Depositions, ¶24.

COMMISSIONS.

See Brokers, ¶41-86.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Dedication, ¶1, 28; Marriage, ¶20, 40.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶254-274.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶98, 101.

COMPENSATION.

See Attorney and Client, ¶165-180; Brokers, ¶41-86; Master and Servant, ¶80, 385; Principal and Agent, ¶81.

COMPETENCY.

See Evidence, ¶540, 546; Homicide, ¶215; Jury, ¶99, 100; Witnesses, ¶37-219, 414.

COMPLAINT.

See Indictment and Information; Pleading, ¶54.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Evidence, ¶213; Payment; Release.

¶16(1) (Or.) There is an account stated and settlement barring action for overtime, where an employe each month signs a time check stating amount of time and amount due, and receives payment without protest or objection.—Sumpter v. St. Helens Creosoting Co., 164 P. 708.

CONCLUSIVENESS.

See Judgment, ¶582-707, 822.

CONCURRENT NEGLIGENCE.

See Master and Servant, ¶226.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Bills and Notes, ¶444; Cancellation of Instruments, ¶22; Counties, ¶111; Eminent Domain, ¶169; Landlord and Tenant, ¶47; Reformation of Instruments, ¶24; Vendor and Purchaser, ¶118, 299.

CONFIRMATION.

See Guardian and Ward, ¶103; Mortgages, ¶526; Municipal Corporations, ¶510.

CONFLICT OF LAWS.

See Descent and Distribution, ¶5; Limitation of Actions, ¶2.

CONNECTING CARRIERS.

See Carriers, ¶174-185.

CONSENT.

See States, ¶191.

CONSIDERATION.

See Bills and Notes, ¶352; Contracts, ¶71-75; Corporations, ¶99; Husband and Wife, ¶188; Judgment, ¶841; Mortgages, ¶25.

CONSOLIDATION.

See Insurance, ¶705.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

See Carriers, ¶14.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, ¶16. Special or local laws, see Statutes, ¶79, 94. Subjects and titles of statutes, see Statutes, ¶120.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶26 (Or.) A state Constitution is a limitation and not a grant of power.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

¶48 (Kan.) Every presumption must be indulged to uphold an act of the Legislature, and every reasonable doubt will be resolved in its favor.—*State v. Bentley*, 164 P. 290.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

¶58 (Ariz.) Under Acts 1915, c. 62, §§ 1-6, 8, and Const./art. 5, § 8, article 4, § 8, article 6, §§ 14, 17, article 11, §§ 3, 5, article 22, § 18, and article 7, § 9, *held*, that as power of appointment is primarily in people, and as section 8 inferentially imposes duty upon Legislature in all cases where Constitution does not provide for filling of vacancies, act creating office of law and legislative reference librarian, and appointing defendant thereto, does not violate any provision of Constitution.—*Dunbar v. Cronin*, 164 P. 447.

¶60 (Cal.App.) St. 1915, p. 1530, providing for a bureau of tuberculosis under state board of health and granting of state aid counties for support of tuberculosis patients and giving board of health power to investigate county instructions where such patients are treated, *held* not violative of Const. art. 11, § 13, as to delegation of power.—*Sacramento County v. Chambers*, 164 P. 613.

(B) Judicial Powers and Functions.

¶70(3) (Wash.) Where the Legislature, acting within its constitutional powers, has authorized issuance of bonds by cities for certain purposes, the question of public policy is not for the courts.—*Shorts v. City of Seattle*, 164 P. 239.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

¶197 (Wash.) Rem. Code 1915, §§ 6262-17, 6262-19, although applied so as to prohibit issuing of liquor permits to druggists who have violated previous liquor laws, *held* not ex post facto.—*Rosenoff v. Cross*, 164 P. 236.

X. EQUAL PROTECTION OF LAWS.

¶248 (Mont.) Corrupt Practices Act, §§ 48, 49, authorizing award of attorney's fees to successful party in election contest, *held* not viola-

tive of Const. U. S. Amend. 14, § 1, as denying to unsuccessful party equal protection of laws.—*Doty v. Reece*, 164 P. 542.

XI. DUE PROCESS OF LAW.

¶290(2) (Okla.) Ordinance of city of Tulsa levying assessments for street paving creating arbitrary differences in property to be assessed without regard to benefits received, and allowing certain benefited property to escape assessment, violated Const. art. 2, § 7, and U. S. Const. Amend. 14.—*City of Tulsa v. McCormick*, 164 P. 985.

¶292 (Cal.) Statutes regulatory of when and under what circumstances trees on a highway subserving useful as well as ornamental purposes may be destroyed do not take property of the abutting owner without due process.—*Santa Barbara County v. More*, 164 P. 895.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

¶326 (Mont.) Corrupt Practices Act, §§ 48, 49, authorizing award of attorney's fees to successful election contestant, *held* not violative of Const. Mont. art. 3, § 6, providing that courts shall be open to all without sale or delay.—*Doty v. Reece*, 164 P. 542.

CONSTRUCTION.

See Chattel Mortgages, ¶117-150; Constitutional Law, ¶26, 48; Contracts, ¶152, 159; Covenants, ¶47; Deeds, ¶112-175; Exchange of Property, ¶4; Justices of the Peace, ¶130; Landlord and Tenant, ¶47, 322; Master and Servant, ¶145; Mechanics' Liens, ¶5; Mines and Minerals, ¶43; Municipal Corporations, ¶58; Sales, ¶62; Statutes, ¶181-226; Trial, ¶295; Wills, ¶439-634.

CONSTRUCTIVE NOTICE.

See Notice, ¶6.

CONSTRUCTIVE TRUSTS.

See Trusts, ¶95.

CONTEMPT.

See Depositions, ¶71; Injunction, ¶230; Jury, ¶21.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

¶44 (Okla.Cr.App.) Contempt, being offense against authority of particular court, such court, if having jurisdiction of parties and subject-matter, has jurisdiction to try and punish contemnors, regardless of where or in what states contempt was committed.—*Farmers' State Bank of Texhoma v. State*, 164 P. 132.

¶61(2) (Okla.Cr.App.) Jury's province in indirect contempt proceeding is limited solely to question of guilt or innocence.—*Farmers' State Bank of Texhoma v. State*, 164 P. 132.

III. PUNISHMENT.

¶81 (Wash.) Contempt of county auditor in not obeying writ of mandate was purged and the controversy ended when his term of office expired.—*State v. Wallace*, 164 P. 741.

CONTEST.

See Elections, ¶270, 307.

CONTINGENT REMAINDERS.

See Wills, ¶630, 634.

CONTINUANCE.

See Criminal Law, ¶1151.

¶7 (Wash.) It is within discretion of trial court to grant or refuse a continuance.—Jones v. Jones, 164 P. 757.

CONTRACTORS' BONDS.

See Municipal Corporations, ¶347; Schools and School Districts, ¶81.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Alteration of Instruments; Assignments; Bailment; Bills and Notes; Brokers, ¶71; Cancellation of Instruments; Carriers, ¶58; Chattel Mortgages; Compromise and Settlement; Corporations, ¶406; Counties, ¶111; Covenants; Customs and Usages; Damages, ¶28, 120; Evidence, ¶384-466; Exchange of Property; Fixtures, ¶27; Frauds, Statute of; Guaranty; Injunction, ¶42; Insurance; Interest; Landlord and Tenant, ¶322; Limitation of Actions, ¶24, 25, 46; Mandamus, ¶84; Mines and Minerals, ¶85; Money Lent; Municipal Corporations, ¶331-374; Novation; Partnership; Payment; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales, ¶62; Schools and School Districts, ¶81-86, 135; Specific Performance; Spendthrifts, ¶8; Stipulations; Telegraphs and Telephones, ¶54; Usury; Vendor and Purchaser; Warehousemen; Waters and Water Courses, ¶156, 158.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

¶9(1) (Or.) An agreement to purchase stock, providing that purchasers will execute a supplemental agreement satisfactory to sellers guaranteeing purchase, and that buyers and said guarantor on said agreement will deposit satisfactory security to be hereafter determined, is void for uncertainty in that it fails to specify amount of security.—Holtz v. Olds, 164 P. 583.

¶9(1) (Or.) There is not the necessary meeting of minds where the terms of the chattel mortgage which parties agree shall be executed and substituted for a lien giving right to possession are not agreed on with certainty.—Gregory v. Oregon Fruit Juice Co., 164 P. 728.

(B) Parties, Proposals, and Acceptance.

¶25 (Or.) An agreement to make a contract in the future is not binding, unless all the terms and conditions are agreed upon, and nothing left to future negotiations.—Holtz v. Olds, 164 P. 583.

(D) Consideration.

¶71(3) (Okl.) Forbearance in the prosecution of an action is sufficient consideration for a contract.—Hays v. Smith, 164 P. 470.

¶75(2) (Colo.) An agreement to give plaintiff possession of property on a certain day, to which he is entitled under existing contract, is no consideration for release of any of his rights thereunder.—Benford v. Yockey, 164 P. 725.

(F) Legality of Object and of Consideration.

¶107 (Wash.) An insurance agent, by agreeing to obtain without commission a loan from his company to defendant if latter would take out life policies for which agent would obtain commissions, violates Rem. Code 1915, § 6059-180, prohibiting rebates, and is void in view of section 6000-191, imposing a penalty for such an act.—Moser v. Pantages, 164 P. 768.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

¶152 (Utah) All the words used in a contract must, if possible, be given their usual and ordinary meaning and effect.—Board of Education of Salt Lake City v. Wright-Osborn Co., 164 P. 1033.

¶159 (Wash.) In general, "renewal," as applied to promissory instruments, means change of something old for something new.—Guie v. Byers, 164 P. 75.

In general, the words "renewal" and "extension" apply to the particular debt and instruments between the same parties or their successors.—Id.

"Renewal" and "extension" are not words of art, having no legal nor technical significance, and may mean whatever the parties intended when contracting.—Id.

III. MODIFICATION AND MERGER.

¶245(2) (Cal.App.) Rule that written agreement supersedes oral stipulations, held not to apply to collateral agreement, on which instrument is silent, and not purporting to affect its terms.—Simmons v. Firth, 164 P. 807.

¶245(2) (Kan.) Where telephone contract for purchase of grain is followed by confirmation letter from purchaser setting forth contract, the confirmation controls, unless seller notifies purchaser of any objection thereto.—Wallingford v. Bushton Grain & Supply Co., 164 P. 275.

IV. RESCISSION AND ABANDONMENT.

¶261(1) (Cal.App.) In view of Civ. Code, § 1689, plaintiff could rescind an oral agreement whereby defendant agreed, but later refused, to teach plaintiff to sell washing machines and subagencies.—Shull v. Crawford, 164 P. 330.

V. PERFORMANCE OR BREACH.

¶300(1) (Cal.App.) Delay in completion of building held not excused by acts of owner or architect or by storm where no demand for additional time was made by contractor as required by the contract.—Suhr v. Metcalfe, 164 P. 407.

Street improvements by municipal authorities do not excuse delay in completing building unless it rendered performance of contract practically impossible; mere difficulty or unexpected expense not being sufficient.—Id.

¶300(2) (Cal.App.) Civ. Code, § 1511, does not excuse delay in performance of building contract because of agreement between contractor and owner for extra work.—Suhr v. Metcalfe, 164 P. 407.

¶319(2) (Kan.) In action to recover for part performance of contract to construct floor in a warehouse which burned before floor was completed, recovery could not be based on fact that on contractor's request owner declined to rebuild, or that he collected insurance procured before contract was made.—Carroll v. Bow-ersock, 164 P. 143.

In action to recover for part performance of contract to put floor in warehouse which burned before work was completed, recovery was limited to amount of contract work done which was then so far identified with building that the material and labor would have inured to owner's benefit if fire had not occurred.—Id.

¶321(4) (Or.) Under a contract to purchase from defendants all corporate stock owned by them, "to be issued as hereinafter set out," agreement by defendants therein to make inventory of goods of corporation according to terms, held a condition precedent to payment, breach of which entitled plaintiffs to recover money deposited with defendants.—Holtz v. Olds, 164 P. 583.

¶323(2) (Idaho) Where by the undisputed testimony there is clearly a substantial failure

of performance on the part of one of the parties to the contract, the court should so declare as a matter of law.—*Austin v. Brown Bros. Co.*, 164 P. 95.

VI. ACTIONS FOR BREACH.

⚡324(1) (Cal.) In action for breach of contract, complaint, although not wholly consistent on subject of rescission, construed, and held to state cause of action for loss of profits; there being no averments of return or offer to return necessary in quantum meruit.—*Walsh v. Standart*, 164 P. 795.

⚡332(1) (Cal.) Allegation that plaintiff notified defendants that by reason of their failure and refusal to perform contract, plaintiff has elected to rescind and cancel contract, is not allegation that contract has been rescinded.—*Walsh v. Standart*, 164 P. 795.

⚡343 (Colo.) A general denial held insufficient where plaintiff, as allowed by Rev. Code 908, § 72, has pleaded generally performance of conditions precedent in a contract.—*National Surety Co. v. Queen City Land & Mortgage Co.*, 164 P. 722.

CONTRADICTION.

See Witnesses, ⚡405.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ⚡70-101, 122.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Husband and Wife, ⚡47, 183, 267; Indians, ⚡15; Mortgages.

COPY.

See Costs, ⚡132.

CORPORATIONS.

See Action, ⚡45; Banks and Banking; Bills and Notes, ⚡340; Building and Loan Associations; Carriers; Contracts, ⚡9; Guaranty, ⚡4; Guardian and Ward, ⚡23; Insurance, ⚡675, 705; Limitation of Actions, ⚡88; Mandamus, ⚡83, 132; Municipal Corporations, ⚡873; Pleading, ⚡177; Railroads; Street Railroads; Taxation, ⚡158, 380; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

⚡60 (Cal.App.) Where a corporation transferred to its stockholders a leasehold and personal property, the conveyance was a transfer of the corporation's capital or assets within Civ. Code, § 309, which is equivalent to capital stock.—*Stewart v. Stewart Hotel Co.*, 164 P. 620.

(C) Issue of Certificates.

⚡99(2) (Cal.App.) Corporation stock, issued in return for valuable services rendered and labor performed on behalf of the corporation, is not issued without consideration.—*Ellsworth v. National Home & Town Builders*, 164 P. 14.

(D) Transfer of Shares.

⚡116 (Wash.) A contract of sale of the stock of a corporation held executory merely, and not executed, when to induce consummation of contract a warranty as to extent of corporation's liabilities was given.—*Pacific Power & Light Co. v. White*, 164 P. 602.

⚡120 (Wash.) A warranty inducing consummation of contract to purchase stock, given when the purchaser was not legally bound to consummate, has consideration.—*Pacific Power & Light Co. v. White*, 164 P. 602.

"Liabilities" of corporation, warranted in a contract of sale of its stock and in a separate warranty not to exceed a certain amount, are not limited to contractual liabilities, but include those for torts.—*Id.*

A warranty on which sale of the stock of a corporation is made against its liabilities, undisclosed or contingent or otherwise, exceeding a certain amount, is continuing.—*Id.*

⚡121(1) (Wash.) Only such of the sellers of the stock of a corporation as sign a contract of warranty as to extent of its liabilities, inducing consummation of purchase, are necessary parties defendant to action thereon.—*Pacific Power & Light Co. v. White*, 164 P. 602.

⚡121(5) (Utah) A general scheme to defraud cannot be inferred merely because a vendor is charged with making certain false representations concerning stock offered for sale.—*Smith v. Gilbert*, 164 P. 1026.

⚡123(15) (Wash.) Where the pledgee of stock accepted bonds in lieu of the note for which the stock was pledged and received the bonds and thereafter refused to deliver the stock to the surety, its act constituted conversion.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

⚡130 (Cal.App.) The mere fact that certain stock was named in a pooling agreement which was never consummated would not prevent its transfer on the books to the holder.—*Ellsworth v. National Home & Town Builders*, 164 P. 14.

⚡133 (Cal.App.) In action by holder of corporation stock for a corporation's refusal to make stock transfer on its books, evidence of the consideration paid by her was inadmissible.—*Ellsworth v. National Home & Town Builders*, 164 P. 14.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⚡186 (Cal.App.) Under Civ. Code, § 309, a corporation to save itself from loss may, in view of section 343, transfer assets in consideration of a delivery to it of its own stock.—*Stewart v. Stewart Hotel Co.*, 164 P. 620.

A transfer of corporate assets to stockholders in consideration of their surrender of their stock, etc., held not subject to attack under Civ. Code, § 309.—*Id.*

(B) Meetings.

⚡193 (Cal.App.) Though by-laws provided that the stockholders' meetings should be held in Phoenix, Ariz., acts of stockholders and directors elected by them at a meeting in Los Angeles, to which all the stockholders consented, and notice of which they waived, were valid.—*Ellsworth v. National Home & Town Builders*, 164 P. 14.

VI. OFFICERS AND AGENTS.

(B) Authority and Functions.

⚡298(3) (Idaho) Where meeting of directors of corporation was unlawful because notice was not given to all directors as required by by-laws, failure of absent directors or stockholders to dissent or to set aside known action of board amounts to a ratification.—*Pettengill v. Blackman*, 164 P. 358.

⚡306 (Wash.) Under Rev. Code 1915, §§ 3677, 3697, 3698, directors held not personally liable for fraud of president and manager because, knowing of other fraudulent acts, they failed to discharge him.—*Northern Codfish Co. v. Stiberg*, 164 P. 750.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

—406(2) (Okla.) In view of Rev. Laws 1910, §§ 1252, 1253, 1246, president of corporation has no inherent authority to contract for corporation; his power in that respect being no greater than that of any other director.—*Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, 164 P. 671.

—414(4) (Utah) Ordinarily, secretary of corporation has no right to execute and deliver its promissory note without authority being conferred upon him by its board of directors.—*McCarrick v. Lenox Mining Co.*, 164 P. 478.

Secretary of corporation has implied authority to issue its promissory note in accordance with custom by which he has been permitted to issue similar notes.—*Id.*

—425(4) (Cal.App.) Where the secretary of a corporation without authority indorsed a check payable to corporation and used proceeds in a transaction in which he was interested adversely, there being no evidence of prior similar act, the rule that a corporation is bound by powers that its agent is permitted to exercise openly could not be invoked.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—425(4) (Idaho) Where one without collusion or fraud deals with a corporation through officer in active management of its business and officer's act is one which corporation might do, corporation is estopped from relying on officer's lack of authority as defense against such other party.—*Pettengill v. Blackman*, 164 P. 358.

Where one deals with corporation in good faith and unaware of any defect of authority or other irregularity on part of those acting for it and there is nothing to excite suspicion of such defect, etc., corporation is bound by contract though defect, etc., exists.—*Id.*

—425(5) (Cal.App.) Where plaintiff purchased land from a corporation, and its officers represented that the deed would convey good title, on which she relied without inquiry, company was estopped to deny plaintiff's ownership, though it and its officers acted in good faith and made no misrepresentations while plaintiff had constructive record notice of condition of title.—*Prouty v. Rogers*, 164 P. 901.

—426(1) (Cal.App.) Resolution of directors and stockholders of a corporation writing down stock to cover defalcations of secretary held not to prevent an action for conversion of a check cashed by secretary at a bank without authority.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

Where secretary of a corporation without authority indorsed a check payable to corporation to a bank in a transaction in which he was personally interested, contention that corporation suffered no loss because money was used to secure title to property upon which corporation had a mortgage held without merit.—*Id.*

—426(3) (Okla.) Where act of president of oil company, in contracting for sale of oil, was repudiated by company's directors, it was not binding on company in favor of third person, not party thereto.—*Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, 164 P. 671.

—426(10) (Cal.App.) Even though a corporation was benefited by the execution of a renewal trust deed, its retention of such benefits would not constitute a ratification of the act of its secretary in cashing a check and using proceeds to secure title to the property or prevent it from repudiating it, but loss must fall on bank which cashed check.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—426(10) (Idaho) Where a private corporation receives and retains the benefits of an illegal transaction, on the part of its directors,

such conduct amounts to a ratification.—*Pettengill v. Blackman*, 164 P. 358.

—426(12) (Cal.App.) In view of Civ. Code, § 2310, regarding ratification, where secretary of corporation without authority indorsed a check payable to corporation and used proceeds to secure title to property upon which corporation had mortgage, that corporation took a renewal deed of trust did not amount to a ratification of secretary's unauthorized act of which it was not then aware.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—428(11) (Cal.App.) Where an agent of a corporation is dealing with corporate property in his own behalf and is interested adversely to corporation or in a scheme to defraud corporation, it will not be presumed that he will communicate facts affecting transaction, and his knowledge will not be imputed to corporation, except where it is represented in whole transaction by officer as agent.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

—429 (Cal.App.) In view of Civ. Code, §§ 2230, 2234, held that an officer of a corporation who is an agent and trustee may not use corporate property for own benefit, and such use is notice of lack of authority.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

VIII. INSOLVENCY AND RECEIVERS.

—544(1) (Idaho) In the absence of collusion or fraud, an insolvent corporation is not prohibited from preferring certain creditors over others.—*Pettengill v. Blackman*, 164 P. 358.

—544(6) (Idaho) Where an insolvent corporation makes a bona fide transfer of property to a creditor as security for an actual debt and for an adequate consideration, neither collusion nor fraud in its legal sense can be predicated on such transaction.—*Pettengill v. Blackman*, 164 P. 358.

—545(1) (Utah) Where both parties act in good faith, execution of a mortgage by an insolvent corporation to a minority stockholder for money loaned to and applied by corporation to payment of current debts, and a subsequent foreclosure by a stockholder, is not an unlawful preference.—*Callahan v. Pioneer Nurseries Co.*, 164 P. 878.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

—630(6) (Wash.) Personal judgment cannot be obtained against corporation that has been dissolved.—*Droppelman v. Illinois Surety Co.*, 164 P. 70.

XII. FOREIGN CORPORATIONS.

—668(1) (Or.) A foreign corporation doing business within the state is a "resident" to extent that it is amenable to process of state courts.—*Hamilton v. North Pac. S. S. Co.*, 164 P. 579.

—691 (Wash.) Action asking for appointment of receiver of foreign corporation which has been dissolved receiver having been appointed in its home state, is "proceeding quasi in rem," and cannot be maintained.—*Droppelman v. Illinois Surety Co.*, 164 P. 70.

CORPUS DELICTI.

See Homicide, —228.

CORROBORATION.

See Criminal Law, —508, 511; Witnesses, —412, 414.

CORRUPT PRACTICE ACT.

See Constitutional Law, —248, 326; Statutes, —79.

COSTS.

See Appeal and Error, **780**, 786, 984; Damages, **72**; Elections, **307**; Husband and Wife, **301**; Insurance, **675**.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

4 (Wash.) Where at time defendant executed bond no attorney fee was provided for by statute, plaintiff cannot recover under later enactment, providing for attorney's fee in addition to all other costs.—Peterson v. Jahn Contracting Co., 164 P. 937.

32(1) (Idaho) Actions involving title to or possession of irrigation ditches are within Rev. Codes, §§ 4901, 4903, and party in whose favor judgment is rendered is entitled to recover costs of suit.—Brunzell v. Stevenson, 164 P. 80.

V. AMOUNT, RATE, AND ITEMS.

178 (Wash.) The cost of preparing plats is not a taxable item of costs in the first instance.—Perlus v. Market Inv. Co., 164 P. 65.

182 (Wash.) The cost of preparing certified copies of city ordinances is not a taxable item, unless the ordinances were in issue under the pleadings so as to make them admissible in evidence.—Perlus v. Market Inv. Co., 164 P. 65.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

232 (Or.) Where suit is dismissed on appeal by defendant for failure of plaintiff to produce preponderance of evidence, dismissal should be without costs or disbursements to either party.—Prouty v. Burroughs, 164 P. 187.

260(1) (Or.) Where an appeal was taken in good faith, the respondent is not entitled to 10 per cent. of the judgment as damages for delay.—White v. East Side Mill & Lumber Co., 164 P. 736.

260(2) (Ariz.) An appeal taken for delay will be dismissed, and damages awarded to appellee.—Williams v. West Pub. Co., 164 P. 317.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

277(3) (Or.) It is within discretionary power of court to stay proceedings in suit until plaintiff therein shall have paid costs assessed against him in prior suit between the same parties, involving substantially same matter and praying for same relief.—Windsor v. Holloway, 164 P. 1177.

Order requiring that within 90 days plaintiff pay costs of prior suit between same parties involving same subject-matter and same relief, and in default thereof his suit be dismissed, held not abuse of discretion.—Id.

COTENANCY.

See Tenancy in Common.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Estoppel, **62**; Health, **21**.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

1 (Cal.App.) Counties are not municipal corporations, but local subdivisions of state created by sovereign power without consent or action by their inhabitants, although they are quasi corporations and may be within inhibi-

tions of Const. art. 4, §§ 22, 31.—Sacramento County v. Chambers, 164 P. 613.

II. GOVERNMENT AND OFFICERS.**(C) County Board.**

49 (Kan.) Rule that ordinarily finding of public body as to steps taken preliminary to its action is conclusive does not apply where prior valid special election was condition precedent to its action.—Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County, 164 P. 281.

III. PROPERTY, CONTRACTS, AND LIABILITIES.**(B) Contracts.**

111(2) (Kan.) County board by virtue of Gen. St. 1915, § 2552, has no power to provide for erection of county jail without popular vote, and its contract under color of election held without required notice is unenforceable.—Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County, 164 P. 281.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

178 (Kan.) Gen. St. 1915, § 2553, requiring notice of a special election to vote bonds for the erection of a county jail to be published in newspaper "for" 30 days before time set, is not complied with where notice is omitted from last issue of paper prior to date named.—Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County, 164 P. 281.

That election to vote bonds for erection of county jail was held upon same day as state primary did not alter its character as special election.—Id.

Failure to publish notice of special election to vote on bonds for erection of county jail for full period required by Gen. St. 1915, § 2553, rendered election void.—Id.

VI. ACTIONS.

210 (Wash.) Rem. Code 1915, § 951, allowing actions against counties, does not expressly mention damages from operation of a ferry, does not exclude such action, since section 5013 authorizes counties to operate ferries.—Bergen v. Lewis County, 164 P. 73.

COUNTS.

See Pleading, **54**.

COUNTY COURTS.

See Courts, **185**.

COURTS.

See Constitutional Law, **70**; Contempt; Judges; Justices of the Peace; Motions, **56**; Prohibition, **5**.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.**(D) Rules of Decision, Adjudications, Opinions, and Records.**

91(1) (Cal.App.) The last decision of a court of last resort, though inconsistent with earlier decision, is deemed to establish the law.—Chambers v. Belmore Land & Water Co., 164 P. 404.

97(1) (Wash.) Whether a national bank is liable as custodian of a will for failure to deliver it is a federal question.—Myers v. Exchange Nat. Bank, 164 P. 951.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

185 (Colo.) Suit to set aside divorce decree is not divorce suit and an appeal therein is

governed by Rev. St. 1908, § 1536, as to appeals in general, and not by Sess. Laws 1915, p. 206, § 12, as to appeals in divorce actions.—*Boyd v. Boyd*, 164 P. 703.

§185 (Or.) An order of the county court rejecting a claim against a spendthrift's estate is appealable in view of L. O. L. § 945.—*In re Barker*, 164 P. 382.

Under L. O. L. § 559, the circuit court may enter judgment for claimant on appeal from an order of county court rejecting claim against estate of spendthrift.—*Id.*

§185 (Or.) L. O. L. § 554, requiring filing of transcript within 30 days after perfecting appeal, is mandatory and jurisdictional.—*In re Ryan's Estate*, 164 P. 586.

Where on appeal from county to circuit court transcript is not filed, as required by L. O. L. § 554, within 30 days from perfecting appeal, the circuit court has no power to order that the transcript be filed as of a date within the expired 30 days.—*Id.*

An appeal from the county to the circuit court having been dismissed for failure to file transcript in time, the circuit court could not, at a subsequent term, without showing of appellant's mistake, inadvertence, or excusable neglect, reinstate the cause for trial.—*Id.*

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

§212 (Cal.App.) In action at law wherein amount of demand was less than \$2,000, appeal should have been taken to District Court of Appeal.—*Pierce v. Employers' Indemnity Exch.*, 164 P. 403.

Const. art. 6, § 4, gives Supreme Court to which appeal has been wrongly taken jurisdiction to make no orders except an order of transfer to the proper court.—*Id.*

COVENANTS.

See Injunction, §62; Vendor and Purchaser, §92.

II. CONSTRUCTION AND OPERATION.

(B) Covenants of Title.

§47 (Kan.) In general warranty deed of lots fronting on streets in an addition, "according to the recorded plat thereof," the grantor, by such reference, did not represent or guarantee the courses, distances, measurements, or quantity of lots to be as set forth in plat.—*Fitzpatrick v. Crowther*, 164 P. 300.

IV. ACTIONS FOR BREACH.

§108(1) (Wash.) Where a vendor agreed to prosecute or defend any suit necessary to vest title in the purchaser, the purchaser, who had a substantial interest in the property, was not delinquent in not returning the evidences of title to the vendor so he could defend such a suit in his own name, where no request for the return was made.—*Yanasse Land Co. v. Hewitt*, 164 P. 196.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Appeal and Error, §994; Criminal Law, §768; Witnesses, §360-406.

CRIMINAL LAW.

See Assault and Battery, §78; Bail; Burglary; Contempt; False Pretenses; Highways, §186; Homicide; Indictment and Information; Intoxicating Liquors, §132-239; Jury, §21, 23; Larceny; Lewdness; Obstructing Justice; Rape.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§15 (Okl.Cr.App.) Under Const. art. 5, § 54, statutes repealing penalties for offenses operate prospectively, and are applicable only to offenses committed after the statute became effective.—*Penn v. State*, 164 P. 992.

VII. FORMER JEOPARDY.

§192 (Colo.) Under the express provisions of Rev. St. 1908, § 1907, defendants discharged upon the charge of illegally selling intoxicating liquors cannot be placed in jeopardy a second time upon the state successfully prosecuting a writ of error from such discharge.—*People v. Denver Athletic Club*, 164 P. 1158.

§202(1) (Colo.) Where defendant was acquitted of charge of having had sexual intercourse with female under 18, acquittal was a bar to subsequent prosecution for nonsupport of the girl and her illegitimate child.—*Reil v. People*, 164 P. 315.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§293 (Colo.) Demurrer to the plea of autrefois acquit admits the facts set up in the plea.—*Reil v. People*, 164 P. 815.

§294 (Colo.) In prosecution for nonsupport of illegitimate child and its mother, where defendant pleaded autrefois acquit because he had been acquitted in prosecution for having had intercourse with girl under 18, if acquittal was on ground that she was over 18, matter should have been set up by state's answer to plea.—*Reil v. People*, 164 P. 315.

X. EVIDENCE.

(C) Other Offenses, and Character of Accused.

§369(8) (Okl. Cr. App.) In prosecution for statutory rape, evidence of sexual intercourse between prosecutrix and defendant subsequent to the act upon which prosecution is based is admissible to show the intimate relation of the parties, and to corroborate ultimate fact to be proven.—*Penn v. State*, 164 P. 992.

§369(15) (Utah) In prosecution for robbery, letters which there was evidence to show defendant wrote and which referred to another robbery, but indicated that it was committed by same person as committed robbery in question, are admissible to identify defendant as guilty party.—*State v. Martin*, 164 P. 500.

§370 (Ariz.) In prosecution for illegal sale of intoxicants by employé of defendant, evidence of other sales by employé before and after sale charged, held properly admitted to show knowledge, etc., of defendant.—*Elliott v. State*, 164 P. 1179.

In prosecution for sale of intoxicants by employé of defendant, although conviction could not be had upon other sales, evidence of other sales not personally made by defendant, held competent; it being reasonable inference that if liquor was frequently sold at his place he must have known of it.—*Id.*

§371(10) (Wash.) In prosecution of physician for having issued prescription for whisky without reason to believe that person to whom it was issued was sick, testimony as to prescriptions other than that on which charge was laid was admissible.—*City of Seattle v. Hewetson*, 164 P. 234.

(E) Best and Secondary and Demonstrative Evidence.

§402(1) (Wash.) Where effort by means of subpoena duces tecum had been made to have record book of drug store and its prescription file brought into court in prosecution for having issued prescription without reason to believe that person to whom it was issued was

sick, etc., oral testimony as to its contents was admissible.—City of Seattle v. Hewetson, 164 P. 234.

⇒404(4) (Okla. Cr. App.) In prosecution for selling whisky, a certain pint of whisky which prosecuting witness identified as that bought from defendant, and which sheriff testified was the whisky he got from prosecuting witness, was sufficiently identified to authorize its admission in evidence.—Collingwood v. State, 164 P. 1154.

⇒404(5) (Utah) State can introduce letters which it was shown without dispute defendant had written, to be used by experts as standards of comparison with disputed handwriting.—State v. Martin, 164 P. 500.

(F) Admissions, Declarations, and Hearsay.

⇒406(1) (Cal. App.) Where there was ample evidence that a crime had been committed, admissions and confessions of defendant made voluntarily held properly received in evidence.—People v. Searle, 164 P. 819.

⇒419, 420(8) (Mont.) Sheriff's testimony that some person stated to him, but not in defendant's presence, that defendant claimed to own stolen property, is inadmissible as hearsay.—State v. Brodock, 164 P. 658.

(G) Acts and Declarations of Conspirators and Codefendants.

⇒424(3) (Okla. Cr. App.) Contradictory statements by codefendant after the crime, not shown to have been made in the presence or hearing of a defendant separately tried, are not original evidence against latter.—Thomas v. State, 164 P. 995.

(J) Testimony of Accomplices and Codefendants.

⇒508(1) (Idaho) When the requirement as to corroboration of accomplice testimony has been met, it may become of the utmost importance in securing a just enforcement of the law.—State v. Smith, 164 P. 519.

⇒511(1) (Okla. Cr. App.) It is not essential that corroborating evidence shall cover every material point in accomplice's testimony, or be alone sufficient to warrant a conviction.—Moody v. State, 164 P. 676.

⇒511(2) (Idaho) A conviction cannot be sustained on the uncorroborated testimony of an accomplice, though it is only necessary that it be corroborated on some material fact which in itself and unaided by accomplice's testimony tends to connect accused with the offense.—State v. Smith, 164 P. 519.

⇒511(2) (Okla. Cr. App.) Evidence corroborative of an accomplice need not directly connect the defendant with the commission of the crime; it is sufficient if it tends to do so.—Moody v. State, 164 P. 676.

If accomplice is corroborated as to material facts by independent evidence connecting defendant with crime, the jury may infer that he speaks the truth as to all, though corroboration must show more than mere commission of offense of the circumstances thereof.—Id.

⇒511(3) (Okla. Cr. App.) Evidence corroborating an accomplice and tending to connect defendant with the commission of the crime may be circumstantial only.—Moody v. State, 164 P. 676.

(M) Weight and Sufficiency.

⇒561(1) (Okla. Cr. App.) The state must establish guilt beyond a reasonable doubt.—Lancaster v. State, 164 P. 1152.

XII. TRIAL.

(A) Preliminary Proceedings.

⇒622(1) (Idaho) Under Rev. Codes, § 7860, as amended by Laws 1911, c. 112, the granting

or refusal of a separate trial rests in the discretion of the trial court.—State v. Smith, 164 P. 519.

⇒628(5) (Okla. Cr. App.) Where county attorney, after trial began, showed that he had learned of another witness whom he did not know of before, leave to indorse name of such witness on information and to permit him to testify may be granted by court in its discretion.—Waller v. State, 164 P. 1151.

⇒629 (Okla. Cr. App.) Under Const. art. 2, § 20, accused in capital case need not demand list of witnesses to be used by state in chief, and trial court cannot force him to trial until he waives such demand, or it has been complied with.—Spess v. State, 164 P. 131.

(B) Course and Conduct of Trial in General.

⇒636(5) (Cal. App.) While defendant had right to be present when jury visited premises, held, that he waived right by stipulation of counsel that no one need accompany jury except sheriff.—People v. Searle, 164 P. 819.

(C) Reception of Evidence.

⇒673(3) (Okla. Cr. App.) Where contradictory statements made by codefendant after the crime, out of the presence or hearing of defendant separately tried, relate to material matters and a proper foundation is laid, they may be shown only to affect witness' credibility, and it is the court's duty to so instruct.—Thomas v. State, 164 P. 995.

(E) Arguments and Conduct of Counsel.

⇒730(1) (Kan.) Misconduct of counsel in presence of jury, where court immediately directs jury to disregard such misconduct, will not cause reversal of judgment, unless it appears that the misconduct was such that it could not be so cured by court.—State v. McLeMore, 164 P. 161.

(F) Province of Court and Jury in General.

⇒737(1) (Okla. Cr. App.) Questions of fact involving the guilt or innocence of the accused are always for the jury.—Horn v. State, 164 P. 683.

⇒758 (Idaho) Where only issue was self-defense instruction that jury should not accept defendant's testimony blindly, or unless corroborated, but might consider its truth, taking into account defendant's interest as bearing on his credibility, was erroneous.—State v. Lundhigh, 164 P. 690.

⇒761(6) (Okla. Cr. App.) An instruction on self-defense held not objectionable as assuming that the defendant invited or provoked a difficulty with the deceased.—Bashara v. State, 164 P. 324.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⇒770(2) (Okla. Cr. App.) Where the evidence was circumstantial and conflicting, it was error to refuse to instruct on the theory of the defense which the evidence tended to support.—Crittenden v. State, 164 P. 675.

⇒778(12) (Idaho) Instruction under Rev. Codes, § 7866, that if state had proved that defendant shot and killed deceased, it was incumbent upon defendant to prove his plea of self-defense by preponderance of the evidence, was an erroneous statement of the law.—State v. Lundhigh, 164 P. 690.

⇒783(1) (Ariz.) In prosecution for illegal sale of intoxicants by employé of defendant, instruction either as requested or as modified when given held too general to define purpose of admitting evidence of other sales.—Elliott v. State, 164 P. 1179.

⇒784(1) (Okla. Cr. App.) Where state's case is based wholly on circumstantial evidence, and defendant shows facts tending to exonerate him from crime, the refusal of instruction on circumstantial evidence was error.—*Pierson v. State*, 164 P. 1006.

⇒814(1) (Okla. Cr. App.) Instructions to the jury must be applicable to the case; the law applicable being determined by the accusation and the evidence introduced.—*Anderson v. State*, 164 P. 128.

⇒814(19) (Mont.) In prosecution for grand larceny, where court charged, in substance, Rev. Codes, §§ 8119, 9187, defining principal, and advising jury that distinction between accessory before fact and principal has been abrogated by statute, neither of such charges was improper as implying that a felony had been committed.—*State v. Wiley*, 164 P. 84.

(H) Requests for Instructions.

⇒824(1) (Okla. Cr. App.) Where statute fixes maximum penalty, but omits a definite minimum punishment, an instruction practically in its language, in absence of any request for instruction as to minimum term of imprisonment, is not prejudicial error.—*West v. State*, 164 P. 327.

⇒829(1) (Ariz.) Refusal of instruction held not reversible error in view of given instruction to same effect.—*Elliott v. State*, 164 P. 1179.

⇒829(2) (Okla. Cr. App.) When the instructions properly submit all the issues in the case fairly and impartially, it is not necessary to submit additional requested instructions emphasizing some peculiar phase of the case.—*Horn v. State*, 164 P. 683.

⇒829(3) (Mont.) In prosecution for grand larceny, court's refusal of instructions that felonious intent to steal must have accompanied original taking, etc., held not erroneous; subject having been covered.—*State v. Wiley*, 164 P. 84.

⇒830 (Okla. Cr. App.) Where defendant's requested instruction pertains to a material issue, but is not in proper form, the court should give a correct instruction if it has not otherwise instructed on such issue.—*Thomas v. State*, 164 P. 995.

(J) Custody, Conduct, and Deliberations of Jury.

⇒854(2) (Okla. Cr. App.) Under Rev. Laws 1910, § 5899, in a capital case, and on reasonable request of counsel for the state or for defendant the jury should be put in charge of sworn bailiff and kept together, though the court may permit jury to separate before final submission when no such request is made.—*Horn v. State*, 164 P. 683.

⇒855(2) (Okla. Cr. App.) Jurors' use of small quantities of intoxicants mixed with curative drugs for medicinal purposes when not deliberating on verdict will not vitiate verdict, where they were in no way incapacitated for proper performance of their duties.—*Allen v. State*, 164 P. 1002.

⇒863(1) (Okla. Cr. App.) Under Rev. Laws 1910, § 5906, where nothing had occurred by reason of bailiff's remarks to jury to prejudice defendant's substantial rights, it was within trial court's discretion to recall jury for additional instructions, or to correct those given; defendant being present.—*Moody v. State*, 164 P. 678.

(L) Waiver and Correction of Irregularities and Errors.

⇒902 (Idaho) Where counsel for accused, at time of giving of an instruction, states that it is satisfactory, he cannot on appeal from an adverse decision complain that his rights were not protected thereby.—*State v. Smith*, 164 P. 519.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⇒913(1) (Cal. App.) In view of Pen. Code, §§ 1191, 1202, in a prosecution for embezzlement, where, after verdict of guilty, plaintiff made oral application for release on probation, and time for hearing this application and for pronouncing judgment was extended several times, and probation was finally denied and judgment entered 33 days after date of conviction, defendant was entitled to a new trial.—*People v. Gilbreth*, 164 P. 18.

⇒925½(1) (Okla. Cr. App.) Under Rev. Laws 1910, § 5937, it is ground for new trial for the jury to receive evidence out of court, such as part of written evidence at preliminary examination, which was not introduced at the trial and which is damaging to defendant.—*Thomas v. State*, 164 P. 995.

⇒925½(4) (Okla. Cr. App.) That jurors were permitted to have local newspapers containing statements of other homicides, where all references to the one on trial were cut out, was not reversible error.—*Allen v. State*, 164 P. 1002.

⇒938(4) (Okla. Cr. App.) The overruling of a motion for a new trial, based on newly discovered evidence of a witness who testified at the trial, which by due diligence could have been elicited at that time, is not error.—*Pann v. State*, 164 P. 992.

⇒939(1) (Utah) Evidence held to establish that accused was reasonably diligent in preparing for trial, where he was without funds and important witnesses lived several hundred miles distant, and did not appeal though subpoenas were given to sheriff.—*State v. Williams*, 164 P. 253.

⇒941(1) (Utah) Where evidence barely sustained a conviction for larceny of horses, the trial court abused its discretion in denying a new trial motion, largely based on cumulative affidavits, showing that the man from whom he had innocently secured them really existed, which the sheriff had testified was not a fact.—*State v. Williams*, 164 P. 253.

⇒943 (Cal. App.) Refusal to grant a new trial was proper where the alleged newly discovered evidence would merely contradict statements of certain witnesses.—*People v. Yip Sing*, 164 P. 806.

XV. APPEAL AND ERROR AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇒1036(2) (Cal. App.) Under circumstances, held prejudicial error could not be predicated on cross-examination of defendant's character witnesses, there having been no objection or assignment of misconduct, and no request for admonition or instruction to disregard.—*People v. Fodera*, 164 P. 22.

⇒1036(4) (Wash.) Claim that oral testimony as to contents of drug store's record book and prescription file was inadmissible because secondary and because no proper foundation was laid, should have been pointed out to trial court.—*City of Seattle v. Hewetson*, 164 P. 234.

⇒1037(2) (Cal. App.) Defendant not having moved to strike out, nor requested instruction to disregard, cannot predicate prejudicial error on asking of improper question by district attorney answered in the negative.—*People v. Fodera*, 164 P. 22.

⇒1038(1) (Okla. Cr. App.) Where no objection is made and exception taken to an instruction when given and it is partly erroneous, the giving of it is not reversible error, unless some constitutional or express statutory right of defendant is invaded.—*Bashara v. State*, 164 P. 324.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

⇐1084 (Okla.Cr.App.) Where trial court fixes amount of defendant's bail bond as a supersedeas on appeal, it must fix time within which bond shall be given and error filed; otherwise the appeal bond will not be effective as a supersedeas.—*Ex parte Burton*, 164 P. 135.

(D) Record and Proceedings Not in Record.

⇐1086(14) (Mont.) Under Rev. Codes, § 9271, subd. 4, prohibiting reversals for errors in instructions not excepted to before charge is given, refusal of requested instructions cannot be reviewed where record does not show proceedings when instructions were settled.—*State v. Brodock*, 164 P. 658.

⇐1092(8) (Utah) The district court loses jurisdiction to settle and allow bill of exceptions not served and allowed within time fixed by statute or within extension of that time on proper application.—*State v. Martin*, 164 P. 500.

⇐1092(9) (Utah) Under Comp. Laws 1907, § 4946, and section 3286, district courts may, for cause shown, extend time for settling bill in case extension is applied for within 30-day period, or at any time before previous extension has expired.—*State v. Martin*, 164 P. 500.

⇐1111(1) (Okla.Cr.App.) Where county attorney's argument is not taken down in shorthand and embodied in the record in full, and dispute arises as to what he said, the court is bound by court's finding in the record as to what occurred.—*Moody v. State*, 164 P. 676.

⇐1115(1) (Okla. Cr. App.) Under Procedure Criminal Rev. Laws 1910, § 5878, when two or more are jointly prosecuted for a misdemeanor, the discretion of the court in granting or refusal of a severance is reviewable if case-made in bill of exceptions shows application setting out sufficient grounds.—*Murphy v. State*, 164 P. 1000.

⇐1120(3) (Okla.Cr.App.) Where court refuses to permit question to be answered, the record must show what the answer would have been, so that appellate court can determine whether it was material and whether defendant was injured by its exclusion.—*Collingwood v. State*, 164 P. 1154.

(E) Assignment of Errors and Briefs.

⇐1129(1) (Idaho) Under Rev. Codes, § 7946, written charges requested by either state or defendant are deemed excepted to, and Supreme Court may examine them whether assigned as error in appellant's brief or not.—*State v. Lundhigh*, 164 P. 690.

(F) Dismissal, Hearing, and Rehearing.

⇐1131(4) (Colo.) Under Rev. St. 1908, § 1907, a writ of error by state to review a judgment dismissing prosecution for selling intoxicating liquors at a club will be dismissed, where constitutional prohibition amendment renders question moot.—*People v. Denver Athletic Club*, 164 P. 1168.

(G) Review.

⇐1134(3) (Utah) Notwithstanding Comp. Laws 1907, § 4916, as amended by Laws 1915, c. 113, Supreme Court cannot review matters considered by trial court in imposing sentence, though his remarks indicated that he considered matters brought out in another trial.—*State v. Martin*, 164 P. 500.

⇐1141(2) (Okla.Cr.App.) The burden of showing error rests upon the appellant, and his counsel must clearly point out any error in the instructions and support them with argument and authority.—*Penn v. State*, 164 P. 992.

⇐1144(16) (Cal.App.) It will be presumed the jury heeded admonition to disregard offers of

evidence rejected and answers stricken out.—*People v. Fodera*, 164 P. 22.

⇐1151 (Cal.App.) Where it does not appear that defendant was prejudiced by refusal of postponement, and evidence amply sustains verdict, conviction will be affirmed.—*People v. Kitley*, 164 P. 609.

⇐1156(4) (Okla.Cr.App.) On a motion for new trial on the ground that a sitting juror within Rev. Laws 1910, § 5858, was prejudiced against defendant, conflicting evidence presented a question of fact for the trial court, and its determination in the absence of any abuse of its discretion will not be disturbed.—*Spradlin v. State*, 164 P. 990.

Where evidence on a motion for new trial on account of a sitting juror's actual bias within Rev. Laws 1910, § 5858, is clear, and the rebuttal evidence is doubtful and evasive, refusal of new trial amounts to an abuse of trial court's discretion authorizing reversal of a conviction.—*Id.*

⇐1159(2) (Okla.Cr.App.) When evidence authorizes a legitimate conclusion of guilt, a conviction will not be reversed.—*Gant v. State*, 164 P. 990.

⇐1159(2) (Okla.Cr.App.) When the facts proven warrant a conviction, a reversal will not be granted on the ground that the verdict and judgment are contrary to the evidence.—*Neighbors v. State*, 164 P. 1155.

⇐1159(3) (Cal.App.) Where conflicting evidence sufficiently supports conviction, the judgment will not be disturbed.—*People v. Yip Sing*, 164 P. 806.

⇐1159(3) (Mont.) Verdict cannot be reversed where evidence is conflicting.—*State v. Brodock*, 164 P. 658.

⇐1159(3) (Okla.Cr.App.) Where there is a conflict between evidence for state and that for defendant, and state's evidence justifies a conviction, it will not be reversed.—*Womack v. State*, 164 P. 477.

⇐1159(3) (Okla.Cr.App.) When the record discloses facts sufficient either to warrant an acquittal or to support a conviction, only errors of law will be reviewed.—*Horn v. State*, 164 P. 683.

⇐1159(3) (Okla.Cr.App.) Verdict on conflicting evidence will not be interfered with on ground that evidence is insufficient, where there is competent evidence from which jury could rationally find defendant's guilt.—*Thomas v. State*, 164 P. 995.

⇐1162 (Okla.Cr.App.) Where state's evidence overwhelmingly establishes the guilt of accused and his testimony is insufficient to justify the criminal conduct complained of, only fundamental error will be considered.—*Lemley v. State*, 164 P. 1152.

⇐1163(3) (Okla.Cr.App.) Before a conviction on competent and credible evidence can be reversed for refusal to permit an impeaching witness to answer, defendant must affirmatively show that he has been prejudiced by the court's action.—*Collingwood v. State*, 164 P. 1154.

⇐1166½(1) (Ariz.) In prosecution for sale of intoxicants, refusal to excuse jury during examination of spectator who had sent a glass looking like whisky, but was ginger ale, to defendant during trial for admitted purpose of influencing jury for defendant, held not reversible error.—*Elliott v. State*, 164 P. 1179.

⇐1166½(6) (Idaho) Where accused has counsel and exercises the right to challenge jurors, court's omission to inform him that, if he intends to challenge a juror, he must do so before jury is sworn, is not prejudicial error.—*State v. Smith*, 164 P. 519.

⇐1168(2) (Cal.App.) Where the prosecuting witness' story lay near the border line of incredibility, any error in admitting or rejecting

material evidence is prejudicial error.—*People v. Prietz*, 164 P. 13.

⚡1169(1) (Kan.) Where evidence is admitted to contradict statement of witness on cross-examination on an immaterial collateral matter, judgment will not be reversed where the evidence could not have produced prejudicial effect on jury.—*State v. McLemore*, 164 P. 161.

⚡1169(2) (Kan.) Where there is no question as to identity of assailant, or that he was present at time and place of alleged assault, no reversible error was committed by permitting party to whom complaint was made to testify as to name of assailant.—*State v. McLemore*, 164 P. 161.

⚡1169(2) (Mont.) Where defendant in larceny trial claimed property taken belonged to him, admission of hearsay evidence that defendant had made such claim was harmless error.—*State v. Brodock*, 164 P. 658.

⚡1170½(5) (Cal.App.) Under circumstances, held prejudicial error could not be predicated on cross-examination of defendant's character witnesses.—*People v. Fodera*, 164 P. 22.

⚡1170½(5) (Kan.) In prosecution for rape, erroneous refusal to permit cross-examination of person assaulted as to whether she contracted with attorneys to bring action for damages will not cause reversal of conviction where it does not appear that its exclusion was harmful.—*State v. McLemore*, 164 P. 161.

⚡1170½(5) (Okla.Cr.App.) Conviction will not be reversed for refusal to permit further cross-examination of an accomplice, where full opportunity was given for cross and recross examination, and it is not shown that any new or material matter is to be inquired into.—*Moody v. State*, 164 P. 676.

⚡1171(1) (Okla.Cr.App.) County attorney's remarks in argument will be considered in reference to evidence, and, to constitute reversible error, any impropriety must be such as may have improperly influenced the verdict.—*Allen v. State*, 164 P. 1002.

⚡1171(5) (Okla.Cr.App.) To constitute reversible error the argument complained of must amount to a comment on defendant's failure to testify in his own behalf, and county attorney's argument in reply to argument for defendant on same lines is not ground for reversal.—*Moody v. State*, 164 P. 676.

⚡1172(1) (Okla.Cr.App.) Mere assertions of error contained in the brief cannot be considered, unless it appears to court that there has been a probable miscarriage of justice and defendant's substantial rights have been injuriously affected by instructions given.—*Penn v. State*, 164 P. 992.

⚡1172(2) (Cal.App.) Although it is the province of the court to determine whether a confession should be received in evidence, an instruction that jury should disregard confession if not voluntarily made is without prejudice to one indicted for burglary.—*People v. Sweetman*, 164 P. 627.

Conceding that there was no occasion for the instruction and no evidence showing that accused had stolen property in his possession, an instruction with reference to possession by defendant of stolen property unexplained and the effect of such proof held without prejudice to defendant charged with burglary.—*Id.*

⚡1173(4) (Ariz.) In prosecution for sale of intoxicants by employe of defendant, assuming that defendant's place was making it business to sell liquor, modification of instruction regarding purpose of evidence of other sales, held not prejudicial.—*Elliott v. State*, 164 P. 1179.

⚡1174(5) (Okla.Cr.App.) That juror in violation of Rev. Laws 1910, §§ 5899, 5900, 5937, casually spoke to sheriff passing through courtroom while jury were deliberating, held harmless error.—*Allen v. State*, 164 P. 1002.

(B) Determination and Disposition of Cause.

⚡1182 (Ariz.) Where accused submitted cause on judgment roll forming transcript on appeal with no record of evidence, made no appearance by argument or brief, the judgment will be affirmed, where it does not appear that any substantial right has been denied.—*Hammond v. State*, 164 P. 317.

⚡1186(1) (Okla.Cr.App.) Conviction will not be reversed for misdirection in instruction unless, after examination of record, it appears that error has probably resulted in a miscarriage of justice or denial of defendant's constitutional and statutory rights.—*West v. State*, 164 P. 327.

⚡1186(1) (Okla.Cr.App.) Where defendant's guilt is conclusively established, and there is no reason to believe that on a second trial a jury could properly reach any other verdict, a new trial will not be granted except for fundamental error.—*Allen v. State*, 164 P. 1002.

⚡1186(1) (Utah) Trial judge's consideration of facts brought out by another trial in sentencing defendant is not even irregularity which authorizes Supreme Court to set aside sentence and remand defendant for resentencing.—*State v. Martin*, 164 P. 500.

CROPS.

See Chattel Mortgages, ⚡117; Landlord and Tenant, ⚡322.

CROSS-EXAMINATION.

See Evidence, ⚡558; Witnesses, ⚡274-287, 372.

CROSSINGS.

See Railroads, ⚡337.

CUMULATIVE EVIDENCE.

See Criminal Law, ⚡941; New Trial, ⚡104.

CUSTOMS AND USAGES.

⚡8 (Wash.) No rights can spring from a custom that violates a law.—*Myers v. Exchange Nat. Bank*, 164 P. 951.

DAMAGES.

See Animals, ⚡100; False Imprisonment, ⚡36; Fraud, ⚡59; Husband and Wife, ⚡334; Interest, ⚡39; Municipal Corporations, ⚡404; Sales, ⚡418; Trover and Conversion, ⚡60.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚡28 (Wash.) In a suit to foreclose purchase-money mortgage under agreement whereby seller was to improve certain streets in vicinity of property, mortgagor could not set off rental value of a residence which he did not build because of failure of the mortgagee to make contemplated improvements.—*Boston Trust Co. v. Evalon Co.*, 164 P. 606.

⚡37 (Wash.) Damages to business as such, particularly when measured in terms of profits, are not recoverable in an action for personal injuries, where the business involves substantial investment of capital and the time and services of plaintiff's wife.—*Singer v. Martin*, 164 P. 1105.

(B) Aggravation, Mitigation, and Reduction of Loss.

⚡62(2) (Wash.) Defendant, though liable for injuries from undue violence where plaintiff attempted to prevent him from taking possession of automobile, held not liable for aggravation

thereof by plaintiff's subsequent voluntary acts.—*Geissler v. Geissler*, 164 P. 746.

⚡64 (Kan.) Under section 5 of federal Employers' Liability Act of April 22, 1908, *held*, that railroad, sued thereunder for injury to an employé, may not set off against the judgment the amount owing such employé under contract for insurance not releasing it from liability for injury to employé by its negligence.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

(C) Interest, Costs, and Expenses of Litigation.

⚡72 (Kan.) Where city obtained judgment against one partner and judgment applying upon his indebtedness a claim which city owed him personally, and where other partner and surety defending subsequent action were given credit for amount of such claim, judgment against them for reasonable costs, attorney's fees, and expenses was proper.—*City of Topeka v. Brooks*, 164 P. 285.

V. EXEMPLARY DAMAGES.

⚡89(2) (Okl.) In action for failure to pay for construction work, plaintiff cannot recover exemplary damages, attorney's fees, and interest on money borrowed as result of breach, as such elements of damage are too remote, and the action is not for breach of obligation not arising on contract within Rev. Laws 1910, § 2851.—*Trustees of Horton's Estate v. Sherwin*, 164 P. 469.

⚡91(1) (Okl.) Under Rev. Laws 1910, § 2851, punitive damages in action for breach of a non-contract obligation are recoverable in addition to actual damages only where defendant has been guilty of oppression, fraud, or malice, actual or presumed.—*Western Union Telegraph Co. v. Cates*, 164 P. 779.

To authorize recovery of punitive damages in tort, evidence must show some oppression, fraud, or malice.—*Id.*

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

⚡120(1) (Okl.) Under Rev. Laws 1910, § 2852, measure of damages for breach of a contract, except where expressly provided for, is amount which will compensate injured party for all detriment proximately caused thereby, or which in ordinary course would be likely to result therefrom.—*Trustees of Horton's Estate v. Sherwin*, 164 P. 469.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡131(1) (Wash.) Verdict of \$1,312.81 *held* not excessive where a bullet was removed from plaintiff's leg, numerous nerves were injured, she was in the hospital for 18 days, and unable for over 9 weeks to follow her occupation of waitress.—*Croze v. John*, 164 P. 941.

⚡132(12) (Cal.) In suit by husband for loss of wife's services, and by wife for personal injuries, verdict of \$22,500 *held* not excessive.—*Meek v. Pacific Electric Ry. Co.*, 164 P. 1117.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

⚡153 (Cal.App.) Complaint alleging in general terms injuries suffered by employé, concluding with the prayer for a specific amount of damages, was not insufficient for failing to allege in the body of the complaint the specific damage suffered.—*Abalas v. Consolidated Const. Co.*, 164 P. 19.

⚡160 (Ala.App.) Complaint alleging that plaintiff "expended much for medicines and treatment and employment of physicians," in the absence of demurrer, was sufficient to justify

proof of exact amount expended for care and nursing.—*Abalas v. Consolidated Const. Co.*, 164 P. 19.

(B) Evidence.

⚡172(1) (Wash.) In action for injuries in collision to passenger in jitney bus, *held*, that it was competent to show character and magnitude of plaintiff's business, capital, assistance, and profits as circumstances for jury's consideration in determining value of plaintiff's loss of his own services.—*Singer v. Martin*, 164 P. 1105.

⚡185(1) (Wash.) Evidence *held* to show that defendant's violence towards plaintiff did not cause injuries justifying verdict in excess of \$750.—*Geissler v. Geissler*, 164 P. 746.

⚡186 (Cal.) Uncontradicted evidence that a wife lost an arm above the elbow, that she had been in sound health, and did the housework, but that her injuries were permanent, and prevented her from performing her usual duties, and that her nervous system was seriously impaired, and that the expectation of life of both the plaintiffs was upwards of 30 years, is a sufficient showing upon which the jury is authorized to find the value of the services.—*Meek v. Pacific Electric Ry. Co.*, 164 P. 1117.

⚡187 (Okl.) Where plaintiff's right arm, side, and leg were injured and partly paralyzed, and he stated effect of his injuries as to disabling him from manual labor, jury might judge extent of his permanent disability, and testimony of physicians thereon was not necessary to his recovery therefor.—*St. Louis, I. M. & S. Ry. Co. v. Cantrell*, 164 P. 110.

(C) Proceedings for Assessment.

⚡206(3) (Okl.) Where plaintiff exhibits part of his body to jury and to physicians called by him to testify as to extent of injuries, and offers to submit to examination by any physicians named by court, other than defendant's physicians, refusal to require him to submit to examination by defendant's physicians was not error.—*Oklahoma Ry. Co. v. Thomas*, 164 P. 120.

⚡216(1) (Cal.) In suit by husband and wife for injuries to the wife, an instruction that in fixing the damages the jury should fix the amount in each separate matter irrespective of the amount of the other, and should not consider whether the total amount awarded is large or small, was not erroneous.—*Meek v. Pacific Electric Ry. Co.*, 164 P. 1117.

⚡216(7) (Utah) Instruction on measure of damages *held* not to leave the recovery for future pain and suffering open to mere conjecture and possibility, but to limit such right to evidence.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

⚡216(8) (Wash.) In action for injuries in collision to passenger in jitney bus, complaint *held* not to allege injury to business as such so as to warrant an instruction thereon.—*Singer v. Martin*, 164 P. 1105.

DAMS.

See Waters and Water Courses, ⚡160, 177.

DEATH.

See Deeds, ⚡61; Explosives, ⚡8; Homicide, ⚡203; Judgment, ⚡12.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

⚡2(1) (Kan.) The unexplained absence of an insured for more than 12 years without any showing that nothing had been heard from him since his disappearance, or any showing that any effort had been made to ascertain his whereabouts, was not sufficient to prove his death.—*Mackie v. Grand Lodge A. O. U. W. of Kansas*, 164 P. 263.

II. ACTIONS FOR CAUSING DEATH.**(A) Right of Action and Defenses.**

§31(3) (Or.) Administrator of employé killed at work, having no kin as named in Employers' Liability Act, § 4, held entitled to recover under L. O. L. § 380, as to actions for wrongful death.—*Hawkins v. Anderson & Crowe*, 164 P. 556.

DEBTOR AND CREDITOR.

See Bankruptcy; Fraudulent Conveyances; Subrogation.

DECEDENTS.

See Descent and Distribution; Executors and Administrators.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law. §424; Evidence, §272; Homicide, §200-215.

DEDICATION.**I. NATURE AND REQUISITES.**

§1 (Or.) Common-law dedications may be either express or implied.—*McCoy v. Thompson*, 164 P. 589.

§15 (Or.) The dedicator's intent in statutory dedications is generally shown by the plat and writing.—*McCoy v. Thompson*, 164 P. 589.

In common-law dedications, the dedicator's intent is gathered from his acts and conduct and what he said in making the dedication.—*Id.*

§19(5) (Or.) A landowner's action in filing a plat containing the words, "street forty ft. wide," and selling lots according to such plat, constitutes a completed dedication.—*McCoy v. Thompson*, 164 P. 589.

§20(5) (Cal.) Where one owning strip of land along beach allowed property owners in vicinity to use beach as road according to custom of country, there was no dedication of highway.—*People v. Rindge*, 164 P. 633.

§28 (Or.) An unsuccessful attempt at statutory dedication of a street, if followed by sales according to the plat, may result in a completed common-law dedication.—*McCoy v. Thompson*, 164 P. 589.

§31 (Or.) Neither a formal acceptance by the county nor the immediate opening and improvement of a street is essential to an irrevocable dedication.—*McCoy v. Thompson*, 164 P. 589.

§35(5) (Colo.) A bridge over defendant's canal in a vacated highway, with a short road therefrom over its land, used by its tenants and a few others, built and maintained by defendant for eight years, did not become a highway, as regards defendant's duty to continue maintenance of bridge; the county commissioners having expressly declared it should not be a public highway.—*Harding v. North Poudre Irr. Co.*, 164 P. 1156.

II. OPERATION AND EFFECT.

§48 (Or.) A completed street dedication binds the dedicator's successors in interest.—*McCoy v. Thompson*, 164 P. 589.

§51 (Or.) The intent to dedicate a street 40 feet wide is clearly indicated where the plat contains the words, "street forty ft. wide."—*McCoy v. Thompson*, 164 P. 589.

§54 (Or.) A statutory dedication generally operates as a grant by the statute's terms.—*McCoy v. Thompson*, 164 P. 589.

DEEDS.

See Cancellation of Instruments; Covenants; Fraudulent Conveyances; Infants, §31; Mortgages; Reformation of Instruments.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances in General.**

§9 (Kan.) Under Gen. St. 1915, § 2062, one may convey an interest in land to take effect in the future.—*Brown v. Paul*, 164 P. 288.

(B) Form and Contents of Instruments.

§40 (Kan.) Where general deed conveyed lots described by numbers and as fronting on certain streets in an addition, recorded plat of the addition became a part of the deed in aid of the description, as if reference to it was followed by words, "according to the recorded plat thereof."—*Fitzpatrick v. Crowther*, 164 P. 300.

(D) Delivery.

§56(2) (Cal.) Delivery of a deed is not effected by mere manual tradition thereof, unless accompanied with intent that the deed shall become operative as such; that is, that it shall presently pass title without reservation of any right of revocation or recall.—*Hefner v. Sealey*, 164 P. 898.

That the grantor stated that her purpose was to avoid the necessity of administration is not necessarily inconsistent with an intent to presently and irrevocably pass title.—*Id.*

§56(4) (Cal.) Save under exceptional circumstances, transfer of property by deed necessitates a delivery of the deed to terminate grantor's title, and where deed remains in grantor's possession to be delivered after death, it is void.—*Fisher v. Oliver*, 164 P. 800.

§61 (Cal.) Validity of a deed deposited with third person to take effect at grantor's death requires absolute delivery beyond power of recall.—*Fisher v. Oliver*, 164 P. 800.

§66 (Cal.) Whether the requisite intent for delivery of a deed existed is a question of fact for the trial court or jury.—*Hefner v. Sealey*, 164 P. 898.

III. CONSTRUCTION AND OPERATION.**(B) Property Conveyed.**

§112(2) (Cal.App.) Description in a deed to plaintiff, referring to recorded map, but misstating location of map, in record book, held sufficient.—*Prouty v. Rogers*, 164 P. 901.

(C) Estates and Interests Created.

§133(1) (Kan.) Under a warranty deed to the grantor's son for life, and to his wife jointly while she remained his wife or widow, and on his death without issue and her remarriage to go to the son's legal heirs, the children were mere heirs apparent with no vested interest or remainder.—*Brown v. Paul*, 164 P. 288.

§136 (Kan.) Under deed to grantor's son for life and to his wife jointly while his wife or widow, and on his death without issue and her remarriage title to go to the son's legal heirs, the wife was a joint tenant for life during widowhood or widowhood.—*Brown v. Paul*, 164 P. 288.

(E) Conditions and Restrictions.

§150 (Cal.App.) Provisions in deed forfeiting land if premises are used for sale of intoxicants, where made to secure to vendor a monopoly of such business, are void.—*Southern Pac. R. Co. v. Blaisdell*, 164 P. 804.

The fact that a vendor prohibited sale of intoxicants on all parcels of land conveyed under penalty of forfeiture does not imply that he was contemplating a monopoly of the business.—*Id.*

⌘166 (Cal.App.) Where purchaser was about to breach contract restricting sale of intoxicants and paid balance on purchase price before same was due, vendor's return of money was not such repudiation as would prohibit enforcement of forfeiture.—*Southern Pac. R. Co. v. Blaisdell*, 164 P. 804.

⌘175 (Cal.App.) A vendor was not estopped from enforcing forfeiture for breach of contract restricting sale of intoxicants on the land because it accepted payment in ignorance of violations.—*Southern Pac. R. Co. v. Blaisdell*, 164 P. 805.

IV. PLEADING AND EVIDENCE.

⌘200 (Cal.) While after parting with title grantor will not be permitted to disparage the title which he has conveyed, where the issue is whether there was a delivery, evidence of his statements and acts after delivery are admissible.—*Fisher v. Oliver*, 164 P. 800.

⌘208(1) (Cal.) Evidence held to support a finding of delivery of deed.—*Hefner v. Sealey*, 164 P. 898.

⌘208(2) (Cal.) Evidence showing that deceased made deed to sister and told her the property was hers, but retained possession of the deed until he died, held insufficient to establish valid delivery.—*Fisher v. Oliver*, 164 P. 800.

⌘211(1) (Kan.) Evidence held to sustain trial court's findings that deceased, who conveyed his real property to defendants, was mentally incompetent and incapable of making the conveyances at the time of their execution and delivery.—*Bruington v. Wagoner*, 164 P. 1057.

DEFAULT.

See Judgment, ⌘139-174.

DELEGATION OF POWER.

See Constitutional Law, ⌘60; Intoxicating Liquors, ⌘11; Licenses, ⌘6.

DELIVERY.

See Carriers, ⌘174; Deeds, ⌘56-66, 200, 208; Sales, ⌘150; Telegraphs and Telephones, ⌘54.

DEMAND.

See Jury, ⌘25; Trover and Conversion, ⌘9.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ⌘404.

DEMURRER.

See Criminal Law, ⌘293; Pleading, ⌘195, 214.

DEPARTURE.

See Pleading, ⌘180.

DEPOSITIONS.

See Mandamus, ⌘40.

⌘19 (Wash.) Under Rem. Code 1915, § 1240, since there is a choice of modes for examination in taking depositions and the rights of the parties are equal, the duty of determining the mode devolves upon the court.—*State v. Truax*, 164 P. 597.

⌘24 (Wash.) Even where statutes permit an oral examination under a commission, that method is not favored, and will be allowed only in clear cases of necessity.—*State v. Truax*, 164 P. 597.

⌘57 (Cal.App.) Under Code Civ. Proc. § 1986, subsec. 3, a subpoena issued upon order of court,

requiring attendance of witness before commissioner to give deposition, has same territorial force and effect as subpoena issued, requiring attendance before court, and may require attendance of witness though he resides outside county but within 50-mile limit.—*Merrill v. Superior Court of City and County of San Francisco*, 164 P. 340.

⌘71 (Cal.App.) Under Code Civ. Proc. § 1991, superior court cannot punish witness for contempt in disobeying subpoena issued to require him to appear before commissioner for taking of his deposition without hearing first upon notice, and refusal to obey order then issued.—*Merrill v. Superior Court of City and County of San Francisco*, 164 P. 340.

⌘81 (Cal.App.) Where deposition taken out of state on commission did not have attached seal of court, as required by Code Civ. Proc. § 2024, so that court granted motion to suppress it, but, on learning witness was now in South America, and that to have deposition taken again would cause an indefinite delay, court properly granted motion to amend by affixing its seal.—*Marvin v. Eng-Skell Co.*, 164 P. 332.

DEPOSITS.

See Banks and Banking, ⌘154; Landlord and Tenant, ⌘184.

DEPUTIES.

See Sheriffs and Constables, ⌘18, 22, 100.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Husband and Wife, ⌘274; Taxation, ⌘862-890; Wills.

I. NATURE AND COURSE IN GENERAL.

⌘5 (Cal.) Law of decedent's domicile controls disposition of his personal property, where law at location of property is not in conflict.—*McDougald v. Lillenthal*, 164 P. 387.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

⌘34 (Cal.) Under Civ. Code, § 1386, subd. 2, providing issue of deceased brothers and sisters take by descent in certain cases, and subdivision 4, giving entire estate to surviving spouse if decedent does not leave certain enumerated relatives, including, as now amended the issue of deceased brothers and sisters, such issue now take by descent.—*In re Jepson's Estate*, 164 P. 1.

(B) Surviving Husband or Wife.

⌘52(2) (Wash.) Wife who in good faith married husband knowing he had been divorced but not knowing laws prohibited his remarriage within six months, held entitled to half property acquired by their joint efforts though marriage was void.—*In re Brencley's Estate*, 164 P. 913.

DETECTIVES.

⌘3 (Colo.) Employer of detective agency may sue for breach of a bond given pursuant to Rev. St. 1908, § 2088.—*Southwestern Surety Ins. Co. v. Miller*, 164 P. 507.

In view of Rev. St. 1908, § 2086, held, that recovery could be had on bond given by detective agency pursuant to such section for fraud committed in connection with contract for compensation.—*Id.*

Detective agency may violate the provisions of a bond given pursuant to Rev. St. 1908, § 2088, without being guilty of oppression or compounding a felony.—*Id.*

Complaint in action on bond executed by de-

tective agency held sufficient as against surety under Mills' Ann. Code, § 49.—Id.

Where detective agency defrauded patron, her measure of damages is such sum as will fairly compensate her for loss suffered.—Id.

DETINUE.

See Replevin.

DIRECTING VERDICT.

See Appeal and Error, ¶997; Trial, ¶177.

DIRECTORS.

See Corporations, ¶298, 306.

DISBARMENT.

See Attorney and Client, ¶52.

DISCHARGE.

See Accord and Satisfaction; Compromise and Settlement; Principal and Surety, ¶104-128; Release.

DISCOVERY.

See Damages, ¶206.

II. UNDER STATUTORY PROVISIONS.

(B) Production and Inspection of Writings and of Other Matters.

¶107 (Or.) Unsworn statement of counsel of neglect or refusal of defendants to obey an order to allow inspection of writing is not the requisite preliminary proof thereof to make available the presumption, under L. O. L. § 533, that the writing is as alleged by plaintiff.—Oregon Art Tile Co. v. Hegele, 164 P. 548.

DISCRETION OF COURT.

See Appeal and Error, ¶946-984; Certiorari, ¶9; Continuance; Criminal Law, ¶1151, 1156; Judgment, ¶139; New Trial, ¶6; Pleading, ¶236; Prohibition, ¶4; Receivers, ¶8.

DISCRIMINATION.

See Carriers, ¶13, 32.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶773, 780-802; Costs, ¶232; Criminal Law, ¶1131.

I. VOLUNTARY.

¶26 (Ariz.) Actions of tort being in their nature joint and several, plaintiff therein may, at any stage, enter a nolle prosequi, dismiss, or discontinue as to part of the defendants without discharging the rest.—Lally v. Cash, 164 P. 443.

II. INVOLUNTARY.

¶60(3) (Cal.) Code Civ. Proc. § 583, as to dismissal for want of prosecution, held inoperative pending an appeal from judgment for plaintiff, although trial court attempted to vacate judgment pending appeal.—Kinard v. Jordan, 164 P. 894.

DISORDERLY HOUSE.

See Evidence, ¶322.

DISSOLUTION.

See Corporations, ¶630, 691.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ¶1171.

DISTRICTS.

See Drains, ¶14, 18; Municipal Corporations, ¶450.

DITCHES.

See Drains; Waters and Water Courses, ¶244.

DIVORCE.

See Courts, ¶185.

III. DEFENSES.

¶54 (Wash.) Where husband inflicted severe physical punishment on wife, she abandoned him of right when his employer forced him to leave place at which they both lived, wife continuing in employment, and such abandonment did not deprive her of her right to divorce for husband's cruelty.—Stolz v. Stolz, 164 P. 920.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

¶124 (Nev.) Evidence in a suit for divorce held sufficient to establish plaintiff's bona fide residence within the state, though she admitted she was living at a hotel and owned no property within the state.—Merritt v. Merritt, 164 P. 644.

¶131 (Wash.) In an action for divorce, evidence held sufficient to entitle wife to divorce on ground of nonsupport.—Snyder v. Snyder, 164 P. 209.

(G) Appeal.

¶184(10) (Wash.) Where appellate court cannot say that evidence in divorce does not preponderate in support of the trial court's conclusion, and there is no question of law involved, the decree will be affirmed.—Hayes v. Hayes, 164 P. 740.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

¶210 (Idaho) In view of Rev. Codes, §§ 2862, 2873, an order for alimony and suit money cannot be made in an original proceeding in Supreme Court instituted for the purpose of prohibiting a trial judge from exceeding his powers in a divorce action.—In re Callahan, 164 P. 356.

¶214(4) (Idaho) Under Rev. Codes, § 3894, as amended by Laws 1911, c. 206, a motion for alimony and suit money in an action for divorce must be heard in the county or district in which the action is pending.—In re Callahan, 164 P. 356.

¶249(1) (Nev.) The power of the court given by Rev. Laws, § 5841, to make such disposition of the property of the parties as shall be just and equitable in granting a decree of divorce, is limited by Const. art. 4, § 31, St. 1864-65, c. 76, and St. 1873, c. 119, determining the property rights of husband and wife.—Walker v. Walker, 164 P. 653.

Notwithstanding Rev. Laws, § 2172, either spouse can, under section 2173, acquire an interest in the separate property of the other which a divorce court can protect under the power given by section 5841.—Id.

Under Rev. Laws, § 5841, the court in granting a divorce to the wife for the husband's misconduct may protect the husband's equitable interest in property settled on the wife as her separate estate.—Id.

¶249(1) (Okla.) Under Rev. Laws 1910, § 4966, court refusing a divorce may make such order as may be equitable for disposition of property of parties or either of them, having regard to time and manner of its acquisition, whichever holds title.—Jones v. Jones, 164 P. 463.

¶252 (Nev.) Rev. Laws, § 2166, determines the rights of the parties to the community property on dissolution of the marriage, though the

earlier statute, section 5841 empowering the court to dispose of the property on granting a divorce, has not been amended or repealed in terms.—Walker v. Walker, 164 P. 653.

⚡252 (Wash.) Where custody of the children was allowed to the defendant wife who was also given a decree of divorce to which she was not entitled, she was nevertheless entitled to share in the property, so that she could maintain the children, and hence a division was proper.—McDonall v. McDonall, 164 P. 204.

⚡252 (Wash.) Wife, entitled to divorce from her husband for cruel and inhuman treatment consisting of physical violence, is entitled to all their property, which does not exceed \$450 in value.—Stolz v. Stolz, 164 P. 920.

⚡286 (Wash.) Where each spouse prayed for divorce, and, though the husband alone was entitled to a divorce, the court granted a divorce to each, the decree will not be disturbed; each party being as effectually released by the decree as if it were granted to the husband alone.—McDonall v. McDonall, 164 P. 204.

VI. CUSTODY AND SUPPORT OF CHILDREN.

⚡307 (Cal.App.) Denial of wife's motion, made after husband's judgment for divorce, for allowance for support of minor child, wife having received \$2,000 for that purpose from her husband's separate estate pursuant to their agreement before divorce, *held* not abuse of discretion.—Rolleri v. Rolleri, 164 P. 817.

⚡308 (Wash.) Where on divorce father was ordered to pay for maintenance of his children same monthly sum he had been voluntarily contributing, and it did not appear that it was excessive, no complaint can be made.—McDonall v. McDonall, 164 P. 204.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

⚡322 (Nev.) Under Const. art. 4, § 31, St. 1864-65, c. 76, and St. 1873, c. 119, fixing the property rights of husband and wife, the dissolution of the marriage does not of itself operate to change the property rights.—Walker v. Walker, 164 P. 653.

⚡330 (Nev.) A decree rendered in a foreign state divorcing a wife has no binding effect in personam against her husband, who was a non-resident of such state and owned no property therein.—Keenan v. Keenan, 164 P. 351.

⚡331 (Nev.) Under Rev. Laws, § 2166, the Nevada courts cannot make a division of community property; divorce having been granted by the courts of a foreign state.—Keenan v. Keenan, 164 P. 351.

Where a wife procured a judgment of divorce in a foreign state other than Nevada, of which her husband was a resident, she cannot, on ground of liberality of Nevada divorce laws, maintain an action for division of community property situated in Nevada.—Id.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Costs, ⚡182.

DOMICILE.

See Venue, ⚡21.

DOUBLE TAXATION.

See Taxation, ⚡47.

DRAINS.

I. ESTABLISHMENT AND MAINTENANCE.

⚡2(1) (Cal.App.) Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1½, inclusion of portion of city of Long Beach in drainage district *held* not violative of provisions of charter vesting city with control of all uses of its streets.—Van de Water v. Pridham, 164 P. 1136.

St. 1903, p. 354, as amended by St. 1915, p. 359, in view of section 4, *held* not void because of failure to provide that doing of work shall depend upon its being a public benefit.—Id.

⚡2(2) (Cal.App.) St. 1903, p. 354, as amended by St. 1915, p. 359, regarding drainage districts, *held* not superseded by St. 1915, p. 1502, creating flood control district, etc.—Van de Water v. Pridham, 164 P. 1136.

⚡14(3) (Cal.App.) Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1, providing for initiation of proceedings for a drainage district, and section 5, providing that determination of board shall be made in writing, filed and entered upon minutes, board *held* impliedly authorized to deny, modify, or change petition.—Van de Water v. Pridham, 164 P. 1136.

⚡14(3) (Idaho) Order of court declaring proposed drainage district duly organized under Laws 1913, c. 16, § 4, is not an appealable order under Rev. Codes, § 4800, because the Drainage Act provides further hearing, and an appeal from order confirming report of commissioners.—In re Organization of Drainage Dist. No. 1 of Ada County, 164 P. 1018.

Laws 1913, c. 16, and amendments do not provide appeal from order of district court declaring a district duly organized after first hearing on petition therefor, and such order does not finally adjudicate rights involved in proceeding thereunder.—Id.

⚡18 (Cal.App.) St. 1903, p. 354, as amended by St. 1915, p. 359, §§ 8b, 8c, 8e, 8g, in relation to drainage districts, construed with reference to Pol. Code, § 4484, and *held*, that it was intent of Legislature that payment for work should be in bonds in a sum equal to amount of contractor's bid plus sum advanced by him for payment of incidental expenses, to be delivered by treasurer to contractor or his assignees, while provision for sale as a means of such administration is incomplete and uncertain as to acts necessary to accomplish purpose of law.—Van de Water v. Pridham, 164 P. 1136.

⚡55 (Idaho) The owner of a ditch constructed across an established highway must provide a bridge over the intersection for the use and benefit of the public.—Gooding Highway Dist. of Gooding County v. Idaho Irr. Co., 164 P. 99.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

See Intoxicating Liquors, ⚡15, 132.

DUE PROCESS OF LAW.

See Constitutional Law, ⚡290, 292.

DUES.

See Insurance, ⚡743.

DYING DECLARATIONS.

See Homicide, ⚡200-215.

DYNAMITE.

See Explosives, ⚡8.

EARNING CAPACITY.

See Damages, ¶187.

EASEMENTS.

See Waters and Water Courses, ¶153.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

¶42 (N.M.) Rule that grant of an indefinite easement cannot be enlarged beyond terms shown by practical construction does not apply, where findings, reasonably construed, hold that no practical construction was made by the parties.—*Herbst v. Rogers*, 164 P. 827.

ECCENTRICITY.

See Wills, ¶41.

ELECTIONS.

See Constitutional Law, ¶248, 326; Counties, ¶178; Municipal Corporations, ¶279, 918; Statutes, ¶79.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

¶51 (Cal.App.) Where civil service commission failed to obey Charter of Los Angeles County, art. 9, § 34, whereby it was required to prescribe general rule under which all transfers from one position to similar position in same class and grade should be made, act of commission in purporting to transfer a deputy county clerk to office of registrar of voters did not vest him with any title to office.—*People v. McAleer*, 164 P. 425.

Registrar of voters is appointive county officer, and, office not being in unclassified service named in Charter of Los Angeles County, art. 9, § 33, appointment to it must, as required by express provision of section 11, subd. 1, be made by board of supervisors from eligible civil service list.—*Id.*

Office of registrar of voters of county of Los Angeles being independent office, and being specified by charter as office to be filled by appointment to be made by board of supervisors from eligible list, it could not be filled by act of civil service commission under guise of transferring a deputy clerk thereto.—*Id.*

VII. BALLOTS.

¶177 (Mont.) Notwithstanding Rev. Codes, § 575, in view of sections 545, 551, 552, a ballot not having thereon the official stamp is to be counted; the stamp having been put on the back of the stub at the head of the ticket and so removed with it.—*Harrington v. Crichton*, 164 P. 537.

X. CONTESTS.

¶270 (Mont.) Corrupt Practices Act, §§ 48, 49, authorizing award of attorney's fees to successful party in election contest, *held* valid.—*Doty v. Reece*, 164 P. 542.

¶307 (Mont.) Under Corrupt Practices Act, §§ 48, 49, in election contest, prevailing party, whether petitioner or respondent, is entitled to attorney's fees in addition to his other costs and disbursements; amount to be awarded resting in discretion of court.—*Doty v. Reece*, 164 P. 542.

ELECTRICITY.

¶19(5) (Kan.) In action for death from contact with electric wires, refusal to set aside finding that jury did not know whether deceased saw the wire fall to the ground after he saw it burning in a tree, and finding that he did not pick it up, after seeing it fall, as contrary to the evidence, *held* proper.—*Curtiss v. Reaume*, 164 P. 1089.

¶19(13) (Kan.) In action for death from contact with electric wires, refusal of motion for judgment for defendant on finding that jury did

not know whether deceased saw wire fall after he saw it burning in a tree, and finding that after seeing it fall he did not pick it up, *held* not error.—*Curtiss v. Reaume*, 164 P. 1089.

ELEVATORS.

See Carriers, ¶288, 328.

EMINENT DOMAIN.

See New Trial, ¶128.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

¶28 (Idaho) Where water has already been appropriated for another inferior use, use for superior purpose is subject to Const. art. 1, § 14, regulating the taking of private property for public use.—*Basinger v. Taylor*, 164 P. 522.

¶58 (Kan.) A school board, acting under Gen. St. 1915, §§ 9408-9414, may condemn more than 1½ acres for a schoolhouse site and playgrounds.—*Nelson v. School Dist. No. 3*, 164 P. 1075.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSES COMPENSATION.

¶167(4) (Utah) General rule is that, where statute prescribes procedure or steps to be taken by municipal corporation in exercising right of eminent domain, procedure prescribed becomes matter of substance, and must be strictly followed by condemnor as against owner.—*Town of Tremonton v. Johnston*, 164 P. 190.

¶169 (Kan.) Under Gen. St. 1915, § 9409, record of school board meeting, showing order describing land and declaring its appropriation necessary for a schoolhouse site, is sufficient to authorize condemnation proceeding, where survey has been made and plat has been filed with clerk.—*Nelson v. School Dist. No. 3*, 164 P. 1075.

Where a school district in which is situated a city of the third class has voted under Gen. St. 1915, § 8915, to change its schoolhouse site, school board may then proceed under sections 9408-9414 to condemn the new site.—*Id.*

¶169 (Utah) Despite Comp. Laws 1907, § 309, under section 206x2, before town was authorized to commence condemnation proceedings to condemn spring and appropriate waters, it was necessary that board of trustees adopt ordinance or resolution declaring necessity, to give resident taxpayers statutory opportunity to protest, and requirement was jurisdictional.—*Town of Tremonton v. Johnston*, 164 P. 190.

¶170 (Kan.) Where land is selected for a schoolhouse site, the school board need not try to purchase it at a reasonable price, or procure it by donation, etc., before instituting condemnation proceedings, if the owner refuses to convey or donate it to school district.—*Nelson v. School Dist. No. 3*, 164 P. 1075.

¶181 (Kan.) The notice provided by Gen. St. 1915, § 2192, binds the lessee of real property condemned for a railroad right of way, although no compensation is given to him.—*Salina Northern R. Co. v. Allison*, 164 P. 1068.

A notice under Gen. St. 1915, § 2192, binds the lessee of real property condemned for railroad right of way, though he is in its open and notorious possession.—*Id.*

¶186 (Kan.) In condemning land for a railroad right of way, the notice authorized by Gen. St. 1915, § 2192, is sufficient, even though no map or profile has been filed or notice given under sections 2330, 2331.—*Salina Northern R. Co. v. Allison*, 164 P. 1068.

¶202(1) (Utah) In town's condemnation proceedings, under Comp. Laws 1907, § 206x2, to condemn waters of spring, testimony of owner, on cross-examination that 15 years before filing declaration of homestead, he had stated value of land and spring to be much less than he tes-

tified their value to be at trial was improperly elicited from him, being too remote.—*Town of Tremonton v. Johnston*, 164 P. 190.

—224 (Cal.App.) The granting or denying of new trial on ground that evidence is insufficient to sustain verdict, where there is substantial conflict, rests fully in discretion of trial court.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 58.

In action in eminent domain, it was within trial court's discretion, in considering motion for new trial for insufficiency of evidence to determine whether verdict, in so far as it concerned value of property, was justified, or reasonably in accord with evidence.—*Id.*

In action in eminent domain, court's action in granting defendants' motion for new trial on ground of insufficiency of evidence to sustain verdict as to value of property held not abuse of discretion.—*Id.*

—255 (Utah) In proceedings to condemn land, where no demurrer was interposed to complaint, and no objection respecting its sufficiency made either before or during trial, defect that complaint failed to state that attempted condemnation proceedings were authorized as required by statute, being jurisdictional, was not waived.—*Town of Tremonton v. Johnston*, 164 P. 190.

—262(5) (Utah) In condemnation proceedings, improper elicitation of remote testimony of owner of land on cross-examination held harmless to his substantial rights.—*Town of Tremonton v. Johnston*, 164 P. 190.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Damages, —64; Death, —31; Master and Servant, —86, 286, 373-417.

ENCROACHMENT.

See Constitutional Law, —58, 70.

ENTIRE OR SEVERABLE CONTRACT.

See Sales.

ENTRY.

See Motions, —56.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, —248.

EQUITY.

See Cancellation of Instruments; Estoppel, —52-119; Fraudulent Conveyances; Injunction; Interpleader; Judgment, —407-460; Jury, —13, 14; Partition; Quieting Title; Receivers; Reformation of Instruments; Set-Off and Counterclaim; Specific Performance; Subrogation; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

—3 (Ariz.) Where parties, with full knowledge of the conditions of a contract, dealing at arm's length, fully perform it, equity will not disturb the situation.—*McMillon v. Town of Flagstaff*, 164 P. 318.

—40 (Or.) As a suit to rescind a contract for the purchase of a motor truck and to cancel a note given on account of purchase price and recover damages was cognizable in equity, when it later appears that note has been negotiated, unknown to plaintiff when he brought suit, equity will retain suit for purpose of awarding money damages.—*Hetrick v. Gerlinger Motor Car Co.*, 164 P. 370.

II. LACHES AND STALE DEMANDS.

—37(2) (Wash.) Where heirs brought an action to recover real property within three years after becoming of age as required by Rem. Code 1915, § 158, the action is not barred by laches, since that doctrine will not ordinarily defeat an action brought within the statutory period.—*Eves v. Roberts*, 164 P. 915.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

—381 (Idaho) Where specific interrogatories are submitted to a jury in equitable action, their findings are not binding on the court, which may disregard them as clearly against the evidence, and find the facts as shown by the evidence before it.—*Rees v. Gorham*, 164 P. 88.

X. DECREE AND ENFORCEMENT THEREOF.

—427(1) (Or.) In a suit to foreclose a mortgage on land, averments of cross-complaint held sufficient to uphold decree against party who assumed mortgage.—*Knighon v. Chamberlin*, 164 P. 703.

ERROR, WRIT OF.

See Appeal and Error.

ESCROWS.

See Deeds, —61.

ESTATES.

See Descent and Distribution; Executors and Administrators; Frauds, Statute of, —56; Landlord and Tenant; Tenancy in Common; Trusts; Wills.

ESTOPPEL.

See Appeal and Error, —882; Corporations, —425; Deeds, —175; Insurance, —378-390; Judgment, —582-707.

II. BY DEED.

(A) Creation and Operation in General.

—18 (Wash.) In trover for conversion of a bond against the maker or one primarily liable thereon, he cannot question face value of his own valid and subsisting obligation.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

—52 (Idaho) An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision.—*School Dist. No. 8, Twin Falls County, v. Twin Falls County Mut. Fire Ins. Co.*, 164 P. 1174.

—62(3) (Kan.) County cannot be required to carry out void contract for erection of county jail on the ground of estoppel resulting from dealings of county commissioners with contractor, as rights of public are involved.—*Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County*, 164 P. 281.

—62(4) (Or.) Where a street was located according to theory of men who laid out the town, had been maintained for over 40 years, and sidewalks and valuable improvements made, the city is estopped from changing its boundaries merely to attain mathematical exactness.—*Hart v. City of Independence*, 164 P. 719.

(B) Grounds of Estoppel.

—70(3) (Mont.) If, on face of deed and mortgage concerning mining properties, the transaction clearly amounted to a mortgage of the properties, the mortgagee got no title by failure of the mortgagor to assert his rights in the proper-

ty as such, because once a mortgage always a mortgage.—*Elling v. Fine*, 164 P. 891.

⇒74(2) (Colo.) In an action to set aside a deed as in fraud of creditors, the grantor was not estopped to show that he owned a half interest in other property because of the mere fact that such other property was recorded in the name of his wife.—*Rt. Collins Nat. Bank v. Whitton*, 164 P. 309.

⇒75 (Or.) Where owner of personal property permitted an alleged agent to contract for exchange of such property for real estate, and represent himself as principal in the contract, and as owner of property, and to give his personal obligation as such, such owner was forever barred from contradicting alleged agent's misrepresentations.—*Crowder v. Yovovich*, 164 P. 576.

⇒95 (Wash.) Estoppel may be created by silence, as well as by spoken word or overt act.—*Rogers v. Reynolds*, 164 P. 80.

(C) Persons Affected.

⇒98(2) (Cal.App.) Where corporation was estopped to deny ownership of land which it had conveyed, its officer, who received assignment of original owner's contract to convey to company, and thereafter, from owner, conveyance of land, was charged with notice of all facts on which first grantee relied as against company, and estoppel bound him.—*Prouty v. Rogers*, 164 P. 901.

(E) Pleading, Evidence, Trial, and Review.

⇒107 (Kan.) Estoppel must generally be pleaded before evidence thereof is admissible.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

⇒114 (Wash.) The rule that estoppel must be pleaded does not apply to laborer's lien claimants, who did not know, when the liens were filed or the action brought, that third parties, against whom they urge estoppel, would claim title to part of the property.—*Rogers v. Reynolds*, 164 P. 80.

⇒119 (Wash.) Estoppel will not be declared as a matter of law upon disputed facts.—*Haele v. Brackett*, 164 P. 244.

EVIDENCE.

See Criminal Law, ⇒369-561; Depositions; Discovery, ⇒107; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⇒673; Trial, ⇒48.

I. JUDICIAL NOTICE.

⇒5(2) (Wash.) It is common knowledge that stocks of goods sold under compulsory process issued out of courts sell at a sacrifice.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

⇒43(2) (Cal.App.) On hearing of motion to compel defendant to pay plaintiff certain sums for support of illegitimate child, and for expenses pending an appeal by judge who tried case on merits, the court can take judicial notice of record in the case.—*Schallman v. Haas*, 164 P. 336.

⇒44 (Idaho) Court will take judicial notice that disqualification of a judge has ceased by his nonincumbency of office.—*Coburn v. Thornton*, 164 P. 1012; *Bennett v. Same*, Id. 1013.

II. PRESUMPTIONS.

⇒53 (Wash.) A "presumption" is an inference, affirmative or disaffirmative, of the truth of a proposition of fact, which is drawn by a process of reasoning from some one or more

matter of known facts.—*Heidelbach v. Campbell*, 164 P. 247.

⇒75 (Ariz.) In a libel suit, defendant's connection with the alleged libelous article not having been shown, no unfavorable inferences should be indulged from his failure to produce it upon notice.—*Lally v. Cash*, 164 P. 443.

⇒76 (Ariz.) Mere studied evasion of a defendant examined as adverse party under Civ. Code 1913, par. 1680, held not to be substituted for positive evidence of facts sought to be proved by plaintiff.—*Lally v. Cash*, 164 P. 443.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issue.

⇒103 (Wash.) In action against street railroad for personal injuries, question to plaintiff whether he had the money to have operation advised by physician performed was improper, and should not have been asked.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

(C) Similar Facts and Transactions.

⇒135(2) (Kan.) When a party is charged with fraudulent representations, similar representations, made about the same time to other persons, may be shown as bearing upon motive, but such statements made by others in the absence of the person charged are incompetent.—*Atchison Savings Bank v. Potter*, 164 P. 149.

⇒135(2) (Utah) False representations, similar to those in question, are admissible where intent, motive, or knowledge of their falsity by party making them is material, or to prove a general scheme to defraud.—*Smith v. Gilbert*, 164 P. 1026.

In action on notes claimed to have been secured by misrepresentation, testimony of others, to whom plaintiff made similar statements, that they relied thereon was inadmissible.—*Id.*

V. BEST AND SECONDARY EVIDENCE.

⇒182 (Ariz.) That plaintiff had made written demand from defendants to produce the original of an alleged libelous article in court at the trial, as provided in Civ. Code 1913, par. 1760, did not relieve him from the obligation of proving that there was an original.—*Lally v. Cash*, 164 P. 443.

⇒185(12) (Or.) Unsworn declarations of counsel of giving notice to produce writings for use at the trial will not supply the requisite preliminary proof for introduction under L. O. L. §§ 712, 782, of secondary evidence of their contents.—*Oregon Art Tile Co. v. Hegele*, 164 P. 548.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⇒208(3) (Kan.) Pleadings may be admissible in subsequent action between pleader and one not party to former action as admissions against interest of pleader.—*Kington v. Ewart*, 164 P. 141.

⇒213(1) (Mont.) Under Rev. Codes, § 8040, providing that an offer of compromise is not an admission that anything is due, a compromise offer is inadmissible in evidence against party making it.—*Huffine v. Lincoln*, 164 P. 888.

(E) Proof and Effect.

⇒265(7) (Kan.) Admissions contained in a pleading in other litigation while admissible in a subsequent action between the party making them and a stranger are not conclusive of the facts alleged, but are open to explanation or rebuttal.—*Kington v. Ewart*, 164 P. 141.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒272 (Wash.) Rule as to admissions or declarations against interest does not apply as to

testimony of one not party to suit, but who as former officer of one of parties signed note in suit.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

IX. HEARSAY.

⚡322(2) (Okla.) In state's action to abate a nuisance, evidence as to general reputation for lewdness of persons frequenting place charged to be a house of prostitution, and also evidence of the general reputation of such house as a place of prostitution was admissible.—*Balch v. State*, 164 P. 776.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⚡384 (Cal.App.) Civ. Code, § 1647, does not permit parol testimony to vary express terms of written instrument.—*Suhr v. Metcalfe*, 164 P. 407.

⚡400(3) (Or.) Where agent of an alleged undisclosed principal annexed to his bill of sale of personal property exchanged for real estate, an affidavit that he is the owner of such property, parol evidence tending directly to contradict terms of bill of sale, was not admissible.—*Crowder v. Yovovich*, 164 P. 576.

(B) Invalidating Written Instrument.

⚡429 (Wash.) That alterations in an absolute deed are forged may be proved by parol.—*Bradbury v. Nethercutt*, 164 P. 194.

⚡434(11) (Or.) In view of L. O. L. § 713, allowing introduction of parol evidence to vary written contract, where validity of contract is fact in dispute in a suit to rescind a contract for purchase of a truck, a provision in contract that it was only agreement between parties held not to preclude testimony by plaintiff to establish alleged misrepresentations in reliance upon which truck was purchased.—*Hetrick v. Gerlinger Motor Car Co.*, 164 P. 379.

(C) Separate or Subsequent Oral Agreement.

⚡441(7) (Cal.App.) Terms of written contract merely providing for supplying water for mixing concrete and mortar are not varied by evidence of oral agreement to deliver through a pipe near place of work.—*Simmons v. Firth*, 164 P. 807.

⚡441(9) (Cal.) Prior oral negotiations are merged into a written sales contract complete upon its face where no fraudulent representations were made to induce its execution.—*Reamsberg v. Hackney Mfg. Co.*, 164 P. 792.

⚡442(6) (Cal.App.) In a buyer's action to rescind an automobile sales contract, evidence held insufficient to justify a rescission on ground that buyer was misled by representations of seller's agent where buyer signed a written contract superseding oral understandings.—*Tockstein v. Pacific Kissel Kar Branch*, 164 P. 906.

⚡445(1) (Cal.App.) Oral evidence is admissible to prove that parties entered into a new and oral agreement as a substitute for a written one.—*Keeley v. Erbe*, 164 P. 906.

(D) Construction or Application of Language of Written Instrument.

⚡450(7) (Cal.App.) Under Civ. Code, §§ 1638, 1639, parol evidence held inadmissible to show that building contractor's agreement to deliver building free of charges referred only to charges for extras.—*Suhr v. Metcalfe*, 164 P. 407.

⚡450(8) (Wash.) In action for price of peanuts by assignees of company dealing in nuts against another company which sought to offset commissions due it for effecting sales for first company, sale contracts referring to quantity sold as so many cars, it was competent to prove that meaning of word "car," in trade, was a

carload of 30,000 pounds.—*Carstens v. Nut House*, 164 P. 770.

⚡452 (Idaho) Parol testimony is incompetent to vary the terms of a written contract, but may be admitted to explain a latent ambiguity.—*Green v. Consolidated Wagon & Machine Co.*, 164 P. 1016.

(E) Showing Discharge or Performance of Obligation.

⚡466 (Cal.App.) Where tenant assigned his lease to corporation, the landlord consenting thereto in writing, evidence that landlord orally agreed to release tenant from payment of rent was inadmissible.—*Eddie v. Gage Mfg. Co.*, 164 P. 1133.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⚡471(19) (Or.) It was not error to admit statement of witness as to what seemed to him to have been the circumstances where he used the expression as the equivalent of "as I saw it."—*White v. East Side Mill & Lumber Co.*, 164 P. 786.

In action for death of traffic officer when struck by auto truck whose tires were of peculiar make, and the tracks of which could not be reproduced, a witness could say that the tracks found fitted the tires of defendant's automobile.—*Id.*

⚡474(8) (Cal.App.) Objection that a witness who testified as to speed of automobile had not seen it a sufficient time prior to collision to testify on subject goes to weight rather than competency of evidence.—*Dilger v. Whittier*, 164 P. 49.

⚡474(11) (Wash.) In action for damages from maintenance of county ferry, opinion of persons using ferry and of builder as to result of driving thereon in particular ways was competent.—*Bergen v. Lewis County*, 164 P. 73.

⚡474(16) (Cal.App.) Defendants, in an action in eminent domain, being otherwise qualified, were competent to testify as witnesses in their own behalf to value of their property.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 53.

⚡488 (Utah) Testimony by plaintiff, suing for destruction of property by fire, that he valued shed burned at certain amount is inadmissible.—*Gleason v. San Pedro, L. A. & S. L. R. Co.*, 164 P. 484.

(C) Competency of Experts.

⚡540 (Or.) Plaintiff, who had been in contracting business for 12 years, excavation of material having been part of work in which he had been engaged, was qualified to testify as to what is usual and ordinary way of making excavation.—*Hayden v. City of Astoria*, 164 P. 729.

Witness who had been in charge of construction work, had built railroad, and had experience in excavation, held qualified to testify as to usual and ordinary way of making excavation.—*Id.*

⚡546 (Idaho) Qualifications of experts must be determined in first instance by trial court.—*Austin v. Brown Bros. Co.*, 164 P. 95.

(D) Examination of Experts.

⚡558(7) (Or.) Evidence of particular sale is permitted upon cross-examination in proving value in order to test the qualification of the witness.—*Reimers v. Brennan*, 164 P. 552.

XIV. WEIGHT AND SUFFICIENCY.

⚡584(1) (Cal.App.) Unsupported testimony of one person as to declarations of a decedent is weakest of all evidence.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§590 (Cal.App.) In an action for death of employe by explosion of boiler that a witness was defendant's superintendent and to some extent responsible for accident, *held* to class him as a hostile witness, though plaintiffs were compelled to call him as their witness.—Lippert v. Pacific Sugar Corp., 164 P. 810.

§594 (Or.) The jury need not accept as conclusive uncontradicted statements of any witness, and it may disregard undisputed testimony if unsatisfactory.—White v. East Side Mill & Lumber Co., 164 P. 736.

EXAMINATION.

See Damages, §206; Evidence, §558; Witnesses, §274-293.

EXCEPTIONS.

See Appeal and Error, §263, 274, 501; Indictment and Information, §111; Trial, §345.

EXCEPTIONS, BILL OF.

See Criminal Law, §1092.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§7 (Or.) Literal transcript of all evidence, interspersed with remarks and objections of counsel and statements of court's rulings, having appended what purports to be entire charge to jury, is not a bill of exceptions, and objections made cannot be considered.—Mishler v. Edmunson, 164 P. 718.

II. SETTLEMENT, SIGNING, AND FILING.

§40(1) (N.M.) Extension of time for filing complete transcripts under Code 1915, § 4490, does not extend the time to settle and sign bills of exceptions, which must be settled and signed on or before 10 days before original return day.—Herbst v. Rogers, 164 P. 827.

§41(1) (Utah) Where judgment was entered April 3d, modified May 15th, and an extension of time to serve bill of exceptions was granted on April 22d, and service made 27th of June, *held*, that the bill was served, settled, and allowed within the time allowed by Comp. Laws 1907, § 3296.—McGuire v. State Bank of Tremonton, 164 P. 494.

EXCESSIVE DAMAGES.

See Damages, §131, 132.

EXCHANGE OF PROPERTY.

§4 (Colo.) Provision in contract for exchange of properties, for defendant to sell properties received by him and account for part of price in excess of a certain amount, *held* to require him taking property for part of price to account for it at value at which he took it.—Benford v. Yockey, 164 P. 725.

Contract of exchange providing for credit on plaintiff's notes of anything in excess of certain amount received by defendant on sale, *held* to allow plaintiff to recover it, where she had sold the property securing the notes, and purchaser had assumed their payment, and defendant had released plaintiff thereon.—Id.

§4 (Or.) A representation that defendants in operating an apartment house had received on an average of \$150 net during time they occupied premises, was not a guarantee that net income which plaintiffs would receive in operating it would be \$150 a month, or any other sum.—Blakney v. Rowell, 164 P. 709.

§7 (Or.) If defendants, who, pursuant to an agreement for exchange of property, assigned their lease of an apartment house to plaintiffs, warranted that plaintiffs would receive a net gain of \$150 a month if they kept the rooms well filled, defendants were not liable for loss

resulting from plaintiffs' inability to keep rooms well filled.—Blakney v. Rowell, 164 P. 709.

§8(4) (Or.) In a suit to rescind an exchange of property, including the assignment by defendants to plaintiffs of the lease of an apartment house, evidence *held* to show that defendants in operating apartment house received on an average of \$150 a month net during time they occupied premises, so that their representation to that effect was not false.—Blakney v. Rowell, 164 P. 709.

EXCLUSIVE PRIVILEGES.

See Carriers, §14.

EXECUTION.

See Arrest, §39; Attachment; Bills and Notes, §517; Garnishment; Homestead.

II. PROPERTY SUBJECT TO EXECUTION.

§51 (Mont.) Where the purchase price of chattels was to be placed to the seller's credit at a bank, the seller had no interest subject to execution in a note given by the buyer to the bank to secure such credit.—Loud v. Hanson, 164 P. 544.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§172(4) (Colo.) In a suit to enjoin the collection of a judgment, the record *held* to show that the judgment debtor had full knowledge of the entry of the judgment.—Stokes v. Kingsbury, 164 P. 313.

§172(4) (Or.) Defendants in suit to enjoin execution sale, being required to prove valid attachment, must under L. O. L. § 295, show summons issued in the action in which attachment was sued out.—Metropolitan Investment & Improvement Co. v. Schouweiler, 164 P. 370.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§221 (Wash.) In absence of statute, an officer having levied an execution before the return day may thereafter and after actual return prosecute necessary proceedings to convert the property into money.—Hensen v. Peter, 164 P. 512.

(B) Title and Rights of Purchaser.

§290 (Wash.) Where a judgment creditor transferred sheriff's certificates of lands sold on execution to defendant in return for promise to pay certain amount if land was redeemed and another amount if sheriff's deeds were issued, which was subsequently done, but the execution and sale were later set aside, there is a failure of subject-matter preventing the creditor recovering on the contract.—Vanassee Land Co. v. Hewitt, 164 P. 196.

EXECUTORS AND ADMINISTRATORS.

See Death, §31; Descent and Distribution; Jury, §17; Taxation, §890; Trusts; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§32(2) (Kan.) Where jury is called in proceeding to set aside appointment of administrator to pass on disputed question of deceased's residence, court may instruct as to rules governing submission and determination of special questions of fact, but neither party has right to demand instructions.—In re Holloway's Estate, 164 P. 298.

On record in proceeding to set aside appointment of administrator, *held* that court did not treat or dispose of case as one triable by jury

as of right, but that, while approving jury's special findings, it made findings of its own on which its judgment was rested.—Id.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

⌚109(1) (Wash.) Under Gen. & Bal. Code, §§ 1534, 1547, relating to duties of administrators, held that boxes necessary for harvesting of apples grown on an estate were an expense for which administrator could bind estate.—Lamb Davis Lumber Co. v. Stowell, 164 P. 593.

(B) Real Property and Interests Therein.

⌚152 (Okla.) Where administrator of Choctaw minor selected allotment descending to his only heirs, and, after their conveyance to him, sold the land and took a note, payable on delivery of abstract showing clear title, and there was no fraud, and abstract showed clear title, he could recover on note.—Kelly v. Blackwell, 164 P. 103.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⌚216(2) (Cal.) The estate of a deceased person is not liable to the attorney of unsuccessful heirship claimants for costs and attorney's fees in attempting to establish heirship, though their witnesses gave testimony aiding in reaching the decree for distribution, under Code Civ. Proc. § 1720, or any other statute.—In re Walden's Estate, 164 P. 639.

(B) Presentation and Allowance.

⌚225(1) (Kan.) Except by some provision in a will requiring the keeping open of an estate longer than two years, the nonclaim statute, Gen. St. 1915, §§ 4565, 4590, controls.—McDaniel v. Putnam, 164 P. 1167.

⌚225(3) (Kan.) Claim against estate payable on death of another was not a contingent claim under Gen. St. 1915, § 4592, but was an absolute unconditional claim accruing when created; the payment being merely postponed until event which must certainly transpire.—McDaniel v. Putnam, 164 P. 1167.

⌚225(7) (Kan.) One has no power by oral agreement with his creditor to establish a rule as to time for presentation of claim against his estate, different from that declared by the statutes of nonclaim; Gen. St. 1915, §§ 4565, 4590, barring demands against estates not presented within two years.—McDaniel v. Putnam, 164 P. 1167.

Claim against estate, which, by agreement was not to be presented against estate until after death of debtor's wife, which occurred two years after appointment of executor, was barred by the two-year statute of nonclaim (Gen. St. 1915, §§ 4565, 4592).—Id.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(B) Application and Order.

⌚343 (Kan.) Where amended petition alleged that executrix had been appointed more than five years, but that estate had not reached final settlement, but did not allege unpaid claims, it would not be presumed that a sale was necessary for the payment of debts.—Strom v. Wood, 164 P. 1100.

X. ACTIONS.

⌚433 (Wash.) In an action against an administrator de bonis non on a claim properly incurred by former administrator in management of estate, it was not material that former administrator had failed to include such claim in final account rendered to his successor.—Lamb Davis Lumber Co. v. Stowell, 164 P. 593.

⌚437(2) (Wash.) Rem. Code 1915, § 1308, providing that real estate of a decedent shall not be liable for debts unless administration be granted within six years from date of death, is a statute of limitation.—In re Mason's Estate, 164 P. 206.

EXEMPLARY DAMAGES.

See Damages, ⌚89, 91.

EXEMPTIONS.

See Homestead.

EXPENDITURES.

See Executors and Administrators, ⌚109.

EXPERT TESTIMONY.

See Evidence, ⌚540-558.

EXPLOSIVES.

⌚8 (Kan.) Evidence, in action for death of a fireman by explosion while extinguishing fire in a building containing dynamite, held to fix responsibility for its negligent storage upon the tenant and a manufacturing company.—Pinson v. Young, 164 P. 1102.

Where dynamite is stored in a building in violation of ordinance and is exploded by fire in the building and kills a fireman on duty, such negligent storage is a proximate cause of his death.—Id.

In action for death of a fireman by explosion while extinguishing fire in building containing dynamite, instruction as to its liability for storing excessive amount of dynamite in building, held to properly recognize rights of defendant.—Id.

EX POST FACTO LAWS.

See Constitutional Law, ⌚197.

EXPRESS TRUSTS.

See Trusts, ⌚17, 18.

EXTENSION.

See Exceptions, Bill of, ⌚40.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(B) Actions.

⌚36 (Cal.App.) In suit for false imprisonment for \$25,000, verdict of \$500 to plaintiff, who was arrested without process or warrant and without a charge, and confined, was not excessive.—Fiori v. Agnew, 164 P. 899.

⌚40 (Kan.) In action for false imprisonment, instruction that, if defendants did not direct sheriff to imprison plaintiff, the sheriff alone, who was not sued, would be liable was not objectionable, where defendants' testimony was sufficient to relieve them from liability, if it was believed.—Haglund v. Burdick State Bank, 164 P. 167.

FALSE PRETENSES.

⌚6 (N.M.) The giving of a worthless check is a representation of the existing fact that the drawer has credit with the drawee bank for the amount involved.—State v. Tanner, 164 P. 821.

⌚7(1) (N.M.) A "false pretense" is such a fraudulent representation of an existing or past fact by one knowing it not to be true as is

adapted to induce the person to whom it is made to part with something of value.—*State v. Tanner*, 164 P. 821.

FEDERAL COURTS.

See Courts, ¶97.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Damages, ¶64; Death, ¶31; Master and Servant, ¶86, 286.

FEES.

See Attorney and Client, ¶165-180; Constitutional Law, ¶248, 326; Damages, ¶72; Insurance, ¶875; Statutes, ¶79.

FELLOW SERVANTS.

See Master and Servant, ¶279, 287.

FERRIES.

See Appeal and Error, ¶1053; Counties, ¶210.

FILING.

See Appeal and Error, ¶623, 629; Mechanics' Liens, ¶131.

FINDINGS.

See Appeal and Error, ¶1008-1015; Bills and Notes, ¶539; Equity, ¶381; Justices of the Peace, ¶114; Negligence, ¶142; Trial, ¶359, 388-397; Wills, ¶334.

FIRE INSURANCE.

See Insurance.

FIREMEN.

See Explosives, ¶8; Negligence, ¶93; Street Railroads, ¶99.

FIRES.

See Railroads, ¶453-484.

FIXTURES.

¶1 (Or.) The general tests of an article used in connection with realty being a fixture are annexation, adaptation to use, and intention.—*Johnson v. Pacific Land Co.*, 164 P. 564.

¶5 (Or.) Articles which enhance the comfort of a home, such as parts of a water system, are as a rule considered fixtures, when attached in the usual manner.—*Johnson v. Pacific Land Co.*, 164 P. 564.

¶18(1) (Or.) Fixtures attached by the owner to realty, though after the giving of a mortgage, become subject to the mortgage.—*Johnson v. Pacific Land Co.*, 164 P. 564.

¶27(1) (Wash.) Agreement that chattels affixed to realty shall retain personal character may generally be either in writing or parol.—*Boeringa v. Perry*, 164 P. 773.

Right to preserve personal character of fixtures by agreement is limited to those so attached that they may be detached without destroying or materially injuring either chattel or realty.—*Id.*

¶27(2) (Cal.) Where lease provided that improvements by lessee should become property of lessor, rights of parties are governed by that provision regardless of whether improvements are trade fixtures within Civ. Code, § 1019.—*Realty Dock & Improvement Corp. v. Anderson*, 164 P. 4.

¶35(2) (Or.) A mortgagee, whose mortgage is not due, but who is in lawful possession, to recover fixtures from one who has removed them, need not show the security is not ample or will become so.—*Johnson v. Pacific Land Co.*, 164 P. 564.

¶35(2) (Wash.) Giving of chattel mortgage on fixtures is sufficient evidence of intention that they shall retain their personal character.—*Boeringa v. Perry*, 164 P. 773.

FOLLOWING TRUST FUNDS.

See Trusts, ¶349, 357.

FOOD.

¶6 (Or.) L. O. L. § 2227, making sale of diseased food criminal offense, is not designed to punish persons innocently selling diseased food products where defects are latent and not known at time of sale.—*Swank v. Battaglia*, 164 P. 705.

FORBEARANCE.

See Contracts, ¶71.

FORCIBLE ENTRY AND DETAINER.

I. CIVIL LIABILITY.

¶9(1) (Okla.) Right to maintain forcible entry and detainer is not determined by plaintiff's right of possession, but by whether he has been in possession and his possession has been taken away by force, and, unless otherwise provided by statute, one never in possession cannot maintain action.—*Brown v. Mayhall*, 164 P. 973.

Under Rev. Laws 1910, §§ 5504, 5505, aside from relation of landlord and tenant, one who has never been in possession cannot maintain forcible entry and detainer against one in possession under color of title.—*Id.*

FORECLOSURE.

See Chattel Mortgages, ¶256; Mortgages, ¶468-552.

FOREIGN CORPORATIONS.

See Corporations, ¶668, 691.

FOREIGN DIVORCE.

See Divorce, ¶330, 331.

FOREIGN JUDGMENTS.

See Judgment, ¶817-823.

FORFEITURES.

See Deeds, ¶166, 175; Insurance, ¶335-390.

FORMER ADJUDICATION.

See Judgment, ¶582-707.

FORMER JEOPARDY.

See Criminal Law, ¶192-294.

FORNICATION.

See Lewdness.

FRANCHISES.

See Municipal Corporations, ¶680, 681.

FRAUD.

See Brokers, ¶34, 65; Cancellation of Instruments, ¶37; Evidence, ¶135, 434; False Pretenses; Fraudulent Conveyances; Insurance, ¶256, 655; Judgment, ¶511; Limitation of Actions, ¶37; Release, ¶58; Sales, ¶41; Trusts, ¶95; Vendor and Purchaser, ¶33.

I. DECEPTION CONSTITUTING FRAUD AND LIABILITY THEREFOR.

¶13(2) (Idaho) To establish fraud, it must be shown, in addition to falsity of representations of

a material fact upon which party to whom they were made innocently acted to his injury, that party making them knew them to be false, or that he made them recklessly.—*Parker v. Herron*, 164 P. 1013.

⚡13(3) (Idaho) To establish fraud, it must be shown, in addition to falsity of representations of a material fact upon which party to whom they were made innocently acted to his injury, that party having no actual knowledge made them recklessly, without knowledge of their truth.—*Parker v. Herron*, 164 P. 1013.

⚡20 (Or.) Generally, where there has been an inspection by a person making an exchange of property, false representations as to the value cannot be made the basis of an action for damages.—*Reimers v. Brennan*, 164 P. 552.

⚡22(1) (Or.) Where parties deal at arm's length and no artifice is used to prevent investigation, the purchaser must, as a rule, use his means of knowledge and cannot recover for fraud if he fails to do so.—*Reimers v. Brennan*, 164 P. 552.

⚡27 (Kan.) A representation to induce the sale of a stallion, that he was a registered Percheron, was a representation that he was a Percheron regularly registered conformably to the statutory standard.—*Everhart v. Welch*, 164 P. 1098.

⚡28 (Okla.) A general creditor may not maintain an action against a third party for fraudulently inducing such creditor to forbear legal action to collect his debt.—*Evans v. Burson*, 164 P. 471.

⚡29 (Or.) Where an alleged agent made affidavit that he was owner of personal property exchanged for real estate, and gave a note in his own name, and in every way acted as principal in transaction, an undisclosed principal could not bring action for damages for deceit practiced upon such agent.—*Crowder v. Yovich*, 164 P. 576.

II. ACTIONS.

(D) Damages.

⚡59(3) (Ariz.) Where plaintiff pleaded in his reply to defendant's counterclaim for fraud in sale of land that the land was of the value paid by defendant, the measure of defendant's damages was the difference between the purchase price and the actual value as found.—*Wooley v. Locarnini*, 164 P. 319.

(E) Trial, Judgment, and Review.

⚡64(1) (Or.) In a suit for damages for deceit in sale of lands, value of furniture owned by plaintiff and given in exchange as a part of the consideration for conveyance of defendant's land, held for the jury.—*Crowder v. Yovich*, 164 P. 576.

⚡65(1) (Kan.) In action for damages for false representations as to registration inducing plaintiff to purchase a stallion, inadvertent use in instruction of the words "warranted" and "warranty" for "represented" and "representation" was immaterial.—*Everhart v. Welch*, 164 P. 1098.

FRAUDS, STATUTE OF.

See Trusts, ⚡63½.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.

⚡44(4) (Wash.) An oral agreement for lease of a house for a period of years is not enforceable.—*Boston Trust Co. v. Evelon Co.*, 164 P. 606.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⚡56(1) (Wash.) An oral promise to convey realty to a brother, on payment of price held

to create no interest enforceable either in law or in equity.—*In re Mason's Estate*, 164 P. 205.
⚡56(8) (Or.) L. O. L. § 5132, making mining claims real estate, section 5134 making mining claim conveyances subject to provisions governing other realty, and sections 804, 808, requiring conveyances, etc., of real estate to be in writing, prevent oral proof of an agreement to purchase a mining claim interest.—*Hinderliter v. McDonald*, 164 P. 378.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⚡115(2) (Cal.) Although contract sued on is not signed by one defendant, where cross-complaint alleges that later contract, reciting that previous contract between defendants named should be void only in case this contract is completed, is signed by defendants named, incorporation by reference is sufficient to satisfy statute of frauds.—*Walsh v. Standart*, 164 P. 795.

IX. OPERATION AND EFFECT OF STATUTE.

⚡128 (Or.) Under a complaint that plaintiff advanced money for defendant to pay his share of a mining claim they had agreed to purchase, the allegation as to purchase of mining claim is material, and must be proved by competent evidence.—*Hinderliter v. McDonald*, 164 P. 378.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡150(1) (Cal.) Allegation that defendants executed written contract means that all of them, including defendant who did not sign, executed it, and defense that contract was within statute of frauds because not signed by all cannot be taken advantage of under general demurrer.—*Walsh v. Standart*, 164 P. 795.

⚡152(1) (Cal.) Defense that contract sued on is within statute of frauds because not signed by one defendant is available under answer denying generally execution.—*Walsh v. Standart*, 164 P. 795.

FRAUDULENT CONVEYANCES.

See Attachment, ⚡41.

I. TRANSFERS AND TRANSACTIONS INVALID.

(C) Property and Rights Transferred.

⚡43(1) (Or.) Tools and machinery in mill used in manufacture purchased by plaintiff in 1911, are not subject to execution to satisfy a subsequent judgment secured by creditor against seller, although no notice was given of the transfer; L. O. L. § 669 et seq. before amendment in 1913 (*Laws* 1913, p. 537), not applying to that class of property.—*Golden Rod Milling Co. v. Connell*, 164 P. 588.

(D) Indebtedness, Insolvency, and Intent of Grantor.

⚡58 (Colo.) A deed given in consideration of support and maintenance will not be set aside as in fraud of creditors where the grantor at the time of executing the deed owned other property sufficient in amount to satisfy existing indebtedness in the ordinary course prescribed by law for the collection of debts.—*Ft. Collins Nat. Bank v. Whitton*, 164 P. 309.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(I) Trial.

⚡309(6) (Colo.) In an action to set aside a deed as in fraud of creditors, instructions relating to the retention of sufficient property to satisfy the debts held not conflicting.—*Ft. Collins Nat. Bank v. Whitton*, 164 P. 309.

FRIVOLOUS APPEAL.

See Costs, ¶260.

FULL FAITH AND CREDIT.

See Judgment, ¶817-823.

GARNISHMENT.

See Attachment; Execution.

III. PROCEEDINGS TO PROCURE.

¶88 (Kan.) Where affidavit of garnishment did not state that defendant had no sufficient property liable to execution, as required by Gen. St. 1915, § 7121, but defendant voluntarily appeared and gave bond releasing the property attached, he could not question validity of affidavit.—*Bennett v. St. Marys Grain Co.*, 164 P. 259.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

¶180 (Okl.) In an action with service of garnishment, garnishee's answer held to authorize court to determine whether the facts stated rendered the garnishee liable for the amount of his obligations.—*Arnold v. Burks*, 164 P. 970.

¶187 (Okl.) Where counsel now appearing did not then represent any of the parties hereto, and trial court's announcement as to trial was not relied upon by defendant or garnishees, court did not err in overruling motion based on such announcement to set aside judgment against them.—*Arnold v. Burks*, 164 P. 970.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

¶230 (Kan.) Where garnishee makes no answer and issues are not joined and no judgment was entered and no execution issued, garnishee acquires no claim against debtor under an assignment of judgment against the debtor rendered in another action.—*Alexander v. Clarkson*, 164 P. 294.

GRAND JURY.

See Indictment and Information.

GUARANTY.

See Principal and Surety.

I. REQUISITES AND VALIDITY.

¶4 (Wash.) A contract inducing consummation of purchase of the stock of a corporation, whereby part of the sellers warrant its liability not to exceed a certain amount, is one of warranty, and not guaranty.—*Pacific Power & Light Co. v. White*, 164 P. 602.

¶7(1) (Okl.) A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.—*Hays v. Smith*, 164 P. 470.

¶25(3) (Cal.App.) Evidence held insufficient to show that the creditor refused to accept the first of three guarantors alone so as to release him when other guarantors were secured.—*Turton v. Shinn*, 164 P. 38.

IV. REMEDIES OF CREDITORS.

¶85(2) (Cal.App.) In view of Civ. Code, § 3532, where guarantor denied that he had been accepted as guarantor, pleading demand or notice held unnecessary.—*Turton v. Shinn*, 164 P. 38.

GUARDIAN AND WARD.

See Appeal and Error, ¶151; Spendthrifts, ¶8.

I. GUARDIANSHIP IN GENERAL.

¶4 (Idaho) Under Rev. Codes, § 5774, parents of minor children, being themselves competent to transact their own business, and not otherwise unsuitable, are entitled to the guardianship and custody of such children.—*Jain v. Priest*, 164 P. 364.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

¶10 (Cal.) Under Code Civ. Proc. § 1751, and Civ. Code, § 246, subds. 1, 4, the parent of a child under age of 14 being "competent," that is, having mental and moral qualifications, though not having the necessary means, must be appointed guardian, unless by enumerated act or omission she has forfeited right, notwithstanding child's intelligent preference.—*In re Mathews*, 164 P. 8.

¶15 (Okl.) That guardian's bond is payable to state instead of county judge, as provided by law, does not invalidate the bond, and, if it conforms to statute showing for whose benefit it was given, such party may maintain an action thereon.—*Hickman v. Jackson*, 164 P. 979.

¶23 (Idaho) A corporation to whom probate court has awarded custody of children may resign its guardianship or apply to court for permission to surrender them to their parents; such matters resting with the probate court.—*Jain v. Priest*, 164 P. 364.

¶25 (Idaho) Where charitable corporation is made guardian of a child by probate court's order under Sess. Laws 1909, p. 38, court may terminate guardianship the same as it may do in other cases of guardianship.—*Jain v. Priest*, 164 P. 364.

When it appears to probate court that guardianship of minor children awarded by it is no longer necessary, it may be terminated on reasonable notice of the proceedings to the guardian.—*Id.*

Society to which probate court had given custody of children on ground of unfitness of their parents held to have had sufficient notice of proceedings to terminate guardianship to be bound by court's order.—*Id.*

An order of the probate court which had given custody of minor children to benevolent corporation restoring the children to their parents held to terminate the guardianship.—*Id.*

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

¶103 (Okl.) Rev. Laws 1910, § 6384, relating to limit of price and appraisal of land of minors and private guardianship sale, is mandatory, going to court's jurisdiction to make order of confirmation, and an order violating such provision is void for want of jurisdiction.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 985.

¶107 (Okl.) Where county court obtains jurisdiction of guardianship sale, irregularities up to its order of confirmation are cured by the order, which may not be collaterally attacked for such irregularities.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 985.

HABEAS CORPUS.**I. NATURE AND GROUNDS OF REMEDY.**

¶1 (Okl.Cr.App.) Writ of habeas corpus is writ of right granted to inquire into all cases of illegal imprisonment.—*Ex parte Blum*, 164 P. 136.

¶22(1) (Cal.App.) Judgment of conviction of assault to commit rape is not void on its face, because under an indictment charging statutory

rape, and so cannot be nullified through habeas corpus, even if there was error in admitting evidence of force, which question can be reviewed only on appeal.—*Ex parte Drennan*, 164 P. 807.

⚡29 (Okla. Cr. App.) One imprisoned in penitentiary under void commitment issued by court clerk upon verdict, where no judgment was rendered on verdict, will be discharged and remanded to custody of the trial court.—*Ex parte Blum*, 164 P. 136.

⚡33 (Okla. Cr. App.) Prior to filing petition in error only question of excessive bail will be considered on habeas corpus.—*Ex parte Burton*, 164 P. 135.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡53 (Okla. Cr. App.) Petition for habeas corpus on ground that conviction and sentence were void because district trial judge was not a de jure or de facto judge, but was a usurper of the office, *held* insufficient as against a demurrer.—*Ex parte Crouch*, 164 P. 133.

⚡62 (Okla. Cr. App.) Where petitioner, immediately after filing his petition for habeas corpus, filed a motion to dismiss the cause, the petition would be dismissed.—*Ex parte Campbell*, 164 P. 1156.

⚡65 (Idaho) Under Rev. Codes, §§ 8816 and 8842, the Supreme Court is authorized to make a writ of habeas corpus issued by it returnable before any district court.—*Jain v. Priest*, 164 P. 364.

⚡99(4) (Idaho) On habeas corpus by parents to recover custody of children removed by the probate court because of parents' faults, the question is whether those faults have been overcome, and the material evidence is as to their conduct since children were taken from them.—*Jain v. Priest*, 164 P. 364.

⚡102 (Idaho) Under Rev. Codes, § 8354, Supreme Court on habeas corpus may examine evidence to determine whether there was probable cause to believe that the crime charged was committed, and that the party held to answer had committed it.—*Ex parte Baugh*, 164 P. 529.

Evidence taken at preliminary hearing of one charged with having intoxicating liquor in his possession contrary to law *held* not to show probable cause for holding him to answer, so that on habeas corpus he would be discharged.—*Id.*

⚡113(8) (Idaho) The judgment of a district court in habeas corpus proceeding, involving the custody of children, is appealable, within Rev. Codes, § 4807, as amended by Sess. Laws 1911, c. 111.—*Jain v. Priest*, 164 P. 364.

⚡113(12) (Idaho) Even if testimony of physician in parents' proceeding to recover custody of children should have been excluded as a privileged communication, its admission was not reversible error, where the patient also was a witness and gave substantially the same testimony.—*Jain v. Priest*, 164 P. 364.

On habeas corpus by parents to recover custody of their minor children on the ground that they had reformed and were suitable persons to have their custody, findings of district court in their favor, made on conflicting evidence, would not be disturbed on appeal.—*Id.*

HARMLESS ERROR.

See Appeal and Error, ⚡1032-1073; Criminal Law, ⚡1162-1174; Homicide, ⚡339, 340.

HEALTH.

See Food; Municipal Corporations, ⚡191.

II. REGULATIONS AND OFFENSES.

⚡21 (Cal. App.) St. 1915, p. 1530, regarding tuberculosis bureau and granting aid to counties for care of patients is a valid exercise of

sovereign and police power of state, as purpose of county organizations is to perform state functions and state may employ them jointly with itself or alone to carry out its own general governmental functions and policy.—*Sacramento County v. Chambers*, 164 P. 613.

HEARSAY EVIDENCE.

See Criminal Law, ⚡419, 420; Evidence, ⚡322.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Constitutional Law, ⚡292; Dedication; Municipal Corporations, ⚡654-761.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

⚡5 (Cal.) A landowner's use of a beach road within the confines of defendant's property for purpose of reaching his premises does not establish beach road's character as public road.—*People v. Rindge*, 164 P. 633.

⚡17 (Cal.) In suit to abate alleged nuisance maintained by defendants upon and across public highway, evidence *held* to warrant findings that no such highway had been established.—*People v. Rindge*, 164 P. 633.

(B) Establishment by Statute or Statutory Proceedings.

⚡30(6) (Kan.) Where land was taken for a highway, and no notice of the view was served on a joint life tenant living in the county, and there was no notice in fact to or waiver by her, the proceedings as to her were void under Gen. St. 1915, § 8759.—*Brown v. Paul*, 164 P. 288.

⚡64 (Kan.) In suit to enjoin the opening of proposed highway, demurrer to petition *held* properly sustained as to plaintiff children on account of their uncertain and contingent interest in the land.—*Brown v. Paul*, 164 P. 288.

In suit to enjoin the opening of a proposed highway, demurrer to petition was erroneously sustained as to plaintiff wife, a joint life tenant, who had had no notice, as required by Gen. St. 1915, § 8759, and would be made permanent, unless she indicated her willingness to proceed no further.—*Id.*

(D) Title to Fee and Rights of Abutting Owners.

⚡83 (Cal.) The abutting owner is deprived of right to destroy shade and ornamental trees on the side of a highway by Pol. Code, §§ 2633, 2742, 4041, subd. 39, Code Civ. Proc. § 733, and St. 1909, p. 1129, regulatory thereof.—*Santa Barbara County v. More*, 164 P. 895.

Statutes regulatory of when and under what circumstances trees on a highway subserving useful as well as ornamental purposes may be destroyed is constitutional.—*Id.*

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

⚡175(1) (Utah) In action for injuries in collision on highway between motorcycle and automobile, automobile driver was not liable for negligence, if any, in permitting brakes to become deficient where, when danger was discovered, collision could not have been averted.—*Russell v. Watkins*, 164 P. 867.

Passenger on motorcycle driven on wrong side of highway *held* contributorily negligent, so that he could not recover from the owner of the automobile with which the motorcycle collided.—*Id.*

☞176 (Wash.) In action for injuries to passenger in automobile caused by driving over an embankment on highway in attempting to pass another automobile, *Laws 1915, p. 394, § 26*, providing that vehicles at intersection of highway should keep to right of intersections when turning to right, *held* intended to prevent collisions and not applicable.—*Bogdan v. Pappas*, 164 P. 208.

☞184(2) (Cal.App.) In an action for injuries sustained by a child when struck by an automobile diverted from roadway by a collision with an automobile operated by defendant, evidence *held* to justify a finding that injury was due solely to defendant's negligence in operating his car.—*Dilger v. Whittier*, 164 P. 49.

☞184(2) (Mont.) Evidence *held* to show that defendant, driving an automobile which collided with plaintiff's vehicle, was at fault in failing to turn to right of center of highway in passing, as required by *Laws 1913, c. 72, subch. 8, § 1*.—*Savage v. Boyce*, 164 P. 887.

Where collision between defendant's automobile and plaintiff's vehicle occurred on plaintiff's side of the road, defendant was *prima facie* negligent in failing to avoid frightening plaintiff's mule, as required by *Laws 1913, c. 72, subch. 9, § 3*.—*Id.*

☞184(3) (Mont.) Evidence being conflicting as to whether plaintiff was asleep when collision occurred between his vehicle and defendant's automobile, question was for the jury.—*Savage v. Boyce*, 164 P. 887.

☞184(4) (Utah) In action for injuries in highway collision, instruction defining negligence *held* not erroneous.—*Russell v. Watkins*, 164 P. 867.

☞186 (Cal.App.) Evidence on prosecution under Pen. Code, § 367c, of driver of auto for not stopping and assisting occupants of vehicle collided with, *held* sufficient, as against claim of want of knowledge of collision.—*People v. Fodera*, 164 P. 22.

Independently of, as well as in view of, Pen. Code, § 20, knowledge by driver of auto that he has collided with a vehicle is necessary to the offense under section 367c of failure to stop and assist occupants of vehicle.—*Id.*

HOMESTEAD.

I. NATURE, ACQUISITION, AND EXTENT.

(C) Acquisition and Establishment.

☞31 (Wash.) Since the idea of home is the basis of the homestead act, the declarant's honest intention to actually occupy premises as a home is necessary.—*Schoenheider v. Tuengel*, 164 P. 748.

☞57(3) (Wash.) Evidence that plaintiff, after entry of judgment against him, built a small house and lived there for a small portion of the time, *held* insufficient to show homestead occupation in good faith under *Rem. Code 1915, § 552*.—*Schoenheider v. Tuengel*, 164 P. 748.

HOMICIDE.

See Criminal Law, ☞761, 778.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

☞109 (Mont.) Possession and exercise of right of self-defense are necessary to personal safety and not incompatible with the public good.—*State v. Merk*, 164 P. 655.

☞113 (Mont.) Under *Rev. Codes, §§ 8301, 8302*, if one committing homicide was the assailant or engaged in mortal combat, he must, in good faith, have endeavored to decline any further struggle before the homicide was committed.—*State v. Merk*, 164 P. 655.

☞116(2) (Mont.) A person assailed may act upon appearances as they present themselves to him and even slay his assailant, though in

fact he is not in actual peril, if circumstances are such that a reasonable man would be justified in acting as he did.—*State v. Merk*, 164 P. 655.

☞116(6) (Cal.App.) A homicide is not justifiable unless slayer was then in apparent imminent danger of losing his life or sustaining serious bodily injuries, and previous threats unaccompanied by hostile acts are insufficient.—*People v. Gonzales*, 164 P. 1131.

☞118(1) (Mont.) A person assailed by another with apparent murderous intent, need not retreat and seek a place of safety.—*State v. Merk*, 164 P. 655.

☞118(2) (Wash.) Where an assault is so fierce and imminent that the person assaulted is justified in honestly believing that he cannot retreat without increasing danger, he may stand his ground, and if in so doing he kills his assailant, he is justified.—*State v. Meyer*, 164 P. 926.

☞122 (Wash.) Defendant had right to go to defense of his housekeeper if she was being feloniously assaulted and to do such things for her protection as she might have done had she been able in view of *Rem. & Bal. Code, § 2406*.—*State v. Meyer*, 164 P. 926.

Where accused at time he wounded another was acting in necessary defense of his housekeeper, deceased had no right to go to defense of such other, and accused could stand his ground to extent of taking life if necessary.—*Id.*

If a son was aggressor, the right of father to act in his defense remained in abeyance until son had in good faith attempted to withdraw from conflict.—*Id.*

VI. INDICTMENT AND INFORMATION.

☞127 (Idaho) Under *Rev. Codes, §§ 7677, 7679, and 7686*, an information charging that defendant then and there willfully and feloniously and with malice aforethought killed and murdered a named human being is sufficient to charge murder.—*State v. Lundhigh*, 164 P. 690.

☞140 (Mont.) Indictment *held* not to state sufficient facts to constitute the crime of attempt to murder, within *Rev. Codes, § 8894*.—*State v. Rains*, 164 P. 540.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

☞151(1) (Cal.App.) Upon proof that a killing was done by a defendant and nothing further, presumption of law is that it was malicious and an act of murder, and defendant must prove facts in mitigation, excuse, or justification unless they arise from evidence produced against him.—*People v. Searle*, 164 P. 819.

☞151(1) (Idaho) Where state shows defendant's commission of the homicide, burden of proving mitigation or justification is upon defendant, unless evidence tends to prove only manslaughter or justification.—*State v. Lundhigh*, 164 P. 690.

(B) Admissibility in General.

☞157(5) (Wash.) Evidence that a difficulty had occurred between deceased's son and accused four years prior was properly excluded.—*State v. Meyer*, 164 P. 926.

☞190(1) (Wash.) Exclusion of testimony that son said he would go home and get father and clean out whole bunch was improper, where within a few minutes after threat he and father returned armed, and the father was killed.—*State v. Meyer*, 164 P. 926.

(C) Dying Declarations.

☞200 (Idaho) Testimony as to declarations of deceased made when he was cognizant of approaching dissolution was admissible as a dying declaration.—*State v. Lundhigh*, 164 P. 690.

☞203(3) (Cal.App.) Declarations that "I am done," "I am going to die," etc., indicated a sense of impending death sufficient to render dying declarations admissible.—*People v. Gonzales*, 164 P. 1131.

☞215(4) (Okla.Cr.App.) Deceased's statement, as part of his dying declaration, "those negroes shot me and robbed me," was admissible as against objection that it was deceased's opinion.—*Thomas v. State*, 164 P. 995.

(E) Weight and Sufficiency.

☞228(1) (Cal.App.) Evidence that deceased shortly after a shot was fired was mortally wounded by a bullet under circumstances which would exclude inference that wound was self-inflicted held direct evidence of death sufficient to prove corpus delicti.—*People v. Searle*, 164 P. 819.

☞234(3) (Okla.Cr.App.) In prosecution for murder, evidence corroborating accomplice's testimony held sufficient to sustain a conviction.—*Moody v. State*, 164 P. 876.

☞241 (Idaho) After defendant's commission of a homicide is shown he is not required to establish mitigation or justification by a preponderance of the evidence, but only to the extent of raising a reasonable doubt as to his guilt.—*State v. Lundhigh*, 164 P. 690.

☞244(1) (Mont.) Evidence held to show that deceased was the aggressor throughout the difficulty resulting in his death, so that accused was justified, in fear of impending great bodily injury, in shooting deceased.—*State v. Merk*, 164 P. 655.

☞255(1) (Cal.App.) In view of Pen. Code, § 192, defining "manslaughter," evidence held to sustain finding that defendant's conduct in handling a rifle which resulted in the homicide, amounted to criminal negligence, rendering him guilty of manslaughter.—*People v. Searle*, 164 P. 819.

VIII. TRIAL.

(C) Instructions.

☞300(7) (Okla.Cr.App.) On a trial for assault with intent to kill, where the evidence tends to show justification in self-defense, the court must submit instructions properly embracing the law of self-defense.—*Anderson v. State*, 164 P. 128.

☞300(7) (Okla.Cr.App.) Evidence held sufficient to authorize an instruction on defendant's provocation of a difficulty as affecting his right of self-defense.—*Bashara v. State*, 164 P. 324.

☞300(7) (Wash.) To instruct that, before one is justified in taking the life of an assailant, he must retreat to the wall, etc., was erroneous, where accused had no opportunity to retreat.—*State v. Meyer*, 164 P. 928.

☞309(1) (Cal.) Instruction limiting to bodily injury the provoking cause of heat of passion, killing under which is reduced by Pen. Code, § 192, to manslaughter, is error.—*People v. Logan*, 164 P. 1121.

IX. APPEAL AND ERROR.

☞339 (Cal.App.) There is no reversible error in striking out testimony of previous threats made by deceased when there had been no testimony of, or offer to prove, a hostile act by deceased at time of killing, although evidence received later in trial might have furnished a sufficient foundation for stricken evidence.—*People v. Gonzales*, 164 P. 1131.

☞340(1) (Cal.) There being other circumstances calling for an instruction on manslaughter, erroneously limiting the provoking cause of heat of passion to personal injury is prejudicial.—*People v. Logan*, 164 P. 1121.

HOUSEKEEPER.

See Homicide, ☞122.

HUMANITARIAN DOCTRINE.

See Negligence, ☞83; Street Railroads, ☞108.

HUSBAND AND WIFE.

See Descent and Distribution, ☞52; Divorce; Evidence, ☞269; Judgment, ☞256; Marriage; Witnesses, ☞52-61.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

☞47(1) (Wash.) Recording a deed from husband to wife held to convey no title where they simultaneously executed deeds to each other to avoid necessity of administration.—*Eves v. Roberts*, 164 P. 915.

The rule that, where a deed executed and acknowledged is found in the grantee's possession, a delivery will be presumed, does not apply where a husband and wife executed deeds to each other simultaneously to avoid administration proceedings.—*Id.*

V. WIFE'S SEPARATE ESTATE.

(D) Conveyances and Contracts to Convey.

☞183 (Okla.) Where statute allows a married woman to dispose of her separate estate by deed as if she were a feme sole, the discharge of her husband's debt constitutes a sufficient consideration to support her conveyance of her separate estate.—*Thomas v. Halsell*, 164 P. 458.

VI. ACTIONS.

☞209(3) (Cal.) By express provision of Code Civ. Proc. § 427, subd. 8, the husband and wife may incorporate in one cause of action a statement of the damages sustained by the wife on account of personal injuries, and a statement of the consequential damages suffered by the husband.—*Meek v. Pacific Electric Ry. Co.*, 164 P. 1117.

☞235(4) (Wash.) Where the verdict found for the plaintiff against "M. B. et ux.," it was sufficient to sustain a judgment against the defendant husband and the community of the husband and wife.—*Hicks v. Baumgartner*, 164 P. 743.

VII. COMMUNITY PROPERTY.

☞254 (Wash.) Where grantor orally promised to convey land to a brother upon payment of price, which was not paid until after brother's marriage, and to which payments the wife contributed upon execution of deed, the land became community property.—*In re Mason's Estate*, 164 P. 206.

☞267(1) (Cal.App.) Decree for permanent support and maintenance in favor of wife did not affect marital relation, and until marital relation is dissolved, husband is entitled to control community property, with absolute power of disposition other than testamentary, though without wife's written consent he cannot make gift or conveyance without valuable consideration, under Civ. Code, § 172.—*Johnson v. Johnson*, 164 P. 421.

☞267(2) (Wash.) Under Rem. Code 1915, § 5917, giving management, control, and power of disposition of community property to husband, sale by wife, contrary to instructions, known to purchaser, is void; there being no unusual situation.—*McAlpine v. Kohler & Chase*, 164 P. 755.

☞267(9) (Wash.) Unauthorized sale by wife of community property is not ratified by husband, so as to estop him, his inaction being only on statement that it was stored, and he as soon as informed of sale requiring rescission.—*McAlpine v. Kohler & Chase*, 164 P. 755.

☞270(2) (Wash.) Wife held proper party to action against husband for assault in taking

possession of community property.—*Geissler v. Geissler*, 164 P. 746.

§270(10) (Cal.App.) Wife, suing husband for separate maintenance, and joining his relatives on theory they had, by fraudulent conspiracy, acquired community realty, *held* not entitled to decree against the grantees, who, it appeared, had paid full value for the property, and there being no finding of fraud.—*Johnson v. Johnson*, 164 P. 421.

§274(1) (Wash.) Where a son on mother's death took a half interest in community property, his interest cannot be charged with family expenses incurred by father subsequent to mother's death.—*In re Mason's Estate*, 164 P. 205.

Where a son on mother's death took a half interest in community property, his interest cannot be charged with improvements placed upon the property; Rem. Code 1915, § 797, not creating such liability.—*Id.*

§274(3) (Wash.) Where a son on mother's death took a half interest in community property, his interest is chargeable with money advanced to liquidate debts owing at mother's death, if claim is made within period of statute of limitation (Rem. Code 1915, § 1368).—*In re Mason's Estate*, 164 P. 205.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§286 (Cal.App.) Purpose of wife's suit for separate maintenance is specifically to enforce husband's duty by directing him to make certain definite payments at regular intervals for her support, and, subject to such provision, relations of parties to each other and community estate is unchanged.—*Johnson v. Johnson*, 164 P. 421.

§296 (Cal.App.) In action for separate maintenance for cruel treatment, wife's evidence that defendant had had intercourse with her frequently before marriage, and that at nearly every such occurrence had promised to marry her, *held* improperly admitted as without issues and calculated to prejudice defendant.—*Pedreira v. Pedreira*, 164 P. 30.

In action for separate maintenance, allegations of specific cruel treatment did not warrant evidence of specific acts of cruelty other than those presented by pleadings.—*Id.*

§297 (Cal.App.) In wife's action for separate maintenance for cruel treatment, law requires that jury be convinced of cruelty by preponderance of evidence to justify finding for plaintiff.—*Pedreira v. Pedreira*, 164 P. 30.

§298½ (Cal.App.) In wife's action for separate maintenance for cruel treatment, instruction *held* erroneous as ignoring consideration of weight and credibility of evidence of cruelty, and jury's proper function in relation thereto, also as failing to state elements that should enter into determination of amount to be awarded plaintiff.—*Pedreira v. Pedreira*, 164 P. 30.

In wife's action for maintenance for cruel treatment, instruction as to general cruel treatment of plaintiff by defendant *held* not justified by pleadings.—*Id.*

In wife's action for separate maintenance for cruel treatment, husband had right to expect that the jury would be instructed along line suggested by him in requests concerning his theory as to wife's insanity at time of marriage.—*Id.*

In wife's action for separate maintenance for cruel treatment, though jury's verdict was simply advisory, it was nevertheless important that the jury be clearly instructed.—*Id.*

§298½ (Cal.App.) In wife's suit for separate maintenance and support, wherein she joined husband's relatives on theory he had fraudulently conveyed community realty to them, defendants were entitled to findings on issues presented by answer.—*Johnson v. Johnson*, 164 P. 421.

§298(1, 2) (Cal.App.) In a wife's action for separate maintenance for cruel treatment, court

should have permitted inquiry into plaintiff's necessities and her manner of living in order that suitable award might be made for her maintenance.—*Pedreira v. Pedreira*, 164 P. 30.

Wife is entitled to allowance for attorney's fee in suit for separate maintenance only when necessary to enable her properly to maintain action, and burden is on her to show that allowance is necessary; Civ. Code, § 137, governing matter, contemplating allowance shall be made only when necessary.—*Id.*

§298(3) (Kan.) In view of valid antenuptial agreement providing that if the wife survived she should have as her separate property a half interest in two city lots, and of her waiver of other interest in husband's property, an award of \$2,500 for her separate maintenance, in addition to annual allowance of \$180, was excessive.—*Cooper v. Cooper*, 164 P. 153.

§299(1) (Cal.App.) In wife's suit for maintenance, wherein she joined husband's relatives on theory that, by conspiracy, they had acquired community realty, where court found trust company should be appointed trustee of half of community estate for wife, judgment giving such fund to wife absolutely was improper.—*Johnson v. Johnson*, 164 P. 421.

§301 (Cal.App.) If there was fraud in husband's conveyance to relatives, there was no authority, statutory or otherwise, under which court was warranted in rendering judgment against relatives for \$150 attorney's fees in favor of the wife, suing husband for support and joining relatives.—*Johnson v. Johnson*, 164 P. 421.

X. ENTICING AND ALIENATING.

§333(1) (Cal.) In action against parents for alienating a son's affections from his wife, it is presumed the parents acted for the best interest of their child.—*Hall v. Hall*, 164 P. 390.

§333(3) (Wash.) In suit by wife against father-in-law for alienation of husband's affections, declaration of husband that his father had forbidden him to talk to plaintiff, and that matter was in hands of attorneys, and that she would have to talk to them, *held* admissible.—*Jones v. Jones*, 164 P. 757.

§333(9) (Cal.) Plaintiff's testimony regarding minor differences with her husband's parents *held* not to sustain a verdict against them for alienating the husband's affections, where plaintiff had abandoned her husband and it did not appear his affection for her had ceased.—*Hall v. Hall*, 164 P. 390.

To establish willful alienation of a husband's affections by his parents, the proof must be extremely high, since it is not lightly inferred that a parent's conduct toward a child is prompted by malicious motives.—*Id.*

§333(9) (Cal.App.) In wife's action against parents of woman for having alienated affections of plaintiff's husband, who had sought illicitly the regard of defendants' daughter, evidence *held* not to show that defendants were ever guilty of conduct tending to alienate affections of such husband.—*Van Tassell v. Heidt*, 164 P. 817.

§333(9) (Wash.) In a suit by wife against father-in-law for alienation of husband's affections, malice may be shown by conduct as well as testimony of person whose condition of mind is subject of inquiry.—*Jones v. Jones*, 164 P. 757.

In suit by wife against father-in-law for alienation of husband's affections, evidence warranting inference of malice of defendant *held* sufficient to take case to jury.—*Id.*

§334(3) (Wash.) In suit by wife against father-in-law for alienation of husband's affections, as it appeared that defendant consented to marriage to avoid criminal prosecution of son, intending to secure divorce of parties, and that he kept his son away from plaintiff, such action being in opposition to regard of public policy for maintenance of marriage relation, a verdict

of \$12,500 will not be disturbed as result of prejudice on the ground of its size alone.—*Jones v. Jones*, 164 P. 767.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

See Witnesses, ¶360-405.

IMPLIED CONTRACTS.

See Account Stated; Money Lent.

IMPLIED REPEAL.

See Statutes, ¶159.

IMPLIED WARRANTY.

See Sales, ¶268-273.

IMPRISONMENT.

See Arrest; False Imprisonment; Habeas Corpus.

IMPROVEMENT DISTRICTS.

See Municipal Corporations, ¶450.

IMPROVEMENTS.

See Constitutional Law, ¶290; Landlord and Tenant, ¶157, 159; Mechanics' Liens; Municipal Corporations, ¶279-579; Public Lands, ¶64.

IMPUTED NEGLIGENCE.

See Negligence, ¶90, 98.

INCUMBRANCES.

See Partition, ¶88.

INDEMNITY.

See Guaranty; Principal and Surety; Sheriffs and Constables, ¶92.

INDEMNITY INSURANCE.

See Insurance, ¶435.

INDIANS.

See Executors and Administrators, ¶152.

¶15(1) (Okl.) Mansf. Dig. Ark. 1884, c. 27, § 642, providing that, on conveyance of real estate by a person not having the legal title, a subsequent after-acquired title shall pass to the grantee, has no application to a conveyance by a Cherokee freedman, where at the time it was invalid, being expressly prohibited by law, though thereafter the grantor obtained title and was authorized by law to convey.—*Vann v. Adams*, 164 P. 113.

Where an adult, not of Indian blood, but a member of the Cherokee tribe, prior to his allotment conveyed land, a part of the public domain of the Cherokee Indians, afterwards selected by him as his surplus allotment, Act Cong. April 21, 1904, c. 1402, removing restrictions on the alienation of the land of such allottees, did not apply till after he had selected his allotment.—*Id.*

¶27(3) (Okl.) Where minor citizen of Choctaw Nation sues to set aside void guardianship sale of his land and alleges that he has received no part of consideration, he need not tender or pay back such consideration as a prerequisite to maintenance of suit.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 965.

INDICTMENT AND INFORMATION.

See Assault and Battery, ¶78; Criminal Law, ¶628; Homicide, ¶127, 140; Intoxicating Liquors, ¶215, 221; Obstructing Justice, ¶11.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

¶59 (Mont.) Where specific crime is divided into degrees, it is sufficient to charge commission of substantive offense; it being jury's duty, under Rev. Codes, § 9324, to determine from evidence particular degree of crime of which accused is guilty.—*State v. Wiley*, 164 P. 84.

¶110(3) (Wash.) An information charging a crime defined by statute is sufficient when drawn in the language of the statute.—*State v. Richter*, 164 P. 250.

¶111(1) (Okl.Cr.App.) In a prosecution for statutory rape, the defense the accused was less than 18 years, created by Rev. Laws 1910, § 2415, need not be negated in the indictment or information.—*Penn v. State*, 164 P. 992.

¶111(2) (Wash.) Exceptions and provisos found, not in the enacting clause of a criminal statute, but in subsequent clauses, are regarded as matters of defense, and need not be negated in the information nor proven by the state.—*State v. Bartow*, 164 P. 227.

Initiative Measure No. 3 (Laws 1915, p. 4) § 7, allowing registered druggists to sell intoxicating liquors for certain purposes, is not an enacting clause, since it creates no offense, but simply contains exceptions to the crime created and defined in section 4.—*Id.*

¶119 (Wash.) Under Initiative Measure No. 3 (Laws 1915, p. 3) § 4, prohibiting sales of intoxicating liquors, and section 7, allowing registered druggists to sell for certain purposes, allegations in an information charging accused with being a registered druggist and selling for a prohibited purpose, may be rejected as surplusage, since they do not identify the crime.—*State v. Bartow*, 164 P. 227.

INDORSEMENT.

See Criminal Law, ¶628; Elections, ¶177.

INFANTS.

See Adoption; Bastards; Guardian and Ward; Habeas Corpus, ¶99, 102; Lewdness, ¶10.

III. PROPERTY AND CONVEYANCES.

¶31(1) (Kan.) Code Civ. Proc. § 16, relating to actions by persons under disability, does not apply by analogy in determining whether a minor devisee's deed to a life tenant was disaffirmed within a reasonable time after reaching majority.—*Ralph v. Ball*, 164 P. 1081.

VII. ACTIONS.

¶89 (Kan.) In action against nonresident minors, where the only service obtained is by publication, no judgment can be rendered that will affect their title to land in another state.—*Terry v. Miller*, 164 P. 151.

INFORMATION.

See Indictment and Information.

INHERITANCE TAX.

See Taxation, ¶862-890.

INJUNCTION.

See Appeal and Error, ¶954; Chattel Mortgages, ¶256; Execution, ¶172; High-

ways, **§**64; Limitation of Actions, **§**111; Municipal Corporations, **§**513, 536, 538; Specific Performance, **§**127; Taxation, **§**607, 608; Waters and Water Courses, **§**177.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

§4 (Wash.) Regardless of Rem. Code 1915, **§** 1723, Supreme Court may, under Const. art. 4, **§** 4, pending appeal from judgment denying injunction against execution and disposal of county bonds, restrain issuance.—*Bier v. Clements*, 164 P. 82.

(B) Grounds of Relief.

§11 (Idaho) An injunction will not issue unless the party against whom the relief is sought is violating, or threatens to violate, some right of the party seeking the remedy.—*Brunzell v. Stevenson*, 164 P. 89.

II. SUBJECTS OF PROTECTION AND RELIEF.

(C) Contracts.

§62(1) (Cal.App.) Where purchaser had forfeited land by breach of a restriction against sale of intoxicants, an injunction against further breach was proper.—*Southern Pac. R. Co. v. Blaisdell*, 164 P. 804.

VII. VIOLATION AND PUNISHMENT.

§230(2) (Okla.Cr.App.) Information charging contempt for violating injunction order alleged to have been "duly and legally issued" was sufficient as against demurrer on ground that it did not specifically plead that injunction bond had been given.—*Farmers' State Bank of Texhoma v. State*, 164 P. 132.

INSANE PERSONS.

See Wills, **§**34, 163, 164.

INSOLVENCY.

See Bankruptcy; Corporations, **§**544, 545.

INSTRUCTIONS.

To jury, see Criminal Law, **§**758-830, 863; Trial, **§**194-296, 424.

INSURANCE.

See Appeal and Error, **§**1046; Contracts, **§**107; Damages, **§**64; Death, **§**2; Reformation of Instruments, **§**3, 45; Schools and School Districts, **§**82, 90; Trial, **§**255.

II. INSURANCE COMPANIES.

(B) Mutual Companies.

§55 (Idaho) County mutual fire insurance company cannot accept a member whose liability may be limited.—*School Dist. No. 8, Twin Falls County, v. Twin Falls County Mut. Fire Ins. Co.*, 164 P. 1174.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§73 (Kan.) Local soliciting agent without authority to issue fire policies, but who merely procures applications, collects premiums and delivers policies, is not the insurer's "general agent."—*Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 164 P. 1096.

§74 (Cal.App.) Where life insurance company requested L. to act as agent, but was informed by L. he could not do so on account of connection with another company, and contract was made in name of L.'s wife, and L. was to obtain the business, L. was authorized by the company to solicit life insurance.—*Goldstone v. Columbia Life & Trust Co.*, 164 P. 416.

§94 (Cal.App.) Life insurance company, by violation of Pol. Code, **§** 633, in not filing authority to one to act as its agent, may not absolve itself from liability on contract that it has ratified, though contract may have been secured by person not agent or solicitor within the statute.—*Goldstone v. Columbia Life & Trust Co.*, 164 P. 416.

(B) Agency for Applicant or Insured.

§112 (Cal.App.) Where agent of life insurer wrote false answers into insured's application, after delivery of policy to insured it was latter's duty to notify insurer of fraud attempted, and by silence he approved agent's fraudulent act and became responsible therefor.—*Goldstone v. Columbia Life & Trust Co.*, 164 P. 416.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§142 (Cal.App.) Where holder of life policy containing false statements material to risk fraudulently inserted in application by agent died within four months without repudiating agent's fraud to insurer, such delay was fatal to liability of insurer on policy.—*Goldstone v. Columbia Life & Trust Co.*, 164 P. 416.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

§256(2) (Or.) A fraudulent misrepresentation avoiding a fire insurance policy must have been knowingly false, have misled the insurer, and increased the risk.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

(B) Matters Relating to Property or Interest Insured.

§282(8) (Or.) A party in possession under a partly performed contract for purchase of realty is the sole and unconditional owner in fee simple within the Oregon standard fire insurance policy.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

§288(1) (Wash.) Breach of condition of fire policy, for it being void if there be other insurance not indorsed thereon, not contributing to the loss, under 3 Rem. & Bal. Code, **§** 6059-34 does not avoid liability.—*Ramat v. California Ins. Co. of San Francisco*, 164 P. 219.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§335(2) (Wash.) Mode of accounting of holders of policy of burglary insurance on stock of goods held sufficient compliance with requirement of policy that insured should not be liable if accounts of insured were not so kept that actual loss could be accurately determined therefrom.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

§336(2) (Kan.) Provision that other insurance without consent of insurer's secretary and general agent should avoid a fire policy is binding on parties, unless provision has been waived by insurer's authorized agent.—*Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 164 P. 1096.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§378(3) (Kan.) Knowledge of a local soliciting agent, who was not the insurer's general agent that other insurance had been subsequently taken without insurer's consent, is not chargeable to the insurer.—*Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 164 P. 1096.

☞378(3) (Okla.) Local agent's knowledge that insured had no fireproof safe and was keeping his books, etc., in the building where he slept, relying on agent's representation that was a sufficient compliance with iron safe clause, was the knowledge of insurer.—*North River Ins. Co. of New York v. O'Conner*, 164 P. 982.

☞384 (Or.) Under Standard Policy Law, L. O. L. §§ 4666, 4668, as amended by Laws 1911, p. 279, the statutory conditions as to ownership of insured property cannot be waived except in writing attached to or upon the face of the policy.—*Boardman v. Insurance Co. of State of Pennsylvania*, 164 P. 558.

☞388(8) (Kan.) Fact that after the fire the adjuster conferred with insurer's local agent as to value of building and the amount necessary to restore it, did not waive condition that other insurance without insurer's consent should avoid the policy.—*Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 164 P. 1096.

☞390 (Okla.) Insurer knowing that insured, in reliance on its agent's representations was not complying with policy's iron safe clause, held estopped to invoke breach of such clause in avoidance.—*North River Ins. Co. of New York v. O'Conner*, 164 P. 982.

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

☞435 (Cal.) Under a liability policy insuring against sums paid by insured toward satisfying judgments against him, insured's giving a note for such a judgment constitutes a payment rendering insurer liable.—*Rodgers v. Pacific Coast Casualty Co.*, 164 P. 1115.

XIV. NOTICE AND PROOF OF LOSS.

☞550 (Kan.) Amount claimed in proof of loss will not preclude insured from showing a greater loss, where insurer has not been misled or induced to change its position by statements in the preliminary proof.—*Boutross v. Palatine Ins. Co., Limited*, of London, England, 164 P. 1069.

☞555 (Wash.) Construed liberally, as required thereby, 3 Rem. & Bal. Code, § 6059-84, permits waiver, after loss, of provision of fire policy requiring sworn proofs of loss within 60 days.—*Ramat v. California Ins. Co. of San Francisco*, 164 P. 219.

☞558(6) (Kan.) A tender of a substantial sum in full settlement of insured's claims operated as a waiver of all claimed defects in the proof of loss, notwithstanding policy provision that no one could waive such proofs.—*Ring v. Phoenix Assur. Co., Limited*, of London, 164 P. 303.

☞559(1) (Wash.) Burglary insurer's refusal to recognize liability for loss after proofs have been furnished, without specific objection on ground of insufficiency of proofs, is waiver of any informality or defects in them.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

XV. ADJUSTMENT OF LOSS.

☞572 (Kan.) Where agreement for submission under fire insurance policies provided for appointment of two appraisers to appoint an umpire, and that award signed by any two should be binding, one appraiser, by withdrawing, could not prevent the other two from completing the award.—*Boutross v. Palatine Ins. Co., Limited*, of London, England, 164 P. 1069.

☞574(1) (Kan.) Award of appraisers under fire policies was not void for their failure to strictly comply with provision of agreement of submission that they should determine actual cash value of articles and place damages on each separately.—*Boutross v. Palatine Ins. Co., Limited*, of London, England, 164 P. 1069.

☞574(7) (Kan.) In action upon award under fire insurance policies where answer pleads that award was fraudulent, defendant has the burden of proof.—*Boutross v. Palatine Ins. Co., Limited*, of London, England, 164 P. 1069.

XVIII. ACTIONS ON POLICIES.

☞621 (Wash.) Where burglary policy provided no suit should be brought until three months after particulars of loss had been furnished, particulars were furnished January 9th, and company notified disclaimed liability, making no objection to proofs, action was not prematurely commenced March 9th.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

☞640(2) (Or.) Defendant fire insurance company's allegations that plaintiff secured insurance on a house which defendant had previously refused to insure by misstating its name and location, held insufficient where facts showing the materiality of such representations or damage to defendant were not stated.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

☞641(2) (Or.) An insured cannot declare upon the policy and, when charged by insurer's answer with shortcomings, reply that such omissions were waived.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

☞655(2) (Cal.App.) In action on life policy, insurer setting up false answers of insured to material questions, and plaintiff claiming such answers were falsely written in application by agent of insurer, court was technically in error in sustaining objection to questions on matter asked of agent, who was not agent within Pol. Code, § 633.—*Goldstone v. Columbia Life & Trust Co.*, 164 P. 416.

☞665(1) (Wash.) In action on burglary policy, evidence held sufficient to sustain finding of trial court that plaintiffs were real owners of goods and had insurable interest.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

☞665(3) (Wash.) In action on burglary policy, evidence held insufficient to show insured's accounts were inaccurate, or that court was not justified in finding that sufficient accounts had been kept in compliance with policy.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

In action on burglary policy, evidence held insufficient to require holding that goods were overvalued by insured when applying for insurance.—Id.

☞665(4) (Wash.) In action on burglary policy, evidence held sufficient to show that loss by burglary was sustained by plaintiffs.—*Horwitz v. United States Fidelity & Guaranty Co.*, 164 P. 77.

☞668(15) (Wash.) Whether there has been a waiver of conditions of an insurance policy is not a question for the court, where the facts are not conceded and the testimony is conflicting and the proofs are capable of more than one construction.—*Ramat v. California Ins. Co. of San Francisco*, 164 P. 219.

☞675 (Kan.) Fire insurance company not shown to be authorized to do hail insurance business in state is not liable for an attorney's fee, though its answer admitted its authority to do business in state; there being no authority in Gen. St. 1915, § 5359, or other statutes allowing such fee.—*Ring v. Phoenix Assur. Co., Limited*, of London, 164 P. 303.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

☞693 (Or.) By-laws of benefit insurance society providing that local officers shall be considered as agents of members in accepting payments, and that all acts of a local officer shall be construed as having been done for members

and applicants for membership, *held valid*.—*Somo v. Supreme Court I. O. F.*, 164 P. 187.

⚡694(1) (Or.) As duties of a member of a voluntary association are purely voluntary, unless agreement between members provides to contrary, a member may withdraw at any time without consent of association or of beneficiary in a life policy issued to him.—*Somo v. Supreme Court I. O. F.*, 164 P. 187.

⚡705 (Kan.) Members of Kansas fraternal insurance corporation, which, pursuant to statute (Laws 1913, c. 210 [Gen. St. 1915, §§ 5418-5420]), had merged with a Colorado corporation, could not, as private individuals, bring action for segregation, receivership, etc., on claim of fraud in merger; but such action could be commenced only in state's name on relation of its legal representatives.—*Albach v. Fraternal Aid Union*, 164 P. 1035.

(C) Dues and Assessments.

⚡743 (Or.) Where beneficiary in a policy of fraternal insurance on life of her husband assumed payment of premiums at time of a divorce, and paid premiums until policy was canceled upon rightful withdrawal of insured from membership, moneys received by order *held* earned premiums upon a valid contract of insurance, which beneficiary had no right of action against order to recover.—*Somo v. Supreme Court I. O. F.*, 164 P. 187.

(E) Beneficiaries and Benefits.

⚡793 (Or.) Where plaintiff was beneficiary in a policy of benefit insurance on the life of her husband, a divorce did not deprive her of her right to recover full value of policy in event of death of husband prior to his withdrawal from order.—*Somo v. Supreme Court I. O. F.*, 164 P. 187.

INTENT.

See Dedication, ⚡15; Homestead, ⚡31; Statutes, ⚡181; Trusts, ⚡70; Wills, ⚡439.

INTEREST.

See Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

⚡1 (Or.) In the absence of a contract to pay interest, the right to exact it must be found in the statutes.—*Holtz v. Olds*, 164 P. 1184.

⚡3 (Or.) As interest statutes are in derogation of the common law, they must be strictly construed.—*Holtz v. Olds*, 164 P. 1184.

⚡6 (Cal.App.) Except in the case of a loan, covered by Civ. Code, § 1914, interest is not recoverable unless made the subject of an express agreement.—*Young v. Canfield's Estate*, 164 P. 1134.

⚡11 (Or.) Under L. O. L. § 6028, providing that the rate of interest shall be 6 per cent. "on money received to the use of another and retained beyond a reasonable time without the consent of another" etc., plaintiffs were not entitled to interest, from date of deposit, on money deposited with defendants as security for the purchase of stock under a contract void for uncertainty and recovered by plaintiffs in an action honestly litigated by defendants.—*Holtz v. Olds*, 164 P. 1184.

III. TIME AND COMPUTATION.

⚡39(3) (Or.) Trial court improperly allowed interest on contractors' recovery for extra work from date of completion of dam, they being entitled to interest only from date of judgment on amounts recovered.—*Hayden v. City of Astoria*, 164 P. 729.

INTERPLEADER.

II. PROCEEDINGS AND RELIEF.

⚡33 (Utah) Where a litigant tenders the money claimed by two other parties into court, no judgment in his favor for the money can legally be entered.—*McGuire v. State Bank of Tremonton*, 164 P. 494.

INTERROGATORIES.

See Trial, ⚡350, 359.

INTERSTATE COMMERCE.

See Commerce.

INTERVENTION.

See Attachment, ⚡302, 308.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Criminal Law, ⚡370, 371, 404; Indictment and Information, ⚡119; Statutes, ⚡111.

I. POWER TO CONTROL TRAFFIC.

⚡11 (Wash.) Rem. Code, § 6262—1 et seq., regulating sale of intoxicants, was not intended to be exclusive, and does not deny to municipalities of state power to enact ordinances relating to same subject-matter, so long as they are not in conflict with provisions of statute.—*City of Seattle v. Hewetson*, 164 P. 234.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

⚡15 (Wash.) Ordinance of city of Seattle forbidding physician to issue prescription for whiskey without having good reason to believe person to whom issued is actually sick or that liquor is required as medicine, is not void as prohibitory and not regulative; Rem. Code 1915, § 7507, subd. 32, giving city of first class power to regulate sale or gift of intoxicants.—*City of Seattle v. Hewetson*, 164 P. 234.

⚡15 (Wash.) Rem. Code 1915, § 6262—7, providing that a druggist who has been convicted of a violation of any liquor law shall not, within two years thereafter, sell, etc., is not in conflict with section 6262—19.—*Rosenoff v. Cross*, 164 P. 236.

IV. LICENSES AND TAXES.

⚡74 (Wash.) Under Rem. Code 1915, §§ 6262—7, 6262—17, 6262—19, *held* that county auditor could not be compelled to issue a liquor permit to a druggist who had been convicted of violating the local option law, a previous enactment, more than two years previous.—*Rosenoff v. Cross*, 164 P. 236.

VI. OFFENSES.

⚡132 (Wash.) Under Initiative Measure No. 3 (Laws 1915, p. 3) § 4, making it unlawful for any person to sell intoxicating liquors, and section 7, excepting sales by registered druggists for certain purposes from the provisions of the act, section 7 does not in itself define a crime.—*State v. Bartow*, 164 P. 227.

⚡168 (Ariz.) To "permit" unlawful use of intoxicants by proprietor of business implies his knowledge, consent, and acquiescence.—*Elliott v. State*, 164 P. 1179.

Proprietor of soft drink place was not liable for unlawful sale of intoxicants by his employé, although committed in place of business, unless such unlawful act was directed, knowingly assented to, acquiesced in, or permitted by employer.—*Id.*

VIII. CRIMINAL PROSECUTIONS.

⇒215 (Wash.) An information, charging accused with being a registered druggist and selling alcohol for prohibited purposes, is drawn under Initiative Measure No. 3 (Laws 1915, p. 8) § 4, prohibiting sale of intoxicating liquors by any person, and not under section 7 allowing registered druggists to sell for certain purposes, since section 7 creates no crime.—*State v. Bartow*, 164 P. 227.

⇒221 (Wash.) Under Initiative Measure No. 3 (Laws 1915, p. 2) prohibiting sales of intoxicating liquors by any person, and section 7, allowing registered druggists to sell for certain purposes an information need not negative such exception for it is a matter of defense.—*State v. Bartow*, 164 P. 227.

⇒233(1) (Wash.) In prosecution of physician for having issued prescription for whisky without having reason to believe that person to whom it was issued was sick, etc., evidence as to number of prescriptions for intoxicants written by defendant on particular day and day or two previous was competent.—*City of Seattle v. Hewetson*, 164 P. 234.

⇒236(1) (Okl.Cr.App.) Evidence in prosecution for selling whisky held to sustain a conviction.—*Collingwood v. State*, 164 P. 1154.

⇒236(4) (Ariz.) In prosecution for sale of intoxicants by employe of defendant, evidence held to support verdict of guilty.—*Elliott v. State*, 164 P. 1179.

⇒236(9) (Kan.) Evidence in a prosecution for maintaining a liquor nuisance in violation of Gen. St. 1915, § 5524, held sufficient to sustain a conviction.—*State v. Rogle*, 164 P. 1165.

⇒236(11) (Okl.Cr.App.) Evidence, in a prosecution for the unlawful sale and delivery of intoxicating liquor, held insufficient to justify a conviction.—*Kerriel v. State*, 164 P. 136.

⇒238(1) (Wash.) In prosecution for having issued prescription for whisky, question whether defendant had ground to believe that person was actually sick, or liquor was required as medicine, held for jury.—*City of Seattle v. Hewetson*, 164 P. 234.

⇒239(10) (Okl.Cr.App.) Where state's evidence would support an inference that an unlawful sale of liquor was directly consummated by defendant, or by him and another, instruction that one knowingly taking part in illegal sale of liquor is guilty of an offense, was not improper.—*Womack v. State*, 164 P. 477.

INVENTORY.

See Insurance, ⇒335.

IRON-SAFE CLAUSE.

See Insurance, ⇒378; Insurance, ⇒390.

IRRIGATION.

See Waters and Water Courses, ⇒30, 32, 217-253.

JAILS.

See Counties, ⇒178.

JEOPARDY.

See Criminal Law, ⇒192-294.

JITNEYS.

See Carriers, ⇒280, 295, 306; Damages, ⇒172, 216; Municipal Corporations, ⇒661; Trial, ⇒252.

JOINDER.

See Action; Parties, ⇒18-29, 83.

JOINT TENANCY.

See Deeds, ⇒186; Tenancy in Common.

JUDGES.

See Justices of the Peace; Mandamus, ⇒40.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⇒25(2) (Okl.) District judge assigned to hold court in county outside his district has no authority, after expiration of time for which he was assigned, to extend time for preparation of case-made in a case tried before him.—*First State Bank of Mountain Park v. School Dist. No. 65, Tillman County*, 164 P. 102.

IV. DISQUALIFICATION TO ACT.

⇒51(2) (Wash.) A divorced father's application for custody of his child, made a year after the divorce decree, is not merely a continuance of the divorce action but a separate "proceeding" within Rem. Code 1915, § 209-1, authorizing the disqualification of judges for bias before action is taken in the proceeding.—*State v. Superior Court for Clarke County*, 164 P. 198.

⇒51(2) (Wash.) A motion and affidavit of prejudice filed as soon as relator knew the judge objected to would preside over the court in which his cause is pending is made in sufficient time.—*State v. Holden*, 164 P. 595.

⇒51(4) (Wash.) Under statutory provisions prohibiting superior court judges from trying actions where their prejudice is established by motion and affidavit, the motion and affidavit when made in proper time are conclusive, and no inquiry into the facts is permissible.—*State v. Holden*, 164 P. 595.

JUDGMENT.

For judgments in particular actions or proceedings, see also the various specific topics. For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⇒12 (Wash.) Deficiency judgment in forcible entry and detainer, brought by attorney in fact of person judicially determined to have died prior to the suit, held void.—*Picardo v. Peck*, 164 P. 65.

⇒17(3) (Nev.) Constructive service by publication or personal service on a nonresident will not support a decree in personam, though it may support a decree affecting property within the state where process is issued.—*Keenan v. Keenan*, 164 P. 351.

IV. BY DEFAULT.**(B) Opening or Setting Aside Default.**

⇒139 (Okl.) A trial court has a wide discretion in setting aside judgments and decrees rendered in its own court when it does so at the same term at which it is rendered.—*Arnold v. Burks*, 164 P. 970.

⇒153(4) (Okl.) If a final decree or judgment is rendered and the term expires, there must be a substantial compliance with the statute in order to give the court further jurisdiction over the decree or judgment.—*Arnold v. Burks*, 164 P. 970.

⇒159 (Cal.App.) Motion and affidavit under Code Civ. Proc. § 473, to set aside default judgment, merely charging that defendant's attorney was away and neglected to enter appearance, held insufficient.—*Farias v. Farias*, 164 P. 818.

⇒174 (Kan.) In action to quiet title where nonresident defendant was summoned by publication without actual notice, and suffered a de-

fault judgment, and where plaintiff then conveyed to purchaser in good faith, Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), protected purchaser, though judgment was set aside as between plaintiff and defendant.—Whiteman v. Cornwell, 164 P. 280.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

⇒199(1) (Wyo.) Under Laws 1915, c. 134, authorizing judgment notwithstanding verdict on evidence when motion for directed verdict has been denied, *held* that, where a defendant, after moving for directed verdict at end of plaintiff's evidence, introduced evidence without renewing motion at end of all evidence, rule denying motion was not ground for judgment notwithstanding verdict.—Campbell v. Weller, 164 P. 881.

⇒199(8) (Wyo.) In absence of statute, judgment non obstante veredicto is authorized only upon record, and when it is clear upon pleadings that cause of action or defense did not in substance constitute a legal cause of action or defense, and such judgment based merely upon evidence, is unauthorized.—Campbell v. Weller, 164 P. 881.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⇒252(1) (Idaho) Under Rev. Codes, § 4853, judgment must be limited to the relief demanded, or to such as is embraced within issues.—Brunzell v. Stevenson, 164 P. 89.

⇒256(1) (Wash.) Where the verdict warranted judgment against the husband and the community, a judgment "against the defendants and each of them" was too broad, since it could be construed as against wife individually.—Hicks v. Baumgartner, 164 P. 743.

VII. ENTRY, RECORD, AND DOCKETING.

⇒282 (Cal.) Where a will was contested on the ground of undue influence, that the judgment and order admitting the will to probate was signed by a judge other than the one who presided at the trial *held* not fatal.—In re Stone's Estate, 164 P. 643.

⇒282 (Cal.App.) Action of court in signing judgment after death of one defendant in whose favor judgment ran was not an irregularity prejudicial to plaintiff.—Colquhoun v. Fursman, 164 P. 10.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⇒298 (Kan.) District court has absolute control of its judgments during the term at which they were rendered.—Sylvester v. Riebolt, 164 P. 176.

⇒313 (Kan.) Where through inadvertence general judgment, instead of alternative judgment for defendant, was rendered at end of term, it might be corrected, and the proper judgment entered on defendant's motion after term, as authorized by Code Civ. Proc. § 596, subd. 3 (Gen. St. 1915, § 7500).—Oklahoma State Bank v. Hicklin, 164 P. 257.

⇒323 (Ariz.) A judgment should not be amended without notice to parties affected, either in the form of an order to show cause when done of the court's own motion, or, when asked for by party, upon notice with a proper showing.—Ives v. Sanguinetti, 164 P. 435.

IX. OPENING OR VACATING.

⇒400 (Kan.) Rights of bona fide purchaser of realty who, in good faith for valuable consideration and in reliance on a judgment quieting his grantor's title, acquires the realty by warranty deed, are protected by Code Civ. Proc. § 83

(Gen. St. 1909, § 5676), although judgment may be opened for further consideration as to rights of original parties.—Whiteman v. Cornwell, 164 P. 280.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⇒407(1) (Wash.) Where default judgment was fraudulently taken in another county without defendant's knowledge until too late to avail herself of statutory method of vacation, her remedy was by suit to set it aside in court rendering judgment.—Rowe v. Silbaugh, 164 P. 923.

⇒444 (Or.) Decree cannot be impeached in suit in equity merely on allegations that it was procured by perjured testimony.—Windsor v. Holloway, 164 P. 1177.

(B) Jurisdiction and Proceedings.

⇒460(6) (Cal.) The complaint to set aside a judgment as obtained by fraud and without process must show a defense on the merits, and ability to present proof thereof.—Lee v. Colquhoun, 164 P. 894.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

⇒470 (Wash.) A judgment valid on its face cannot be collaterally attacked for matter dehors the record.—Rowe v. Silbaugh, 164 P. 923.

⇒485 (Wash.) Void judgment may be attacked collaterally as well as directly.—Picardo v. Peck, 164 P. 65.

(B) Grounds.

⇒489 (Okla.) Where a want of jurisdiction to enter order or judgment is affirmatively shown by the record proper upon which it is based, such order or judgment is void and subject to collateral attack.—Winters v. Oklahoma Portland Cement Co., 164 P. 965.

⇒511 (Okla.) Orders and judgments procured by fraud are void.—Winters v. Oklahoma Portland Cement Co., 164 P. 965.

⇒517 (Kan.) Judgment by court having jurisdiction of parties and subject-matter is not open to collateral attack for illegality or intrinsic fraud which was open for consideration in trial, although judgment may have been taken by default or consent on day following bringing of original action.—Schenck v. School Dist. No. 34 of Hamilton County, 164 P. 169.

(C) Proceedings.

⇒518 (Wash.) A bill to quiet title asking vacation of a judgment valid on its face is a collateral attack on such judgment, and demurrable.—Rowe v. Silbaugh, 164 P. 923.

⇒521 (Colo.) A bill in equity, brought by a judgment creditor against the plaintiff in the judgment and a sheriff to restrain collection thereof, constitutes a collateral attack upon the judgment where the record is fair on its face and the jurisdiction of the court undenied.—Stokes v. Kingsbury, 164 P. 313.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⇒582 (Or.) Until first decree has been set aside, suit will not lie to retry case between same parties, involving same subject-matter and the same relief.—Windsor v. Holloway, 164 P. 1177.

⇒584 (Okla.) To make a matter *res judicata*, there must be identity in the thing sued for, identity of the cause of action, identity of persons or parties thereto, and identity of the quality in the persons for or against whom the claim is made.—Ratcliff-Sanders Grocer Co. v. Blue-jacket Mercantile Co., 164 P. 1142.

⚡683 (Cal.App.) In view of Code Civ. Proc. § 1176, providing an appeal shall not stay proceedings upon judgment, where lessees continued to occupy premises, pending an appeal in unlawful detainer in which landlord recovered judgment, and no stay was ordered, lease constituted measure of their liability while they remained in possession, and judgment did not bar an action for rent for such period.—*Ramish v. Workman*, 164 P. 26.

⚡605 (Wash.) Action against city for removal of lateral support by cut in regrading street, in which plaintiffs were limited under law to recovery of damages suffered within 30 days prior to filing claim upon which action was based up to date of trial, was not res judicata of subsequent action for damages sustained by them after time of first trial.—*Farnandis v. City of Seattle*, 164 P. 225.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

⚡642 (Kan.) Matters involved in prior decision by the Supreme Court in a suit for a partnership accounting are res adjudicata as to the account as between plaintiff and defendants and their creditors in a subsequent suit.—*Alexander v. Clarkson*, 164 P. 294.

(B) Persons Concluded.

⚡668(1) (Kan.) Judgment, against plaintiff recovered by a defendant herein in prior litigation which had been assigned to secure a debt, was res adjudicata in plaintiff's subsequent proceeding against his debtor on a judgment assigned to him, and to have merits of original judgments reconsidered.—*Alexander v. Clarkson*, 164 P. 294.

⚡704 (Okl.) Where two are sued, and one files separate answer to petition not in nature of cross-petition against his codefendant, and codefendant defaults, judgment on issues joined by petition and separate answer does not necessarily include relative rights of defendants between themselves.—*Henthorn v. Tidd*, 164 P. 783.

⚡707 (Okl.) In an action on an open account against a company and its principal stockholder, finding of bankruptcy court wherein plaintiff was not a party that goods had been purchased by purchaser from defendants as a sole trader doing business under defendant company's name held not res judicata.—*Ratcliff-Sanders Grocer Co. v. Bluejacket Mercantile Co.*, 164 P. 1142.

⚡707 (Wash.) One not a party to a suit is not bound by the judgment.—*Wylde v. Schoening*, 164 P. 752.

XV. LIEN.

⚡768(1) (Colo.) Where a transcript of a valid judgment was filed in another county during the same month in which it was rendered, the judgment debtor was bound to know of the judgment lien.—*Stokes v. Kingsbury*, 164 P. 313.

XVII. FOREIGN JUDGMENTS.

⚡817 (Colo.) Statute of Texas giving to person paying more than legal rate of interest right to recover double the interest paid, though in sense penal as to party exacting usurious interest, is remedial as to party paying, so that Texas judgment based on such statute is entitled to recognition in Colorado.—*Interstate Savings & Trust Co. v. Wyatt*, 164 P. 506.

⚡818(3) (Nev.) While an action may be maintained in one state on a judgment or decree rendered in another, such judgment must be valid, and it will support no action where rendered against a nonresident who was not served within the state and did not appear.—*Keenan v. Keenan*, 164 P. 351.

⚡822(3) (Cal.) Under full faith and credit clause of Constitution of United States (U. S. Const. art. 4, § 1), decree of distribution of New York decedent's property in probate court of New York does not preclude right of state of California to levy inheritance tax on shares of stock in California corporation owned by decedent.—*McDougald v. Lillenthal*, 164 P. 387.

⚡823 (Nev.) A judgment on substituted service of summons is enforceable only on the property within the state out of which summons is issued.—*Keenan v. Keenan*, 164 P. 351.

XVIII. ASSIGNMENT.

⚡841 (Kan.) If a judgment is assigned as security for a bona fide antecedent indebtedness, the consideration for such assignment is sufficient.—*Alexander v. Clarkson*, 164 P. 294.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

⚡878(1) (Kan.) In view of Gen. St. 1909, § 1842, partial satisfaction of judgment against one joint debtor and release of same will operate only as payment pro tanto of indebtedness of other debtors.—*City of Topeka v. Brooks*, 164 P. 285.

Where city had judgment against one partner for failure to complete sewer contract, etc., and released that judgment, reserving right to sue other partner and surety on contractors' bond, such partner and surety, when sued, could not better their position by offering to pay former judgment.—*Id.*

⚡883(1) (Kan.) Before one judgment can be set off against another judgment, there must be mutuality in those judgments and no contravening equities.—*Alexander v. Clarkson*, 164 P. 294.

⚡883(10) (Kan.) Where attorney's lien was properly served on plaintiff in former litigation, and subject to it the successful defendant therein assigned his judgment against plaintiff to secure his indebtedness, plaintiff acquiring assignment of a judgment against his judgment creditor and proceeding against debtors and attorneys holding lien could not, in view of contravening equities, set off judgments.—*Alexander v. Clarkson*, 164 P. 294.

⚡891 (Kan.) Where city obtained judgment against one partner for damages from fraud of partnership and failure to complete sewer contract, its release of judgment, reserving right to sue other partner and surety on contractors' bond, was in effect a covenant not to sue judgment defendant which in view of Gen. St. 1909, §§ 5507-5511, did not prevent it from subsequently prosecuting action against the others.—*City of Topeka v. Brooks*, 164 P. 285.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚡951(2) (Cal.App.) In action for purchase price of goods against several individuals, who pleaded prior judgment against other persons for same goods, but did not set up such judgment as a bar, held proper to admit evidence of such judgment, though not as a bar.—*Colquhoun v. Fursman*, 164 P. 10.

⚡954 (Wash.) In action for damages caused by removal of lateral support when regrading street, in absence of any showing to contrary, it will be presumed that plaintiffs in prior action for former damages were limited to recovery of damages sustained up to time of that trial, and were not allowed to recover for future or prospective injuries to their property.—*Farnandis v. City of Seattle*, 164 P. 225.

JUDICIAL NOTICE.

See Evidence, ⚡5-44.

JUDICIAL POWER.

See Constitutional Law, ¶70.

JUDICIAL SALES.

See Execution, ¶221, 290; Executors and Administrators, ¶343; Guardian and Ward, ¶103, 107; Mortgages, ¶502-552; Receivers, ¶130; Taxation, ¶667.

JURISDICTION.

See Certiorari, ¶28; Contempt, ¶44; Courts; Equity, ¶8, 40; Judgment, ¶489, 818; Justices of the Peace.

JURY.

See Criminal Law, ¶854-863, 925½, 1174; Equity, ¶381; Master and Servant, ¶408; New Trial, ¶52; Trial, ¶28.

II. RIGHT TO TRIAL BY JURY.

¶11(8) (Okla. Cr. App.) Under Const. art. 2, §§ 19, 20, one prosecuted under ordinance for an offense also made a misdemeanor by statute the punishment of which may be imprisonment, is entitled to jury trial in court of original jurisdiction, not satisfied by jury trial in county court on appeal.—*Ex parte Doza*, 164 P. 130.

¶13(1) (Idaho) In determining whether parties are entitled to a trial by jury, courts must look to the ultimate relief sought.—*Rees v. Gorham*, 164 P. 88.

¶13(14) (Idaho) Relief in action for cancellation of mortgage and to require defendant to surrender to plaintiff a note, and for damages, could be obtained only in equity, and the parties are not entitled to jury trial.—*Rees v. Gorham*, 164 P. 88.

¶14(12) (Okla.) In action by the state to abate a public nuisance, the defendant is not entitled to a jury trial.—*Balch v. State*, 164 P. 776.

¶16(6) (Okla.) Where third party files a demominated "interplea in attachment" claiming title and right to possession of attached property, he is a petitioner in replevin under Rev. Laws 1910, § 4701, and plaintiffs' general denial of allegations therein is triable by jury.—*Millus v. Lowrey Bros.*, 164 P. 663.

¶17(3) (Kan.) On appeal from probate court's decision wherein it refused to set aside appointment of administrator on alleged ground that the deceased was not at his death a resident of the county in which appointment was made, a jury is not demandable as a matter of right.—*In re Holloway's Estate*, 164 P. 298.

¶21(4) (Okla. Cr. App.) One charged with indirect contempt is entitled to have his guilt passed upon by jury before punishment is imposed.—*Farmers' State Bank of Texhoma v. State*, 164 P. 132.

¶23(2) (Okla. Cr. App.) Under Bill of Rights, § 7, one prosecuted under Laws 1915, c. 147, § 1, for an offense under a city ordinance, etc., the judgment for which is or may be imprisonment, is entitled to a jury trial.—*Ex parte Gownlock*, 164 P. 130.

¶25(2) (Kan.) Under Workmen's Compensation Act a jury trial is waived unless demanded.—*Ruth v. Witherspoon-Engler Co.*, 164 P. 1064.

¶25(8) (Wash.) Where, though jury fee had been paid in time, no formal demand for jury was served and filed by plaintiff prior to calling of cause for trial, but court offered to grant continuance if defendant desired, which offer was declined, grant of jury trial was not erroneous.—*Skarlatos v. Brice*, 164 P. 939.

¶31(1) (Okla. Cr. App.) The constitutional guaranty of trial by jury cannot be evaded by the powers vested in a municipality under its charter or the nature of jurisdiction conferred upon a municipal court.—*Ex parte Mitchell*, 164 P. 134.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

¶99(2) (Kan.) Where juror on his voir dire stated that he had no opinion, and had expressed no opinion as to result of defendant's trial for rape, and denied testimony of three witnesses that they had heard him say that "they will stick Dr. McLemore," the defendant, his acceptance was not error.—*State v. McLemore*, 164 P. 161.

¶100 (Okla. Cr. App.) Under Rev. Laws 1910, § 5861, a court held justified on the testimony in admitting jurors to the panel over the objection that they had formed opinions as to defendant's guilt or innocence.—*Horn v. State*, 164 P. 683.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

¶44(9) (Wyo.) In a suit to recover \$200 as damage to one-half interest in crop of rye, justice court has jurisdiction, although owner of other half interest might sue; defect of parties plaintiff having been waived.—*Garber v. Spray*, 164 P. 840.

¶60 (Utah) Under Comp. Laws 1907, § 3668, providing where actions shall be commenced in justices' courts, and section 3669, providing for changing the place of trial where suit is brought in the wrong district, the privilege of bringing suit in a particular district is personal to defendant and may be waived.—*Beck v. Lewis*, 164 P. 480.

Under Comp. Laws 1907, § 3668, prescribing where actions in justices' courts shall be commenced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, the defendant waives objection to the precinct by suffering a default judgment, especially where the complaint stated jurisdictional facts and no application for changing the place of trial was made.—*Id.*

IV. PROCEDURE IN CIVIL CASES.

¶73, 74(4) (Utah) Under Comp. St. 1907, § 3668, prescribing where actions in justices' courts shall be commenced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, justice does not lose jurisdiction over suit brought before him in wrong precinct until affidavit setting forth facts as required by section 3669 is filed.—*Beck v. Lewis*, 164 P. 480.

¶73, 74(7) (Wyo.) Where parties after a change of venue was ordered appeared before justice to whom case was transferred, agreed upon a continuance and time for trial, filed their pleadings, and allowed trial to proceed to verdict and judgment without objecting to transfer of cause or jurisdiction, both parties waived right to question validity of change of venue.—*Campbell v. Weller*, 164 P. 881.

¶82(2) (Utah) In an action before a justice of the peace, an officer's return upon a summons of service in a certain precinct does not sustain a finding that defendant was not a resident of another precinct as alleged in the complaint.—*Beck v. Lewis*, 164 P. 480.

¶84(4) (Utah) Under Comp. Laws 1907, § 3668, providing where actions in justices' courts shall be commenced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, justice acquires jurisdiction where defendant appears, although suit was brought in wrong precinct.—*Beck v. Lewis*, 164 P. 480.

¶90 (Kan.) In an action originating in the court of a justice of the peace, no written pleadings of any sort are necessary.—*Blair v. McQuary*, 164 P. 262.

¶91(1) (Wyo.) A petition in justice court, informing defendant of nature of plaintiff's claim, of grounds relied on to support action, and so explicit that judgment thereon will bar an

other suit for same cause of action, is sufficient.—Garber v. Spray, 164 P. 840.

§91(8) (Wyo.) In an action in justice court to recover damages for trespass of cattle, petition *held* sufficient to support judgment against objection after entry that it did not allege or state facts showing that defendant's alleged acts were unlawful or wrongful.—Garber v. Spray, 164 P. 840.

§114 (Wyo.) A finding of fact by justice of the peace on only controverted point in evidence is sufficient to support judgment; it being unnecessary to make findings as to matters admitted or not denied in pleadings.—Garber v. Spray, 164 P. 840.

§119(1) (Wyo.) Judgment of justice court is generally *held* sufficient without formal statement of a finding, where it shows a determination of cause upon the evidence.—Garber v. Spray, 164 P. 840.

§130 (Wyo.) Justice court judgments are to be liberally construed with more regard to substance than form.—Garber v. Spray, 164 P. 840.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§149(1) (Colo.) Any party to suit before justice of peace may take appeal when dissatisfied with judgment, and thereafter has right to control appeal so taken by him, even to extent of dismissing it.—Jones v. Rice, 164 P. 1162.

§149(1) (Kan.) In action before justice, third parties claiming attached property, who, on their application, are made parties defendant, can appeal from a judgment rendered by the justice denying their claims to the property.—Danielson v. Reichert, 164 P. 184.

§159(6) (Cal.App.) In view of Code Civ. Proc. § 948, *held* that under section 978a, notice of exceptions to sureties on appeal from justice must be served upon appellant as well as filed with justice, and in case of failure appeal cannot be dismissed because sureties do not justify.—Consolidated Lumber Co. v. Superior Court of California in and for Los Angeles County, 164 P. 612.

§160(3) (Wyo.) Under Comp. St. § 5261, regarding appeals from justices' courts, a notice, giving title of cause, justice's court where in it was tried and determined, stating that it was tried by a jury, reciting date of trial and judgment, and defendant's desire to appeal, *held* sufficient.—Campbell v. Weller, 164 P. 881.

§160(4) (Wyo.) Under Comp. St. 1910, §§ 5220, 5261, 5262, *held*, that notice of appeal from a judgment rendered by a justice after a change of venue to a different court was properly filed with justice who rendered judgment, and not justice who had original jurisdiction.—Campbell v. Weller, 164 P. 881.

As Comp. St. 1910, § 5263, provides for notice by clerk of district court upon receiving and filing transcript and papers in appeal from a justice of the peace, *held*, that it is not necessary that notice of appeal prescribed in section 5261 be delivered to opposite party.—Id.

(B) Certiorari.

§192 (Colo.) Writ of certiorari, under Rev. St. 1908, § 3837 et seq., to transfer cause from justice to county court and there retry it, is substitute for appeal, and applicable only where party without negligence has been prevented from taking appeal in ordinary way.—Jones v. Rice, 164 P. 1162.

§202(2) (Colo.) Facts stated in plaintiff's petition for certiorari, under Rev. St. 1908, § 3837 et seq., to have his suit in justice court against two defendants retried in county court, *held* insufficient as showing want of even ordinary diligence on plaintiff's part to have judgment for him in justice court reviewed on appeal.—Jones v. Rice, 164 P. 1162.

§205(6) (Utah) Under Comp. Laws 1907, § 3685x, providing that judgment based upon complaint falsely stating jurisdictional fact may be reviewed by certiorari, district court in certiorari to review judgment of justice court cannot receive parol evidence.—Beck v. Lewis, 164 P. 480.

KNOWLEDGE.

See Notice.

LACHES.

See Specific Performance, §105; States, §201.

LANDLORD AND TENANT.

See Evidence, §466; Frauds, Statute of, §44; Mines and Minerals, §73½, 75.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

§22(5) (Cal.App.) Under Civ. Code, § 3300, plaintiff's loss from sacrifice of business at another location *held* not recoverable for defendants' breach of agreement to lease storeroom.—Schnierow v. Boutagy, 164 P. 1182.

(B) Construction and Operation.

§47 (Wash.) Provision in lease for lessor paying the lessee a certain amount if lessor sells the land, and for lessee surrendering possession on payment, entitled lessee to payment only if surrender of possession is required.—Coates v. Carse, 164 P. 760.

IV. TERMS FOR YEARS.

(D) Termination.

§101 (Cal.App.) Civ. Code, § 1932, providing that the hirer of a thing may terminate the hiring when the greater part of the thing hired perishes, etc., is inapplicable to a lease which requires the lessee to make the repairs.—Egan v. Dodd, 164 P. 17.

§109(7) (Or.) Where the tenant abandoned the premises and attempted to surrender them to the landlord, the landlord's reletting to another for the benefit of the tenant and "subject to the order and ready for the occupation" of the tenant at any time, was not an acceptance of the premises by the landlord.—Meagher v. Eilers Music House, 164 P. 373.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

§152(4) (Cal.App.) Lease providing that lessee will not call upon lessor for repairs and will surrender premises in good order less reasonable use casts upon lessee the burden of making repairs necessary to make the building safe.—Egan v. Dodd, 164 P. 17.

§157(2, 3) (Cal.) Safety deposit vault erected by tenant *held* improvement, which under terms of lease became property of lessor.—Realty Dock & Improvement Corp. v. Anderson, 164 P. 4.

§159(2) (Cal.App.) In action against landlord for breach of agreement in lease contract to construct headgates to enable tenant to irrigate land, evidence *held* to warrant finding that landlord's failure to construct such headgates was proximate cause of damage to tenant.—Chambers v. Belmore Land & Water Co., 164 P. 404.

Where failure of landlord to construct headgates to irrigate land caused crop failure on large portion of land planted, lessees cannot be denied recovery on ground that they should have constructed headgates; it appearing that they would have cost upwards of \$2,000.—Id.

VIII. RENT AND ADVANCES.**(A) Rights and Liabilities.**

⌚184(2) (Cal.App.) Provisions of a lease construed, and *held*, that a payment was for a ten-year lease of premises upon conditions specified, and that lessees parted with money in consideration of lease, and title to money passed absolutely to lessor unaffected by fact that he agreed upon performance of certain conditions by lessees to give them credit therefor on future rent.—*Ramish v. Workman*, 164 P. 28.

⌚195(2) (Or.) Where a landlord relet abandoned premises for the benefit of the abandoning tenant, but was unable to collect any rent from the new tenant, the abandoning tenant was liable for the rent as if the premises had not been relet.—*Meagher v. Eilers Music House*, 164 P. 373.

⌚208(1) (Cal.App.) Tenant was not released from obligation to pay rent by his assignment to corporation with landlord's consent in writing; such consent being conditioned on assignee complying with terms of lease.—*Eddie v. Gage Mfg. Co.*, 164 P. 1133.

Where landlord consented to assignment of lease upon conditions not performed by assignee, written consent, however, not purporting to release tenant from payment of rent, such tenant cannot claim that the leasehold interest was surrendered to lessor by operation of law.—*Id.*

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

⌚291(1) (Wash.) Notice to pay rent, or quit, in an action of unlawful detainer, is a matter to be proved at trial, but unnecessary to give court jurisdiction, which depends on service of summons.—*State v. Superior Court for Spokane County*, 164 P. 63.

⌚291(2) (Wash.) Service by landlord on corporation tenant of notice to surrender possession being in strict compliance with Rem. & Bal. Code, § 814, is sufficient.—*W. B. Hutchinson Inv. Co. v. Woman's Exchange*, 164 P. 198.

X. RENTING ON SHARES.

⌚322 (Cal.App.) Regardless of exact terms of share cropping contract, the trial court will not be put in error for interpreting it in accordance with the acts of the parties in making partial settlements.—*Kloster v. Hawn*, 164 P. 402.

LARCENY.

See Burglary; False Pretenses.

II. PROSECUTION AND PUNISHMENT.**(B) Evidence.**

⌚55 (Idaho) Evidence *held* to sustain a conviction of grand larceny in willfully and feloniously taking and driving away cattle the personal property of another.—*State v. Smith*, 164 P. 519.

⌚55 (Mont.) In prosecution for grand larceny, evidence *held* to justify inference that party other than defendant was principal in crime, and that defendant aided and abetted him in its commission.—*State v. Wiley*, 164 P. 84.

⌚64(1) (Mont.) "Recently," or "recent possession," as used in proposition that recent possession of stolen property has probative value in prosecution for larceny, refers to possession in defendant soon after commission of larceny, and not to possession immediately before information is filed or trial had.—*State v. Wiley*, 164 P. 84.

(C) Trial and Review.

⌚77(1) (Idaho) In a prosecution for grand larceny, an instruction on the effect of evidence of possession of recently stolen property *held* not prejudicial.—*State v. Smith*, 164 P. 519.

⌚79 (Mont.) In prosecution for grand larceny, where information charged theft of horse, stealing of which is grand larceny without reference to value, court was not in error for defining to jury offense of larceny, as well as particular degree of it of which defendant was guilty, if at all.—*State v. Wiley*, 164 P. 84.

LAST CLEAR CHANCE.

See Appeal and Error, ⌚1064, 1066; Negligence, ⌚83; Street Railroads, ⌚103, 110, 114; Trial, ⌚252.

LAW OF THE CASE.

See Appeal and Error, ⌚1069, 1195.

LAWYERS.

See Attorney and Client.

LEASE.

See Landlord and Tenant; Mines and Minerals, ⌚73½, 75.

LEAVE OF COURT.

See Pleading, ⌚236.

LEGACIES.

See Wills.

LEGACY TAX.

See Taxation, ⌚862-890.

LEGISLATIVE POWER.

See Constitutional Law, ⌚58, 60.

LEWDNESS.

⌚10 (Cal.App.) In prosecution under Pen. Code, § 288, for lewd and lascivious conduct with minor children, evidence *held* to sustain conviction of attempt to commit act charged.—*People v. Smith*, 164 P. 609.

LIBEL AND SLANDER.

See Evidence, ⌚75.

IV. ACTIONS.**(C) Evidence.**

⌚101(3) (Ariz.) To prove civil liability for libel, plaintiff must show that the alleged libelous article has been seen and read by some other person than himself; Pen. Code 1913, § 225, not applying.—*Lally v. Cash*, 164 P. 443.

⌚112(1) (Ariz.) Evidence *held* not to show defendant's participation in either the composition or publication of an alleged libelous article.—*Lally v. Cash*, 164 P. 443.

LIBRARIAN.

See Constitutional Law, ⌚58; States, ⌚46.

LICENSES.

See Commerce, ⌚63; Intoxicating Liquors, ⌚74.

I. FOR OCCUPATIONS AND PRIVILEGES.

⌚6(5) (Cal.App.) For one engaged in carrying passengers between points outside a city, to drive through it without stopping, does not constitute "a business transacted and carried on in such city," which, under Charter of Cities of the Sixth Class, section 862, subd. 10 (Deering's Gen. Laws 1915, p. 1123), it may license.—*Ex parte Smith*, 164 P. 618.

⌚7(3) (Cal.App.) Prescribing license fees for person carrying on laundry within the city and higher license for person operating wagon for delivery of laundry work to and from any laun-

dry outside of city, etc., held void as creating discrimination not based on difference in nature of business being transacted.—*Ex parte Hines*, 164 P. 339.

—26 (Wash.) Under Rem. Code 1915, § 5562—39, providing that every person injured by jitney bus drivers may recover against the surety to the amount of the bond, each person injured can recover up to the full amount of the bond.—*Nelson v. Pacific Coast Casualty Co.*, 164 P. 594.

LIENS.

See Attorney and Client, —180; Bailment, —18; Bankruptcy, —188-215; Chattel Mortgages, —136-150; Judgment, —168; Mechanics' Liens; Mines and Minerals, —112; Mortgages, —151-186; Trusts, —340; Vendor and Purchaser, —285, 286.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Equity, —87; Executors and Administrators, —225, 437.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

—2(1) (Okl.) An action on contract is generally governed by statute of limitations of the forum, and not by the *lex loci contractus* or the *lex domicilii*.—*Shaw v. Dickinson*, 164 P. 1150.

—2(2) (Or.) A foreign corporation is a "non-resident" although doing business within this state within L. O. L. § 26, providing for application of foreign statute of limitations in actions between "nonresidents."—*Hamilton v. North Pac. S. S. Co.*, 164 P. 579.

—2(3) (Or.) L. O. L. § 26, as to time to sue on actions arising in another state, applies to an injury occurring on a vessel of the state when it is upon high seas; the vessel being deemed a part of the territory of the state to which it belongs.—*Hamilton v. North Pac. S. S. Co.*, 164 P. 579.

Where employé, a resident of Oregon, sued employer, a California corporation, for injuries sustained on high seas, employer could plead the California statute of limitations, in view of L. O. L. § 26.—*Id.*

(B) Limitations Applicable to Particular Actions.

—24(1) (Cal.) Cause of action is founded upon instrument in writing, within Code Civ. Proc. § 337, subd. 1, when contract, obligation, or liability grows out of written instruments, not remotely or ultimately, but immediately.—*O'Brien v. King*, 164 P. 631.

—25(6) (Cal.) An instrument reading, "Received from [plaintiff] * * * \$450 in U. S. gold coin, at 5 per cent. interest," signed by defendant, is within Code Civ. Proc. § 337, subd. 1, and barred only after 4 years.—*O'Brien v. King*, 164 P. 631.

—35(1) (Wash.) Action against national bank to recover for failure to deliver up will entrusted to it for safe-keeping by testator, as required by Rem. Code 1915, §§ 1289, 1292, commenced more than three years after last act in administration of testator's estate, was barred by Rem. Code 1915, § 159, subd. 6.—*Myers v. Exchange Nat. Bank*, 164 P. 951.

—37(2) (Wash.) An action to quiet title, though fraud is practiced in creating the cloud, does not fall within Rem. Code 1915, § 159, limiting actions for relief on the ground of fraud to three years.—*Bradbury v. Nethercutt*, 164 P. 194.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

—44(6) (Kan.) Where minor remainderman executed deed to life tenant in 1898 and disaffirmed it in 1901 after death of life tenant, her action in 1914 to recover property from life tenant's husband who claimed adverse possession from 1898 was not barred by Code Civ. Proc. §§ 15, 16, since her cause of action did not accrue until death of life tenant.—*Ralph v. Ball*, 164 P. 1081.

—46(1) (Cal.App.) Corporation having ratified transaction by its directors, who secured a loan from it, cause of action to recover such money did not accrue until time fixed for repayment, and two-year limitation prescribed by Code Civ. Proc. § 339, subd. 1, did not begin to run until that time.—*Pleasant Valley Hotel Co. v. Henderson*, 164 P. 420.

—55(7) (Kan.) Cause of action for damages to land from a natural enlargement of a ditch rightfully dug by defendant on its right of way accrued when ditch invaded plaintiff's land and damages for permanent injury were recoverable, and was barred when not commenced within two years. Civ. Code, § 17, subd. 3 (Gen. St. 1909, § 5610).—*Peever v. Atchison, T. & S. F. Ry. Co.*, 164 P. 159.

(E) Absence, Nonresidence, and Concealment of Person or Property.

—88 (Or.) A foreign corporation maintaining an agent within the state is not "out of the state," within meaning of L. O. L. § 16.—*Hamilton v. North Pac. S. S. Co.*, 164 P. 579.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

—103(2) (Cal.App.) Where plaintiff, in action to quiet title, was seised of property at all times down to time when action was begun, and defendant was to be treated as holding title in trust for plaintiff, there having been no repudiation, action was not barred by Code Civ. Proc. § 318.—*Prouty v. Rogers*, 164 P. 901.

(G) Pendency of Legal Proceedings, Injunction, Stay, or War.

—111 (Wash.) An injunction obtained by a judgment debtor preventing enforcement of judgment within time limited by Rem. Code 1915, § 459, will suspend the running of the statute until dismissal of injunction.—*Hensen v. Peter*, 164 P. 512.

Where plaintiff had eight months in which to enforce judgment when prevented by defendant's injunction, and sold property under execution 67 days after filing the remittitur, his sale was timely.—*Id.*

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

—182(5) (Okl.) Where defendant answers by general denial, and does not demur at any stage of the proceedings, the defense of limitations cannot be raised in an action for breach of a covenant of warranty.—*Buchner v. Baker*, 164 P. 659.

—187 (Okl.) In action on note which on its face shows that it is barred by limitations as pleaded, plaintiff must plead facts relieving the action from the bar of the statute.—*Shaw v. Dickinson*, 164 P. 1150.

In action on Ohio note, which on its face is barred by pleaded statute of limitations, it is not enough for plaintiff to plead and prove that act on was not barred in Ohio, where defendant had resided, but he must plead and prove that defendant has not been in Oklahoma long enough to bar action under its statute.—*Id.*

LIMITATION OF LIABILITY.

See Telegraphs and Telephones, ¶54.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Subrogation, ¶26.

¶24(1) (Kan.) Under Civ. Code, § 86 (Gen. St. 1909, § 5679), one who purchases property pendente lite is bound by the decree in the pending suit, and that decree is not subject to collateral attack at the instigation of the purchaser.—*Dever v. Eureka Bank*, 164 P. 166.

¶24(2) (Kan.) Where irregularities occur in sheriff's sale on foreclosure, purchaser of mortgagor's interest pendente lite must make his complaint in the suit, and cannot make a collateral attack in an independent action against the grantee in the sheriff's deed.—*Dever v. Eureka Bank*, 164 P. 166.

¶25(3) (Okla.) A third mortgage executed after an action had established his pendens against land in favor of one M. did not attach so that M., as purchaser under his judgment took title clear of the mortgage.—*Employes Building & Loan Ass'n v. Crafton*, 164 P. 473.

¶26(1) (Wash.) Under Rem. Code 1915, § 243, filing of notice of lis pendens in foreclosure suit bars a stranger purchasing the property from asserting a homestead therein.—*Skinner v. Hunter*, 164 P. 244.

Under Rem. Code 1915, § 602, as to procedure on foreclosure, where tenants of the property purchased it from the mortgagors, after filing lis pendens and before judgment of foreclosure, they had no right to declare a homestead.—*Id.*

LIVERY STABLE AND GARAGE KEEPERS.

See Bailment, ¶18.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOANS.

See Money Lent.

LOCAL LAWS.

See Statutes, ¶79, 94.

LOGS AND LOGGING.

See Account Stated, ¶6, 19; Woods and Forests.

MALICIOUS PROSECUTION.

See False Imprisonment.

MALPRACTICE.

See Physicians and Surgeons, ¶14, 18.

MANAGER PLAN.

See Municipal Corporations, ¶48; Statutes, ¶94, 120.

MANDAMUS.

See Intoxicating Liquors, ¶74; States, ¶191.

I. NATURE AND GROUNDS IN GENERAL.

¶3(10) (Or.) Where an officer has been removed and another appointed to perform the work, quo warranto, and not mandamus, is the proper remedy of the discharged officer.—*Alexander v. School Dist. No. 1 in Multnomah County*, 164 P. 711.

¶4(5) (Okla.) Where plaintiffs did not appeal under Laws 1913, c. 219, art. 4, § 2, from action of superintendents of public instruction in B. and C. counties in joining a district partly in each county to a district in C. county, mandamus to compel superintendent of C. county to appoint member and clerk of the consolidated district as it formerly existed will not lie.—*State v. Meachem*, 164 P. 971.

II. SUBJECTS AND PURPOSES OF RELIEF.**(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.**

¶40 (Wash.) In an application for mandamus to require judge to issue a commission allowing examination by oral questions, *held* there was no abuse of discretion in requiring submission of written interrogatories before issuing commission, and writ would not issue.—*State v. Truax*, 164 P. 597.

¶44 (Wash.) Where, on affidavits of prejudice, presiding judge under Rem. Code 1915, § 209—1, transferred cases to another county, the orders reciting that convenience of witnesses and ends of justice were not interfered with, *held*, that exercise of his discretion cannot be interfered with by writ of mandate.—*State v. Superior Court for Clarke County*, 164 P. 62.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶73(1) (Idaho) Under Laws 1913, p. 502, where a law is properly certified by presiding officers of two legislative houses, and is approved and signed by Governor, and lodged in office of secretary of state, the secretary cannot be required by mandamus to alter or amend the law.—*Katerndahl v. Daugherty*, 164 P. 1017.

¶84 (Kan.) Where public officers have entered into contract and refused to recognize its obligation because of mistaken view of question of law their compliance with contract may be enforced by mandamus.—*Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County*, 164 P. 281.

It does not follow that, where controlling body of municipality in exercise of its judgment as to public policy refuses to proceed with contract preferring to answer in damages, it can be held to specific performance by mandamus.—*Id.*

¶88 (Wash.) Under Rem. Code 1915, § 3680, prohibiting secretary of state from filing incorporation articles of company whose name is similar to that of concern already doing business, and section 1014, authorizing mandamus to compel performance of act which law especially enjoins, a domestic corporation may mandamus secretary of state to strike from his records name of a foreign corporation having same name, and authorized to do business after relator.—*State v. Howell*, 164 P. 917.

(C) Acts and Proceedings of Private Corporations and Individuals.

¶132 (Kan.) Mandamus will issue at the state's suit to compel a corporation owning a dam to lower it to height authorized by law, where it is clearly shown that the dam is higher than is authorized.—*State v. Kansas Flour Mills Co.*, 164 P. 1170.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶164(4) (Kan.) Allegations in answer and return to alternative writ of mandamus directing defendant railway to comply with resolution of city by opening street for travel, setting up want of authority and bad faith, *held* to require that plaintiff's motion for judgment on the pleadings be overruled.—*City of Emporia v. Atchison, T. & S. F. Ry. Co.*, 164 P. 272.

¶172 (Or.) In mandamus proceedings to compel a school board to restore a teacher to her former position as principal, where the trans-

fer of the teacher was within the board's discretion, the court cannot consider whether her services as principal were satisfactory.—*Alexander v. School Dist. No. 1 in Multnomah County*, 164 P. 711.

§187(10) (Wash.) Remanding appeal and directing vacation of order committing county auditor for failure to comply with mandate, because of expiration of term of office, does not affect judgment in the mandamus case.—*State v. Wallace*, 164 P. 741.

MANSLAUGHTER.

See Homicide.

MAPS.

See Deeds, §112; Eminent Domain, §186.

MARRIAGE.

See Descent and Distribution, §52; Divorce; Husband and Wife.

§20(2) (Nev.) As the common-law marriage prevails in Nevada, that relation may be formed by words of present assent, and without interposition of any person lawfully authorized to join persons in marriage.—*Parker v. De Bernardi*, 164 P. 645.

§40(4) (Nev.) Where cohabitation was illicit in beginning, though burden of proof is upon those asserting a valid marriage, there is no presumption that relationship continued to be illicit, and a valid common-law marriage may be shown after impediment to marriage was removed.—*Parker v. De Bernardi*, 164 P. 645.

§40(11) (Okla.) Where a second marriage is actually shown, a strong presumption exists in favor of its legality, which is not overcome by proof of prior marriage and wife's failure to obtain divorce; and the party attacking it has the burden of showing that neither party to first marriage had obtained divorce.—*Jones v. Jones*, 164 P. 463.

The burden is upon one asserting illegality of a marriage to prove it.—*Id.*

§51 (Nev.) While prostitution or immorality of the parties might militate against the presumption of a legitimate common-law marriage, such facts are for jury to consider, under proper instructions.—*Parker v. De Bernardi*, 164 P. 645.

MASTER AND SERVANT.

See Appeal and Error, §1048; Damages, §64; Death, §31; Intoxicating Liquors, §163; Jury, §25; Negligence, §98, 101, 136.

I. THE RELATION.

(B) Statutory Regulation.

§16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§80(8) (Wash.) In an action on express contract for labor performed, evidence regarding reasonable value of such labor is admissible where the contract is admitted, but the amount to be paid disputed, as circumstantial evidence of the amount agreed upon.—*Haefele v. Brackett*, 164 P. 244.

§80(9) (Kan.) Evidence substantially the same as in the former hearing of the case, held sufficient to take to the jury the question whether a railway company had contracted with an employé to pay him half wages during any dis-

ability from an injury received in service.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

§80(18) (Wash.) In an action for balance due for wages, whether payments made were in full held a jury question.—*Haefele v. Brackett*, 164 P. 244.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§86 (Or.) The Employers' Liability Act is not applicable to cases wherein the rights of the parties are determinable by maritime law.—*Hawkins v. Anderson & Crowe*, 164 P. 556.

§87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

§89(1) (Colo.) That a miner temporarily passed from his working place to a crosscut to await clearing of smoke, so that he could resume work, did not take him without the scope of his employment.—*Rapson Coal Mining Co. v. Micheli*, 164 P. 311.

That a miner passed from his working place to a crosscut to take a drink of water, to advise a fellow employé that a can of powder had been placed there, and to test a fuse did not take him without the scope of employment.—*Id.*

Where it was a miner's duty to load holes and attach fuse for blasting, he was not without the scope of employment in testing fuses.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

§101, 102(8) (Cal.App.) An employer's duty to furnish employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose.—*Matchette v. California Fruit Cannery Ass'n*, 164 P. 423.

§101, 102(8) (N.M.) The master must exercise reasonable care that the servant's place of work shall be as reasonably safe as is compatible with its nature.—*Leyba v. Albuquerque & Cerrillos Coal Co.*, 164 P. 823.

§129(1) (Cal.App.) The breaking of a rope furnished by the employer, precipitating against a stump, an employé using it, and not the stump, was the proximate cause of his injury.—*Gideon v. Howard*, 164 P. 117.

(C) Methods of Work, Rules, and Orders.

§137(4) (Cal.App.) Defendant electric railway company's failure to furnish sufficient power to move a train, causing a car to back onto an employé, does not establish negligence, especially where employé knew the condition of the power supply.—*Lynch v. Pacific Electric Ry. Co.*, 164 P. 20.

§145 (Cal.App.) Street railway company's rule that "trains must approach all meeting and passing points under full control and prepared to stop" meant control and preparation appropriate to probable emergencies.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

(F) Risks Assumed by Servant.

§206 (N.M.) The servant assumes all the ordinary risks of the service.—*Leyba v. Albuquerque & Cerrillos Coal Co.*, 164 P. 823.

§217(5) (Cal.App.) Where a mechanical engineer was killed by explosion of boiler operated by an employé under immediate instructions of superintendent of plant held that explosion was not a risk which deceased had assumed, although he was intrusted with oversight of all machinery.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§226(2) (N.M.) The servant assumes all of the extraordinary risks, such as those due to the master's negligence of which he has knowledge and the dangers of which he appreciates.—*Leyba v. Albuquerque & Cerrillos Coal Co.*, 164 P. 823.

An "extraordinary risk" is not one which is uncommon or rare, but one arising out of unusual conditions not resulting in the ordinary course of employment, as by reason of the master's negligence.—*Id.*

(G) Contributory Negligence of Servant.

§231(2) (Cal.App.) Where a mechanical engineer in charge of the machinery of a sugar house was informed by superintendent that boiler would carry 70 pounds' pressure, nearly double actual capacity, he was not guilty of contributory negligence in relying on such statement.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§235(6) (Colo.) When an experienced miner tested a fuse near a can of powder and threw a lighted fuse in its direction, a fellow employe's failure to remonstrate with him or leave the place was not contributory negligence.—*Rapson Coal Mining Co. v. Micheli*, 164 P. 311.

§238(3) (Cal.App.) When an employe chooses a dangerous method of work instead of a safe way provided and is injured, he is guilty of contributory negligence as a matter of law.—*Matchette v. California Fruit Cannery Ass'n*, 164 P. 423.

§238(7) (Cal.App.) Where jury might have believed that a motorman's failure to stop car before running into an open switch was due to a mistake in judgment in trying the reverse before using the air brake, they were justified in holding him not guilty of contributory negligence.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

(H) Actions.

§250½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

§256(5) (Cal.App.) In an action for death of employe by the explosion of boiler allowance of amendment of complaint to allege that person operating preboiler was incompetent *held* not implication by court that such employe was in fact incompetent, but that there was evidence of such fact for jury.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§258(11) (Or.) In servant's action for injuries received from fall from hay loft of barn, complaint *held* to state cause of action within Employers' Liability Act.—*Poulios v. Grove*, 164 P. 562.

§264(10) (Cal.App.) In an action for death of employe by explosion of boiler plaintiffs *held* not precluded from relying upon doctrine of *res ipsa loquitur* because they also charged specific omissions of duties or acts of negligence.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§265(1) (Colo.) Where employe's actions were such as might have reasonably been expected by employer under same circumstances, it will be presumed that such acts were within the apparent scope of authority.—*Rapson Coal Mining Co. v. Micheli*, 164 P. 311.

§265(2) (Okla.) A servant, suing for personal injury from the master's negligence, has the burden of showing, not only negligence, but that it was the proximate cause of the injury, which should have been foreseen in the circumstances.—*Wichita Falls & N. W. Ry. Co. v. Cover*, 164 P. 680.

§265(4) (Colo.) The fellow-servant act does not change the rule that burden of proving contributory negligence rests on the employer.—*Rapson Coal Mining Co. v. Micheli*, 164 P. 311.

§265(5) (Cal.App.) In an action for death of employe by explosion of boiler, doctrine of *res ipsa loquitur* is applicable and jury could infer as fact either that there was negligence in management of boiler or defect in its condition.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§265(14) (Cal.App.) Where defendant employer's negligence has been established, defendant has burden of proving plaintiff employe's contributory negligence.—*West v. Jesse A. Linney & Co.*, 164 P. 608.

§276(4) (Cal.App.) In an action for the death of employe by the explosion of boiler, evidence *held* to justify a verdict for plaintiff.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§278(9) (Cal.App.) Evidence that shingles on a roof to which a painter's scaffold was attached slipped, causing the scaffold to fall and injure plaintiff employe, sustains a finding that master was negligent, where the scaffold could have been tied to a chimney.—*West v. Jesse A. Linney & Co.*, 164 P. 608.

§279(5) (Cal.App.) In an action for death of employe by the explosion of boiler evidence *held* to justify a finding that superintendent of plant and boy who operated boiler immediately before explosion allowed steam to reach 47 pounds' pressure, which was 7 pounds more than maximum working pressure.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§281(9) (Cal.App.) In a motorman's action for personal injury, evidence *held* to warrant finding that plaintiff did not drive interurban car into open switch in disregard of switch lamp signals.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

In motorman's action for personal injury, evidence *held* to warrant finding that plaintiff did not approach switch in disregard of company's rules as to speed.—*Id.*

§281(12) (Cal.App.) A finding that plaintiff employe was not guilty of contributory negligence while upon a painter's scaffold *held* sustained by the evidence under St. 1911, p. 796, providing that an employe's slight contributory negligence shall not bar recovery, etc., where his alleged negligent actions were completed before the accident, and would not necessarily have caused the scaffold's fall.—*West v. Jesse A. Linney & Co.*, 164 P. 608.

§284(3) (Colo.) Whether an employe was acting within the scope of his authority is generally a question of fact for the jury under proper instructions.—*Rapson Coal Mining Co. v. Micheli*, 164 P. 311.

§286(3) (Or.) In a farm servant's action for injuries received by falling through a hole in hay loft in which complaint stated a cause of action under Employers' Liability Act, evidence *held* sufficient to go to jury on hypothesis that he was in loft by direction of defendant, was ignorant of hole, and could not see it owing to darkness.—*Poulios v. Grove*, 164 P. 562.

§286(4) (Cal.App.) Evidence in an action for injury *held* sufficient to go to the jury on the question of negligence of the employer in furnishing a defective apparatus, a worn rope, for pulling away a board mould from around hardened concrete.—*Gideon v. Howard*, 164 P. 11.

§286(5) (Or.) In a farm servant's action for injuries, question whether employment was one of risk or danger and hence under Employers' Liability Act *held* for jury.—*Poulios v. Grove*, 164 P. 562.

§287(2) (Cal.App.) In an action for death of employe by explosion of boiler, how far immaturity of boy, less than 16 years of age, who was operating boiler, contributed to explosion *held* for jury.—*Lippert v. Pacific Sugar Corp.*, 164 P. 810.

§288(1) (N.M.) Where the evidence is such that the proper inferences therefrom as to a servant's assumption of risk is a matter with respect to which different opinions might be

reasonably formed, it is a question for the jury.—*Leyba v. Albuquerque & Cerrillos Coal Co.*, 164 P. 823.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

§373 (Cal.) Accident to employé, sent in a team to dig holes, from discharge of gun taken along by fellow servant for personal use held not to arise out of his employment, within Workmen's Compensation Act.—*Ward v. Industrial Acc. Commission of State of California*, 164 P. 1123.

§380 (Cal.App.) "Serious and willful misconduct of a servant" means the same as willful misconduct.—*Diestelhorst v. Industrial Accident Commission of California*, 164 P. 44.

Where a minor employed about machinery had been instructed not to oil it while in motion, but thoughtlessly, after the power had been shut off and while the machine was moving of its own momentum, oiled it, and was injured, he was not chargeable with willful misconduct.—*Id.*

(B) Compensation.

§385(1) (Kan.) In action for compensation by servant, earning \$10.50 a week when injured, proceeding on theory of total incapacity for one year, award under Gen. St. 1915, § 5905, of \$6 per week for 52 weeks, less a cash credit, was correct.—*Sauvain v. Battelle*, 164 P. 1086.

§385(17) (Kan.) A workman, partially or totally incapacitated, is not to be denied compensation on account of obtaining work even more remunerative, which he has the physical capacity to perform.—*Sauvain v. Battelle*, 164 P. 1086.

(C) Proceedings.

§405(1) (Cal.App.) Evidence held to show that minor's disobedience to order was thoughtless, and not the result of willful misconduct.—*Diestelhorst v. Industrial Accident Commission of California*, 164 P. 44.

§405(5) (Kan.) Finding of partial dependency of father and mother of deceased employé within Workmen's Compensation Act held sustained by the evidence.—*Fennimore v. Pittsburg-Scammon Coal Co.*, 164 P. 265.

§405(6) (Kan.) In servant's action for injuries, evidence held to show that he received a severe wrench to his back, and that it would be at least one year from the time of his injury before he could do hard work.—*Sauvain v. Battelle*, 164 P. 1086.

§408 (Kan.) Under Workmen's Compensation Act, where a jury trial is not demanded, a court may call a jury to find the facts and may render judgment on its findings.—*Ruth v. Witherspoon-Engler Co.*, 164 P. 1064.

§408 (Kan.) In action under Workmen's Compensation Act, where jury affirmatively answered that plaintiff was wholly incapacitated from performing labor, its negative answer to question whether he was then partially incapacitated meant that he was not partially incapacitated because wholly incapacitated.—*Roll v. Monarch Cement Co.*, 164 P. 1078.

§411 (Kan.) Where servant's action for injury was tried, and compensation given on the theory of total incapacity for one year, expression in a finding indicating only partial incapacity held not such inconsistency as to require a reversal.—*Sauvain v. Battelle*, 164 P. 1086.

§412 (Kan.) Where amount of a general verdict fixing compensation is substantially what might be reached consistently with special findings, and no motion for new trial is filed, a reversal will not be ordered for a slight discrepan-

cy that might result from inaccurate computation.—*Roll v. Monarch Cement Co.*, 164 P. 1078.

§417(7) (Cal.App.) Where Industrial Accident Commission made award to injured servant on fairly substantial conflict in circumstantial evidence, appellate court cannot interfere with award.—*Richmond Dredging Co. v. Industrial Accident Commission*, 164 P. 407.

MEASURE OF DAMAGES.

See Damages, §120, 216.

MECHANICS' LIENS.

See Bankruptcy, §192, 363; Schools and School Districts, §86.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§5 (Mont.) The rule that mechanics' lien laws are remedial, and will be liberally construed and applied, means that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction.—*Crane & Ordway Co. v. Baatz*, 164 P. 533.

II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

§39 (Cal.) Contract of S. with principal contractor to furnish all labor for completion of work, and pay the laborers, is one to bestow labor on building, entitling S. to lien for labor furnished thereunder.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

S. contracting with principal contractor to furnish all laborers and pay them, and see that they work, is entitled to lien for reasonable wages paid, and the value of his own services required by the contract, as the value of labor furnished.—*Id.*

§51 (Cal.) One merely agreeing to pay wages of building contractor's employés, to be repaid with commission, is not entitled to lien for their labor, he in effect merely making a loan to contractor.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

(C) Agreement or Consent of Owner.

§72 (Kan.) Under terms of the lease, lessee held owners' agent for alteration and repair within mechanic's lien statute (Gen. St. 1915, § 7557), giving lien to contractor with owners' agent.—*Brown v. Walker*, 164 P. 1092.

(D) Persons Entitled in General.

§93 (Cal.App.) Contractor claiming lien is not responsible for defects in structure resulting from faulty specifications furnished by owner's engineer.—*Simmons v. Firth*, 164 P. 807.

Failure of contractor claiming lien to complete work in specified time is not a defense being due to owner's failure to deliver water according to contract, necessary for prosecution of work.—*Id.*

(E) Subcontractors and Contractors' Workmen and Materialmen.

§104 (Cal.) A building contract merely providing when 75 per cent. of price is payable, and not providing the balance shall be payable at least 35 days after final completion, does not substantially comply with Code Civ. Proc. § 1184; so subcontractors are entitled to lien as though work was done for owner.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

III. PROCEEDINGS TO PERFECT.

§131 (Wash.) Rem. Code 1915, § 1134, making mechanics' liens unenforceable, unless claim be filed with county auditor within 90 days,

when construed with Torrens Act, requires such filing with the registrar.—*McMullen & Co. v. Croft*, 164 P. 930.

That mechanic's lien was filed in office of auditor, who is also registrar under Torrens system, did not relieve claimant from filing it with registrar, as required by Torrens Act.—*Id.*

—§134 (Cal.) Claim of lien of subcontractor stating particulars required by Code Civ. Proc. § 1187, with nothing contradictory, is sufficient.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

—§134 (Kan.) Under Gen. St. 1915, §§ 7558, 7559, lien statement naming owners and claimants reciting owners' employment of lessee to make improvements and lessee's employment of claimant to furnish labor and material therefor held sufficient basis for mechanics' liens.—*Brown v. Walker*, 164 P. 1092.

—§134 (Mont.) No set form or order for account and description of property affected in mechanic's lien notice is required.—*Crane & Ordway Co. v. Baatz*, 164 P. 533.

—§135 (Cal.) A lien claim by S. who did business under name of S. & Co., is not bad because contract signed in his name purports to be made by S. & Co.; it not being necessary for claim to make this explanation, but enough that it asserts S. made the contract.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

—§135 (Kan.) Under Gen. St. 1915, §§ 7558, 7559, mechanic's lien statements, otherwise sufficient, naming lessee as contractor, and persons furnishing labor and material as claimants, held sufficient basis for mechanics' liens.—*Brown v. Walker*, 164 P. 1092.

Under Gen. St. 1915, §§ 7558, 7559, mechanics' liens statement naming the owners, the lessee as contractor, and the claimant, although using expressions indicating that claimant was a subcontractor, held sufficient.—*Id.*

—§141 (Cal.) A claim of lien by subcontractors giving name of contractor, held not bad because in view of claim that principal contract was void under Code Civ. Proc. § 1184, alleging their contract with him was made by him on behalf of and for the owner.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

—§148 (Mont.) Under Rev. Codes, § 7291, prescribing how to perfect mechanic's or materialman's lien, materialman's claim of lien must verify account as just and true one, after allowing "all credits."—*Crane & Ordway Co. v. Baatz*, 164 P. 533.

—§154(2) (Mont.) In view of Rev. Codes, § 7988, defining "affidavit," under section 7291, a document filed by materialman as lien claim, containing acknowledgment of managing agent of claimant corporation, taken before notary public, that corporation claimant executed lien notice, was insufficient to support lien.—*Crane & Ordway Co. v. Baatz*, 164 P. 533.

Affidavit to materialman's lien notice should verify account and description of property affected.—*Id.*

—§158 (Kan.) At close of evidence in action to enforce mechanics' liens, amendments were properly allowed to correct informalities in lien statements and conform pleadings to amended statements, where no changes were made in names of owners, contractor, or lien claimants.—*Brown v. Walker*, 164 P. 1092.

—§158 (Wash.) Mechanic's lien notice may be amended after expiration of filing period, in view of Rem. Code 1915, §§ 1134, 1147; but where notice is filed after expiration of time, amendment cannot make it valid.—*McMullen & Co. v. Croft*, 164 P. 930.

Rem. Code 1915, § 1134, making mechanics' liens unenforceable, unless notice is filed within 90 days, is a statute of limitation, and where petition shows failure to file notice in time it cannot be amended.—*Id.*

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

—§161(4) (Cal.) A subcontractor cannot have lien for increased interest the contractor agreed, after work was done, to pay, but may have lien for interest at legal rate; amount owing and time of payment being fixed and certain.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) Waiver of Right to Lien.

—§208 (Kan.) A waiver of a mechanic's lien expressed to be made in favor of any mortgagee of the property, held to preclude the signer from asserting a lien, except in subordination to that of the mortgagee.—*Logan-Moore Lumber Co. v. Bowersock*, 164 P. 156.

—§217 (Kan.) Waiver of mechanic's lien in favor of any mortgagee inures to one who had lent money to purchaser of property under arrangement whereby original owner should hold title as security for price and amount of such loan.—*Logan-Moore Lumber Co. v. Bowersock*, 164 P. 156.

(C) Extinguishment, Release, or Payment.

—§236 (Kan.) Rectal in writing releasing mechanic's lien, that the "owner" had paid for construction of house involved, held to refer to payments by person in possession under a contract for a deed upon payment of price, and not to holder of the legal title.—*Logan-Moore Lumber Co. v. Bowersock*, 164 P. 156.

VII. ENFORCEMENT.

—§277(6) (Cal.) There is no variance between claim of lien of subcontractors for value of work and material up to cessation of labor, estimated at contract price, stated also to be the value thereof, and evidence that this was the value of the work and material, plus 20 per cent. for their profits as subcontractors.—*Sweet v. Fresno Hotel Co.*, 164 P. 788.

—§281(1) (Kan.) In action to enforce a mechanic's lien, evidence held to justify a finding that a party had loaned money to purchaser of property under an arrangement that original owner should hold title as security for price, and for amount of loan.—*Logan-Moore Lumber Co. v. Bowersock*, 164 P. 156.

—§288(3) (Cal.App.) Question of omissions from work of items of specifications being trivial imperfections, which under Code Civ. Proc. § 1187, do not prevent lien, held one of fact, to be determined from the evidence and circumstances of the case.—*Simmons v. Firth*, 164 P. 807.

MEETINGS.

See Corporations, —§193, 298.

MEMBERS.

See Insurance, —§55, 694.

MEMORANDA.

See Frauds, Statute of, —§115.

MERGER.

See Contracts, —§245; Judgment, —§582-605; Mortgages, —§268; Sales, —§90.

MINES AND MINERALS.

See Mortgages, —§33, 36, 608½; Taxation, —§158.

I. PUBLIC MINERAL LANDS.

(C) Patents.

—§43 (Cal.App.) A patent to lot No. 41 and 1664 linear feet of Eureka ledge procured under Federal Mining Act of 1896, gave to gran-

tee fee to lot and so much of lode as apexed within its exterior surface boundaries, with right to follow vein on its dip and nothing more.—*Whildin v. Maryland Gold Quartz Mining Co.*, 164 P. 908.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§73½ (Kan.) Under oil and gas lease providing that on owner's bona fide sale of land before lessee commenced operations and refund of money paid by lessee lessee was to cancel lease, an absolute sale of land to defeat lessee's rights, made before drilling operations commenced, deprived lessee of right to drill land.—*Henning v. Wichita Natural Gas Co.*, 164 P. 297.

Driving of stake locating gas well and of stake locating site for boiler to drive machinery were not a commencement of drilling operations under lease whereby lease would be canceled if owner made a bona fide sale of land before drilling operations were commenced.—*Id.*

§73½ (Kan.) That mineral lease had not been released of record was no evidence that it remained in force; the matter not being affected by Gen. St. 1915, § 4992, requiring lessee to discharge an oil and gas lease that has become forfeited.—*Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co.*, 164 P. 1087.

The execution of an ordinary oil and gas lease creates no presumption of possession by the lessee after its execution.—*Id.*

§75 (Kan.) That lessor after expiration of fixed period of mineral lease executed conveyance subject to lease, and that lease was assigned, was not evidence, in action for rent, of extension of lease.—*Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co.*, 164 P. 1087.

§85 (Or.) Plaintiff cannot recover money advanced for defendant to pay his share of a mining claim interest they had agreed to purchase and own, where plaintiff took title to entire interest in his own name.—*Hinderliter v. McDonald*, 164 P. 378.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

§112(3) (Wash.) Where partners allowed their engines to be operated some months by a mining company in which they were interested, and in negotiations to release the company's property from mechanics' liens agreed to a proposed mortgage covering the engines, they were estopped to deny the engines' liability to laborers' liens filed against the mining company.—*Rogers v. Reynolds*, 164 P. 80.

Coal miners need not inquire regarding the ownership of tools and appliances used by them, in order to protect their right to laborers' liens thereon.—*Id.*

The owner of engines used in a coal mine may be estopped to assert his ownership thereof against lien claimants, although such claimants did not prove they relied upon their employer's supposed ownership of the engines, nor did the owner make any positive representations.—*Id.*

MINORS.

See Infants.

MISLEADING INSTRUCTIONS.

See Trial, §242.

MISREPRESENTATION.

See Fraud.

MISTAKE.

See Reformation of Instruments, §19.

MODIFICATION.

See Appeal and Error, §1151-1154; Sales, §89.

MONEY.

See Replevin, §4.

MONEY LENT.

§7(2) (Or.) It is competent to establish by parol that money was borrowed, irrespective of the purpose to which it was to be applied.—*Hinderliter v. McDonald*, 164 P. 378.

MONEY RECEIVED.

See Action, §32.

MOOT QUESTIONS.

See Criminal Law, §1131; Prohibition, §81.

MORTGAGES.

See Alteration of Instruments, §17; Bankruptcy, §183; Chattel Mortgages; Estoppel, §70; Fixtures, §18; Public Lands, §136.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§25(2) (Idaho) The extension of time by a creditor within which to pay an old obligation is as much a consideration and as much an extension of credit as the granting of a new loan.—*Pettengill v. Blackman*, 164 P. 358.

§25(3) (Cal.App.) A trust deed given in place of a mortgage and in release thereof properly included an amount of interest, since interest and principal are upon same footing as to consideration for the security.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

§33(5) (Mont.) Transaction whereby mining property was conveyed by owners, grantee and wife executing contract to reconvey part of lodes and millsites on payment, *held* prima facie a sale, with option to grantors to repurchase.—*Elling v. Fine*, 164 P. 891.

§36 (Mont.) One claiming that a deed was intended as a mortgage has the burden of proof.—*Elling v. Fine*, 164 P. 891.

§37(2) (Kan.) Instrument in form of warranty deed may be shown to be mortgage by oral proof that it was intended to secure debts of grantor to grantee and others, by any beneficiary.—*Hegwood v. Leeper*, 164 P. 173.

Gen. St. 1915, § 11674, forbidding creation of express trusts concerning lands by parol, does not apply as to oral proof that ordinary warranty deed is in effect mortgage.—*Id.*

§37(2) (Wash.) Parol evidence is admissible to show that a deed absolute on its face is a mortgage.—*Bradbury v. Nethercutt*, 164 P. 194.

§38(1) (Okla.) Evidence *held* to sustain finding that conveyance executed by plaintiff and her husband was intended as a deed, and not a mortgage.—*Thomas v. Halsell*, 164 P. 458.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§151(3) (Kan.) Where owner of mortgaged property abandons construction of a house thereon, mortgagee, taking possession and completing it according to original plans, had a lien for his expenditures superior to mechanic's lien

for material used by owner, where value of property when abandoned, including improvement, was less than the mortgage.—*Logan-Moore Lumber Co. v. Bowersock*, 164 P. 156.

The lien of a mortgagee taking possession and completing building after owner's abandonment cannot be increased, as against a mechanic's lienholder, by cost of improvements not contemplated in original plan.—*Id.*

§176 (Wash.) Deed made and recorded between making and recording of mortgage, *held* subject thereto if grantees knew of the mortgage.—*J. M. Colman Co. v. Cummings*, 164 P. 744.

§181 (Wash.) When a first mortgagee takes a new mortgage, releasing original mortgage upon mortgagor's misrepresentation that no intervening lien exists, equity will reinstate the first mortgage lien in its original priority.—*Bormann v. Hatfield*, 164 P. 921.

§186(5) (Kan.) Evidence *held* to support finding that no preference was intended between several debts secured by deed.—*Hegwood v. Leeper*, 164 P. 173.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§209 (Kan.) Where grantee in deed intended as part security for grantor's debts to third persons exchanged land for another tract and conveyed it in satisfaction of his debt to creditor of his own, informed as to all facts, both were liable to claimants whose liens were thereby lost.—*Hegwood v. Leeper*, 164 P. 173.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§268 (Wash.) Technically, purchase of former mortgage on land by purchaser of sheriff's certificate of sale thereof constituted extinguishment of mortgage.—*Guie v. Byers*, 164 P. 75.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§277 (Kan.) Where grantee in deed intended as part security for grantor's debts to third persons exchanged land for another tract and conveyed it in satisfaction of his debt to creditor of his own, informed as to all facts, both were liable to claimants whose liens were thereby lost.—*Hegwood v. Leeper*, 164 P. 173.

§280(2) (Okl.) Provision in conveyance of realty that grantee assumes payment of described mortgage indebtedness, to be enforceable, must be supported by a consideration.—*Boyd v. Winte*, 164 P. 731.

Where circumstances of conveyance of realty, providing that grantee assumes mortgage indebtedness therein described, are such as to create a resulting trust and grantee takes no beneficial interest, the conveyance is not a sufficient consideration to support an agreement to assume the mortgage.—*Id.*

§280(3) (Or.) A verbal promise by grantee to assume and pay a mortgage on land, if clearly established, is valid and enforceable in equity.—*Knigh-ton v. Chamberlin*, 164 P. 703.

§280(5) (Or.) In a suit against C. and H., to foreclose a mortgage on land, conflicting evidence *held* to support a court finding that H. by oral agreement assumed the mortgage.—*Knigh-ton v. Chamberlin*, 164 P. 703.

X. FORECLOSURE BY ACTION.

(G) Injunction and Receiver.

§468(2) (Wash.) Mortgagees under instrument failing to provide for deficiency judgment *held* entitled to continuance of receivership to pay taxes from rents.—*Newman v. Van Nort-wick*, 164 P. 61.

§473 (Wash.) Payment of taxes from rents to avoid penalty *held* proper request by receiver under mortgage failing to provide for defi-

ciency judgment.—*Newman v. Van Nortwick*, 164 P. 61.

Taxes upon mortgaged property are "necessary charges" and "current expenses" properly chargeable against the income of the property.—*Id.*

(I) Judgment or Decree and Execution.

§494 (Ariz.) A decree of foreclosure of "all the right, title," etc., of a named person in the described premises is not a nullity for uncertainty or indefiniteness of the description of the interest foreclosed.—*Ives v. Sanguinetti*, 164 P. 435.

§496 (Ariz.) Refusal to vacate a foreclosure decree *held* not abuse of discretion where trial had been repeatedly postponed to suit appellant's convenience.—*Ives v. Sanguinetti*, 164 P. 435.

(J) Sale.

§502 (Okl.) Where mortgage contains provision "and waive the appraisalment" provision in order for sale "according to the provisions of law relating to the sale of real estate under execution" means that premises shall be sold "without appraisalment."—*Owens v. Culbertson*, 164 P. 975.

§526(1) (Wash.) Confirmation of a mortgage foreclosure sale is a judicial, and not merely a formal, act, even when no contest is made.—*State v. Holden*, 164 P. 595.

§552 (Wash.) In view of existing conditions and circumstances of parties, language of contract, executed by buyer for undisclosed principal of sheriff's sale certificate of mortgaged land from receiver of bank acting through another person, also interested, *held* not to require re-establishment of existing mortgage to mortgagee, or its extension of time of payment to holder of title.—*Guie v. Byers*, 164 P. 75.

XI. REDEMPTION.

§594(2) (Colo.) Under statute, where property was sold on foreclosure of deed of trust, and purchaser paid delinquent taxes, no redemption having been made by original owner within six months allowed, judgment creditor of original owner was entitled to take out execution and have levy, paying to county treasurer amount required to redeem from sale on foreclosure, and statute did not require sale under levy.—*Stevenson v. Sebring*, 164 P. 308.

§604 (Colo.) One who purchased land on foreclosure of deed of trust, receiving certificate of purchase, and paid delinquent taxes, was not volunteer in paying, and was entitled to recover the taxes paid from judgment creditor of original owner, who took out execution, had levy made, and paid to county treasurer amount required to redeem from sale on foreclosure, having obtained quitclaim deed from owner.—*Stevenson v. Sebring*, 164 P. 308.

Purchaser of land at foreclosure sale under deed of trust, who paid delinquent taxes in good faith and to protect his interest, was entitled to lien on premises to secure repayment against judgment creditor of original owner who took out execution and had levy made, paying county treasurer amount necessary to redeem.—*Id.*

§608½ (Mont.) Defendant, who sold mining property, purchaser and wife executing contract to reconvey part on payment, *held* barred by laches from contending that transaction was intended as mortgage, by failing to claim for more than 13 years.—*Elling v. Fine*, 164 P. 891.

That a grantor claiming his deed was a mortgage, delayed in asserting his rights against his mortgagee and the latter's executor and heirs, on account of lack of funds, because he "didn't want to start anything" until satisfied of his ability "to go through with it," was no excuse for laches in suing therefor.—*Id.*

§624(1) (Colo.) Where holder of equity of redemption redeems land sold on foreclosure of

mortgage, he acquires no rights other than those which existed at time of foreclosure; estate being restored to him free of lien which was foreclosed, but subject to all others.—*Milhoover v. Walker*, 164 P. 504.

Grantee of equity of redemption in mortgaged land has no better right than grantor in redeeming land from foreclosure sale.—*Id.*

MOTIONS.

See Appeal and Error, §289, 304; Judgment, §153; Pleading, §367.

§56(1) (Okla.) Rev. Laws 1910, § 5317, requiring orders made out of court to be entered on the journal, is directory, and compliance therewith is not essential to the validity of the orders.—*Keenan v. Chastain*, 164 P. 1145.

MUNICIPAL CORPORATIONS.

See Account Stated, §20; Constitutional Law, §290; Counties; Estoppel, §62; Intoxicating Liquors, §11; Licenses, §6, 26; Nuisance, §72; Schools and School Districts; Statutes, §94, 120; Street Railroads.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(C) Amendment, Repeal or Forfeiture of Charter, and Dissolution.

§46 (Or.) Proposed charter of Bay City, submitted to voters on June 22, 1914, held duly adopted; proceedings being in all respects according to law.—*State v. Bozorth*, 164 P. 958.

§48(1) (Kan.) Act approved February 17, 1917, relating to government of all cities in Kansas and authorizing them to establish city manager plan of government, in view of section 16 thereof, relating to election, is not in conflict with other statutory requirements, especially the general election laws providing for registration.—*State v. Bentley*, 164 P. 290.

Act Feb. 17, 1917, relating to government of all cities in Kansas and authorizing them to establish a city manager plan of government in view of section 14 thereof, is not in conflict with Const. art. 12, § 5, because placing no restriction on powers of cities as to taxation, assessment, debts, etc.—*Id.*

Provision of Act Feb. 17, 1917, authorizing cities to establish city manager form of government, requiring mayor to call special election on filing of a petition, construed to require petition to be signed by 25 per cent. of legally qualified votes cast for mayor at last election.—*Id.*

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§58 (Or.) A municipal charter is a grant and not a limitation of power.—*Baggage & Omnibus Transfer Co. v. City of Portland*, 164 P. 570.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§111(4) (Okla.) Unless invalid part of ordinance is so clearly severable from valid part thereof that it would be presumed that the law-making body would have passed the valid part without the invalid part, the entire ordinance is void.—*Ex parte Gordon*, 164 P. 1146.

Ordinance of Oklahoma City, enacted pursuant to Rev. Laws 1910, § 581, levying license tax on merchant auctioneers as to part exempting any merchant residing and doing business in city for six months being invalid, the remainder would also be held invalid.—*Id.*

§111(4) (Wash.) Even though some sections of city ordinance regulating sale of intoxicants are void, efficacy of others is not destroyed.—*City of Seattle v. Hewetson*, 164 P. 234.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§125 (Kan.) The civil service law has not the force of a constitutional provision, and may be repealed as to one class of cities and remain in effect as to others.—*State v. Bentley*, 164 P. 290.

§126 (Cal.App.) The act of a city council in abolishing an office is an exercise of legislative power.—*Foley v. City of Oakland*, 164 P. 419.

(B) Municipal Departments and Officers Thereof.

§191 (Cal.App.) Assistant sanitary inspector appointed under an ordinance could be removed by an ordinance abolishing the office; the council being empowered by Charter, §§ 31, 39, 80 (St. 1911, p. 1551), to discontinue offices.—*Foley v. City of Oakland*, 164 P. 419.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Thereof.

§279 (Wash.) Under Rem. Code 1915, § 8006, and Seattle City Charter, art. 4, § 18, city council held to have power to provide by ordinance for making extensions to city water system and issue and sell bonds in payment thereof without submission to voters.—*Shorts v. City of Seattle*, 164 P. 239.

§279 (Wash.) Under Rem. Code 1915, §§ 8005, 8006, and Seattle City Charter, art. 4, § 18, subd. 15, city council held to have power to make additions and extensions to city electric light plant and issue and sell bonds payable solely from special fund created by ordinance without submission to voters.—*Shorts v. City of Seattle*, 164 P. 241.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§294(4) (Or.) Under charter of City of Salem, § 26, notice of street improvement, published by recorder, omitting part of street determined to be improved by city council, held not good as to owners of property adjacent to portion of street described.—*Fry v. City of Salem*, 164 P. 715; *Lord v. Same*, *Id.* 717; *Carson v. Same*, *Id.* 718.

Where reference in recorder's notice to plans and specifications for improvement of street, correctly describing extent to be improved, was made as means to ascertain details and kind of improvement, not to contradict or delineate description of portion of street determined to be improved, erroneous description of extent of street to be improved in recorder's notice was not cured.—*Id.*

Under Salem City Charter, § 26, where notice of street improvement published by recorder, under direction of city council, failed to describe correctly portion of street affected, omitting certain extent thereof notice did not confer jurisdiction on council to take subsequent proceedings for improvement as originally determined, nor to assess costs against abutting property, and its assessment was invalid.—*Id.*

§294(4) (Utah) Under Comp. Laws 1907, § 273, requiring notice of proposed improvements to abutting owners, a notice of intention to create curb and gutter district held not to include an intention to lower grade of entire street, and, as requirements of notice were jurisdictional, tax imposed for such additional improvement was illegal.—*Gwilliam v. Ogden City*, 164 P. 1022.

(C) Contracts.

§331 (Or.) Salem City Charter, § 26, requiring notice for bids for a street improvement to be published for not less than five succes-

sive days in a daily newspaper, requires the notice to be published for five full days before the right to submit bids is closed.—*Watson v. City of Salem*, 164 P. 567.

Under L. O. L. § 531, and Salem City Charter, § 26, a notice that bids would be opened on June 10th, which was first published on June 5th, and published daily thereafter, to and including June 9th, was insufficient.—*Id.*

⇒347(1) (Kan.) Where contractor's bond unconditionally promised to answer for contractors' default, city was not estopped to maintain action on bond because before discovering contractors' fraud it paid them in full, nor because surety released funds it held to indemnify itself under belief that city had accepted the sewer.—*City of Topeka v. Brooks*, 164 P. 285.

⇒360(1) (Or.) Contractors with city to erect dam, delayed by city so that most burdensome portion of work had to be done in winter under most disadvantageous conditions, held entitled to recover of city on quantum meruit for excess cost of work.—*Hayden v. City of Astoria*, 164 P. 729.

⇒360(6) (Or.) So far as work done without their contract by contractors with a city to erect a dam conforms to the contract in character and in the conditions under which it is done, the contract price will govern the contractors' extra recovery on a quantum meruit against the city.—*Hayden v. City of Astoria*, 164 P. 729.

When contractors with city to erect dam did extra work under burdensome conditions not within contemplation of parties, deviations from contract being so material as to entitle contractors to recover on quantum meruit, recovery allowed should take form of damages adequate to compensate for additional burdens, which damages should be added to contract price.—*Id.*

⇒362(2) (Wash.) A provision in a contract with a city for improvement of streets, whereby contractor waived damages by reason of injunction or court action restraining work, held to preclude recovery by contractor for damage sustained where work was enjoined because of failure of city to procure necessary right of way for performance of work in absence of fraud.—*Dietrich v. City of Seattle*, 164 P. 251.

⇒374(4) (Or.) In action against city by contractors to erect dam to recover on quantum meruit for work without the contract, the contract was admissible as establishing the standard of value.—*Hayden v. City of Astoria*, 164 P. 729.

In action against city by contractors to build dam to recover for extra work and delay caused by city, contractors' testimony, tending to show that road into works was good in summer, but would have been impassable in winter but for work they did on it, held competent.—*Id.*

In action against city by contractors to build dam to recover for extra work and delay caused by city, held, that it was competent for contractors to prove that their labor was less efficient in winter season, and that burden of operating rock quarry was greater than.—*Id.*

In action against city by contractors to build dam to recover for extra work and delay caused by city, held, that contractors were properly permitted to show that but for deviations from contract complained of they could have completed work during summer.—*Id.*

(D) Damages.

⇒404(3) (Wash.) In action for damages for removal of lateral support, caused by regrading of city street, notice given city held sufficient to justify trial amendment of complaint to cover item of damages to same property occurring in another street subsequent to notice and to justify admission of evidence relative to such slide.—*Farnandis v. City of Seattle*, 164 P. 225.

(E) Assessments for Benefits, and Special Taxes.

⇒407(1) (Okla.) Ordinance of city of Tulsa levying assessments for street paving creating arbitrary differences in property to be assessed without regard to benefits received, and allowing certain benefited property to escape assessment, violated Const. art. 2, § 7, and U. S. Const. Amend. 14.—*City of Tulsa v. McCormick*, 164 P. 985.

⇒413(1) (Wash.) That raising of streets was made necessary by ship canal made by United States government did not affect jurisdiction of city to order improvement, or to assess abutting property.—*Sanderson v. City of Seattle*, 164 P. 217.

⇒430 (Okla.) Under charter of city of Tulsa, all property is subject to assessment for street improvements which is included between lines drawn parallel with street improved and back from it one-half block on each side; a block or square being part of city bounded on all sides by streets or avenues.—*City of Tulsa v. McCormick*, 164 P. 985.

⇒437 (Okla.) The law authorizing the improvement of streets and avenues of cities and towns by special assessment requires that all property benefited thereby should be taxed in proportion to benefits.—*City of Tulsa v. McCormick*, 164 P. 985.

⇒444 (Or.) Failure to publish a notice for bids for a street improvement for the time and in the manner required by Salem City Charter, § 26, invalidates an attempted special assessment for the improvements.—*Watson v. City of Salem*, 164 P. 567.

The fact that no bids would have been received from other bidders if the full time had been allowed after publication of notice for bids does not validate a special assessment made for street improvements.—*Id.*

⇒450(4) (Mont.) Under Laws 1913, c. 89, as amended by Laws 1915, c. 142, providing for formation of special improvement districts, a property owner who has signed a protest may withdraw therefrom, and thereby defeat the protest by leaving an insufficient number of protestants if he acts within the time allowed by law.—*Hawley v. City of Butte*, 164 P. 305.

⇒510 (Or.) Under Portland city charter, including sections 400, 401, 411, 412, held, that circuit court in reviewing benefit assessments on appeal does not exercise its general jurisdiction, but its doings are part of machinery of city, and result is a city assessment to be enforced as required by charter, so that a sale by the city treasurer to defendant after judgment of circuit court on appeal confirming assessment on plaintiff's land was valid.—*West v. Scott-McClure Land Co.*, 164 P. 554.

⇒513(8) (Utah) In an action to enjoin the collection of an improvement assessment, court of equity will restrain city only from enforcing invalid portion of tax.—*Gwilliam v. Ogden City*, 164 P. 1022.

⇒516 (Utah) Where publication by city of notice of intention to make improvement is jurisdictional, and city does not comply with law, and so does not acquire jurisdiction to order improvement and levy assessment, such assessment may be collaterally assailed at any time.—*Gwilliam v. Ogden City*, 164 P. 1022.

⇒516 (Wash.) Where abutting owners have not objected at time assessment roll was confirmed by court, and have paid assessment, court will not in collateral proceeding inquire into questions of procedure and order of confirmation is not subject to collateral attack unless made void by some subsequent proceeding.—*Sanderson v. City of Seattle*, 164 P. 217.

Under Laws 1911, p. 455, § 23, an improvement assessment cannot be attacked in collateral proceeding by showing of lack of benefit or that it was too high, or that proper credits

have not been given, but lack of original jurisdiction to make improvement must be shown.—*Id.*

Where United States condemned land for a canal and paid damages to a city which raised grade of certain streets because of high water from the canal and assessed abutting property, the assessment after approval cannot be collaterally attacked because cost was not paid from such judgment.—*Id.*

(F) Enforcement of Assessments and Special Taxes.

☞536 (Kan.) That the city had not supplied water for use in flushing the sewer was not a bar to the collection of special assessments for its cost, as there would be a reasonable expectation that it would be supplied later.—*Gardner v. Board of Com'rs of City of Leavenworth*, 164 P. 182.

☞538 (Kan.) In action to enjoin collection of special sewer assessment on ground that amount was too large, whether the adoption of a different plan would have produced the same benefits at a less cost was not open to inquiry.—*Gardner v. Board of Com'rs of City of Leavenworth*, 164 P. 182.

In action to enjoin collection of assessments in a subdistrict for cost of a lateral sewer, no relief could be had because of inequalities in apportionment of cost of the main sewer, which had become final.—*Id.*

☞579 (Or.) City Charter of Portland, § 419, requiring plaintiff in a suit to quiet title to land sold for delinquent assessments to deposit in court with his first pleading purchase price at previous sale with penalty and interest, to be paid to purchaser in case right or title of such purchaser at such sale shall fail, *held* unconstitutional and void, as taking one man's property and giving it to another.—*West v. Scott-McClure Land Co.*, 164 P. 554.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

☞654 (Or.) Where a street location had been recognized for 40 years, a survey measured from a corner located by discovering a bottle buried in the ground as described in a deed *held* insufficient to change the boundaries of the street.—*Hart v. City of Independence*, 164 P. 719.

☞661(1) (Wash.) Under Rem. Code 1915, § 5562—37 et seq., requiring jitney operator to give bond, elements of damages for which recovery may be had against principal enter into and form part of liability against surety to limit of amount of bond.—*Singer v. Martin*, 164 P. 1106.

☞663(3) (Cal.App.) Trees may be lawfully grown and maintained along sidewalks in streets of cities and towns in front of premises of abutting property owners.—*Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35.

While owner of property with trees in front along sidewalks has only qualified interest subject to right of city to trim or remove in public interest, if a person injures trees without right, owner can recover his damages suffered by reason of any depreciation in value of his property.—*Id.*

Telegraph company did not subject itself to action for damages when it cut branches of trees growing in front of city property along sidewalk to clear its wires to prevent interference with their proper operation.—*Id.*

Telegraph or telephone corporation in trimming or severing branches of trees to prevent contact of wires therewith can do no more than is necessary for proper and efficient working of wires without subjecting itself to civil liability for damages.—*Id.*

☞671(4) (Cal.App.) In action by property owners against telegraph company for damages caused by company's cutting off branches of trees in front of plaintiffs' property to clear wires, burden was on plaintiffs to show either that it was entirely unnecessary to remove any branches from trees, or that company removed more branches than situation called for.—*Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35.

In action by property owners against telegraph company for damages caused by company's cutting off branches of trees in front of plaintiffs' property to clear its wires, plaintiffs' evidence *held* insufficient to sustain burden to show either that it was entirely unnecessary to remove any branches or that telegraph company removed more branches than situation called for.—*Id.*

☞680, 681(1) (Cal.App.) Cities and towns are empowered, as agents of state, to grant to public utility corporations, such as those engaged in distribution of water, gas, electricity, or transmission of telegrams, etc., right to use streets in reasonable manner.—*Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35.

☞683(1) (Cal.App.) Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 174, an ordinance granting consent of city of Long Beach to construction of drainage ditch through its streets *held* not invalid because consent was upon terms named, which were protective of public interest, germane to subject, and not violative of drainage district act.—*Van de Water v. Pridham*, 164 P. 1136.

☞691 (Cal.App.) Trees grown and maintained along sidewalks in streets of cities and towns in front of premises of abutting property owners are not nuisances, as would be a purpresture obstructing or materially interfering with traffic.—*Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35.

☞703(1) (Cal.) San Diego ordinance requiring every driver of a vehicle to travel on the right side of the street as near the right-hand curb as possible does not prohibit the use of the left-hand side of the street under all circumstances.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

☞706(6) (Cal.App.) In action for injuries when struck by defendant's automobile, question of defendant's negligence *held* for jury.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

☞706(6) (Or.) Evidence *held* to present a jury question whether driver of defendant's automobile truck was negligent in turning to the left before crossing an intersection, and in so doing killing the traffic officer stationed at such intersection.—*White v. East Side Mill & Lumber Co.*, 164 P. 736.

☞706(7) (Cal.) If a person does not have ordinary skill in driving an automobile, it is lack of ordinary care to attempt to do so, and such conduct is contributory negligence barring recovery for injuries.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

☞706(7) (Cal.App.) In action for injuries when struck by defendant's automobile, question of plaintiffs' contributory negligence *held* for jury.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

☞706(8) (Cal.App.) In action for injuries when struck by automobile, where there was testimony that by change of direction of automobile plaintiff was suddenly placed in peril, court could give instruction as to plaintiffs' duty under circumstances of sudden and unexpected danger.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

☞706(8) (Or.) In action for death of traffic policeman when struck by auto truck, instruction on care required of him *held* not to im-

pose lower degree than ordinary care.—*White v. East Side Mill & Lumber Co.*, 164 P. 736.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

☞757(1) (Wash.) A city need not improve all streets platted within its boundaries, but only those which are necessary, and the city is itself the judge of such necessity.—*La Breck v. City of Hoquiam*, 164 P. 67.

☞761(2) (Wash.) While a city must keep streets improved by it in reasonable repair, it is not responsible for defective sidewalks built by private individuals for private convenience on unimproved streets in outlying districts of the city.—*La Breck v. City of Hoquiam*, 164 P. 67.

A city is not liable for a pedestrian's injuries caused by a defective private plankway constructed without permission or notice to the city by an individual on an unimproved street irrespective of whether the city knew, or should have known, such walkway had been constructed.—*Id.*

A plank walkway constructed by property owner on an unimproved street for convenience in reaching his premises is a private walk, although a mail carrier and some neighbors frequently used it in going to his house.—*Id.*

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

☞873 (Idaho) Const. art. 8, § 4, and article 12, § 4, were intended to prevent any municipal corporation from becoming interested in any private enterprise or from using funds derived from taxation in aid of such enterprise within exceptions provided for in article 12, § 4.—*School Dist. No. 8, Twin Falls County, v. Twin Falls County Mut. Fire Ins. Co.*, 164 P. 1174.

(C) Bonds and Other Securities, and Sinking Funds.

☞918 (1) (Wash.) Under Rem. Code 1915, § 8006, and Seattle City Charter, art. 4, § 18, city council held to have power to provide by ordinance for making extensions to city water system and issue and sell bonds in payment thereof without submission to voters.—*Shorts v. City of Seattle*, 164 P. 239.

☞918(1) (Wash.) Under Rem. Code 1915, §§ 8005, 8006, Seattle City Charter, art. 4, § 18, subd. 15, city council held to have power to make additions and extensions to city electric light plant and issue and sell bonds payable solely from special fund created by ordinance without submission to voters.—*Shorts v. City of Seattle*, 164 P. 241.

☞925 (Wash.) Under a city charter containing no provision as to date for maturity of bonds for waterworks, city council may provide that bonds shall mature serially, a specified amount six years after date, and a like amount annually thereafter, in view of Rem. Code 1915, § 8008.—*Shorts v. City of Seattle*, 164 P. 239.

☞925 (Wash.) Under Rem. Code 1915, § 8008, held that city council of Seattle has power to provide for payment of bonds for extension of electric light plant beginning 6 years and ending 20 years after date, although Seattle City Charter, art. 4, § 18, subd. 15, provides that such bonds shall be payable between tenth and fortieth years after date.—*Shorts v. City of Seattle*, 164 P. 241.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ☞693-798.

MUTUAL INSURANCE COMPANIES.

See Insurance, ☞55.

NAMES.

See Signatures.

NATIONAL BANKS.

See Banks and Banking, ☞233.

NAVIGABLE WATERS.

See Waters and Water Courses.

I. RIGHTS OF PUBLIC.

☞34 (Cal.App.) In action by State Reclamation Board to abate as nuisance diversion of waters into San Joaquin river, under St. 1913, p. 252, § 12, where allegations in complaint are comprehensive enough and injunctive relief is asked for, it may be awarded where it accomplishes purposes of abatement.—*McClatchy v. Laguna Lands, Limited*, 164 P. 41.

The merits of action to abate as nuisance diversion of water of river contrary to St. 1913, p. 252, § 12, cannot be tried on affidavits.—*Id.*

Complaint, in action brought in San Joaquin county, to abate as public nuisance diversion of water into San Joaquin river, contrary to St. 1913, p. 252, § 12, need not allege that some specific tract of land in said county has been injured, or that injury is immediately present, it being sufficient if it can be gathered from complaint that lands therein are directly threatened with the injury complained of.—*Id.*

NECESSARIES.

See Spendthrifts, ☞8.

NEGATIVE PREGNANT.

See Pleading, ☞126.

NEGLIGENCE.

See Carriers, ☞177, 280-397½; Damages, ☞131, 132; Death, ☞31; Electricity, ☞19; Explosives, ☞8; Food, ☞6; Highways, ☞175-184; Master and Servant, ☞80-288; Municipal Corporations, ☞703-761; Physicians and Surgeons, ☞14, 18; Railroads, ☞276-484; Schools and School Districts, ☞141; Street Railroads, ☞81-118; Telegraphs and Telephones, ☞66; Trial, ☞296.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

☞32(2) (Cal.App.) Where plaintiff entered defendants' saloon to use toilet, and then ordered a drink, and then walked into an open and unguarded trapdoor, he had become a customer, and defendants owed him duty of ordinary care.—*Braun v. Vallade*, 164 P. 904.

☞44 (Kan.) A merchant is bound to maintain his storeroom in a reasonably safe condition for customers.—*Reese v. Abeles*, 164 P. 1080.

Where a customer in a store was invited to look at some goods on the shelves, without warning of an open stairway, partly darkened by piles of merchandise, and fell through the stairway and was injured, the merchant was negligent.—*Id.*

☞52 (Kan.) Proprietor of store, inviting customer to inspect shelf goods, without warning of presence of open stairway near by, darkened by piles of merchandise, was liable in damages to customer falling into the stairway.—*Reese v. Abeles*, 164 P. 1080.

II. PROXIMATE CAUSE OF INJURY.

↪56(1) (Cal.App.) In action for brakeman's death, it was immaterial that defendant canning company had not complied with contract with railroad prescribing distance to be left between platform and track, where accident might have happened in any event.—*Matchette v. California Fruit Cannery Ass'n*, 164 P. 423.

↪59 (Okla.) An act is the proximate cause of an injury when such injury was the natural and probable consequence of the act and one that ought to have been foreseen in the light of the attending circumstances.—*Wichita Falls & N. W. Ry. Co. v. Cover*, 164 P. 660.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

↪70 (Kan.) Where a customer in a store was invited to look at some goods on the shelves without warning of an open stairway, partly darkened by piles of merchandise, and fell through the stairway and was injured, she was not guilty of contributory negligence.—*Reese v. Abeles*, 164 P. 1080.

↪83 (Cal.) The last clear chance doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the other party, knowing his peril, fails to use ordinary care to avoid injuring him.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

↪83 (Cal.App.) Strictly considered, doctrine of last clear chance can be invoked only in favor of person who is injured.—*Potter v. Back Country Transp. Co.*, 164 P. 342.

(C) Imputed Negligence.

↪90 (Cal.) Under Civ. Code, § 1714, in order that the negligence of one person may be imputed to another, they must stand in such relation of privity that the maxim, "qui facit per alium facit per se," applies.—*Bryant v. Pacific Electric Ry. Co.*, 164 P. 385.

↪93(1) (Cal.) If the occupant of an automobile exercises control over the driver or possesses power of control, the negligence of the driver is imputable to him.—*Bryant v. Pacific Electric Ry. Co.*, 164 P. 385.

To establish a joint undertaking between occupant and driver of automobile so as to impute driver's negligence to occupant, it is not sufficient merely that the occupant determines the destination or the route, but he must have some control.—*Id.*

↪93(1) (Okla.) Where plaintiff, fireman, was riding to fire on truck driven at high speed by driver over whom he had no control, driver's negligence, if any, in colliding with a street car, with resulting injury to plaintiff, was not imputable to him.—*Oklahoma Ry. Co. v. Thomas*, 164 P. 120.

↪93(3) (Cal.) The mere fact that plaintiff was riding in an automobile driven by his 29 year old son does not impute to the plaintiff the negligence of his son.—*Bryant v. Pacific Electric Ry. Co.*, 164 P. 385.

That plaintiff and his son were employed by the same corporation or interested therein would not impute to the plaintiff the negligence of his son in driving an automobile belonging to the corporation.—*Id.*

(D) Comparative Negligence.

↪98 (Cal.App.) That motorman negligently failed to stop car before running into open switch would not require a verdict against him in his action for personal injuries, if his negligence was slight in comparison with employer's negligence, in view of St. 1911, p. 796.—*Lincoln v. Pacific Electric Ry. Co.*, 164 P. 412.

↪101 (Or.) In servant's action for injuries, where complaint stated cause of action within Employers' Liability Act, under section 6 thereof, contributory negligence was only to be considered in fixing damages.—*Poulios v. Grove*, 164 P. 562.

IV. ACTIONS.**(B) Evidence.**

↪122(1) (Utah) Where the evidence is conflicting, burden of establishing contributory negligence by a preponderance of the evidence held upon defendant, regardless of whether such evidence comes from plaintiff's or defendant's witnesses.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

↪134(5) (Cal.App.) In action by customer for injuries received on falling through a trapdoor in barroom, evidence held to show that plaintiff's injuries were caused by defendants' negligent act in leaving open unguarded trapdoor in place open and accessible to customers.—*Braun v. Vallade*, 164 P. 904.

↪134(8) (Wash.) Evidence, in an action for damages from fire, held to authorize submitting to the jury whether defendant exercised due diligence to prevent the fire from spreading to plaintiff's property.—*Sandberg v. Cavanaugh Timber Co.*, 164 P. 200.

(C) Trial, Judgment, and Review.

↪136(22) (Cal.App.) A brakeman switching cars in defendant canning company's yards and killed while unnecessarily standing between platform and track, it being impossible to safely stand there, held guilty of contributory negligence as a matter of law.—*Matchette v. California Fruit Cannery Ass'n*, 164 P. 423.

↪136(25) (Okla.) Ordinarily the question of proximate cause is for the jury, but where the facts are not in dispute and reasonable men cannot differ on the question, it may become one of law for the court.—*Wichita Falls & N. W. Ry. Co. v. Cover*, 164 P. 660.

↪136(30) (Cal.) Evidence held to make a jury question whether plaintiff, riding in an automobile driven by his 29 year old son, was chargeable with imputed negligence of the son in a collision.—*Bryant v. Pacific Electric Ry. Co.*, 164 P. 385.

↪136(31) (Cal.App.) The trial court did not abuse its discretion in directing a verdict for defendant electric railway company where an employé stepped between two cars of a train for some unknown reason and shortage of electricity caused one portion to back against him, although St. 1911, p. 796, allowed recovery where employé's negligence was slight and employer's gross.—*Lynch v. Pacific Electric Ry. Co.*, 164 P. 20.

↪138(1) (Cal.App.) In action for injuries received in falling through trapdoor in defendant's barroom, instruction referring to trapdoor in floor as being part of said barroom, etc., if understood as referring to floor space filled by trapdoor, held not confusing.—*Braun v. Vallade*, 164 P. 904.

↪139(2) (Wash.) Instruction, in an action for the destruction of property from fire spreading from defendant's premises, held not erroneous as requiring a higher degree of care than the law imposes on the owner of premises on which a fire originates without his act or fault.—*Sandberg v. Cavanaugh Timber Co.*, 164 P. 200.

↪142 (Kan.) Where the jury in answer to a special question finds defendant negligent as to a single act, defendant is acquitted of every other charge of negligence in the petition, except the one specifically designated in the finding.—*Williams v. Atchison, T. & S. F. Ry. Co.*, 164 P. 260.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Appeal and Error, ¶981; Criminal Law, ¶938-943; New Trial, ¶99-104, 150.

NEW TRIAL.

See Appeal and Error, ¶289, 304, 933, 977-981, 1015; Criminal Law, ¶913-943, 1156; Eminent Domain, ¶224.

I. NATURE AND SCOPE OF REMEDY.

¶6 (Wash.) A motion for new trial is addressed to the sound discretion of the trial court.—*Skarlatos v. Brice*, 164 P. 939.

II. GROUNDS.

(D) Disqualification or Misconduct of or Affecting Jury.

¶52 (Wash.) A verdict will not be set aside because its amount could not be reached under either party's theory without mistake or compromise, unless passion, prejudice, or willful disregard of the testimony clearly appears.—*Haefele v. Brackett*, 164 P. 244.

A verdict for labor performed in an amount less than plaintiff demanded will not be set aside as a compromise verdict at defendant's request, where plaintiff's claims were contested and certain of his items might well be rejected.—*Id.*

(G) Surprise, Accident, Inadvertence, or Mistake.

¶88 (Cal.App.) Where no facts were stated from which trial court could determine what effort sheriff had made to serve a subpoena upon two alleged material witnesses for defendant, and it was not shown that defendant placed subpoena in hands of sheriff before trial, *held*, that there was no abuse of discretion in denying a motion for new trial.—*Dilger v. Whittier*, 164 P. 49.

(H) Newly Discovered Evidence.

¶99 (Colo.) Alleged newly discovered evidence does not warrant granting of new trial unless it appear there was no lack of diligence and such evidence contradicts material evidence of successful party.—*Southwestern Surety Ins. Co. v. Miller*, 164 P. 507.

¶99 (Wash.) Trial court did not abuse discretion in refusing new trial because of so-called newly discovered evidence, nearly all of which was purely cumulative and rest of which related to matters of common knowledge at trial.—*Skarlatos v. Brice*, 164 P. 939.

¶102(2) (Cal.App.) New trial will not be granted for newly discovered evidence which was almost wholly cumulative, particularly where the unsuccessful party by reasonable diligence could have procured such evidence at trial.—*Chambers v. Belmore Land & Water Co.*, 164 P. 404.

¶103 (Mont.) The discovery of a compromise offer, which would be inadmissible in evidence under direct provisions of Rev. Codes, § 8040, cannot be the basis for granting a new trial under section 6794, authorizing new trials for newly discovered material evidence, etc.—*Huffine v. Lincoln*, 164 P. 888.

¶104(1) (Cal.App.) Whether new trial should be granted or refused on ground of newly discovered evidence which is cumulative, is peculiarly within province of trial court.—*Fiori v. Agnew*, 164 P. 899.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

¶128(5) (Cal.App.) Under Code Civ. Proc. §§ 657, 659, defendants' motion for new trial on

ground of insufficiency of evidence to justify verdict, pursuant to notice of intention to move on such ground *held* sufficient.—*Pacific Gas & Electric Co. v. Rollins*, 164 P. 53.

In an action in eminent domain, where defendants moved for new trial for insufficiency of evidence, and specification of particulars directed attention to particular elements of value on which compensation should be fixed, each element being mentioned, and stated that testimony did not justify jury's conclusion that property was of no greater value than fixed, specification was sufficient.—*Id.*

¶150(4) (Cal.) Affidavits presented with motion for new trial are not entitled to weight, no showing being made that the evidence embodied in them could not with reasonable diligence have been produced at the trial.—*Hefner v. Sealey*, 164 P. 898.

¶163(1) (Wash.) Under Rem. Code 1915, § 399, authorizing new trials where inadequate damages were given under influence of passion or prejudice, a new trial ordered need not recite the apparent presence of passion or prejudice.—*Nelson v. Pacific Coast Casualty Co.*, 164 P. 594.

NON OBSTANTE VEREDICTO.

See Judgment, ¶199.

NONRESIDENCE.

See Limitation of Actions, ¶88; Taxation, ¶867.

NONSUIT.

See Dismissal and Nonsuit.

NONSUPPORT.

See Divorce, ¶131.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, ¶414; Assignments, ¶57; Attorney and Client, ¶180; Bills and Notes, ¶332-341; Cancellation of Instruments, ¶22; Chattel Mortgages, ¶150; Corporations, ¶428, 429; Counties, ¶178; Eminent Domain, ¶181; Evidence, ¶185; Guaranty, ¶7; Highways, ¶30; Insurance, ¶378; Judgment, ¶323; Justices of the Peace, ¶160; Landlord and Tenant, ¶291; *Lis Pendens*; Master and Servant, ¶217; Mortgages, ¶176; Municipal Corporations, ¶294; Principal and Agent, ¶148, 177; Principal and Surety, ¶126; Vendor and Purchaser, ¶227.

¶2 (Okla.) Words "actual notice," as used in Rev. Laws 1910, § 2926, often mean knowledge of facts sufficiently pertinent to enable reasonably prudent persons to ascertain the ultimate facts.—*Thomas v. Huddleston*, 164 P. 106.

¶6 (Okla.) Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led, and, when a person had sufficient information to lead him to a fact, he shall be deemed conversant of it.—*Thomas v. Huddleston*, 164 P. 106.

NOVATION.

¶6 (Cal.App.) Where building contractor gave subcontractor order on owner which latter accepted, there was novation by which liability of both original contractor and owner became fixed.—*Suhr v. Metcalfe*, 164 P. 407.

NUISANCE.

See Jury, ¶14; Navigable Waters, ¶34; Venue, ¶5, 16.

II. PUBLIC NUISANCES.**(A) Nature of Injury, and Liability Therefor.**

¶61 (Okl.) Under Rev. Laws 1910, § 4251, a place where intoxicating liquors are sold in violation of the law, where cigarettes are sold to minors, and where lewd persons congregate to indulge in immorality, *held* a public nuisance.—*Balch v. State*, 164 P. 776.

(B) Rights and Remedies of Private Persons.

¶72 (Cal.) Under Civ. Code, §§ 3480, 3493, and Code Civ. Proc. § 731, private individual, the enjoyment of whose property was injuriously affected, *held* entitled to sue to abate nuisance of maintaining 30,000 hogs, fed by refuse collected from city of Los Angeles, though public was also damaged.—*Johnson v. V. D. Reduction Co.*, 164 P. 1119.

(C) Abatement and Injunction.

¶82 (Okl.) A public nuisance may be abated by a civil action brought by the state on the relation of the county attorney of the county in which such nuisance exists.—*Balch v. State*, 164 P. 776.

OBJECTIONS.

See Appearance, ¶24; Criminal Law, ¶1036-1038; Judges, ¶51; Justices of the Peace, ¶60; Parties, ¶75-83; Pleading, ¶409, 418.

OBSTRUCTING JUSTICE.

¶11 (Okl.Cr.App.) Information in prosecution under Rev. Laws 1910, § 2150, for interfering with officer, *held* not to state an offense where it only charged that accused advised hotel keeper not to permit sheriff to seize liquor therein.—*Hawthorn v. State*, 164 P. 134.

OBSTRUCTIONS.

See Municipal Corporations, ¶691.

OFFER.

See Sales, ¶23.

OFFER OF PROOF.

See Trial, ¶48.

OFFICERS.

See Building and Loan Associations, ¶23; Constitutional Law, ¶58; Corporations, ¶298-429; Counties, ¶49; Detectives; Elections, ¶51; Evidence, ¶44; Judges; Justices of the Peace; Mandamus, ¶73-88; Municipal Corporations, ¶125-191; Obstructing Justice; Prohibition, ¶6; Receivers; Schools and School Districts, ¶53; Sheriffs and Constables; States, ¶46, 48.

I. APPOINTMENT, QUALIFICATION, AND TENURE.**(A) Offices, and Power to Appoint to and Remove from Office.**

¶1 (Or.) A teacher permanently employed under Laws 1913, p. 70, § 4, does not hold an office, since the statute refers to it as an employment, and Const. art. 15, § 2, prohibits the Legislature from creating any office the tenure of which shall be longer than four years.—*Alexander v. School Dist. No. 1 in Multnomah County*, 164 P. 711.

(C) Eligibility and Qualification.

¶19 (Cal.App.) Const. art. 4, § 19, though it employs the words "who shall be elected," does not have a wholly prospective effect as to the time of election of the assemblymen, since the word "shall" neither legally nor grammatically denotes mere futurity, but conveys the idea of obligation.—*Chenoweth v. Chambers*, 164 P. 428.

Const. art. 4, § 19, prohibiting dual incumbency of assemblyman during term for which "he shall have been elected," does not by use of the quoted words limit its provisions to assemblymen elected after enactment of such provision.—*Id.*

¶30 (Cal.App.) Assemblyman elected for term January, 1915, to January, 1917, could not by resigning evade Const. art. 4, § 19, effective December 21, 1916, prohibiting legislators from accepting other office during term for which elected.—*Chenoweth v. Chambers*, 164 P. 428.

OPEN ACCOUNTS.

See Account, Action on.

OPENING.

See Judgment, ¶139-174, 400.

OPINION EVIDENCE.

See Evidence, ¶471-558.

OPTIONS.

See Vendor and Purchaser, ¶18.

ORDERS.

See Motions; New Trial, ¶163.

ORDINANCES.

See Municipal Corporations, ¶111.

OUTSTANDING TITLE.

See Tenancy in Common, ¶19.

PARENT AND CHILD.

See Adoption, ¶7; Bastards; Divorce, ¶307, 308; Guardian and Ward; Habeas Corpus, ¶99, 102; Infants.

PARI MATERIA.

See Statutes, ¶224.

PAROL CONTRACTS.

See Assignments, ¶34.

PAROL EVIDENCE.

See Evidence, ¶384-466.

PAROL TRUSTS.

See Trusts, ¶17, 18.

PARTICULARS, BILL OF.

See Pleading, ¶314, 385.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also the various specific topics.

I. PLAINTIFFS.**(B) Joinder.**

¶18 (Ariz.) Ordinarily, parties interested in the decision of the cause must be before the court as plaintiffs or defendants.—*Howard v. Luke*, 164 P. 439.

II. DEFENDANTS.**(B) Joinder.**

⚡27 (Ariz.) One claiming damages in tort may join in the action all or any number of the tort-feasors as defendants.—Lally v. Cash, 164 P. 443.

⚡29 (Ariz.) Ordinarily, parties interested in the decision of the cause must be before the court as plaintiffs or defendants.—Howard v. Luke, 164 P. 439.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡75(2) (Ariz.) A defect of parties may be waived by proceeding to trial without objection, unless the omitted party is indispensable to a conclusive determination of the controversy.—Howard v. Luke, 164 P. 439.

⚡75(3) (Wyo.) Where objection to defect of parties plaintiff is not made until filing of motion to set aside judgment, the error, if any, is waived.—Garber v. Spray, 164 P. 840.

⚡75(5) (Or.) Where a complaint stated a cause of action for deceit, but did not state that contract was made by or through an agent, or that representations were made to an agent of plaintiff, defense that defendant dealt with another person as principal, and that plaintiff had no capacity to sue as undisclosed principal, was not a plea in abatement.—Crowder v. Yovich, 164 P. 576.

⚡83 (Utah) That in materialman's action to enforce preferential right against contract price other materialmen and laborers were not in court held not objection of which contractor's trustee in bankruptcy could avail himself.—Joseph Nelson Supply Co. v. Leary, 164 P. 1047.

PARTITION.**II. ACTIONS FOR PARTITION.****(A) Right of Action and Defenses.**

⚡17(2) (Wash.) Under Rem. Code 1915, § 844, the court in partition suit not only has power, but is required, to determine title, when put in issue.—Womach v. Sandygren, 164 P. 600.

(B) Proceedings and Relief.

⚡88 (Wash.) One who purchased interest in intestate's estate of one of heirs is in partition properly charged with amount of mortgage which heir, for his own benefit placed on land standing in his name, but on resulting trust in favor of intestate.—Womach v. Sandygren, 164 P. 600.

PARTNERSHIP.

See Judgment, ⚡642.

I. THE RELATION.**(C) Evidence.**

⚡55 (Ariz.) Evidence held wholly insufficient to establish a partnership between defendants.—Rouss v. Racket Store, 164 P. 1182.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(D) Actions by or Against Firms or Partners.**

⚡219(3) (Nev.) Under Rev. Laws, §§ 5239, 5240 (Joint Debtors Acts), in an action against partners, the court did not exceed its jurisdiction by rendering judgment against one of them.—Conway v. District Court of Eighth Judicial Dist. of Nevada in and for Lyon County, 164 P. 1009.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.**(D) Actions for Dissolution and Accounting.**

⚡327(6) (Kan.) In a suit for a partnership accounting, held that there was no variance be-

tween petition and evidence changing the cause of action to one to recover damages for defendant's failure to carry out the terms of a settlement.—Scott v. Shewell, 164 P. 1061.

⚡344 (Okla.) In suit to establish partnership interest, where court found that a plaintiff had a one-half partnership interest, and where partners retained only three-eighths interest, conclusion that plaintiff was estopped to claim more than an undivided one-half of an undivided three-eighths interest was not erroneous.—Rogers v. Ralston, 164 P. 980.

PART PAYMENT.

See Accord and Satisfaction, ⚡11.

PASSENGERS.

See Carriers, ⚡280-333.

PATENTS.

See Mines and Minerals, ⚡43.

PAYMENT.

See Accord and Satisfaction; Bills and Notes, ⚡538; Compromise and Settlement; Judgment, ⚡878; Municipal Corporations, ⚡925; Sales, ⚡202; Subrogation; Vendor and Purchaser, ⚡187.

I. REQUISITES AND SUFFICIENCY.

⚡16(1) (Cal.App.) The taking of a promissory note from a debtor or third party will not extinguish the debt and create a new obligation, unless received under an express agreement to that effect.—Clark v. Berlin Realty Co., 164 P. 333.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡74(3) (Cal.App.) That a corporate creditor received a note of the corporation and marked other notes "paid" does not conclusively establish a payment, so as to free from liability a stockholder who disposed of its stock before the last note was taken.—Clark v. Berlin Realty Co., 164 P. 333.

PEDIGREE.

See Animals, ⚡20½; Fraud, ⚡27, 65.

PENALTIES.

See Limitation of Actions, ⚡35; Usury, ⚡138, 142; Woods and Forests, ⚡11.

PENDENCY OF ACTION.

See Lis Pendens.

PERJURY.

See Judgment, ⚡444.

PERSONAL INJURIES.

See Carriers, ⚡280-333; Damages, ⚡131, 132, 172, 185, 216; Death, ⚡31; Electricity, ⚡19; Highways, ⚡175-184; Master and Servant, ⚡86-417; Negligence; Railroads, ⚡276-337; Street Railroads, ⚡81-118; Trial, ⚡194, 260.

PETITION.

See Appeal and Error, ⚡362; Pleading, ⚡54.

PHYSICAL EXAMINATION.

See Damages, ⚡206.

PHYSICIANS AND SURGEONS.

See Intoxicating Liquors, ¶15, 233; Witnesses, ¶209.

¶14(2) (Wash.) Each school of medicine is entitled to practice in its own way, and because one does not use the other's methods will not constitute malpractice.—*Ennis v. Banks*, 164 P. 58.

¶18(8) (Wash.) In malpractice suit for alleged negligence in treating injury to plaintiff's wrist, where doctors of equal skill, being in no way discredited, disagreed as to advisability of operation not performed by defendant, *held*, that plaintiff cannot recover.—*Dishman v. Northern Pac. Beneficial Ass'n*, 164 P. 943.

¶18(9) (Wash.) In action for malpractice, where death might have resulted either from the malpractice alleged or from the disease itself, or from removing the patient, the question of cause of death was for the jury.—*Ennis v. Banks*, 164 P. 58.

The question of whether a physician was guilty of malpractice in changing diet of a typhoid patient from beef broth to soft toast and poached egg was for the jury.—*Id.*

¶18(10) (Wash.) In an action against a physician for malpractice in changing diet of a typhoid patient, substance of proper instruction covering the issues given.—*Ennis v. Banks*, 164 P. 58.

PLATS.

See Costs, ¶178; Dedication, ¶19; Deeds, ¶40.

PLEA.

See Criminal Law, ¶293, 294.

PLEADING.

See Evidence, ¶208.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

¶36(3) (Colo.) Though there was no finding of release by defendant of plaintiff on notes, defendant cannot question such fact, having admitted it by answer.—*Benford v. Yockey*, 164 P. 725.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶54 (Cal.App.) In an action by creditor against a corporate stockholder to hold it liable for corporate debts, where there were several counts, essential allegations showing the stockholder's liability contained in one count may by reference be incorporated in another.—*Clark v. Berlin Realty Co.*, 164 P. 333.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) *Traverses or Denials and Admissions.*

¶126 (Cal.App.) That the employers furnished the rope by which the employé was injured is admitted by their answer, denying only that they negligently furnished it.—*Gideon v. Howard*, 164 P. 11.

(E) *Set-Off, Counterclaim, and Cross-Complaint.*

¶142 (Cal.) An averment in counterclaim that milk was furnished within two years last past *held* sufficient to support findings and judgment, against objection that counterclaim was not existing at commencement of action, as required by Code Civ. Proc. § 438, subd. 2, in absence

of demurrer to counterclaim or objection to evidence.—*Del Monte Ranch Dairy v. Bernardo*, 164 P. 628.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

¶177 (Or.) Plaintiff's reply to defendant's allegation of foreign incorporation in action for employé's injury *held* not to admit its nonresidence.—*Hamilton v. North Pac. S. S. Co.*, 164 P. 579.

¶180(2) (Or.) A plaintiff cannot allege that he has fully complied with a contract and later shift his ground by replying that omissions charged in defendant's answer were waived.—*Waller v. City of New York Ins. Co.*, 164 P. 959.

¶180(2) (Wash.) Where the complaint was based on breach of alleged written contract of lease, a reply, stating that the written contract had been abrogated and an oral one entered into, was a departure.—*Perlus v. Market Inv. Co.*, 164 P. 65.

Where the complaint set up breach of alleged written lease and payment of money under the lease, seeking return of such money paid, a reply, showing abrogation of the lease and settlement of the claims of the parties, was a departure.—*Id.*

¶182 (Idaho) Under Rev. Codes, § 4201, failure to deny written instrument contained in answer admits its genuineness and due execution, but plaintiff is not thereby precluded from taking any position in avoidance of the contract not inconsistent with such admission.—*Austin v. Brown Bros. Co.*, 164 P. 95.

V. DEMURRER OR EXCEPTION.

¶195 (Kan.) In action on note, answer of defendant indorsers *held*, as against a demurrer, to sufficiently plead a set-off based upon alleged fraud practiced upon them by plaintiff holder and defendant maker of the note.—*Blair v. McQuary*, 164 P. 262.

¶214(1) (Colo.) Demurrer to a bill admits its allegations.—*Mihooover v. Walker*, 164 P. 504.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

¶236(1) (Wash.) Where the plaintiff sought to amend his reply, after his third amended complaint, and after having set up in his reply inconsistent causes of action, it was not an abuse of discretion to refuse the amendment.—*Perlus v. Market Inv. Co.*, 164 P. 65.

¶236(3) (Kan.) After a case has been called for trial, it is within trial court's discretion to refuse permission to amend pleadings so as to present new issues.—*Long v. Kansas City, M. & O. R. Co.*, 164 P. 175.

¶236(4) (Idaho) An application to amend a complaint while a motion for nonsuit is pending is addressed to the discretion of the trial court.—*The Mode v. Myers*, 164 P. 91.

¶245(3) (Kan.) Under Civ. Code, § 140 (Gen. St. 1915, § 7032), granting permission to amend petition during trial by interlineation increasing sum sued for where defendant objected, but requested no delay, and proceeded with trial, there was no error.—*Ring v. Phoenix Assur. Co., Limited, of London*, 164 P. 303.

¶246(1) (Wash.) Allowing amendment of complaint is not error, although there are statements in amended complaint inconsistent with statements in original, where the object sought is the same.—*Bradbury v. Nethercutt*, 164 P. 194.

¶261 (Or.) Where original answer set up defense of violation of Bulk Sales Law, the court had no power under L. O. L. § 102, to allow defendant to file an amended answer after trial alleging actual fraud in the transfer; that being a material alteration.—*Golden Rod Milling Co. v. Connell*, 164 P. 588.

⚡264 (Cal.) That defendant's original answer admitted making certain representations regarding goods sold is immaterial where the amended answer asserted its purpose of standing upon a subsequent written contract.—*Rensberg v. Hackney Mfg. Co.*, 164 P. 792.

VII. SIGNATURE AND VERIFICATION.

⚡291(2) (Idaho) Where plaintiff waives right to attack genuineness of written instrument pleaded in answer by failing to file affidavit, as required by Rev. Codes, § 4201, his waiver does not amount to admitting its validity, and he might show that instrument, irrespective of due execution and genuineness, is void.—*Pettengill v. Blackman*, 164 P. 358.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

⚡314 (Or.) Under Oregon law, a bill of particulars is demandable only under provisions of L. O. L. § 84, and, unless complaint alleges account, a bill of particulars is not demandable under the section.—*Hayden v. City of Astoria*, 164 P. 729.

⚡330 (Wash.) Under Rem. Code 1915, § 284, where account furnished by defendant was not as particular as demanded by counsel for plaintiffs, but was account which, in connection with pleadings, fully informed plaintiff of every fact demanded to be furnished, trial court properly overruled objections to defendant's evidence that account was defective.—*Carstens v. Nut House*, 164 P. 770.

XI. MOTIONS.

⚡367(2) (Kan.) Where the only purpose of a motion to make the petition more definite and certain is to require plaintiff to plead his evidence, it should be overruled.—*Scott v. Shewell*, 164 P. 1061.

⚡367(2) (Okla.) Rev. Laws 1910, § 4770, authorizing the court to require a petition so indefinite that the precise nature of the charge is not apparent to be amended, applies only to petitions stating a good cause of action and to defects on its face, and not to omitted matters which would give opposite party an opportunity to demur.—*Liston v. Nail*, 164 P. 467.

⚡367(6) (Okla.) Failure to act upon a motion to make the petition more definite and certain would itself have constituted an abandonment and waiver thereof.—*Arnold v. Burks*, 164 P. 970.

XII. ISSUES, PROOF, AND VARIANCE.

⚡376 (Utah) Evidence that stock sold was not treasury stock nor nonassessable as represented, was properly excluded, where admitted by pleadings.—*Smith v. Gilbert*, 164 P. 1026.

⚡385 (Or.) When bill of particulars is furnished as required by statute or by order of court of competent jurisdiction, party furnishing it is confined in proof to items alleged therein, though he may offer proof of value of items along other lines.—*Hayden v. City of Astoria*, 164 P. 729.

In action against city by contractors to erect dam to recover cost of extra work, where contractors furnished account on demand of city, action not being on account, so that bill of particulars was not demandable under L. O. L. § 84, account furnished could not be used to shut out testimony otherwise competent in absence of showing city had been misled.—*Id.*

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡403(1) (Or.) Answer in action for servant's injury held to sufficiently allege nonresidence of defendant corporation at time cause of action arose when aided by allegations of complaint.—*Hamilton v. North Pac. S. S. Co.*, 164 P. 679.

⚡409(4) (Colo.) A matter not put in issue by pleadings held not treated at trial as in issue, where the only evidence bearing thereon was evidently offered on another question.—*National Surety Co. v. Queen City Land & Mortgage Co.*, 164 P. 722.

⚡418(1) (Okla.) Where pleader takes leave to plead over, error in order sustaining the demurrer is waived, but where pleader is allowed to withdraw amendment and to stand upon pleading to which demurrer has been sustained and to appeal, he does not waive error therein.—*Winters v. Oklahoma Portland Cement Co.*, 164 P. 965.

⚡432 (Idaho) A defective allegation of a good cause of action, in the absence of a demurrer, is cured by a verdict and judgment.—*The Mode v. Myers*, 164 P. 91.

PLEDGES.

See Corporations, ⚡123.

POLICY.

See Insurance.

POLITICAL RIGHTS.

See Elections.

POSSESSION.

See Adverse Possession; Forcible Entry and Detainer, ⚡9; Landlord and Tenant, ⚡291; Larceny, ⚡64, 77; Vendor and Purchaser, ⚡299.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRECEDENTS.

See Courts, ⚡91, 97.

PREFERENCES.

See Bankruptcy, ⚡188-215; Corporations, ⚡544, 545.

PRELIMINARY EVIDENCE.

See Evidence, ⚡182, 185.

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See Adverse Possession; Limitation of Actions.

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See Executors and Administrators, ⚡225.

PRESUMPTIONS.

See Appeal and Error, ⚡907-934; Criminal Law, ⚡1144, 1163; Death, ⚡2; Evidence, ⚡53-76.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Insurance, ⚡73-112, 378; Mechanics' Liens, ⚡72.

I. THE RELATION.

(A) Creation and Existence.

⚡23(1) (Wash.) In action by dealers in peanuts against company dealing in peanuts, on assigned claim for price of nuts sold, wherein defendant company claimed commissions due it in excess of amount it owed, evidence held sufficient to support conclusion that defendant company was at all times acting for plaintiffs' predecessor in selling peanuts.—*Carstens v. Nut House*, 164 P. 770.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

☞81(1) (Wash.) Company which sold peanuts through another company acting as broker, and assignees of selling company against broker company's claim for commissions could not avail themselves of fact that broker company made sales in its own name.—*Carstens v. Nut House*, 164 P. 770.

☞81(2) (Wash.) In action for price of peanuts by assignees of company against another company which sought to offset commissions for effecting sales for first company, where evidence warranted conclusion that first company failed to consummate sales made for it for reasons apart from want of financial ability of purchasers, defendant company was not called upon to prove financial responsibility of purchasers.—*Carstens v. Nut House*, 164 P. 770.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

☞103(7) (Cal.App.) In absence of authority, express or implied, an agent cannot transfer his principal's property, and such authority will not be presumed.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

☞119(1) (Utah) In order that one may recover a deposit in a bank made by the agent of the owner, on the ground that it was to be held pending a settlement of unlitigated claims, he must prove that the agent had authority to make the deposit for that purpose.—*McGuire v. State Bank of Tremonton*, 164 P. 494.

☞121 (Cal.App.) In action for purchase price of goods sold to one person who assumed to act for others, it was proper to exclude testimony of such person as to the extent of his authority for others.—*Colquhoun v. Fursman*, 164 P. 10.

(B) Undisclosed Agency.

☞143(3) (Or.) The rule that an undisclosed principal may sue upon a contract made by his agent does not apply to a case where an alleged agent made affidavit that he was owner of personal property exchanged for real estate, and gave a note in his own name, and in every way acted as principal in transaction.—*Crowder v. Yovovich*, 164 P. 576.

☞143(3) (Wash.) A warranty on which sale is made to one in fact acting as agent inures to the benefit of the undisclosed principal.—*Pacific Power & Light Co. v. White*, 164 P. 602.

(C) Unauthorized and Wrongful Acts.

☞148(4) (Cal.App.) Where a party freely contracts with an agent knowing limit of his authority, he cannot thereafter assert that he was misled into believing the agent had greater authority.—*Tockstein v. Pacific Kissel Kar Branch*, 164 P. 906.

(D) Ratification.

☞163(3) (Kan.) If defendant railroad's superintendent had no authority to bind it by contract that employé should receive half wages during disability from service accidents, his statements, made long afterward, would not amount to a ratification.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

☞170(2) (Cal.App.) Unauthorized acceptance by agent for owner of order drawn by principal contractor in favor of subcontractor was ratified where owner was advised of agent's action and accepted it thinking it all right.—*Suhr v. Metcalfe*, 164 P. 407.

(E) Notice to Agent.

☞177(1) (Cal.App.) Any presumption that agent will communicate knowledge to his prin-

cipal is disputable.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

(F) Actions.

☞189(4) (Kan.) The usual form of averment that the contract sued on was made by "defendant's duly authorized agent," or words of like import, is sufficient to sustain evidence of any appropriate manner of authorization short of estoppel.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

☞194(2) (Kan.) In action by railroad employé on a contract for half wages during disability, evidence held to justify instruction as to when act is within apparent scope of agent's authority.—*McAdow v. Kansas City Western Ry. Co.*, 164 P. 177.

PRINCIPAL AND SURETY.

See Bail; Guaranty; Municipal Corporations, ☞374; Sheriffs and Constables, ☞157.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

☞39 (Wash.) That a surety company executing bond to purchaser of uncompleted building for its completion was uninformed that consideration was to be partly in other property did not release it from liability, where company retained no interest in price.—*Osborne v. Chicago Bonding & Surety Co.*, 164 P. 742.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

☞66(1) (Wash.) Where surety bond covered operation of automobile within limits of city, surety was not liable for accident occurring upon county highway not within corporate limits of such city.—*Bogdan v. Pappas*, 164 P. 208.

III. DISCHARGE OF SURETY.

☞104(4) (Wash.) Plaintiff, who deposited bonds as security for the note of another and took back as indemnity a note of the pledgee, is not subject to the doctrine of secured or protected sureties, where the note was absolutely worthless.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

☞109 (Wash.) Where a bondholder pledged bonds as security for a note of another person, he was a surety, and, when the pledgee consented to accept in lieu of the note certain bonds constituting a change in the primary contract, the surety was released.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

Where plaintiff deposited stock to secure another's note, and the pledgee thereafter surrendered the note and accepted bonds issued under a composition agreement, plaintiff held not entitled to defend its refusal to return the stock on the ground that the composition agreement was void.—*Id.*

☞125 (Okl.) General liability of surety is not conditioned on the diligence by the holder of the obligation to collect of the principal, and the negligence of the holder is no defense to the surety.—*Union Mut. Ins. Co. v. Page*, 164 P. 116.

☞126(3) (Okl.) Term "require," as used in Rev. Laws 1910, § 1058, permitting surety to require creditor to proceed against principal, means to demand; to insist upon; to claim as by right. So that surety's request or suggestion is insufficient.—*Union Mut. Ins. Co. v. Page*, 164 P. 116.

Failure of payee of note to sue principal upon surety's oral request to creditor's attorney, etc., without any showing that attorney was authorized by creditor to take legal proceedings, or that request was communicated to creditor,

would not release surety, though principal, then solvent, afterwards became insolvent.—Id.

⚡128(1) (Wash.) Mere silence of surety, when informed of a modification of the contract, does not imply assent, and to bind him to the new undertaking it is not sufficient that he passively acquiesces; he must actively consent.—Thompson v. Metropolitan Bldg. Co., 164 P. 222.

PRIORITIES.

See Chattel Mortgages, ⚡136-150; Mortgages, ⚡151-186; Waters and Water Courses, ⚡140.

PRIVILEGED COMMUNICATIONS.

See Witnesses, ⚡209-219.

PROBATE.

See Wills, ⚡211-400.

PROCEEDING QUASI IN REM.

See Corporations, ⚡691.

PROCESS.

See Appearance, ⚡24; Corporations, ⚡668; Infants, ⚡89; Judgment, ⚡17; Justices of the Peace, ⚡82.

PROFITS.

See Damages, ⚡37.

PROHIBITION.

See Intoxicating Liquors.

I. NATURE AND GROUNDS.

⚡3(1) (Mont.) Writ of prohibition arrests proceedings of a judicial character only when a plain, speedy, and adequate remedy does not exist.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546.

Where a third party claiming attached property sold before judgment had an action in claim and delivery in conversion or by intervention in original action, prohibition will not lie.—Id.

⚡3(3) (Wash.) Where trial court has jurisdiction in unlawful detainer, the Supreme Court will not issue a writ to prohibit entry of judgment; there being a complete remedy by appeal.—State v. Superior Court for Spokane County, 164 P. 63.

⚡4 (Mont.) The writ of prohibition is an extraordinary judicial writ issued only in the sound legal discretion of the court.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546.

⚡5(2) (Mont.) That court ordered sale of attached stock of liquors before judgment as provided by Rev. Codes, § 6671, held no abuse of discretion warranting issuance of writ of prohibition.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546.

⚡6(1) (Mont.) Writ of prohibition arresting proceedings of a judicial character only will not lie as against a sheriff's acts.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546.

⚡13 (Cal.App.) Where court's act, performance of which is sought to be restrained by writ of prohibition has been done, though court acted in excess of its jurisdiction, alternative writ will not be made peremptory.—Kaye v. Superior Court of Kern County, 164 P. 912.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡27 (Mont.) The applicant for a writ of prohibition assumes the burden of showing that the lower court is acting without jurisdiction and that no adequate remedy at law exists.—State

v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546.

⚡31 (Cal.App.) Where record on petition for writ of prohibition presents moot question, proceeding will be dismissed without prejudice to petitioners' right to apply for such other and further writ as they may deem advisable.—Kaye v. Superior Court of Kern County, 164 P. 912.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance, ⚡550-559.

PROPERTY.

See Fixtures.

PROSTITUTION.

See Lewdness.

PROVISIONAL REMEDIES.

See Appeal and Error, ⚡954.

PROVISOS.

See Indictment and Information, ⚡111.

PROXIMATE CAUSE.

See Negligence, ⚡56, 59.

PUBLIC DEBT.

See Counties, ⚡178; Municipal Corporations, ⚡873-925; Schools and School Districts, ⚡90, 97; States, ⚡119.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ⚡279-579.

PUBLIC LANDS.

See Mines and Minerals, ⚡43; Taxation, ⚡177.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(E) School and University Lands.

⚡54(2) (Kan.) In controversy relating to proprietorship of island school land, and of alleged accretions to the island, where court defined "island" according to Laws 1913, c. 295, § 9, exclusive of its invalid part as to accretions, held, that there was no misconception of law on part of court in stating findings.—Corbett v. Cohen, 164 P. 264.

⚡54(5) (Kan.) In settler's proceeding under Laws 1913, c. 295, to acquire title to island land as school land, where his survey and affidavit of settlement and clerk's notice of proceeding described land other than that settled upon, which was no part of an island, it justified a dismissal.—Jensen v. Finnup, 164 P. 1071.

(G) Grants to States for Internal Improvements.

⚡64 (Idaho) For county commissioners to accept on state's behalf grant of right of way over public domain expressed in Rev. St. U. S. § 2477 (Comp. St. 1913, § 4919), it must conform to Rev. Codes, § 910 et seq., and its order of record declaring certain section lines to be public highways, is not substantial compliance with law.—Gooding Highway Dist. of Gooding County v. Idaho Irr. Co., 164 P. 99.

(M) Conveyances, Contracts, and Exemptions.

⚡136 (Wash.) Where entrymen on desert land installed an irrigation pipe line and gave a chattel mortgage thereon, mortgage being duly

filed, mortgagee could foreclose against defendant who obtained land in contest of entry.—Boeringa v. Perry, 164 P. 773.

III. DISPOSAL OF LANDS OF THE STATES.

⌚165½ [New vol. 25 Key-No. Series] (Okl.) Under Rev. Laws 1910, § 7187, relating to appeals from a decision of commissioners of the land office to district court, the written notice upon commissioners' secretary may be sent by telegram, where actually received within time fixed.—Little v. Hallock, 164 P. 963.

Where lessee of school lands indorses his acceptance of an appraisal of his improvements, and after sale the value thereof is deposited with commissioners, and the lessee surrenders possession, he is entitled under Rev. Laws 1910, § 7153, to appraised value, and commissioners cannot order it returned to purchaser.—Id.

PUBLIC NUISANCE.

See Nuisance, ⌚61-82.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication.

PUNISHMENT.

See Contempt, ⌚81.

PUNITIVE DAMAGES.

See Damages, ⌚89, 91.

QUALIFICATIONS.

See Judges, ⌚51; Officers, ⌚19, 30; States, ⌚48.

QUASHING.

See Attachment, ⌚230-250.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

⌚7(2) (Cal.App.) Since plaintiff could show, in foreclosure action, failure of consideration for which a mortgage was given, he may maintain an action to remove from his premises the cloud of such mortgage.—Shull v. Crawford, 164 P. 330.

⌚10(2) (Idaho) Where judgment debtor causes realty to be conveyed by his vendor directly to third person, in fraud of creditors, and judgment creditor sells it as property of judgment debtor, holder of sheriff's deed may, under Rev. Codes, § 4538, maintain action as owner to quiet title.—The Mode v. Myers, 164 P. 91.

⌚21 (Idaho) An action to quiet title is a proper form of action by the receiver of an insolvent bank to determine defendants' claims to an adverse interest in realty formerly owned by bank and mortgaged by it to secure holder of a certificate of deposit.—Pettengill v. Blackman, 164 P. 358.

Plaintiff, in suit to quiet title, has the right to have every adverse interest determined, and may require any one claiming an adverse interest to come in and set up nature of his interest; and interest of mortgagee is interest adverse to holder of legal title.—Id.

II. PROCEEDINGS AND RELIEF.

⌚39 (N.M.) In a suit to quiet title under Code 1915, §§ 4387, 4388, neither a judgment creditor nor his assignee can maintain an answer or counterclaim.—Security Investment & Development Co. v. Capital City Bank, 164 P. 829.

⌚44(3) (Cal.App.) In an action to quiet title, evidence held sufficient as a prima facie showing to establish plaintiff's right as against defendant to a decree quieting his title to the lot described.—Redmond v. McLean, 164 P. 15.

⌚44(5) (Cal.App.) Evidence held to justify a finding that plaintiff was at commencement of trial in possession of lot described in complaint, and was owner thereof and entitled to a decree quieting his title thereto.—Redmond v. McLean, 164 P. 15.

⌚47(2) (Cal.App.) In an action to quiet title, held, that a finding of trial court purporting to locate lot upon ground and fix its dimensions should be disregarded where boundary and dimensions were not in issue, and the part of decree based thereon should be stricken.—Redmond v. McLean, 164 P. 15.

QUI FACIT PER ALIUM.

See Negligence, ⌚90.

RAILROADS.

See Carriers, ⌚318; Eminent Domain; Master and Servant; Street Railroads.

X. OPERATION.

(D) Injuries to Licensees or Trespassers in General.

⌚276(1) (Kan.) A railroad's duty to a trespasser is merely to refrain from willfully injuring him.—Garcia v. Atchison, T. & S. F. Ry. Co., 164 P. 272.

⌚280 (Kan.) Where boy climbed on a switch engine and his presence was not known to engineer and engine was struck by freight train and boy was killed, that fireman without authority permitted him to remain on engine did not show railroad's wanton or willful negligence, rendering it liable for damages in action by his parents.—Garcia v. Atchison, T. & S. F. Ry. Co., 164 P. 272.

(F) Accidents at Crossings.

⌚337(5) (Kan.) In action for death of one killed based on failure to sound whistle 80 rods from the crossing, where it appeared that deceased knew that train was approaching, failure to sound the whistle would not create a liability when not the proximate cause of death.—Williams v. Atchison, T. & S. F. Ry. Co., 164 P. 260.

(I) Fires.

⌚453 (Wash.) Relative to liability for setting fires, railroad is required to exercise, not highest, but only reasonable and ordinary, care in operating locomotive.—Firemen's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co., 164 P. 765.

⌚478(1) (Utah) Complaint, in action against railroad company for firing plaintiff's property, held sufficient to state cause of action.—Gleason v. San Pedro, L. A. & S. L. R. Co., 164 P. 484.

⌚481(1) (Utah) In action against railroad company for firing premises, evidence that sparks and cinders were found as far distant from the right of way as the property fired is inadmissible, where such sparks were found some time after the occurrence.—Gleason v. San Pedro, L. A. & S. L. R. Co., 164 P. 484.

⌚484(1) (Utah) In action against railroad company for negligently firing plaintiff's property, evidence held sufficient to carry case to jury.—Gleason v. San Pedro, L. A. & S. L. R. Co., 164 P. 484.

⚡484(1) (Wash.) Evidence as to a fire starting 140 feet from a railroad being negligently set from a locomotive held sufficient to go to the jury.—Firemen's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co., 164 P. 765.

⚡484(3) (Utah) In view of conflicting evidence as to whether fire injuring plaintiff's premises was caused by a railway train, no witness having seen the first start, the question was for the jury.—P. A. Sorensen Co. v. Denver & R. G. R. Co., 164 P. 1020.

⚡484(4) (Wash.) Question of locomotive, claimed to have set fire, being equipped with spark arrester, should not be submitted to jury; all evidence agreeing it had best-known appliance on market.—Firemen's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co., 164 P. 765.

RAPE.

See Criminal Law, ⚡369, 1168, 1170½; Indictment and Information, ⚡111; Witnesses, ⚡372.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

⚡48(1) (Cal.App.) Permitting prosecuting witness in a prosecution for rape to testify to statements made by her to a third party as to treatment she had suffered was reversible error, where her story was close to the border line of incredibility.—People v. Prietz, 164 P. 13.

⚡51(1) (Kan.) Evidence held sufficient to show that rape was committed.—State v. McLeMore, 164 P. 161.

(C) Trial and Review.

⚡59(20, 21) (Kan.) Where evidence to prove offense shows completed offense at certain time and place, and evidence and statements of counsel are all directed to that time and place, although there is incidental evidence that accused attempted an assault at another time and place, it was not error to fail to instruct as to assault with intent to commit rape.—State v. McLeMore, 164 P. 161.

RATIFICATION.

See Brokers, ⚡41; Corporations, ⚡426; Insurance, ⚡94-142; Principal and Agent, ⚡163, 170; Reformation of Instruments, ⚡22.

REAL ACTIONS.

See Forcible Entry and Detainer, ⚡9; Partition.

REAL ESTATE.

See Venue, ⚡5.

REASONABLE DOUBT.

See Criminal Law, ⚡561.

REBUTTAL.

See Witnesses, ⚡360.

RECEIPTS.

See Payment, ⚡74.

RECEIVERS.

See Mortgages, ⚡468, 473.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

⚡1 (Mont.) Under Rev. Codes, § 6698, as to appointment of receiver, the power is to be exercised sparingly and with unusual caution, and only to prevent manifest wrong imminent-

ly impending, or where there is no other plain, speedy, or adequate remedy.—Montana Ranches Co. v. Dolan, 164 P. 306.

⚡6 (Mont.) The appointment of a receiver will be denied when the applicant has any other adequate remedy.—Montana Ranches Co. v. Dolan, 164 P. 306.

Where receiver was asked for farm property and crops, if the property was not disposed of before the crops were severed from the soil and became personal property, claim and delivery would be a plain, speedy, and adequate remedy, and the receiver could not be appointed.—Id.

⚡8 (Mont.) An application for appointment of a receiver is addressed to the sound legal discretion of the trial court.—Montana Ranches Co. v. Dolan, 164 P. 306.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡32 (Mont.) Since the remedy, by receivership is an extraordinary one, the applicant has the burden of presenting facts sufficient to disclose to the court a necessity for the remedy.—Montana Ranches Co. v. Dolan, 164 P. 306.

Appointment of receiver will not be made where the only necessity shown was that there was danger that the crops would be removed and sold to innocent purchasers and the proceeds converted; there being no allegations that defendant threatened or intended so to act.—Id.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(D) Sale and Conveyance or Redelivery of Property.

⚡130 (Okla.) In view of Rev. Laws 1910, § 4982, court of equity in foreclosure has jurisdiction to order its receiver to sell property before a decree determining rights of parties, when a sale will benefit all parties whose rights are involved.—Lawton Mill & Elevator Co. v. Farmers' & Merchants' Bank of Cincinnati, Iowa, 164 P. 670.

In foreclosure, where cause was at issue and a foreclosure might be obtained, if justified, an application for a receiver's sale because of deterioration of machinery and partial cancellation of insurance was insufficient to justify an order therefor.—Id.

RECEPTION OF EVIDENCE.

See Criminal Law, ⚡673; Trial, ⚡48.

RECOGNIZANCES.

See Bail.

RECORDS.

See Appeal and Error, ⚡501-708; Chattel Mortgages, ⚡150; Criminal Law, ⚡1086-1120; Evidence, ⚡43; Judgment, ⚡768; Mortgages, ⚡176.

⚡9(1) (Wash.) Effect of the Torrens Act is to require all liens affecting real estate registered under act, to be recorded with registrar of titles, within time required under existing laws.—McMullen & Co. v. Croft, 164 P. 980.

RECRIMINATION.

See Divorce, ⚡54.

REDEMPTION.

See Mortgages, ⚡594-624.

REDIRECT EXAMINATION.

See Witnesses, ⚡287.

REFORMATION OF INSTRUMENTS.

See Alteration of Instruments; Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§3 (Or.) In suit to reform an insurance policy, waiver of the conditions of the policy as to change of ownership by failure of the company to inquire about the ownership was not available; such ground of recovery being available only in an action at law on the policy.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

§19(1) (Ariz.) A deed containing a plain description of a certain 40 acres would not be reformed, where no mistake was made by the scrivener, and the land was that which the purchaser intended to buy, and the mistake was solely that of the vendor.—McMillon v. Town of Flagstaff, 164 P. 318.

§19(1) (Or.) That an instrument does not express the intent of one of the parties, but does conform to that of the other, does not warrant its reformation.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

§19(2) (Mont.) Mistake of scrivener whereby writing does not correctly express terms agreed on by parties, while not technical mutual mistake, is one for which equity will grant correction.—Parchen v. Chessman, 164 P. 531.

§22 (Ariz.) Where at the time of contract and partial cash payment deed of the property was placed in escrow, the later acceptance by vendor of the agreed purchase price and her permitting the escrow keeper to deliver the deed to the purchaser after she discovered misdescription of the land in contract and deed, was a ratification of the deed.—McMillon v. Town of Flagstaff, 164 P. 318.

§24 (Idaho) Where the suit to reform the contract is incidental to another action, no prior demand for reformation need be made, and this is especially true where it clearly appears that such a demand would be refused.—Bowers v. Bennett, 164 P. 93.

In action for breach of an escrow agreement for the sale of land, wherein defendant by cross-petition sought the reformation of the contract, it was not necessary for defendant to return initial payment on price or interest on deferred payments as a condition precedent to such relief.—Id.

II. PROCEEDINGS AND RELIEF.

§36(2) (Or.) The complaint must distinctly allege what the original agreement of the parties was, and clearly and precisely point out wherein there was a misunderstanding.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

§36(3) (Or.) The complaint must allege that the mistake was mutual and did not arise from the gross negligence, or that his misconception originated in the fraud of the defendant.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

§44 (Idaho) Parol evidence is admissible to correct a mistake of the scrivener whereby he fails to express the agreement of the parties to a written instrument.—Bowers v. Bennett, 164 P. 93.

§45(1) (Idaho) The law requiring a party to establish his case "beyond a reasonable doubt" applies only in criminal cases, and not in a suit for the reformation of a contract.—Bowers v. Bennett, 164 P. 93.

§45(1) (Mont.) The rule requiring clear, convincing, and satisfactory evidence to warrant reformation for mistake refers to quality, rather than quantity, and under Rev. Codes, §§ 7861, 8028, testimony of a single witness, though op-

posed to that of more, is sufficient.—Parchen v. Chessman, 164 P. 531.

Relative to mutual mistake for reformation, there is presented merely a case of credibility and weight, where one party testifies to and the other against mistake.—Id.

§45(1) (Or.) The testimony as to the real contract intended between parties must be clear and convincing, and, if it is at an equal balance either as to what the agreement was or as to the mutuality of the mistake, reformation will not be allowed.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

§45(8) (Mont.) Relative to reformation of a renewal note, by elimination of the clause waiving the defense of limitations, evidence held sufficient to warrant the finding of mistake having been made in drafting the note.—Parchen v. Chessman, 164 P. 531.

§45(14) (Or.) In suit to reform and recover upon an insurance policy, evidence held not sufficient to show mistake by the insurance company in writing the policy.—Boardman v. Insurance Co. of State of Pennsylvania, 164 P. 558.

REGISTRATION.

See Animals, §20½; Fraud, §27, 65; Records.

REHEARING.

See Appeal and Error, §632; New Trial.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Evidence, §406; Judgment, §891; Mechanics' Liens, §236; Mortgages, §181; Payment.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§58(6) (Kan.) In action for personal injury while traveling by freight train on shipper's pass, wherein plaintiff claimed that the pleaded settlement was based on fraudulent representations, evidence held to make that a question for the jury.—Griffith v. Atchison, T. & S. F. Ry. Co., 164 P. 1094.

RELEVANCY.

See Criminal Law, §369-371; Evidence, §108, 135.

REMAINDERS.

See Deeds, §133; Wills, §634.

REMAND.

See Appeal and Error, §1106.

REMOVAL.

See Guardian and Ward, §25; Schools and School Districts, §53, 141.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

See Bills and Notes, §138.

RENT.

See Landlord and Tenant, §184-208.

REPAIRS.

See Landlord and Tenant, §152.

REPEAL.

See Criminal Law, §15; Statutes, §159; Taxation, §862.

REPLEVIN.**I. RIGHT OF ACTION AND DEFENSES.**

⌚4 (Cal.App.) Money is not subject of an action of claim and delivery unless it is marked or designed so as to make it specific as regards identification.—Hillyer v. Eggers, 164 P. 27.

⌚5 (Ok.) One claiming to be the owner of property held by an individual under a bond given in judicial proceedings for redelivery of it, other than the person against whom the writ runs, may assert his rights in it by replevin.—Alexander v. Alexander, 164 P. 114.

Where the property of one is seized under a writ running against another, and a third party executes a redelivery bond and obtains possession, it is no defense to replevin by the owner against the person in possession that he is holding under such bond.—Id.

⌚8(5) (Kan.) Plaintiff bank, which acquired title to wheat by paying draft attached to bill of lading, and which, after purchaser refused to pay, took reassignment from its transferee, after wheat had been attached by third party, and thereafter sold it, held not entitled to recover possession in replevin against attaching officer.—Oklahoma State Bank v. Hicklin, 164 P. 257.

IV. PLEADING AND EVIDENCE.

⌚59 (Cal.App.) In claim and delivery, specific personal property claimed should be described with reasonable degree of certainty.—Hillyer v. Eggers, 164 P. 27.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⌚103(4) (Kan.) Where plaintiff, obtaining possession of property replevied, failed to show right to its possession, defendant was entitled to judgment in the alternative for the return of the property, or of its value if a return could not be made.—Oklahoma State Bank v. Hicklin, 164 P. 257.

REPLY.

See Pleading, ⌚177-182.

REQUESTS.

See Criminal Law, ⌚824-830; Trial, ⌚255-267.

RESCISSION.

See Cancellation of Instruments; Contracts, ⌚261; Sales, ⌚101, 126; Vendor and Purchaser, ⌚92-116.

RESIGNATION.

See Guardian and Ward, ⌚23.

RES IPSA LOQUITUR.

See Master and Servant, ⌚265.

RES JUDICATA.

See Judgment, ⌚582-707.

RESTRICTIONS.

See Deeds, ⌚175.

RESULTING TRUSTS.

See Trusts, ⌚63½-89.

RETREAT.

See Homicide, ⌚118.

RETURN.

See Justices of the Peace, ⌚82.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, ⌚1036-1186.

REVOCATION.

See Executors and Administrators, ⌚32; Wills, ⌚179, 183, 221.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, ⌚369.

RULES.

See Master and Servant, ⌚145.

SAFE PLACE TO WORK.

See Master and Servant, ⌚101, 102.

SALES.

See Attachment, ⌚195, 196; Corporations, ⌚116-121; Evidence, ⌚400, 442; Exchange of Property; Execution, ⌚221, 290; Executors and Administrators, ⌚343; Guardian and Ward, ⌚103, 107; Intoxicating Liquors, ⌚215; Mortgages, ⌚502-552; Municipal Corporations, ⌚579; Principal and Agent, ⌚103; Public Lands, ⌚54; Receivers, ⌚130; Taxation, ⌚667; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

⌚23(3) (Cal.) A written offer to buy signed by the buyer alone, becomes binding upon both parties when accepted and acted upon by the seller.—Remsburg v. Hackney Mfg. Co., 164 P. 792.

⌚41 (Or.) Doctrine of caveat emptor applies to sale of potatoes by wholesaler to retail dealer in absence of deceit or misrepresentation.—Swank v. Battaglia, 164 P. 706.

⌚52(5) (Cal.) In an action for breach of contract to deliver milk, evidence held sufficient to sustain finding that defendant sold to plaintiff 320 gallons per day for 13 days at 16 cents per gallon.—Del Monte Ranch Dairy v. Bernardo, 164 P. 628.

⌚52(6) (Cal.App.) Evidence held insufficient to show that goods sold to one individual were sold upon credit and authority of defendants, so as to charge them with the purchase price.—Colquhoun v. Fursman, 164 P. 10.

⌚52(7) (Idaho) In an action on notes given by buyer for a secondhand gasoline engine, evidence held not to sustain the allegations of the answer that the seller had fraudulently represented its qualities and performance.—Parker v. Herron, 164 P. 1013.

II. CONSTRUCTION OF CONTRACT.

⌚62 (Idaho) Where three persons gave individual orders for nursery stock to agent of nursery company, and at his suggestion the three orders were combined in one and signed by one of the three, the combined order became a separable contract.—Austin v. Brown Bros. Co., 164 P. 95.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

⌚89 (Kan.) Where buyer of wheat to be shipped to Galveston wired seller to "bill the wheat to Ft. Worth, Texas," the wire, without extraneous evidence of different intention, authorized shipment of all the wheat to Ft. Worth.—Brun-

wig v. Farmers' Grain, Fuel & Live Stock Co., 164 P. 154.

—90 (Cal.App.) In absence of fraud, all preliminary negotiations are presumably merged in a written contract for purchase of personality, especially as Civ. Code, § 1625, provides that execution of a written contract supersedes prior negotiations.—Tockstein v. Pacific Kiesel Kar Branch, 164 P. 906.

(B) Rescission by Seller.

—101 (Kan.) In action for damages for seller's failure to ship wheat according to contract, defended on ground of rescission for purchaser's refusal to pay draft for first car shipped, anything said or done by seller inducing buyer to believe it had waived failure to pay draft would estop seller to claim breach by reason of nonpayment.—Wallingford v. Bushton Grain & Supply Co., 164 P. 275.

(C) Rescission by Buyer.

—126(1) (Or.) Where a truck was purchased February 8, and suit was brought March 20, for rescission of contract because of false representations, truck having been returned to seller twice during intervening weeks, held that buyers were not barred of their remedy by failing to act more promptly in attempting to rescind.—Hetrick v. Gerlinger Motor Car Co., 164 P. 379.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

—150(3) (Kan.) Under contract stipulating delivery of wheat on or before December 30, 1914, and, if not delivered then, giving buyer option to extend time of delivery, seller had all of that day in which to deliver, and where it did not deliver buyer on December 31st might extend time of delivery.—Kansas Flour Mills Co. v. Dirks, 164 P. 273.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

—202(1) (Mont.) Where a buyer was to pay for chattels by having a bank credit the price to the seller, the title did not pass where such credit was not extended, under Rev. Codes, § 4632, providing that title passes when the parties agree upon present transfer, etc.—Loud v. Hanson, 164 P. 544.

(B) Rights and Liabilities of Seller as to Third Persons.

—220 (Kan.) Assignee of contracts for the shipment of wheat, after a modification as to destination, etc., regardless of his knowledge thereof, could assert no rights against the seller under the original contract, except as modified.—Brunswick v. Farmers' Grain, Fuel & Live Stock Co., 164 P. 154.

Where assignee of contract, previously modified by direction to seller to ship wheat to F. W. instead of to G., refused to accept and pay for car because not shipped to G., and did not receive shipments at F. W., he could not recover damages of seller for failure to deliver at G.—Id.

VI. WARRANTIES.

—268(2) (Cal.) A finding that a machine sold was defective in material and workmanship does not bring the case within Civ. Code, § 1766, providing that articles are impliedly warranted to be free from latent defects, and that improper materials were not knowingly used in their manufacture.—Rensberg v. Hackney Mfg. Co., 164 P. 792.

—272 (Cal.) A finding that a plow when tested upon certain land failed to work except to make a few irregular furrows, and to scratch the surface of the soil, does not establish a general unfitness equivalent to a want of merchanta-

bility within Civ. Code, § 1771, declaring that the merchantability of goods is impliedly warranted.—Rensberg v. Hackney Mfg. Co., 164 P. 792.

—273(2) (Cal.) Civ. Code, § 1770, providing that articles manufactured for a particular purpose are impliedly warranted reasonably fit, etc., is inapplicable to a plow purchased by description, and not produced under an order or for a particular purpose.—Rensberg v. Hackney Mfg. Co., 164 P. 792.

—287(6) (Kan.) Where plaintiff sold a vacuum trap, to be returned within 60 days if it did not work, and purchaser complained of its failure within that time, and plaintiff attempted unsuccessfully to make it work, he waived return, and was not entitled to recover price.—Morehead Mfg. Co. v. Western Straw Products Co., 164 P. 1082.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

—404 (Kan.) Gen. St. 1915, § 8510, relating to bills of lading and the liability of carriers thereunder, does not preclude buyer of corn from recovering against seller for a shortage in the amount paid for.—Bennett v. St. Marys Grain Co., 164 P. 259.

—405 (Idaho) Contract for nursery stock, providing that stock not true to name as labeled should be replaced or price refunded, implies substantial performance by seller, for breach of which buyer is entitled to recover compensatory damages.—Austin v. Brown Bros. Co., 164 P. 95.

—417 (Cal.App.) In action for breach of written contract to sell tin pipe, evidence held insufficient to show that contract was procured by plaintiff's fraud and misrepresentations.—Marvin v. Eng-Skell Co., 164 P. 332.

—418(2) (Kan.) Where wheat was not delivered within time fixed by contract, or within the extended time, and market price advanced, buyer was entitled to damages measured by difference between contract price and market price at end of extended time for delivery.—Kansas Flour Mills Co. v. Dirks, 164 P. 273.

—418(2) (Kan.) Where wheat was bought for shipment during August and seller breached contract on August 6th or 7th, the measure of damages was the difference between contract price and market price at the place of delivery when the wheat would have been delivered if shipped up to close of August 31st.—Wallingford v. Bushton Grain & Supply Co., 164 P. 275.

—421 (Kan.) In action for damages for seller's failure to ship wheat according to contract, instruction, that seller would be relieved from consequences of waiver if afterwards without fault of buyer it breached contract on another ground, held misleading.—Wallingford v. Bushton Grain & Supply Co., 164 P. 275.

—422 (Kan.) In action for damages for seller's failure to ship wheat according to contract, special findings of jury held to entitle buyer to judgment.—Wallingford v. Bushton Grain & Supply Co., 164 P. 275.

SATISFACTION.

See Judgment, —891; Payment; Release.

SCHOOLS AND SCHOOL DISTRICTS.

See Bankruptcy, —192; Eminent Domain, —58; Mandamus, —172; Officers, —1; Public Lands, —54.

II. PUBLIC SCHOOLS.

(C) Government, Officers, and District Meetings.

—53(5) (Idaho) On information under Rev. Codes, § 7459, charging that defendant know-

ingly, willfully, and intentionally neglected and refused to perform her duties as school trustee, where record showed defendant's performance of duties, information was properly dismissed.—*Corker v. Cowen*, 164 P. 85.

Where information charged that defendant knowingly and intentionally charged and collected money for service as clerk of school board, in addition to salary allowed by law, but it appeared that such moneys were paid to her under an independent contract, Rev. Codes, § 7459, did not apply.—*Id.*

Rev. Codes, § 7459, in so far as it relates to performance of official duties, is not designed to cover acts of an officer amounting to a misfeasance, but is aimed at failures of such officers to act at all, where an act is required by law.—*Id.*

(D) District Property, Contracts, and Liabilities.

§ 69 (Okla.) The relocation of a schoolhouse in a school district containing a town or village qualified to vote at school district elections is governed by Sess. Laws 1913, c. 219, art. 3, §§ 13, 15.—*School Dist. No. 19 v. Parrish*, 164 P. 466.

If at a meeting of the voters of a district having a schoolhouse the value of which is less than \$500 by a two-thirds vote, they determine to relocate it, it is then the duty of the district board to locate it at some point in the district, or in an adjoining town or village.—*Id.*

§ 81(2) (Utah) That school board required bidders for completion of work on percentage to fix guaranteed maximum cost held not to prevent competitive bidding, and original contractor's surety was liable where cost exceeded original contract price.—*Board of Education of Salt Lake City v. Wright-Osborn Co.*, 164 P. 1033.

Assuming that building contractor's bond was limited to two years, held, that surety was liable for default occurring within that time, though suit was not brought or amount of liability ascertained within the two years.—*Id.*

Architects' audit and certificate of expense of completing contract for school building held admissible against contractor's surety in action on bond.—*Id.*

Surety on bond of contractor for construction of school building held liable for materials furnished for use, and complying with specifications, though school board removed them and substituted other materials.—*Id.*

§ 82(1) (Idaho) Contract of insurance between a school district and a county mutual fire insurance company is void and will form no basis for recovery against the company for loss by fire.—*School Dist. No. 8, Twin Falls County, v. Twin Falls County Mut. Fire Ins. Co.*, 164 P. 1174.

§ 85 (Utah) Architects' certificate on which school board terminated contract for construction of school building held not insufficient because representing judgment of only one of two partners named as architects.—*Board of Education of Salt Lake City v. Wright-Osborn Co.*, 164 P. 1033.

Though contract for construction of school building required notice to contractor before board was authorized to furnish labor or materials, held, that notice was not required before terminating contract upon architects' certificate.—*Id.*

§ 86(2) (Utah) Under Comp. Laws 1907, § 1400x, laborers and materialmen held to have preferential right against money due contractor from school district superior to rights of contractor's assignee.—*South High School Dist. of Summit County v. McMillan Paper & Supply Co.*, 164 P. 1041.

Laborers and materialmen may set up right to money due contractor from school district under Comp. Laws 1907, § 1400x, in any pend-

ing action involving it without bringing separate actions.—*Id.*

Failure of school board to take bond from contractor conditioned as required by Laws 1909, c. 68, held not to render it liable to contractor's assignee.—*Id.*

§ 86(2) (Utah) Under Comp. Laws 1907, § 1400x, assignee of contract price under contract with school district held to take subject to claims for labor and materials.—*Joseph Nelson Supply Co. v. Leary*, 164 P. 1047.

Under Comp. Laws 1907, § 1400x, parties furnishing labor or materials to contractor with school district held to have preferential right against contract price.—*Id.*

Failure of school district to require bond from contractor as required by Laws 1909, c. 68, held not to make the district liable for claims for labor and materials.—*Id.*

Rights of laborers and materialmen against contract price for construction of school building under Comp. Laws 1907, § 1400x, held equal without regard to time of furnishing labor or materials or commencing action.—*Id.*

§ 86(2) (Utah) Under Comp. Laws 1907, § 1400x, held, that there is no right of preference to fund due contractor from school district as among materialmen by reason of priority of commencing action.—*George A. Lowe & Co. v. Leary*, 164 P. 1052.

§ 87 (Or.) Under Gen. Laws 1915, p. 331, § 4, providing that cost of educating a high school pupil be fixed by dividing the cost of maintaining schools by average daily attendance, etc., interest paid on debt incurred for construction of school cannot be included in the maintenance charges.—*School Dist. No. 24 of Marion County v. Smith*, 164 P. 875.

(E) District Debt, Securities, and Taxation.

§ 90 (Idaho) School district cannot under Const. art. 8, § 4, and article 12, § 4, become a member of a county mutual fire insurance company organized under Laws 1911, p. 768, as amended by Laws 1913, p. 129.—*School Dist. No. 8, Twin Falls County, v. Twin Falls County Mut. Fire Ins. Co.*, 164 P. 1174.

A school district is a "municipal corporation" within Const. art. 12, § 4, relating to such corporation's interest in or aid of any private enterprise.—*Id.*

Liability of a member of a county mutual fire insurance company being unlimited, a contract by which a school district seeks to become a member of such company is void under Const. art. 8, § 3.—*Id.*

§ 97(4) (Ariz.) While Civ. Code 1913, pars. 2736, 2740, regulating elections for school bond issues, must be substantially followed, mere irregularities in conducting the election or in the notice, returns, or canvass of the votes, will not invalidate an election.—*Howard v. Luke*, 164 P. 439.

In contesting the validity of a school bond election held by a school district, the school district, being the only party vitally interested, is a necessary party to the action.—*Id.*

Under Civ. Code 1913, par. 2740, providing that the county board of supervisors shall issue school bonds if it appears that such issue was approved at an election, the supervisors have only ministerial duties to perform and are not required to defend suits testing the legality of school bond elections.—*Id.*

The validity of a school bond election held by a school district cannot be collaterally attacked in an action to enjoin the county board of supervisors from issuing bonds pursuant to such election.—*Id.*

(G) Teachers.

§ 135(5) (Kan.) Where a school board, by an irregular contract, employed a teacher for eight months, permitted her to teach for four months, and issued monthly warrants for payment ac-

ording to her contract, there was a ratification of the contract.—Parrick v. School Dist. No. 1, Riley and Geary Counties, 164 P. 1172.

⚡141(4) (Kan.) Teacher's failure to reopen her school after vacation at the time informally fixed upon by school board is a question of negligence governed by Gen. St. 1915, § 8975, authorizing board, in conjunction with county superintendent, to dismiss a teacher for negligence.—Parrick v. School Dist. No. 1, Riley and Geary Counties, 164 P. 1172.

⚡141(5) (Kan.) Gen. St. 1915, § 8975, governing teacher's dismissal for negligence, requires concurrence of county superintendent without which board's dismissal does not relieve district from liability to teacher under contract of employment.—Parrick v. School Dist. No. 1, Riley and Geary Counties, 164 P. 1172.

⚡141(5) (Or.) Under Laws 1913, pp. 69, 70, §§ 1, 2, 4-6, the board of directors of a school district can transfer a permanently employed teacher, who had been serving as principal, to another school, where she was an instructor, without a notice of charges and hearing thereon.—Alexander v. School Dist. No. 1, in Multnomah County, 164 P. 711.

SEALS.

See Depositions, ⚡81.

SECONDARY EVIDENCE.

See Criminal Law, ⚡402; Evidence, ⚡182, 185.

SEEPAGE WATER.

See Waters and Water Courses, ⚡146.

SELF-DEFENSE.

See Homicide, ⚡109-118, 180, 244, 300.

SEPARATE ESTATE.

See Husband and Wife, ⚡183.

SEPARATE MAINTENANCE.

See Husband and Wife, ⚡286-301.

SEPARATE TRIALS.

See Criminal Law, ⚡622.

SEPARATION.

See Criminal Law, ⚡854.

SERVANTS.

See Master and Servant.

SERVICES.

See Damages, ⚡172, 186; Executors and Administrators, ⚡216.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Judgment, ⚡883; Pleading, ⚡195.

I. NATURE AND GROUNDS OF REMEDY.

⚡11 (Wash.) Where a lessee sued for breach of the alleged written lease, and the lessor counterclaimed for rent, whereupon the plaintiff replied, setting up an abrogation of the lease which constituted a departure, the lessor could not press his claim based on the lease.—Perlus v. Market Inv. Co., 164 P. 65.

II. SUBJECT-MATTER.

⚡29(2) (Ok.) In action on building contract, defendant may elect to counterclaim against contractor for damages from failure to perform contract, instead of defending against any recovery because of such failure to perform.—Brown v. Tull, 164 P. 785.

⚡49(1) (Cal.App.) Assignment of last payment due under building contract made before payment was due is assignment of a "thing in action" within Code Civ. Proc. § 368.—Suhr v. Metcalfe, 164 P. 407.

SETTING ASIDE.

See Garnishment, ⚡187; Judgment, ⚡139-174, 400.

SETTLEMENT.

See Accord and Satisfaction; Account Stated; Compromise and Settlement; Payment; Release.

SEVERABLE CONTRACTS.

See Sales, ⚡62.

SHADE TREES.

See Woods and Forests, ⚡11.

SHEEP.

See Animals.

SHERIFFS AND CONSTABLES.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Deputies and Assistants, Substitutes, and Special Officers.

⚡18 (Wash.) Under Rem. Code 1915, § 3990, authorizing sheriffs to appoint deputies, and to deputize in writing persons to do particular acts, only appointments to do particular acts must be written.—Crose v. John, 164 P. 941.

Where a sheriff gave a deputy's badge to a person and told him to arrest a certain criminal, the appointment as deputy was general, and not special, within Rem. Code 1915, § 3990, requiring appointments to do particular acts to be in writing.—Id.

⚡22 (Wash.) Rem. Code 1915, § 3990, providing that persons may be deputed by a sheriff in writing to do particular acts, is sufficiently complied with where the sheriff gives a deputy a metal badge with the words "Deputy Sheriff" written upon it.—Crose v. John, 164 P. 941.

III. POWERS, DUTIES, AND LIABILITIES.

⚡92 (Idaho) Under Rev. Codes, § 4478, as amended by Sess. Laws 1913, c. 71, where property levied on by constable is claimed by stranger to writ, constable is not bound to further execute his writ, though if he demands and accepts indemnity, he is bound to proceed and rely on his indemnity.—Smith v. Graham, 164 P. 354.

⚡100 (Wash.) Where a deputy sheriff, who was ordered to arrest a certain criminal and to kill him if necessary, negligently shot plaintiff, thinking she was the criminal, the sheriff and his bondsmen are liable.—Crose v. John, 164 P. 941.

IV. LIABILITIES ON OFFICIAL BONDS.

⚡157(3) (Wash.) Where a deputy sheriff, who was ordered to arrest a certain criminal and to kill him if necessary, negligently shot plaintiff, thinking she was the criminal, the sheriff and his bondsmen are liable.—Crose v. John, 164 P. 941.

SIDEWALKS.

See Municipal Corporations, ¶761.

SIGNATURES.

See Frauds, Statute of, ¶115; Judgment, ¶282.

¶4 (Ariz.) That one's name is attached to a paper does not make it his act and deed, unless he put it there himself or caused or permitted it to be put there by another.—*Lally v. Cash*, 164 P. 443.

SILENCE.

See Estoppel, ¶95.

SPECIAL JUDGES.

See Judges, ¶25.

SPECIAL LAWS.

See Statutes, ¶79, 94.

SPECIFICATION OF ERRORS.

See New Trial, ¶128.

SPECIFIC PERFORMANCE.

IV. PROCEEDINGS AND RELIEF.

¶105(3) (N.M.) Where findings, supported by substantial evidence, show that plaintiff's claim for specific performance is stale, there can be no recovery.—*Raton Waterworks Co. v. City of Raton*, 164 P. 826.

¶119 (Cal.App.) In action for specific performance of contract to convey land, contract itself does not afford any evidence of adequacy of consideration, though, being in writing, presumption is that it was for valuable consideration.—*Porter v. Stockdale*, 164 P. 33.

¶123 (Cal.App.) Under Civ. Code, § 3391, where plaintiff, in action for specific performance of agreement to convey land, failed to prove adequacy of consideration, though issue was made by pleadings, and his attention was called to it, judgment of nonsuit was proper.—*Porter v. Stockdale*, 164 P. 33.

¶127(1) (Ok.) In suit against corporation for specific performance of its option contract for delivery of oil at price fixed in president's unauthorized and repudiated contract with another company, temporary injunction against sale of oil was reversible error.—*Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, 164 P. 671.

SPEED.

See Evidence, ¶474.

SPENDTHRIFTS.

¶8 (Or.) Under L. O. L. §§ 1324, 1326, 1327, held, that guardian of a spendthrift was bound to pay out of ward's estate for articles of food sold to and consumed by ward, although sufficient money had been furnished ward to secure necessary food where such money had been squandered.—*In re Barker*, 164 P. 382.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STATE AID.

See Health, ¶21.

STATES.

II. GOVERNMENT AND OFFICERS.

¶46 (Ariz.) Acts 1915, c. 62, creating office of law and legislative reference librarian, and appointing defendant thereto, does not violate any

provision of Constitution.—*Dunbar v. Cronin*, 164 P. 447.

Acts 1915, c. 62, creating office of law and legislative reference librarian, and appointing defendant thereto, if not a proper exercise of power of Legislature to appoint officers in absence of a provision in Constitution for their appointment, held an exercise of its power to appoint its own officers.—*Id.*

In view of Const. art. 4, § 1, subd. 3, and art. 5, § 7, as Acts 1915, c. 62, became a law on March 24, 1915, although not operative until 90 days thereafter, qualification of defendant as law and reference librarian thereunder on April 2d, held valid.—*Id.*

¶48 (Ariz.) As Laws 1915, c. 62, although a law on March 24, 1915, did not become operative until 90 days thereafter, board of curators appointed under provisions of Civ. Code 1913, par. 4554, had not been superseded or displaced on April 2d, and had authority to approve defendant's bond as law and legislative reference librarian under chapter 62.—*Dunbar v. Cronin*, 164 P. 447.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

¶119 (Cal.App.) Counties may be within inhibitions of Const. art. 4, §§ 22, 31.—*Sacramento County v. Chambers*, 164 P. 613.

St. 1915, p. 1530, providing tuberculosis bureau under state board of health and granting of state aid to counties for support of tuberculosis patients, etc., held not violative of Const. art. 4, § 22, prohibiting use of state money for institution not under state control exclusively, although Pol. Code, § 4041, subd. 7, sections 4223, 4307, subd. 7, give counties certain control over their hospitals, etc.—*Id.*

St. 1915, p. 1530, providing for bureau of tuberculosis and for granting of state aid to counties for support of tuberculosis patients, held not violative of Const. art. 4, § 31, as to loan of credit.—*Id.*

VI. ACTIONS.

¶91(2) (Ok.) A suit to mandamus the state banking board is a suit against the state, so that, without the state's consent, a judgment making the writ peremptory was error.—*State Banking Board v. Oklahoma Bankers' Trust Co.*, 164 P. 660.

¶201 (Kan.) No inaction or delay on the part of public officers will prevent the state from recovering its due, nor bar its right thereto.—*In re Moseley's Estate*, 164 P. 1073.

A statute requiring public officials within six months to commence proceedings to collect moneys due the state is a mere legislative direction to them, and not a statute of limitations whereby the debtor can defeat the state's claim.—*Id.*

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

¶16(2) (Idaho) Under Const. art. 4, § 10, a bill properly certified by presiding officers of two houses of Legislature, and approved and signed by Governor, cannot be then amended or altered.—*Katerndahl v. Daugherty*, 164 P. 1017.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

¶79(1) (Mont.) Corrupt Practices Act, §§ 48, 49, authorizing award of attorney's fees to suc-

cessful election contestant, *held* not violative of Const. Mont. art. 5, § 26, forbidding special laws granting special privileges.—*Doty v. Reece*, 164 P. 542.

⇒94(1) (Kan.) Act Feb. 17, 1917, relating to government of all cities in Kansas and giving them option to establish a city manager plan of government, is a general, and not a special, act.—*State v. Bentley*, 164 P. 290.

Act Feb. 17, 1917, relating to government of all cities in Kansas, and giving them option to establish city manager plan of government, and permitting commission to fix manager's salary, does not violate Const. art. 12, § 5, requiring general laws for the organization of cities.—*Id.*

III. SUBJECTS AND TITLES OF ACTS.

⇒120(8) (Kan.) Act Feb. 17, 1917, entitled "An act relating to the government of all cities in Kansas and to establish an optional form of government," and giving cities option to adopt the city manager plan, does not violate constitutional requirement as to title and subject of act.—*State v. Bentley*, 164 P. 290.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

⇒159 (Kan.) The Legislature always has the power by the adoption of a later act to suspend the operation of an earlier act, and where the two acts are in conflict the later expression of the legislative will controls.—*State v. Bentley*, 164 P. 290.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇒181(1) (Wash.) Under any rule of construction of a statute, whether strict or liberal, the legislative intent, when clearly apparent, must prevail.—*Shorts v. City of Seattle*, 164 P. 239.

⇒188 (Cal.App.) Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the Legislature.—*Chenoweth v. Chambers*, 164 P. 428.

⇒207 (Wash.) The courts will not so construe different provision of the law as to create a conflict, where any other course is reasonably possible.—*Rosenoff v. Cross*, 164 P. 236.

⇒224 (Kan.) Older statutes must be read in light of later statutes, and subordinated thereto and harmonized therewith, and otherwise will be *held* to have been impliedly repealed by the later statutes.—*In re Moseley's Estate*, 164 P. 1073.

⇒226 (Or.) When statute of another state is adopted and enacted, it must be deemed to have been passed subject to interpretation given by courts of state of origin.—*Maryland Casualty Co. v. Klaber's Estate*, 164 P. 574.

⇒226 (Wyo.) As Comp. St. 1910, § 5440, regarding contest of wills and proof of insanity and undue influence is from Code of California, and is substantially same, *held*, that California decisions construing as to burden of proof are at least strongly persuasive.—*Wood v. Wood*, 164 P. 844.

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STIPULATIONS.

See Venue, ¶44.

¶18(6) (Wash.) In view of a stipulation of facts to the contrary, *held*, that it could not be presumed that an insolvent trustee who had converted trust funds and commingled them with its own had withdrawn for its own use only its part of the common fund, and that the balance remaining was the trust fund.—*Heidelberg v. Campbell*, 164 P. 247.

STOCK.

See Banks and Banking, ¶40; Corporations, ¶60-133.

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STREET RAILROADS.

See Master and Servant, ¶145; Negligence, ¶98.

II. REGULATION AND OPERATION.

¶81(1) (Cal.) It is the duty of the motorman on a street car to exercise ordinary care.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶85(3) (Cal.) An automobile driver when the street is impassable has the right to drive upon the street car track.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶93(4) (Cal.) A street railway motorman is not required to presume that an automobile driver will fail in his duty to give way to the car approaching the crossing at the same time as himself.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

¶98(6) (Cal.App.) Duty of a pedestrian in crossing a city street is to use ordinary care with regard to street cars, which is care which people of ordinary prudence would reasonably be expected to exercise under circumstances.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

¶99(7) (Cal.) Where deceased, driving an automobile, saw the street car while he was 40 feet from the track and could have avoided danger, his driving the car directly against the street car was contributory negligence barring recovery.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

That deceased, driving an automobile, was surprised by a special street car to the rear of the regular car does not excuse his contributory negligence in driving his automobile against said car, where he saw the special car and with due care could have avoided injury.—*Id.*

An automobile driver, on approaching a street railway crossing, must give way to a street car about to pass at the same time, if necessary in order to avoid a collision.—*Id.*

¶99(7) (Wash.) Under facts as to speed of auto and street car and their distance, when he looked from point of collision, *held*, the driver of auto was guilty of contributory negligence as matter of law in attempting to drive in front of car.—*McEvilla v. Puget Sound Traction, Light & Power Co.*, 164 P. 193.

¶99(15) (Okla.) Ordinary rules regulating conduct of persons engaged in private business, etc., are not controlling in case where members of fire department are hurrying to fire in answer to alarm.—*Oklahoma Ry. Co. v. Thomas*, 164 P. 120.

Plaintiff, fireman riding to fire on truck which had given proper warning of its approach, was justified in assuming that defendant's street car would be stopped 300 feet from street intersection, as required by ordinance.—*Id.*

¶102(2) (Cal.App.) The mere fact that a person confused by a street car was negligent does not of itself excuse negligence of street railroad, if pedestrian's negligence is remote, and did not contribute approximately to the cause of the injury.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

¶103(3) (Cal.) The doctrine of last clear chance does not apply in favor of heirs of a deceased automobile driver whose car was struck by a street car, where, when the deceased's peril could have been discovered, the collision and consequent injury was unavoidable.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

¶110(2) (Cal.) The facts showing the applicability of the last clear chance rule need not be alleged in the complaint.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶113(7) (Okla.) In action for injury to fireman from collision between his truck and street car, evidence that he had previously ridden on truck at similar speed, or that he knew when he boarded it that truck would proceed at any particular rate of speed, was inadmissible to show his contributory negligence.—*Okahoma Ry. Co. v. Thomas*, 164 P. 120.

¶114(13) (Cal.App.) In action for personal injuries to plaintiff, when hit by defendant's street car, in which negligence of defendant was established, evidence *held* to support a finding that plaintiff was not negligent.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

¶114(19) (Cal.) Evidence *held* insufficient to show liability of street railway for death of automobile driver upon the last clear chance doctrine.—*Arnold v. San Francisco-Oakland Terminal Rys.*, 164 P. 798.

¶117(26) (Cal.) Evidence *held* to present question for jury whether automobile driver was negligent in attempting to pass on left of street car when the street car was undergoing repairs.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶118(1) (Cal.) In action for personal injuries when street car collided with automobile, street railway was entitled to have inquiry limited to conduct of motorman at the time and not his general capacity.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶118(2) (Cal.) In action for injuries to passengers in an automobile when struck by a street car, it was error to instruct that street cars with proper appliances are easily stopped.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

¶118(11) (Cal.App.) In an action for injuries to a pedestrian struck by defendant's street car, an instruction on contributory negligence *held* not to state doctrine of comparative negligence, but only to require that it be established that plaintiff was guilty of such contributory negligence as to excuse defendant.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

STREETS.

See Dedication; Highways; Municipal Corporations, ¶413, 654-761.

SUBCONTRACTORS.

See Mechanics' Liens, ¶104.

SUBROGATION.

☞2 (Cal.App.) Resolution of directors and stockholders of a corporation writing down stock to cover defalcations of secretary held not to support contention that amount received on secretary's bond should be credited pro rata on claim for conversion of a check cashed by the secretary of a bank without authority.—*Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank*, 164 P. 1124.

☞26 (Okla.) Where owner conveyed lots to a married woman subject to a mortgage and she conveyed to another subject to first and second mortgages, and before her conveyance one M. sued her and her husband and established a lis pendens and they were sold to M. subject to mortgages, plaintiff, who, pending M.'s suit, loaned second grantee money to pay mortgages and took third mortgage was a volunteer and not entitled to subrogation to rights of first mortgagee.—*Employees' Building & Loan Ass'n v. Crafton*, 164 P. 473.

SUFFRAGE.

See Elections.

SUIT.

See Action.

SUPERSEDEAS.

See Criminal Law, ☞1084.

SUPPORT.

See Divorce, ☞181.

SURETYSHIP.

See Principal and Surety.

SURPLUSAGE.

See Indictment and Information, ☞119.

SURRENDER.

See Landlord and Tenant, ☞109.

SWINDLING.

See False Pretenses.

TAXATION.

See Constitutional Law, ☞290; Licenses; Mortgages, ☞604; Municipal Corporations, ☞407-579.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

☞47(5) (Utah) Where plaintiff bank owned all stock in building corporation, the bank was the "owner" of the building held by the building company within meaning of Const. art. 13, §§ 2, 3, and Comp. Laws 1907, §§ 2505-2509, prohibiting double taxation.—*McCornick & Co. v. Bassett*, 164 P. 852.

Taxation of a bank's capital stock without deducting value of realty owned by building company of which bank held all stock was double taxation prohibited by Const. art. 13, §§ 2, 3, Comp. Laws 1907, §§ 2505-2509.—*Id.*

III. LIABILITY OF PERSONS AND PROPERTY.**(B) Corporations and Corporate Stock and Property.**

☞158 (Utah) Taxation of drain tunnels under Const. art. 13, § 4, held unauthorized where it appeared that the tunnels had no value independent of the operation of the mine.—*Ontario Silver Mining Co. v. Hixon*, 164 P. 498.

(C) Public Property and Institutions.

☞177 (Wash.) State lands under contract of sale are not taxable as real property so as to warrant issuance of certificates of delinquency.—*Connor v. Spokane County*, 164 P. 517.

V. LEVY AND ASSESSMENT.**(B) Assessors and Proceedings for Assessment.**

☞319(2) (Utah) Where bank furnished assessor statement as required by Comp. Laws 1907, § 2507, showing ownership of building held by building company of which bank held all stock, and assessor assessed that property to other company, but assessed capital stock as given, it will be presumed that bank's assessment also covered such property.—*McCornick & Co. v. Bassett*, 164 P. 852.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

☞380 (Idaho) Under Revenue Act, § 173, proportion of capital stock, surplus, etc., of bank invested in or represented by property outside of county in which it is located is not to be deducted from full cash value of its capital stock in listing it for assessment.—*Weiser Nat. Bank v. Washington County*, 164 P. 1014.

(G) Review, Correction, or Setting Aside of Assessment.

☞493(1) (Okla.) On original application for certiorari to review action of county court in reviewing on appeal action of treasurer of county in proceeding by a special tax auditor to list and assess bank's omitted property, agreed statement of facts held not to justify issuance of writ.—*Southern Nat. Bank of Wynnewood v. Wallace*, 164 P. 461.

☞493(2) (Okla.) Neither the Supreme Court nor district court have jurisdiction on appeal or by petition in error to review county court's order or judgment in pending proceeding before it from action of county treasurer under statutes governing discovery of omitted taxable property.—*Grady County v. Chickasha Cotton Oil Co.*, 164 P. 457.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.**(C) Remedies for Wrongful Enforcement.**

☞607 (Colo.) The courts do not look with favor on suits to enjoin the collection of public revenue.—*Kendrick, County Treasurer, v. A. Y. & Minnie Min. & Mill Co.*, 164 P. 1161.

☞608(9) (Colo.) A suit to enjoin collection of taxes as excessive should have been dismissed; an adequate remedy at law being provided, and it being complainant's duty to have paid the whole tax assessed and have proceeded under Rev. St. 1908, § 5750, to recover excess.—*Kendrick, County Treasurer, v. A. Y. & Minnie Min. & Mill Co.*, 164 P. 1161.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

☞667 (Wash.) Under procedure prescribed by our statute, that property was sold for approximately 50 cents in excess of amount of taxes due does not render void tax foreclosure proceeding or title acquired thereby.—*Dwight v. Waldron*, 164 P. 761.

XI. TAX TITLES.**(A) Title and Rights of Purchaser at Tax Sale.**

☞730 (Wash.) A purchaser's interest in a contract to buy state lands is not assigned by a certificate of delinquency.—*Connor v. Spokane County*, 164 P. 517.

A certificate of delinquency on state lands un-

der contract of sale will not ripen into title upon the right of redemption being foreclosed.—Id.

(D) Rights and Remedies of Purchaser of Invalid Title.

⚡821(2) (Wash.) Rem. Code 1915, § 9252, authorizing repayment of sums paid for void certificates of delinquency, applies to a certificate issued on state lands under contract of sale, since such certificate cannot ripen into perfect title.—Connor v. Spokane County, 164 P. 517.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

⚡862 (Kan.) Repeal of inheritance tax act by Laws 1913, c. 330, did not relieve the executor or probate court of any unperformed duties imposed upon them by repealed act.—In re Moseley's Estate, 164 P. 1073.

⚡864 (Cal.) Inheritance Tax Law 1905, § 1, imposes tax (1) upon all property passing by will or by intestate laws of state, and (2) upon all property of nonresident, which, regardless of mode of transfer or succession, shall be within state.—McDougald v. Lillenthal, 164 P. 387.

⚡867(1) (Cal.) Imposition, under Inheritance Tax Law 1905, § 1, of inheritance tax upon all property of nonresident, which, regardless of mode of transfer or succession, shall be within state, is not dependent upon any proceedings in probate, ancillary or otherwise, had within state under its power to tax all property within its limits.—McDougald v. Lillenthal, 164 P. 387.

⚡867(2) (Cal.) Ownership, by New York decedent, of portion of capital stock of California corporation, which ownership was evidenced by certificates of stock located in state of New York, was ownership of property within California within Inheritance Tax Law.—McDougald v. Lillenthal, 164 P. 387.

⚡890 (Kan.) Where inheritance tax due under repealed act of 1909 was not paid by executor having ample funds, probate court's order discharging him before his payment of tax will be set aside on state's motion.—In re Moseley's Estate, 164 P. 1073.

TEACHERS.

See Officers, ⚡1; Schools and School Districts, ⚡135, 141.

TELEGRAPHS AND TELEPHONES.

See Municipal Corporations, ⚡663, 671, 680, 681.

II. REGULATION AND OPERATION.

⚡54(5) (Kan.) Under the Carmack amendment (Act Cong. June 18, 1910, c. 309), an interstate telegraph company may by contract limit its liability for nondelivery of an unrepeated message to the amount paid for its transmission, even in case of gross negligence.—Kirsch v. Postal Telegraph Cable Co., 164 P. 267.

⚡66(4) (Okl. In action for failure to deliver a death message, evidence held not to show that defendant's conduct was actuated by or accompanied with any evil intent or gross negligence, with respect to its liability in punitive damages.—Western Union Telegraph Co. v. Cates, 164 P. 779.

TENANCY IN COMMON.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡19(1) (Wash.) Tenant cannot by purchasing outstanding adverse title to or incumbrance on land deprive his cotenants of their common interest when purchase is made for benefit and protection of common estate.—Dwight v. Waldron, 164 P. 761.

⚡19(2) (Wash.) Purchase by one cotenant of outstanding title or claim against land owned in common is as to other cotenants voidable only; they having right to elect to share in benefit of purchase.—Dwight v. Waldron, 164 P. 761.

If cotenant wishes to share adverse title acquired by purchasing tenant, he must within a reasonable time tender payment of his share of price necessarily expended in acquiring title.—Id.

Equity does not oblige cotenant to pay out money to protect common title, but permits him to do so and converts him into trustee when he has done so.—Id.

⚡19(5) (Wash.) Where cotenant has purchased adverse claim to land, failure of other cotenants to reimburse him within reasonable time will be taken as election on their part to allow him to take the title he has acquired for his individual use.—Dwight v. Waldron, 164 P. 761.

⚡38(5) (Wash.) Action after 20 years by cotenant to set aside tax deed and quiet title to certain undivided interests in land held barred by laches.—Dwight v. Waldron, 164 P. 761.

TERM.

See Judgment, ⚡298.

TESTAMENTARY CAPACITY.

See Wills, ⚡34-55.

THEFT.

See Larceny.

TIME.

See Deeds, ⚡9; Exceptions, Bill of, ⚡40, 41; Execution, ⚡221; Executors and Administrators, ⚡225; Insurance, ⚡621; Interest, ⚡39; Judgment, ⚡153; Principal and Surety, ⚡104; Sales, ⚡126.

⚡9(4) (Or.) L. O. L. § 531, relating to computation of time, applies to measurement of time for publication of notices by cities or towns.—Watson v. City of Salem, 164 P. 1184.

TITLE.

See Adverse Possession; Bills and Notes, ⚡443; Chattel Mortgages, ⚡127; Covenants, ⚡47; Dedication, ⚡54; Insurance, ⚡282; Limitation of Actions, ⚡44; Municipal Corporations, ⚡663; Partition, ⚡17; Quietening Title; Replevin, ⚡8; Sales, ⚡202; Statutes, ⚡120; Taxation, ⚡730, 821; Vendor and Purchaser, ⚡112.

TORRENS ACT.

See Mechanics' Liens, ⚡131; Records, ⚡9.

TORTS.

See Action, ⚡28; Assault and Battery, ⚡29, 43; Carriers, ⚡177, 280-397½; Damages, ⚡131, 132; Death, ⚡31; Dismissal and Nonsuit, ⚡26; Electricity, ⚡19; Explosives, ⚡8; False Imprisonment, ⚡36, 40; Forcible Entry and Detainer, ⚡9; Fraud; Highways, ⚡175-184; Husband and Wife, ⚡200, 333, 334; Judgment, ⚡605; Libel and Slander; Limitation of Actions, ⚡55; Master and Servant, ⚡86-288; Municipal Corporations, ⚡691-761; Negligence; Nuisance; Parties, ⚡27; Physicians and Surgeons, ⚡14, 18; Railroads, ⚡276-484; Street Railroads, ⚡81-118; Telegraph and Telephones, ⚡66; Trover and Conversion.

TOWAGE.

See Appeal and Error, ⚡882.

TOWNS.

See Municipal Corporations.

TRAFFIC OFFICER.

See Municipal Corporations, ¶706.

TRANSCRIPTS.

See Appeal and Error, ¶608; Judgment, ¶768.

TRANSFER OF CAUSES.

See Criminal Law, ¶1084.

TREES.

See Woods and Forests.

TRESPASS.

See Animals, ¶83, 100.

TRIAL

See Continuance; Costs; Criminal Law, ¶622-902; Jury; New Trial; Stipulations; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

¶28(1) (Utah) Court's admonition to jury, before viewing resort premises claimed to have been injured by railway fire, that jury was merely to view the premises *held* proper.—P. A. Sorensen Co. v. Denver & R. G. R. Co., 164 P. 1020.

The purpose of a view of premises by a jury is to enable them to better understand the evidence produced in open court, and not to take independent evidence.—Id.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

¶48 (Kan.) Evidence, admissible to establish one phase of a case, and not of another, may be received, and its application limited in the instructions to the purpose for which it is competent.—State v. Cowan, 164 P. 183.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

¶132 (Wash.) In a personal injury suit remark of counsel in argument for defendant that a certain matter was not proved because "we were not allowed to introduce the evidence" *held* cured by counsel's withdrawal and request to jury not to consider.—Strafford v. Northern Pac. Ry. Co., 164 P. 71.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

¶139(1) (Utah) Weight of negative testimony of witnesses as to giving warning signals ordinarily is for jury; but when physical conditions and attending circumstances render it highly improbable that they could hear, rule is otherwise.—Russell v. Watkins, 164 P. 867.

¶143 (Utah) Where there is substantial conflict in the testimony, it is the province of the jury, and not trial court, to determine the weight of the testimony.—Dimmick v. Utah Fuel Co., 164 P. 872.

¶143 (Wash.) Questions on which evidence was conflicting were for jury under proper instructions.—Singer v. Martin, 164 P. 1105.

(D) Direction of Verdict.

¶177 (N.M.) By their requests for a directed verdict the parties in effect request the court to find facts, and are therefore concluded by its finding, if supported by substantial evidence.—De Burg v. Armenta, 164 P. 838.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

¶194(16) (Cal.) In action for injuries to passengers in an automobile when struck by a street car, an instruction that street cars with proper appliances are easily stopped was objectionable as a charge on a fact.—Langford v. San Diego Electric Ry. Co., 164 P. 398.

¶194(16) (Cal.App.) In action for injuries received in falling through trapdoor in defendants' barroom, instruction referring to trapdoor in floor as being part of said barroom, etc., if understood as referred to floor space filled by trapdoor, *held* not invasion of province of jury by charging as to matters of fact.—Braun v. Vallade, 164 P. 904.

(B) Necessity and Subject-Matter.

¶217 (Or.) Instruction that the jury is supreme in the realm of fact, and that the court is supreme in the realm of law, whether it correctly states it or not, is proper.—White v. East Side Mill & Lumber Co., 164 P. 736.

(C) Form, Requisites, and Sufficiency.

¶234(7) (Utah) Instruction on burden of proof of contributory negligence and assumption of risk *held* not so erroneous as to mislead jury into believing that in passing upon these questions they would be confined to the evidence of defendant's witnesses.—Dimmick v. Utah Fuel Co., 164 P. 872.

¶240 (Utah) Instruction that, if plaintiff was injured and he had no knowledge that coal which fell on plaintiff was on extension chute and defendants had full opportunity to warn plaintiff and failed to do so, verdict must be for plaintiff, *held* not argumentative as against the defendants.—Dimmick v. Utah Fuel Co., 164 P. 872.

¶240 (Utah) Refusal to give argumentative instructions was not erroneous.—Smith v. Gilbert, 164 P. 1026.

¶241 (Utah) In a servant's action for injuries, action of court in charging jury in the language of statute as to vice principals and fellow servants *held* error.—Dimmick v. Utah Fuel Co., 164 P. 872.

¶242 (Utah) A requested instruction, regarding consideration of testimony after jury's view of premises, was properly refused, where as a whole it was misleading.—P. A. Sorensen Co. v. Denver & R. G. R. Co., 164 P. 1020.

¶244(4) (Utah) A portion of instruction that, if plaintiff was injured and he had no knowledge of danger, and defendants had knowledge and full opportunity to warn him, verdict must be for plaintiff, *held* not to give undue prominence to particular facts to defendant's prejudice.—Dimmick v. Utah Fuel Co., 164 P. 872.

(D) Applicability to Pleadings and Evidence.

¶250 (Idaho) An instruction should not be given unless founded on the issues in the case or evidence received at the trial.—Austin v. Brown Bros. Co., 164 P. 95.

¶251(2) (Idaho) Where only issue in an action was whether a constable had performed his statutory duty in levying upon sufficient property of the judgment debtor, and the question of the debtor's insolvency was immaterial, instruction on latter question was error.—Smith v. Graham, 164 P. 354.

Where only issue in action was whether con-

stable had performed his statutory duty in levying upon sufficient property of judgment debtor to satisfy the judgment, and judgment debtor claimed no exemption, instruction on exemption was error.—*Id.*

⚡251(7) (Kan.) In action on note given for bank stock, defended on the ground that it was obtained by fraud and was without consideration, where no waiver of defense of failure of consideration was pleaded, it was not error to refuse instruction on waiver.—*Atchison Savings Bank v. Potter*, 164 P. 149.

⚡251(8) (Cal.) In action for injuries to automobile passenger struck by street car, giving of instruction on incompetent employees and refusal of one requested thereon held erroneous.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

⚡251(8) (Wash.) Instructions given in a malpractice case regarding general negligence, and in effect stating that for want of ordinary care the physician was liable, held erroneous because not within issues.—*Ennis v. Banks*, 164 P. 58.

⚡252(8) (Wash.) Instruction given in a malpractice case that, in determining ordinary skill and diligence, the "advanced state of the profession at the time" might be considered, held misleading, there being no evidence relating thereto.—*Ennis v. Banks*, 164 P. 58.

Instruction, given in a malpractice case, that "when a cause is shown which might produce an accident in a certain way * * * it is a warrantable presumption * * * that the one shown was the operative agency," held erroneous; there being no accident.—*Id.*

⚡252(10) (Wash.) In action against proprietor of jitney bus by passenger therein injured when bus collided with another car, requested instruction held erroneous as invoking phase of rule of last clear chance inapplicable on facts.—*Singer v. Martin*, 164 P. 1105.

⚡252(17) (Utah) In the absence of evidence from which a general scheme to defraud could be inferred, refusal of instruction upon this question was not erroneous.—*Smith v. Gilbert*, 164 P. 1028.

⚡253(8) (Nev.) In an action for restitution of real property, in which defendant alleged that he was plaintiff's husband, an instruction on presumption of continuance of illicit relation held erroneous, as disregarding all weight of evidence tending to establish a marital relation between parties during their residence in the state.—*Parker v. De Bernardi*, 164 P. 645.

(E) Requests or Prayers.

⚡255(5) (Wash.) Where plaintiff testified, and defendant's counsel objected, evidence was incompetent, and asked court to direct jury to disregard answer, and court ruled it was immaterial, in absence of request for more specific direction, court's statement was sufficient.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

⚡255(12) (Wash.) In action on accident policy having clauses for total and partial disability, where defendant failed to request instruction on partial disability and to except to the instructions on total disability, it cannot complain of failure to instruct on partial disability.—*Sladjo v. National Casualty Co.*, 164 P. 203.

⚡255(13) (Wash.) Failure to give a definition of proximate cause in an instruction was not erroneous where no such instruction was requested.—*Singer v. Martin*, 164 P. 1105.

⚡260(1) (Cal.App.) Refusal of requested instructions fully and correctly covered by given instructions is not error.—*Braun v. Vallade*, 164 P. 904; *Fiori v. Agnew*, *Id.* 899.

⚡260(1) (Kan.) It is not reversible error to refuse an instruction stating in detail the law covering an issue submitted, where the court

clearly states the same rule in the instruction given.—*Ruth v. Witherspoon-Engler Co.*, 164 P. 1064.

⚡260(1) (Or.) Refusal of requested instructions which, in so far as they conform to the law, were covered by charges given, was not error.—*White v. East Side Mill & Lumber Co.*, 164 P. 736.

⚡260(1) (Wash.) When requested instructions were amply covered by instructions given, it was not error to refuse to give requests in exact language asked.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

⚡260(8) (Cal.App.) In action for injuries received by plaintiff when hit by defendant's street car, a requested instruction on care required of plaintiff held sufficiently covered by instruction given.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

⚡260(8) (Wash.) In action against street railroad for injuries to passenger while alighting, defendant was not required to rest defense on inference from instructions given, but to have its version on request specifically submitted to jury, if there was substantial evidence supporting allegations of affirmative defense.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

⚡261 (Wash.) To entitle party to predicate error on court's refusal to give requested instruction, it must be substantially correct, and instruction which is in part correct and in other particulars incorrect may be refused as whole.—*Nollmeyer v. Tacoma Ry. & Power Co.*, 164 P. 229.

⚡261 (Wash.) When instruction partly good and partly bad is offered, court is not required to weed out and reject bad and give good on pain of reversal.—*Singer v. Martin*, 164 P. 1105.

⚡267(2) (Cal.App.) It is not error for court to so state requested instructions as to correctly state law.—*Fiori v. Agnew*, 164 P. 899.

(G) Construction and Operation.

⚡295(1) (Cal.App.) It is duty of jury to consider all of instructions given as a whole in arriving at verdict.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

⚡295(1) (Wash.) It is immaterial that words and sentences in instruction, taken separately, do not state law, where, construed with context, they are correct.—*Bergen v. Lewis County*, 164 P. 78.

⚡295(1) (Wyo.) Effect of instructions is not to be determined alone upon single statement to which exception is taken, but charge must be taken as whole in determining effect.—*Wood v. Wood*, 164 P. 844.

⚡295(5) (Or.) In action for fraud in exchange of realty, an instruction upon right of plaintiffs making an investigation of the property to rely on defendants' representations held to fairly submit the issues, when considered as an entirety.—*Reimers v. Brennan*, 164 P. 552.

⚡295(6) (Wash.) In action against proprietor of jitney bus by passenger injured when bus collided with another car, instructions as whole held to have given jury law of proximate cause as applied to excessive speed as well as to every charge of negligence.—*Singer v. Martin*, 164 P. 1105.

⚡296(3) (Cal.) Error in instructing that railroad had duty of employing competent servants held not cured by qualification that it was liable for failure to do so.—*Langford v. San Diego Electric Ry. Co.*, 164 P. 398.

⚡296(3) (Cal.App.) In action for injuries received in falling through trapdoor in barroom, where instruction referred to trapdoor in floor as being part of said barroom, etc., any confusion possible being doubt as to whether reference was to spaces below trapdoor when open, or to floor space filled by trapdoor when closed, held cured by instruction that if trapdoor was locat-

ed at private portion of premises, defendants were not required to guard it.—*Braun v. Valade*, 164 P. 904.

⚡296(3) (Utah) In a servant's action for injuries caused by a piece of coal falling from a chute at a mine, portion of instruction complained of, considered with remainder of instruction, *held* to reasonably imply that jury must find that plaintiff did not know that coal was on chute.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

⚡296(3) (Wash.) Instruction erroneously declaring it is defendant's duty to exercise highest degree of care consistent with practical conduct of business is not cured by another properly defining degree of care resting on it.—*Firemen's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co.*, 164 P. 765.

⚡296(4, 5) (Cal.App.) Error in instructing that servant could not recover for injuries if he was contributorily negligent *held* cured by subsequent specific instruction that any recovery should be reduced pro rata.—*Robinson v. Smith-Booth-Usher Co.*, 164 P. 29.

⚡296(4, 5) (Cal.App.) In an action for injuries to a pedestrian hit by a street car, an instruction on care required if plaintiff suddenly found herself in peril *held* to state principle that an unwise choice under such peril is not of itself contributory negligence, when considered with other instructions.—*Hammond v. Pacific Electric Ry. Co.*, 164 P. 50.

⚡296(6) (Utah) In action for injuries portion of instruction that risks that are assumed by an employee are those that threaten immediate injury to such employee, taken in connection with whole charge, *held* not error.—*Dimmick v. Utah Fuel Co.*, 164 P. 872.

⚡296(11) (Wash.) In action for damages caused by removal of lateral support in regrading city street, instruction, that jury might find for plaintiffs in such sum as they had been damaged since filing of notice by reason of any slides which took place within two years prior to filing of complaint, *held* not prejudicial when considered with other portions of charge explaining that respondents were confined to such damages caused by slides occurring between 30 days prior to filing of claim up to trial.—*Farnandis v. City of Seattle*, 164 P. 225.

IX. VERDICT.

(A) General Verdict.

⚡320 (Okla.) Trial judge is not required to prepare forms of verdict.—*Brown v. Tull*, 164 P. 785.

⚡345 (Okla.) Where trial judge prepares forms of verdict, party aggrieved must except to form prepared at time in order to avail himself of any error therein.—*Brown v. Tull*, 164 P. 785.

(B) Special Interrogatories and Findings.

⚡350(1) (Kan.) There was no error in submitting a special question within the issues raised by the pleadings.—*Long v. Kansas City, M. & O. R. Co.*, 164 P. 175.

⚡359(1) (Kan.) Judgment may not be rendered contrary to the general verdict sustaining several defenses to an action, on special findings of fact, unless the special findings defeat each defense.—*First Nat. Bank v. Stroup*, 164 P. 1064.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

⚡388(1) (Wyo.) A judgment without findings is not void, but merely irregular or erroneous.—*Garber v. Spray*, 164 P. 840.

⚡395(8) (Cal.App.) Action of court in signing findings after death of one defendant in whose favor judgment ran was not an irregular-

ity prejudicial to plaintiff.—*Colquhoun v. Fursman*, 164 P. 10.

⚡397(1) (Mont.) Where defendant was barred by laches from raising question whether transaction in suit was mortgage, trial court was justified in failing specifically to find on the subject.—*Elling v. Fine*, 164 P. 891.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

⚡424 (Okla.) In foreclosure of mechanic's lien, error in refusing defendants' instructions as to effect of contractor's fraudulent change of contract was cured by instruction stating law as to alteration of contracts more favorably to defendants than instructions refused.—*Brown v. Tull*, 164 P. 785.

TROVER AND CONVERSION.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

⚡9(1) (Or.) Refusal to surrender an article to the owner entitled to its possession is a conversion.—*Gregory v. Oregon Fruit Juice Co.*, 164 P. 728.

⚡10 (Wash.) Defendants' assignment to bank of six nonnegotiable notes as security for loan, *held* an actual conversion of the last of such notes held in trust by them for plaintiff.—*Wylde v. Schoening*, 164 P. 752.

II. ACTIONS.

(C) Evidence.

⚡35 (Or.) Plaintiff claiming conversion because of defendant's refusal to accept, as agreed, a chattel mortgage, in place of a lien giving right to possession, has the burden of showing the terms of mortgage were agreed on with certainty, and tender of note and mortgage conforming thereto.—*Gregory v. Oregon Fruit Juice Co.*, 164 P. 728.

⚡35 (Wash.) In trover for the conversion of a negotiable instrument, bond, or other evidence of indebtedness, the face value is prima facie the true value.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

In trover for conversion of a bond, the burden is on the defendant to overcome the prima facie evidence of value consisting of the face value.—*Id.*

(D) Damages.

⚡50 (Wash.) In trover for the conversion of a chose in action such as a negotiable instrument, bond, or other evidence of indebtedness, the plaintiff is entitled to recover as damages the value of the thing converted.—*Thompson v. Metropolitan Bldg. Co.*, 164 P. 222.

⚡50 (Wash.) In action for conversion of note, measure of recovery is face of note and interest from date of conversion only where note was personal obligation of solvent maker or other person individually liable.—*Wylde v. Schoening*, 164 P. 752.

In action for conversion of note, last of series given for price of land, being charge only against mortgaged premises, no deficiency judgment being recoverable, measure of recovery was value of security as of date of conversion, less amount of other notes and accrued interest, with interest on amount found.—*Id.*

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Limitation of Actions, ¶103.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

¶17, 18(3) (Wash.) An oral promise to convey real estate to a brother on payment of price did not create an enforceable express trust.—*In re Mason's Estate*, 164 P. 206.

(B) Resulting Trusts.

¶63½ (Okla.) Resulting trusts are not within the statute of frauds.—*Boyd v. Winte*, 164 P. 781.

¶63¾ (Wash.) An oral promise to convey real estate to a brother on payment of price did not create a resulting trust.—*In re Mason's Estate*, 164 P. 206.

¶70 (Okla.) Where the legal estate in property is conveyed or transferred with the intent that the beneficial interest shall not go with the legal title, there is a resulting trust in favor of the one to whom the equitable interest was intended to go.—*Boyd v. Winte*, 164 P. 781.

¶88 (Okla.) Resulting trusts may be established by parol evidence, where such evidence is not otherwise incompetent.—*Boyd v. Winte*, 164 P. 781.

¶88 (Wash.) Trust arising from title to land purchased being taken in name of another than one paying purchase price is not express trust, but resulting trust, which may be established by parol.—*Womach v. Sandygren*, 164 P. 600.

¶89(1) (Okla.) In action to recover on note and to foreclose mortgage on realty, conveyance of realty to defendant held, on the evidence, to create a resulting trust under which defendant took no beneficial interest in the realty.—*Boyd v. Winte*, 164 P. 781.

¶89(1) (Wash.) Evidence in partition held sufficient to establish resulting trust in deceased.—*Womach v. Sandygren*, 164 P. 600.

¶89(2) (Or.) In action to have defendant declared a trustee of interest in land, bought with funds of both parties, there being no fraud, plaintiff must show by preponderance of evidence that part of purchase money belonged to him if full accounting were had.—*Prouty v. Burroughs*, 164 P. 187.

(C) Constructive Trusts.

¶95 (Wash.) An insolvent's conversion of the proceeds of the sales of goods held in trust with privilege of sale held not to create a trust ex maleficio giving the consignor a lien on all the insolvent's assets.—*Heidelbach v. Campbell*, 164 P. 247.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

¶161 (Or.) Under L. O. L. § 685, surety on bond of trustees under will was not entitled to be relieved of further liability upon its arbitrary demand to be relieved, without showing any fault, dereliction, or misconduct on part of its principals.—*Maryland Casualty Co. v. Klamber's Estate*, 164 P. 574.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(A) Rights of Cestui Que Trust as against Trustee.

¶340 (Wash.) The trust relation does not create a lien on property of like kind, whether that property be money or property of a different nature.—*Heidelbach v. Campbell*, 164 P. 247.

(B) Right to Follow Trust Property or Proceeds Thereof.

¶349 (Wash.) The right of the beneficiary of a trust to pursue a fund is based on the principle that it is the beneficiary's property, not upon any right of lien against the wrongdoer's general estate.—*Heidelbach v. Campbell*, 164 P. 247.

¶357(2) (Cal.App.) Where defendant in suit to quiet title when receiving her deed had notice that grantor had nothing more than bare legal title, necessarily a title held in trust for plaintiff, who owned entire beneficial interest, defendant, if title vested in her at all, received it subject to trust and obligation to convey to plaintiff.—*Prouty v. Rogers*, 164 P. 901.

(C) Actions.

¶372(3) (Colo.) In a suit to recover real estate alleged to have been held in trust for plaintiff, letter written by record owner in form of a solemn declaration held sufficient to support a court finding for plaintiff.—*Tuckerman v. Berry*, 164 P. 721.

TUBERCULOSIS.

See Constitutional Law, ¶60; Health, ¶21; States, ¶119.

UNDISCLOSED AGENCY.

See Principal and Agent, ¶143.

UNDUE INFLUENCE.

See Wills, ¶166.

UNITED STATES.

See Public Lands.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer; Landlord and Tenant, ¶291.

USAGES.

See Customs and Usages.

USURY.

See Judgment, ¶817.

II. PENALTIES AND FORFEITURES.

¶138 (Okla.) Under Rev. Laws 1910, §§ 1004, 1005, borrower's agreement to pay and his payment of more than 10 per cent. per annum is usurious, and he may in a proper action recover twice the amount of the entire interest so paid instead of twice amount of interest paid above the legal rate.—*Ardmore State Bank v. Thompson*, 164 P. 977.

¶142(1) (Okla.) When a loan contract is usurious, the borrower making a written demand for the return of the whole interest so paid instead of twice the interest paid over and above the legal rate is within his rights.—*Ardmore State Bank v. Thompson*, 164 P. 977.

VACATION.

See Appeal and Error, ¶113, 1199; Attachment, ¶230-250; Garnishment, ¶187; Judgment, ¶139-174, 400; Mortgages, ¶498.

VALUE.

See Eminent Domain, ¶202; Evidence, ¶474, 488; Justices of the Peace, ¶44; Taxation, ¶380; Trover and Conversion, ¶35.

VENDOR AND PURCHASER.

See Chattel Mortgages, ¶150; Exchange of Property; Frauds, Statute of, ¶56; Husband and Wife, ¶267; Lis Pendens, ¶24-26; Mortgages, ¶502-552; Municipal Cor-

porations, **§**579; Receivers, **§**130; Sales; Specific Performance; Taxation, **§**687, 730, 821; Trusts, **§**357.

I. REQUISITES AND VALIDITY OF CONTRACT.

§18(1) (Cal.) An option is a sale, not of property, but of a right to purchase.—Hicks v. Christeson, 164 P. 395.

§18(3) (Cal.) An optionee's letter to the owner's broker, requesting that he have deeds ready for delivery upon part payment of the purchase price and execution of notes for the remainder, is not an exercise of the option where no promise to pay the purchase price is made.—Hicks v. Christeson, 164 P. 395.

§18(4) (Cal.App.) An agreement as to purchase of land and indorsements thereon held an option to purchase, for which payments made were consideration, so that, on lapse of time fixed by contract and default by purchaser, neither purchaser nor his assignee could recover such payments.—Compton Land Co. v. Vaughan, 164 P. 610.

§33 (Cal.App.) Mere expressions of opinion by vendor are not false representations unless they were not honestly given and vendor knew them to be false.—Carlson v. Farm Land Inv. Co., 164 P. 344.

§44 (Or.) Testimony of plaintiff purchaser and another that vendor misrepresented a boundary line does not warrant a rescission where abstract, deeds, and maps correctly describing the property were examined by plaintiff's agents, and where plaintiff seeks to rescind after property has decreased in value.—Marmeni v. Belarts, 164 P. 955.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§92 (Cal.App.) Upon breach of contract provision forfeiting land if used for sale of intoxicants, a vendor may refuse to execute deed, in view of Civ. Code, **§** 1109.—Southern Pac. R. Co. v. Blaisdell, 164 P. 804.

(C) Rescission by Purchaser.

§112(1) (Or.) Under a contract providing for a deed after payment of purchase price, payable a long time subsequent to date of contract, held, defect in vendor's title did not call for rescission.—Ward v. James, 164 P. 370.

§114 (Or.) Granting that contract should be reformed, so as to require vendor to furnish an abstract of title, purchaser, who purchased an abstract and made payment on purchase price after vendor's alleged failure, was not entitled to rescind for vendor's failure to furnish an abstract.—Ward v. James, 164 P. 370.

§116 (Or.) Under an agreement providing for a deed after payment of purchase price, purchaser cannot rescind and recover payments thereon for defects in vendor's title, where he has not tendered or paid purchase price.—Ward v. James, 164 P. 370.

Under agreement providing for deed after payment of purchase price, purchaser cannot rescind for defects in vendor's title, where, after allowing purchaser all credits to which he is entitled, he is still in default in payment of interest at time vendor brings suit to foreclose contract.—Id.

In order to put vendor in default and claim rescission of contract, purchaser must be ready to pay entire purchase price, must offer so to do, and demand a deed.—Id.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Purchase Money.

§187 (Idaho) Where time is agreed to be of the essence of a contract for the sale of real

estate, that the vendor accepts an interest payment a short time after it is due is not a waiver of promptness in future payments.—Bowers v. Bennett, 164 P. 93.

V. RIGHTS AND LIABILITIES OF PARTIES.

(B) As to Third Persons in General.

§214(1) (Wash.) Where the vendor consents in writing to the purchaser conveying to a third party, a subsequent assignee of the vendor cannot sue upon the contract of purchase.—Vanassee Land Co. v. Hewitt, 164 P. 196.

§214(6) (Or.) An assignment, or arrangement for an assignment, of a contract for the purchase of land, does not change status of vendor; the assignee standing in no better position than assignor.—Ward v. James, 164 P. 370.

(C) Bona Fide Purchasers.

§227 (Ok.) Purchaser of land with knowledge of facts which would put prudent man upon inquiry which with ordinary diligence would lead to actual notice of rights adverse to his vendor is, if he neglects such inquiry, chargeable with actual notice within Rev. Laws 1910, **§** 2926.—Thomas v. Huddleston, 164 P. 106.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

§265(1) (Colo.) Vendor's lien avails against all subsequent purchasers and incumbrancers of land under grantee who are not bona fide purchasers for valuable consideration and without notice.—Mihooover v. Walker, 164 P. 504.

Original owner of land, who incumbered it by deed of trust, and thereafter sold to party who agreed to pay note, etc., deed of trust being foreclosed, held entitled to enforce vendor's lien against remote grantees of party who assumed mortgage indebtedness; they having had notice of his agreement.—Id.

§266(1) (Colo.) Where, as part consideration for sale, purchaser of land assumed payment of incumbrance, and vendor was compelled to discharge incumbrance, he could enforce his lien; assumption of mortgage not being a waiver.—Mihooover v. Walker, 164 P. 504.

§299(2) (Or.) Although contract did not require delivery of good and sufficient deed, free from all legal incumbrances, until payment of purchase price, vendor must, where he seeks strict foreclosure, be able to furnish a good commercial title.—Ward v. James, 164 P. 370.

(B) Actions for Purchase Money.

§315(3) (Kan.) In an action for purchase money placed in escrow pending perfecting of title, evidence held sufficient to sustain judgment against vendor on ground that, having retained possession, it was his duty to pay taxes, and not permit land to be sold on tax sale which cut off all interest of both parties.—Kington v. Ewart, 164 P. 141.

VENDORS' LIENS.

See Vendor and Purchaser, **§**265, 266.

VENUE.

See Justices of the Peace, **§**73, 74; Mandamus, **§**44.

I. NATURE OR SUBJECT OF ACTION.

§5(5) (Cal.App.) Action to abate as public nuisance diversion of water contrary to St. 1913, p. 252, **§** 12, where it involves injuries to real property, must be tried in the county in which the subject of the action or some part thereof is situated.—McClatchy v. Laguna Lands, Limited, 164 P. 41.

⌚16 (Cal.App.) Where real property injured by public nuisance is situated partly in one county and partly in another, action to abate such nuisance may be brought in either county under Code Civ. Proc. § 392.—*McClatchy v. Laguna Lands, Limited*, 164 P. 41.

II. DOMICILE OR RESIDENCE OF PARTIES.

⌚21 (Cal.App.) Where a contract was made in county to be performed at defendant's principal place of business in that county, defendant was entitled to have the case tried there, though a small part of the work was to be done and delivered in San Francisco, but plaintiff was to install such work in defendant's store.—*L. & E. Emanuel v. Oberlin Bros. Co.*, 164 P. 818.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

⌚44 (Wash.) Plaintiff's attorney having agreed that defendant was entitled to a change and that he would not oppose motion, *held*, under facts, that defendant was entitled to change of venue as a matter of right.—*State v. Superior Court of Washington for Clarke County*, 164 P. 516.

VERDICT.

See Appeal and Error, ⌚930, 1001-1005; Criminal Law, ⌚1159; Judgment, ⌚256; Pleading, ⌚432; Trial, ⌚320-359.

VERIFICATION.

See Pleading, ⌚291.

VIEW.

See Trial, ⌚28.

VINDICTIVE DAMAGES.

See Damages, ⌚89, 91.

VOTERS.

See Elections.

WAGES.

See Assignments. ⌚12; Master and Servant, ⌚80.

WAIVER.

See Action, ⌚28; Appeal and Error, ⌚1078; Appearance, ⌚24; Chattel Mortgages, ⌚136; Criminal Law, ⌚902; Insurance, ⌚384, 388, 555-559; Justices of the Peace, ⌚60; Mechanics' Liens, ⌚208, 217; Pleading, ⌚409, 418; Sales, ⌚101; Vendor and Purchaser, ⌚114, 187, 266; Writings, ⌚219.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

⌚34(5) (Kan.) Where goods were delivered in good condition to a warehouseman, and were destroyed by fire, the burden was on the warehouseman under Gen. St. 1915, § 4422, to absolve himself from negligence by showing an excuse for failure to deliver them on demand.—*Caldwell v. Skinner*, 164 P. 1166.

⌚34(7) (Wash.) In an action against a warehouseman to recover for merchandise destroyed by fire, evidence *held* not to show that warehouseman, by signing a regular bill of lading as a receipt for goods, agreed to become insurer according to provisions on back thereof applicable only to carriers.—*Washington Shoe Mfg. Co. v. Dodwell Dock & Warehouse Co.*, 164 P. 252.

WARNING.

See Negligence, ⌚52.

WARRANTY.

See Corporations, ⌚120; Covenants, ⌚47; Sales, ⌚268-287.

WATERS AND WATER COURSES.

See Drains; Eminent Domain, ⌚28; Navigable Waters; Venue, ⌚5, 18.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

⌚30 (Colo.) Change of point of diversion of appropriation for irrigation *held* not to injure junior appropriator, and so properly decreed under Laws 1903, p. 279.—*Boulder & Larimer County Irrigating & Mfg. Ditch & Reservoir Co. v. Culver*, 164 P. 509.

⌚32 (Colo.) Appropriation of water for irrigation is not abandoned when, ditch being destroyed, it is diverted into another ditch of same owner.—*Boulder & Larimer County Irrigating & Mfg. Ditch & Reservoir Co. v. Culver*, 164 P. 509.

VI. APPROPRIATION AND PRESCRIPTION.

⌚133 (Idaho) Permit issued by state engineer is not water right, and is not itself evidence of appropriation of water.—*Basinger v. Taylor*, 164 P. 522.

⌚138 (Wash.) One who for 20 years uses water from private ditch on neighbor's land, and annually cleans and repairs ditch, is, where acts and declarations of neighbor recognize his right to some proportion of water, entitled as of right to proportion thereof.—*Lyons v. Ingle*, 164 P. 745.

⌚140 (Idaho) Under Const. art. 15, § 3, users of water for domestic purposes have preference over those claiming water for any other use.—*Basinger v. Taylor*, 164 P. 522.

Appropriator of water, invoking doctrine of relation, in order that date of priority of his appropriation shall relate back to date of its initiation, must show substantial compliance with statutory provisions, and can invoke doctrine only to extent of completed appropriation.—*Id.*

⌚143 (Idaho) Under pleading claiming title to public waters of state, decree must be based upon amount of water actually diverted and applied to beneficial use.—*Basinger v. Taylor*, 164 P. 522.

⌚143 (Utah) No land owner is entitled to more water for any specific purpose than is reasonably necessary to supply his needs for that purpose, regardless of quantity that has been used for the purpose and the length of use.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

Claimants of water may not waste it, either by applying more than is reasonably necessary to supply their needs for culinary, domestic, or live stock purposes, or in conducting the water from the main source or supply to their premises or point of use.—*Id.*

⌚144 (Utah) Where continuous open stream of water is permitted to flow to premises for culinary, domestic, and live stock purposes, reasonable amount of excess water passing premises may be used in garden or orchard, or for other irrigation purposes.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

Courts are under duty to prevent discrimination and inequality among water users who have adopted system of rotation on any particular irrigation system or stream.—*Id.*

⌚145 (Idaho) One entitled to use of water may change place of diversion, if others are not injured thereby; but right to change is sub-

ject to protection of rights of other appropriators from stream.—*Basinger v. Taylor*, 164 P. 522.
 ☞145 (Utah) Landowner may not appropriate water for one purpose and then apply it or any part of it to another purpose.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

☞146 (Colo.) Seepage water which originally was diverted from stream for irrigation and flowed into gulch tributary to same stream cannot be diverted from gulch to prejudice of rights of senior appropriators on stream.—*Durkee Ditch Co. v. Means*, 164 P. 503.

☞152(3) (Idaho) Holder of permit issued by state engineer for appropriation of water is not entitled to injunction to prevent diversion of waters from stream, unless he shows that he is in position to make beneficial use thereof.—*Basinger v. Taylor*, 164 P. 522.

☞152(4) (Utah) Users of water cannot be compelled to install a more expensive method of diversion for preventing loss by seepage or evaporation, but may be compelled to prevent waste by keeping their ditch in repair.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

☞152(12) (Utah) In case involving water rights, though trial courts possess better opportunity to reflect equities of case than does Supreme Court, when it is apparent that trial courts have failed to reflect justice in particular matter in view of whole evidence, parties to record have right to invoke judgment of Supreme Court on particular matter.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

In cases involving water rights in arid regions, appellate court should be very slow to interfere with judgments unless it is clear that equity and justice require such interference.—*Id.*

VII. CONVEYANCES AND CON-TRACTS.

☞156(6) (Colo.) Under a contract by plaintiff with defendant irrigation company's predecessor, giving plaintiff certain water rights, such rights are limited to water supply as it existed before defendant acquired property, and do not include water from reservoirs built by defendant.—*North Poudre Irr. Co. v. Liggett*, 164 P. 1158.

Where defendant irrigation company's predecessor granted plaintiff one of 216 water rights, and 30 contracts were sold, and defendant exchanged all but plaintiff's contract for stock interests, plaintiff must prorate in times of water scarcity with 216, instead of 30, water rights.—*Id.*

☞158(2) (Utah) Owner of water right could agree to any arrangement as to use of water satisfactory to himself and other water users, and his agreement as to amount of water to which he was entitled, if acted upon by other water users, bound not only him but also those who claimed under or through him.—*Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856.

VIII. ARTIFICIAL PONDS, RESER-VOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

☞160 (Kan.) A dam built by an individual under a special act of the Legislature does not become illegal by reason of being transferred to a corporation.—*State v. Kansas Flour Mills Co.*, 164 P. 1170.

☞177(1) (Or.) Substantially uncontradicted evidence that defendant's dam backed water on to plaintiff's land, preventing cultivation of some land, and interfering with pumping pure water to his house, *held* to require an injunction against such an obstruction of the stream.—*Dragseth v. Mason*, 164 P. 376.

IX. PUBLIC WATER SUPPLY.

(B) Irrigation and Other Agricultural Purposes.

☞217 (Colo.) Appropriator for irrigation of water from stream should, as required by Laws 1911, p. 463, maintain headgate at point of intake, that water commissioner may regulate use of water.—*Boulder & Larimer County Irrigating & Mfg. Ditch & Reservoir Co. v. Culver*, 164 P. 506.

☞244 (Idaho) Where ditch or canal is constructed prior to the establishment of the road which intersects it, the expense of building a bridge must be borne by the county or highway district to which the road belongs.—*Gooding Highway Dist. of Gooding County v. Idaho Irr. Co.*, 164 P. 99.

☞253 (Idaho) Where Carey Act Construction company contracted to furnish desert land entryman water, right to use of which becomes appurtenant to land, and issued to him stock of company intended to become owner of irrigation system retaining possession thereof as security for payments, and did not record contract, entryman's subsequent recorded mortgage, taken without notice, under Rev. Codes, § 3160 was superior to company's lien.—*Ireton v. Idaho Irr. Co.*, 164 P. 687.

WILLFUL AND WANTON INJURIES.

See Master and Servant, ☞380; Railroads, ☞280.

WILLS.

See Appeal and Error, ☞151; Courts, ☞97; Descent and Distribution; Executors and Administrators; Trusts.

II. TESTAMENTARY CAPACITY.

☞34 (Cal.) Aside from dementia leaving no mental power to form any conception of the relation of things, insanity which will avoid a will is delusion operating on the testamentary act.—*In re Collins' Estate*, 164 P. 1110.

☞41 (Cal.) Extreme stinginess and other personal peculiarities and habits *held* not to constitute unsoundness of mind of testator.—*In re Collins' Estate*, 164 P. 1110.

☞52(1) (Wyo.) Under Comp. St. 1910, § 5394, Laws 1915, c. 149, § 1, sections 5418, 5440, 5444, *held*, that while proponent must establish a prima facie case by formal proofs of subscribing witnesses in view of presumption of sanity burden is upon contestant to show by a preponderance of evidence that testator was not of sound mind.—*Wood v. Wood*, 164 P. 844.

☞55(1) (Cal.) Evidence on a will contest *held* insufficient to support a verdict that decedent was not of sound and disposing mind.—*In re Collins' Estate*, 164 P. 1110.

Opinions as to unsoundness of mind of testator *held* not to establish it, when based on facts showing only personal peculiarities and habits, and frailties neither present at time of execution of will nor affecting its provisions.—*Id.*

☞55(1) (Kan.) In action to set aside a will, evidence *held* to sustain a finding of testamentary capacity.—*Nordman v. Nordmark*, 164 P. 1062.

IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

☞96 (Colo.) Testatrix having made previous will signed by witnesses, a letter by her containing no words of bequest, but statements of intention to destroy old will and make a new one and that she would have some one witness and sign letter only she could not bear to have any one know about it till her death, is not a will.—*Tuckerman v. Berry*, 164 P. 721.

(F) Mistake, Undue Influence, and Fraud.

⚡163(1) (Wyo.) Under Comp. St. 1910, § 5394, Laws 1915, c. 149, § 1, sections 5418, 5440, 5444, *held* that while proponent must establish a prima facie case by formal proofs of subscribing witnesses in view of presumption of sanity burden is upon contestant to show by a preponderance of evidence that testator was subjected to undue influence.—Wood v. Wood, 164 P. 844.

⚡164(7) (Cal.) In a will contest on the sole ground of undue influence, evidence as to the soundness of mind and sanity of the deceased was properly excluded.—In re Stone's Estate, 164 P. 643.

⚡166(1) (Kan.) In action to set aside a will, evidence *held* to sustain a finding that its execution was not procured by undue influence.—Nordman v. Nordmark, 164 P. 1062.

(G) Revocation and Revival.

⚡179 (Cal.) Later will containing no express revocation of earlier, but disposing of entire estate, revokes earlier.—In re Marx's Estate, 164 P. 640.

⚡183 (Cal.) Where testatrix made two wills, but later did not revoke earlier expressly, and contained charitable bequests in excess of one-third of estate, and excess was sufficient to pay all bequests of first will not repeated in second, both instruments would stand as will, and invalid bequests of second would be applied to the valid gifts of first, and any balance would go as intestate property.—In re Marx's Estate, 164 P. 640.

Invalid dispositions in subsequent will do not revoke valid dispositions in earlier will, not expressly revoked, and are ineffective for any purpose.—Id.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

⚡211 (Wash.) Under terms of letters which passed between testator and a national bank, *held* that bank was not liable under Rem. Code 1915, §§ 1289, 1292, for its failure to deliver up testator's will after his death.—Myers v. Exchange Nat. Bank, 164 P. 951.

⚡221 (Cal.) Where later will is probated and thereafter earlier will is discovered, but valid provisions of two do not conflict, probate of later will should not be revoked.—In re Marx's Estate, 164 P. 640.

(D) Hearing or Trial.

⚡324(3) (Cal.) Where on the first appeal the evidence was held insufficient to warrant denying probate, and the contestant on the second trial introduced no further evidence, direction of verdict for the proponent was proper.—In re Stone's Estate, 164 P. 643.

⚡329(4) (Wyo.) In will contest instruction that insanity or unsoundness of mind must be established with "reasonable certainty," *held* explained if not limited by instructions making verdict depend upon preponderance of evidence and defining preponderance, etc.—Wood v. Wood, 164 P. 844.

⚡334 (Kan.) In an attack upon a will for lack of testamentary capacity and undue influence, special findings *held* sufficiently specific and complete.—Nordman v. Nordmark, 164 P. 1062.

(K) Review.

⚡360 (Cal.) Where the sole question was whether the will was the product of undue influence, the contestant could not on appeal raise the question whether the will was duly and formally executed.—In re Stone's Estate, 164 P. 643.

⚡400 (Wyo.) On appeal in will case it may be assumed that testimony of petitioner and subscribing witnesses referred to in judgment

admitting will to probate was merely formal proof usually taken of will offered for probate.—Wood v. Wood, 164 P. 844.

In view of Comp. St. 1910, § 5441, where bill of exceptions on appeal from admission of will to probate does not show proofs of subscribing witnesses or whether they testified, but bill does not purport to contain all of evidence, *held*, that court may assume that will was produced and its due execution and competency of testator sufficiently shown.—Id.

VI. CONSTRUCTION.

(A) General Rules.

⚡439 (Wash.) The primary object in construing wills is to determine the testator's intent.—In re Slocum's Estate, 164 P. 759.

(F) Vested or Contingent Estates and Interests.

⚡630(2) (Kan.) Under will giving property to widow for life or until her remarriage, etc., and on that contingency for distribution to her and her children, she took a life estate, to be enlarged to one-half interest in fee by remarriage, etc., with vested remainder to children in all the property, subject to diminution to vested remainder in one-half on her remarriage.—Strom v. Wood, 164 P. 1100.

⚡634(8) (Kan.) Under will devising a life interest to testator's wife with remainder to their five children, and providing that if any child died before the inheritance passed to him, his issue, if any, should take his share, the husband of a deceased daughter, dying after testator and before the life tenant, inherited daughter's share.—Hammond v. Martin, 164 P. 171.

⚡634(9) (Kan.) Under will giving property to widow for life or until her remarriage, and on that contingency for distribution to her and her children, the latter were given a vested remainder in all the property subject to diminution to vested remainder in one-half on her remarriage.—Strom v. Wood, 164 P. 1100.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

⚡717 (Kan.) A devisee is presumed to accept a devise favorable to him, and if he desires to renounce, he should do so within a reasonable time.—Strom v. Wood, 164 P. 1100.

A timely renunciation of a devise relates back to the death of the testator.—Id.

Where a judgment was recovered against one devised land in same county by his father's subsequent probated will, which became a lien on his interest, the devisee by his nonaction for five years was presumed to have accepted the devise, and could not then file a disclaimer.—Id.

⚡740(4) (Kan.) Relief will not be granted against a mistake in construction of will, where it must be given at expense of minor beneficiaries, who had nothing to do with mistake, and whose interest cannot be adequately protected by any judgment which courts could render.—Terry v. Miller, 164 P. 151.

(F) Legacies Charged on Property, Estate, or Interest.

⚡820(4) (Wash.) Where testator gave his wife a life estate in both his separate and community property with power to use for her maintenance, and provided that on her death, her property and his then remaining should descend, etc., maintenance expenditures should be deducted from total of husband's and wife's property.—In re Slocum's Estate, 164 P. 759.

WITHDRAWAL.

See Trial, ⚡132, 296.

WITNESSES.

See Appeal and Error, **¶**994, 1048; Criminal Law, **¶**628, 629, 678, 1169, 1170½; Depositions; Evidence, **¶**474; Habeas Corpus, **¶**118; New Trial, **¶**88.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

¶37(5) (Idaho) In prosecution for murder, testimony as to deceased's dying declarations was admissible when given by witness testifying from her knowledge thereof, and not relying upon the translation thereof made to her by an interpreter.—*State v. Lundhigh*, 164 P. 690.

¶52(3) (Okla.) Under Rev. Laws 1910, § 5050, husband held an incompetent witness to testify for or against his wife in action in ejectment and to quiet title, where main issue was whether conveyance of wife's property executed by herself and husband was a deed or a mortgage.—*Thomas v. Halsell*, 164 P. 458.

¶52(7) (Okla.Cr.App.) In prosecution of husband for perjury in his suit against his wife for divorce in order to obtain service of summons by publication, the wife is a competent witness for the state.—*West v. State*, 164 P. 327.

¶58(4) (Wash.) Under Rem. Code 1915, § 1214, regarding testimony of spouse, in suit by wife against father-in-law for alienation of husband's affections, testimony of husband, purporting to show want of affection for plaintiff, and testimony of witnesses as to declarations by husband prior to any knowledge on defendant's part of relation between husband and plaintiff, held not competent, over objection.—*Jones v. Jones*, 164 P. 757.

In suit by wife against father-in-law for alienation of husband's affections, under Rem. Code 1915, § 1214, regarding testimony by spouse, competency of husband as a witness depended upon his relationship at time of trial, and he would be precluded from testifying against his wife as to occurrences before their marriage.—*Id.*

¶61(1) (Mont.) Rev. Codes, § 9483, as amended by Laws 1915, c. 111, expressly excepts from the rule of noncompetency of husband or wife to testify against the other in a criminal case cases of criminal violence on one by the other.—*State v. Rains*, 164 P. 540.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title, or Interest of Persons Deceased or Incompetent.

¶139(14) (Colo.) Under Rev. St. 1908, § 7267, in suit to foreclose mortgage on premises sold by mortgagor to one who gave a note secured by deed of trust, which note was transferred to party whose administrator was made defendant to effect complete foreclosure, plaintiff could testify to execution and delivery of first note by mortgagor, and that it had not been paid.—*Nesbitt v. Swallow*, 164 P. 1163.

(D) Confidential Relations and Privileged Communications.

¶209 (Wash.) Rem. Code 1915, § 1214, does not preclude a physician from testifying without consent of patient, in a personal injury suit by her, as to matters learned in an examination, for the express purpose of testifying, after she had ceased to be his patient.—*Strafford v. Northern Pac. Ry. Co.*, 164 P. 71.

¶217 (Ariz.) Even if evidence brought out on cross-examination of a defendant under Civ. Code 1913, par. 1680, as to examination of adverse party, was concerning communications privileged as to him, such privilege could not extend to a codefendant.—*Lally v. Cash*, 164 P. 443.

¶219(4) (Kan.) The heirs at law of one who has been treated by a physician may waive the provision of Code Civ. Proc. § 321 (Gen. St. 1909, § 5915), making a physician incompetent to testify to any knowledge obtained in his professional capacity from his patient.—*Bruington v. Wagoner*, 164 P. 1057.

III. EXAMINATION.

(B) Cross-Examination and Re-Examination.

¶274(2) (Cal.App.) Cross-examination of witnesses as to defendant's character for kindness and gentleness held within proper scope.—*People v. Fodera*, 164 P. 22.

¶275(2) (Cal.) Where defendant in his counterclaim relied upon a claim for goods sold, refusal to allow plaintiff to show, by cross-examination of defendant, that claim had been assigned, is reversible error.—*Del Monte Ranch Dairy v. Bernardo*, 164 P. 628.

¶275(3) (Cal.App.) In wife's action for separate maintenance for cruel treatment, wife claiming as cruelty defendant's having procured her commitment to hospital for insane and on direct examination testifying to facts that necessarily created the impression that she was sane at the time, defendant's inquiry to her on cross-examination directed to point that she did not even know she was examined or committed held permissible.—*Pedreira v. Pedreira*, 164 P. 30.

¶275(4) (Or.) In action for fraud in exchange of realty, it was a proper exercise of the court's discretion to exclude cross-examination of defendant to elicit the fact that the property received by him was sold two years after the exchange at an advance in value.—*Reimers v. Brennan*, 164 P. 562.

¶275(5) (Cal.) Where defendant, in direct examination, went into certain matters, allowing cross-examination relating to same matters did not show abuse of discretion, merely because defendant was thereby confused.—*O'Brien v. King*, 164 P. 631.

¶276 (Ariz.) Civ. Code 1913, par. 1680, providing for cross-examination of an adverse party, is a modification of the common-law rules of evidence.—*Lally v. Cash*, 164 P. 443.

An adverse interest is the test of the right to cross-examine a party under Civ. Code 1913, par. 1680, as to cross-examination of adverse party.—*Id.*

¶287(4) (Wash.) Where a part of a conversation is elicited on cross-examination, the whole conversation may be gone into on redirect examination.—*Strafford v. Northern Pac. Ry. Co.*, 164 P. 71.

(C) Privilege of Witness.

¶293 (Cal.App.) Pen. Code, § 367c, making it offense for driver of auto colliding with vehicle not to stop and assist the occupants and give them his car number and his name and address, held not to compel him to give evidence against himself in violation of Const. art. 1, § 13.—*People v. Fodera*, 164 P. 22.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(B) Character and Conduct of Witness.

¶360 (Kan.) In action for assault, where defendant's testimony contradicted plaintiff's statements on cross-examination as to her reputation for truthfulness, court, in its discretion, might permit her in rebuttal to prove her good reputation for truthfulness.—*Colvin v. Wilson*, 164 P. 284.

(C) Interest and Bias of Witness.

¶372(2) (Kan.) In a prosecution for rape, it is proper on cross-examination of person assaulted to show as affecting her credibility

that she contracted with attorneys to bring an action for damages for the alleged assault.—*State v. McLemore*, 164 P. 161.

(D) Inconsistent Statements by Witness.

—379(2) (Okl. Cr. App.) In prosecution for selling whisky, the court should have permitted a witness called to impeach prosecuting witness to answer a question as to whether prosecuting witness stated to him that he did not get the whisky from defendant.—*Collingwood v. State*, 164 P. 1154.

—380(5) (Or.) Under L. O. L. § 861, as to impeaching one's own witness, a witness may be contradicted by a party calling him, where the witness gives testimony damaging to the party calling him on the ground of surprise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in section 864.—*Reimers v. Brennan*, 164 P. 552.

—397 (Wash.) Testimony of witness in a former suit, introduced for purpose of contradicting or impeaching him as witness in subsequent action, is not substantive evidence in case in which he is testifying.—*National City Bank v. Shelton Electric Co.*, 164 P. 933.

In action on note, where plaintiff made prima facie case of due execution on date specified in note, testimony impeaching witness who attested correctness of date merely destroyed such witness' testimony, but did not affect prima facie case made by specification of date in note.—*Id.*

(E) Contradiction and Corroboration of Witness.

—405(1) (Kan.) Evidence should not be admitted to contradict a statement of a witness elicited on cross-examination on an immaterial collateral matter.—*State v. McLemore*, 164 P. 161.

—412 (Utah) In action for injuries in motor vehicle collision, where defendant's testimony that his brakes were all right was undisputed, exclusion of testimony of repairmen to whom defendant took car 12 days after accident was not error, being corroborative of undisputed testimony.—*Russell v. Watkins*, 164 P. 867.

—414(1) (Utah) In action for injuries in motor vehicle collision, where defendant's testimony that his brakes were all right was undisputed, exclusion of testimony of repair man to whom defendant took car 12 days after accident was not error, being remote in time.—*Russell v. Watkins*, 164 P. 867.

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